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AMERICAN LAW REPORTS ANNOTATED

RE APPLICATION OF THE CITY OF NEW YORK RELATIVE TO ACQUIRING TITLE TO THE PARKWAY IN THE BOROUGH OF THE BRONX.

JAMES A. WOOLF et al., Appts.

MADELINE PIERCE, Respt.

New York Court of Appeals — October 28, 1913.

(209 N. Y. 344, 103 N. E. 508.)

Boundaries — property abutting on highway.

1. Where a conveyance is of property abutting on a public highway, or where the descriptive lines run to or along such highway, the presumption is of an intent on the part of the grantor to convey title to the center of the highway; which presumption, however, must yield to language showing a contrary intent.

[*See note on this question beginning on page* 6.]

Same — effect of description.

2. The presumption of an intent on the part of a grantor of land abutting on a highway to convey title up to the center of the highway is rebutted by a description of the premises conveyed which bounds them beginning at the northwesterly corner of W. street and S. avenue, thence running westerly along said street 50 feet, thence north parallel with the avenue 100 feet, thence easterly parallel with the street 50 feet, thence southerly along the avenue 100 feet to the place of beginning.

APPEAL by petitioners from an order of the Appellate Division of the Supreme Court, First Department, affirming an order of a Special Term for New York County, Part I., directing distribution of an award to respondent in proceedings to acquire title to land required for street improvements. *Reversed.*

The facts are stated in the opinion of the court.

Mr. James R. Deering, with Mr. James A. Deering, for appellants James A. Woolf et al.:

The deed from Thomas O. Woolf, Joseph A. Woolf, and John A. Woolf to Claus Young, dated July 19, 1855, did not include any part of the land within the boundaries of Walnut street

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on the Mount Eden map. The grant was limited to the exterior lines of Walnut street and Second avenue.

English v. Brennan, 60 N. Y. 609; White's Bank v. Nichols, 64 N. Y. 65; Tag v. Keteltas, 92 N. Y. 625, affirming 16 Jones & S. 241; Dexter v. Riverside & O. Mills, 39 N. Y. St. R. 933, affirmed in 133 N. Y. 684, 31 N. E. 627; Re St. Nicholas Terrace, 76 Hun, 209, 27 N. Y. Supp. 765, affirmed in 143 N. Y. 621, 37 N. E. 635; Deering v. Riley, 38 App. Div. 164, 56 N. Y. Supp. 704, affirmed in 167 N. Y. 184, 60 N. E. 447; Tietjen v. Palmer, 121 App. Div. 233, 105 N. Y. Supp. 790; Trowbridge v. Ehrich, 191 N. Y. 361, 84 N. E. 297; Bartow v. Draper, 5 Duer, 130; Morison v. New York Elev. R. Co. 74 Hun, 398, 26 N. Y. Supp. 641; Watson v. New York, 67 App. Div. 573, 73 N. Y. Supp. 1027, affirmed in 175 N. Y. 475, 67 N. E. 1091; Higinbotham v. Stoddard, 72 N. Y. 94; Harris v. Oakley, 17 N. Y. S. R. 198, 2 N. Y. Supp. 305; Hall v. Whitehall Water Power Co. 103 N. Y. 129, 8 N. E. 509; People ex rel. Burnham v. Jones, 112 N. Y. 597, 20 N. E. 577; Jones v. Cowman, 2 Sandf. 233; Van Armringe v. Barnett, 8 Bosw. 367; Coster v. Peters, 5 Robt. 192; Wallace v. Fee, 50 N. Y. 694; Mead v. Riley, 18 Jones & S. 20, affirmed in 102 N. Y. 669; Fearing v. Irwin, 4 Daly, 385, 55 N. Y. 486; Augustine v. Britt, 15 Hun, 395, affirmed in 80 N. Y. 647; Lee v. Lee, 27 Hun, 1; Chapman v. Wheeler, 5 Alb. L. J. 337; Falker v. New York, W. S. & B. R. Co. 17 Abb. N. C. 279.

The point of beginning, or starting point, is controlling and must be adhered to; and such starting point controls all subsequent courses.

Jackson ex dem. People v. Wendell, 5 Wend. 142; Jackson ex dem. Craigie v. Wilkinson, 17 Johns. 146; Elliott v. Lewis, 10 Hun, 486; Jackson ex dem. Yates v. Hathaway, 15 Johns. 447, 8 Am. Dec. 263; Kings County F. Ins. Co. v. Stevens, 87 N. Y. 287, 41 Am. Rep. 361, reaffirmed in 101 N. Y. 411, 5 N. E. 353; Dexter v. Riverside & O. Mills, 39 N. Y. S. R. 933, 15 N. Y. Supp. 374, affirmed in 133 N. Y. 684, 31 N. E. 627; Holloway v. Delano, 139 N. Y. 412, 34 N. E. 1052; Patten v. New York Elev. R. Co. 3 Abb. N. C. 306; Lee v. Lee, 27 Hun, 1; Morison v. New York Elev. R. Co. 74 Hun, 398, 26 N. Y. Supp. 641; Re St. Nicholas Terrace, 76 Hun, 209, 27 N. Y. Supp. 765, affirmed in 143 N. Y. 621, 37 N. E. 635; Kennedy v. Mineola, H. & F. Traction Co. 77 App. Div. 484, 78 N. Y. Supp. 937; Jacquemin v. Finnegan, 39 Misc. 628, 80 N. Y. Supp. 207.

Messrs. **Tallmadge W. Foster and Lawrence S. Coit,** for appellants Mary J. Woolf et al.:

The point of beginning in the description is the point of intersection of the northerly line of Walnut street with the easterly line of Second avenue.

English v. Brennan, 60 N. Y. 609; Tietjen v. Palmer, 121 App. Div. 233, 105 N. Y. Supp. 790.

The location of the point of beginning at the intersection of the exterior lines of the two streets necessarily excludes the land in the streets.

White's Bank v. Nichols, 64 N. Y. 65.

Mr. Harold Swain, for respondent:

The deed, Woolf to Young, dated July 19, 1855, included the land in Walnut street to the center line thereof.

Woolf v. Woolf, 131 App. Div. 751, 116 N. Y. Supp. 104; Trowbridge v. Ehrich, 191 N. Y. 361, 84 N. E. 297; Van Winkle v. Van Winkle, 184 N. Y. 193, 77 N. E. 33; White's Bank v. Nichols, 64 N. Y. 65; Hennessy v. Murdock, 137 N. Y. 317, 33 N. E. 330; Bissell v. New York C. R. Co. 23 N. Y. 61; Re Ladue, 118 N. Y. 219, 23 N. E. 465.

Hiscock, J., delivered the opinion of the court:

This appeal involves a controversy over the right to an award in proceedings to acquire title for street improvements. Without going into the details of the proceeding, it is sufficient to state that the underlying and decisive question is whether, under the description used in one or more conveyances, the grantee took title to the middle or only to the exterior line of a public highway known as Walnut street, now in the city of New York.

The description thus to be interpreted ran as follows: "All that certain lot, piece, or parcel of land, situate, lying, and being in the town of West Farms, aforesaid, and which is known and designated by the number 267 (two hundred sixty-seven) on a certain map, . . . the premises hereby conveyed being bounded and described as follows: Beginning at the northwesterly corner of Walnut street and Second avenue as laid down on said map; thence running westerly along said

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street, fifty (50) feet; thence northerly parallel with said avenue one hundred (100) feet; thence easterly parallel with said street fifty (50) feet to said avenue; thence southerly along said avenue one hundred (100) feet to the corner aforesaid and place of beginning."

The map in question showed lot 267 as abutting on said highway, and, if this description carried title to the center of the street, then the award has been properly distributed; if it carried title only to the exterior line of Walnut street, then the orders thus far made were erroneous and should be reversed.

There is no dispute concerning the general principles which govern the interpretation of a conveyance which bounds and describes lands by reference to a public highway. The language is to be interpreted most favorably in favor of the grantee, and under ordinary circumstances, where the conveyance is of a lot abutting on a highway, or where the descriptive lines run to or along such highway, the presumption is of an intent on the part of the grantor to convey title to the center of the highway. This presumption, however, must yield to language which shows an intent on the part of the grantor to exclude from his conveyance title to the bed of an abutting street, and to limit such title to the exterior lines thereof. Notwithstanding the views of the learned courts below, we think that the effect of the language used in the conveyances before us for consideration was to thus exclude title to the bed of Walnut street.

Boundaries—property abutting on highway.

The description of the premises to be conveyed places the starting point at the "northwesterly corner of Walnut street and Second avenue," as laid down on the map referred to in the description. It is so well settled as to be practically conceded by counsel for respondent that the terms thus used meant the corner formed by the exterior lines of Walnut street and Second avenue, and did not mean the intersection of their center lines. Thus we have the starting point of the description in the exterior line and on the side of Walnut street rather than in its center. It is again well settled that the starting point in such a description is of great importance; and, while it has been said that its effect is not conclusive, but must yield where it is inconsistent with other lines in the description (Van Winkle v. Van Winkle, 184 N. Y. 193, 204, 77 N. E. 33), it must control the other parts of the description, at least in the absence of some irreconcilable inconsistency. White's Bank v. Nichols, 64 N. Y. 65, 71.

I not only do not find the lines of description employed in the conveyances inconsistent with, but rather, as it seems to me, entirely consistent with, this point of commencement. We find that the description thus commencing in the exterior line of Walnut street runs along said street 50 feet; thence northerly from it 100 feet, thence easterly parallel with the street 50 feet; and thence southerly 100 feet to the starting point. In other words, we have a piece of land of rectangular shape, and the course which runs away from Walnut street is of the same length as that which runs back to said place of beginning in the exterior line of the street. The length and terminus of the final course in the exterior line of the street being thus definitely fixed, it would make an unusual description to run the parallel line of equal length to the center rather than side of the street.

While it is impossible to make any complete review of the authorities, even in this state, which have dealt with this general question, reference may be made to a few of them which seem especially pertinent.

English v. Brennan, 60 N. Y. 609, involved the interpretation of a description in a deed which ran as follows: "Beginning at the southwesterly corner of Flushing and Clermont avenues, running thence westerly along Flushing avenue 25 feet; thence southerly at right an-

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gles to Flushing avenue 79 feet 9 inches to a point distant 40 feet 7½ inches westerly from the westerly side of Clermont avenue; thence easterly and on a line at right angles to Clermont avenue 40 feet 7½ inches to Clermont avenue; and thence northerly along Clermont avenue 75 feet to the place of beginning." It will be noted that this description was very similar to the one now before us in that it commenced in the exterior line of a street and then ran "along" the highway. It was held that the description did not include title to the bed of the street, and Judge Andrews, writing the opinion of the court, after recognizing the general rule that in a grant of land lying adjacent to a highway it is to be presumed that the grantor intended to convey his interest in the street, said: "But this presumtion is rebutted if it appears by the description in the deed that he intended to exclude it from the conveyance. It is in all cases a question of intent, to be determined by the description in the grant, construed in view of the presumption referred to. . . . We are to express our judgment on the case before us and determine whether Clermont avenue is or is not excluded from the grant to the defendant by the description in his deed. We are of opinion that it is, and that his lot is bounded by the sides, and not by the thread or center of Clermont and Flushing avenues. It is to be observed that the subject of the conveyance is, on the face of the deed, the land within the precise metes and bounds given. The point of beginning in the description is the corner of Flushing and Clermont avenues. This point is made necessarily by the intersection of the side, and not of the center, lines of the street. . . . The second course terminates at a point 40 feet 7½ inches westerly from the westerly side of Clermont avenue, showing that in making the measurements the grantor had the side of the street in view. The next course is defined to be at right angles to Clermont avenue 40 feet 7½ inches to that avenue. If it had run to the avenue generally, a different question might have been presented; but, the precise length of the line being stated, this, in connection with the other parts of the description, seems to render it quite certain that it was to terminate at the side, and not in the center, of the street, and, if this is so, the course to the place of beginning was along the side of the avenue."

In White's Bank v. Nichols, 64 N. Y. 65, the court had before it for construction a description which read in part as follows: "Beginning on the northwesterly line of Carolina street at its intersection with the northeasterly line of Garden street; thence northwesterly along the northeasterly line of said Garden street; . . . thence southeasterly along the line of said block to the state line; thence southerly along the state line to Carolina street; and thence southwesterly bounding on Carolina street to the place of beginning." It was held that this description did not include title to the bed of Garden street; and, while it is true that such description was somewhat stronger in rebutting the presumption of a conveyance to the center of the street because the line was described as running "along the northeasterly line of Garden street," still the decision of the court was based on broader principles than mere consideration of said line, and which are applicable to the present case. For instance, it was said: "The grant under which the defendant claims title describes the granted premises as commencing at the intersection of the exterior lines of two streets, of which Garden street is one, and so as necessarily to exclude the soil of the street. The point thus established is as controlling as any monument would have been and must control the other parts of the description; all the lines of the granted premises must conform to the starting point thus designated, so that while but for this designation of the commencement of

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the survey or boundary the lines along Garden street and Carolina street might, within the general principles before referred to, be carried to the center of those streets respectively, they are necessarily confined to the exterior lines of the streets, so as to connect at this starting point. The precise point was decided by this court. English v. Brennan, supra."

In Kings County F. Ins. Co. v. Stevens, 87 N. Y. 287, 292, 41 Am. Rep. 361, the court considered a deed which conveyed land described as "beginning at a point on the southerly side of the Wallabout bridge road;" and which description, after running certain courses and distances, ran a certain distance "to the Wallabout bridge road," and from thence along said road a certain distance to the place of beginning. Again, with full recognition of the general principles invoked by the respondent, it was held that this description commencing on the side of the road rebutted the presumption of an intent to convey to the center; the court saying: "In the case before us, the starting point of the description is on the southerly side of the Wallabout bridge road, and the exact point of beginning is fixed by the reference to the lands of Skillman. The other lines are described by courses and distances, and the third course gives the length of that line in feet, to the road, which we think fairly imports that the measurement is to the side of the road, and the fourth course as along the road, etc., to the place of beginning."

In Deering v. Reilly, 167 N. Y. 184, 60 N. E. 447, it was held that a conveyance of the lands described as "beginning on the northeasterly corner of Blackburry alley, on the southeasterly side of the Bloomingdale road," and running along said alley a certain distance, thence by other descriptions back to the Bloomingdale road, and thence along that road to the place of beginning, did not include any part of said road or alley in the conveyance. See also Holloway v. Southmayd, 139 N. Y. 390, 34 N. E. 1047, 1052.

It seems to me clear that the descriptions involved in the authorities cited are so similar in their important features to the one before us that they lead us with compelling force to the conclusion that the present description does not run to the center of the street, unless their force has been weakened by later controlling decisions. I find none such. Counsel for the respondent thinks that he has found such in the cases of Woolf v. Woolf, 131 App. Div. 751, 116 N. Y. Supp. 104, Van Winkle v. Van Winkle, 184 N. Y. 193, 77 N. E. 33, and Trowbridge v. Ehrich, 191 N. Y. 361, 84 N. E. 297; and therefore I shall proceed to consider them briefly.

The Woolf Case seems to sustain his contention, and, if controlling, would be an authority for his contention that his client's deed took him to the center of the street. That decision, however, was based on a construction of the Trowbridge Case which, in my opinion, was erroneous, and to which I shall next refer.

The description in the Trowbridge Case ran as follows: "Beginning at a point where the northerly line of One Hundred and Sixty-third street intersects the easterly line of Stebbins avenue; running thence easterly along the northerly line of One Hundred and Sixty-third street 30 feet; thence northerly and parallel with Stebbins avenue 128.71 feet; thence westerly and parallel with One Hundred and Sixty-third street 30 feet; and thence southerly and along the easterly line of Stebbins avenue 128.71 feet to the point or place of beginning." 191 N. Y. 364. It was held that this description indicated an intention not to include the fee of the street because the grant dealt with the boundary lines rather than the center lines of the streets, and to this extent the decision confirms the one which we are now making. In the course of his opinion Judge Haight said: "Had she [the grantor] commenced at the intersection of the two

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streets and thence ran along the street it would have been apparent that she intended to convey to the center of the street" (191 N. Y. 365); and it was this expression which was made the basis of the decision in the Woolf Case. It is to be noted in the first place that what was said was purely a dictum, but in addition to this the terms of description suggested by way of illustration were entirely different than those which were and are being construed in the Woolf Case and the present case. In both of these cases the starting point is concededly at the intersection of the exterior lines of two streets. In the illustration which was used in the Trowbridge Case there was assumed a starting point at "the intersection of the two streets," and such point would be formed by the intersection of the two center lines; and hence the controlling point of commencement would be in the center of the street instead of at the side thereof.

In the Van Winkle Case the conveyance was of a certain lot, and the commencing point of the description which was employed was stated in one conveyance as being "at a stake by the fence on the crossroad leading from Harlem 50 links from the southeastern corner of the fence;" and in another conveyance as being "at a stake by the fence on the public crossroad, the corner of Mr. Jauncey's land;" and the determination whether the conveyance ran to the center of the highway largely turned on the effect of this statement of the point of commencement of the description. The case was regarded as a close one, and two principles which do not exist in this case were invoked for the purpose of carrying title to the center of the road. The first one was that the starting point was of uncertain location, and that therefore the other lines in the description were to be considered in determining the intent of the parties, and that, doing this, such other lines carried the description "to the public road and thence south along the road to the place of beginning," and therefore, under general principles, included title to the middle of the street. The second point was that a stake or monument placed upon the boundary of a highway is not necessarily to be regarded as fixing the starting point in the description at the side instead of the center of the street because of the impossibility of locating such monument in the bed of the highway; and that therefore such a point of commencement, under such circumstances, would not be controlling upon the other lines of description.

Our conclusion, therefore, is that the conveyances in question carried title to the exterior, and not to the center, line of Walnut street, and that the orders appealed from were erroneous and should be reversed, and the award be directed to be paid to the appellants, with costs in all courts.

Same—effect of description.

Cullen, Ch. J., and **Gray, Chase, Hogan**, and **Miller**, JJ., concur. **Willard Bartlett**, J., absent.

Ordered accordingly.

ANNOTATION.

Description with reference to highway as carrying title to center or side of highway.

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II. Presumption generally, 7.
III. Reason for presumption, 11.
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b. Reference to map or plat, 17.
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d. Ownership of fee in highway, 34.
VII. Conveyance by state or municipality, 35.

I. Introductory.

This note is confined to the construction of conveyances of land abutting on a highway with respect to their effect to carry title to the fee to the center of the highway. Being thus limited to the construction of particular conveyances, it does not discuss the general presumption that an abutting owner holds the fee to the center of the highway; nor does it discuss the rights and liabilities of an abutter, resulting from his ownership of the fee in the street.

The question as to the riparian rights of a person taking a conveyance to land abutting on a street and opposite to a watercourse is also excluded.

II. Presumption generally.

It is a rule of universal recognition that a private conveyance of land bounded by or abutting on a highway the fee to which belongs to the abutting owners is presumed to take the fee to the highway to the center line thereof.

England.—Mickelthwait v. Newlay Bridge Co. (1886) L. R. 33 Ch. Div. 133, 55 L. T. N. S. 336, 51 J. P. 132, 23 Eng. Rul. Cas. 165; Re White [1898] 1 Ch. 659, 67 L. J. Ch. N. S. 430, 78 L. T. N. S. 550, 46 Week. Rep. 479; Berridge v. Ward (1861) 10 C. B. N. S. 400, 142 Eng. Reprint, 507, 30 L. J. C. P. N. S. 218, 7 Jur. N. S. 876. And see dictum in Holmes v. Bellingham (1859) 7 C. B. N. S. 329, 141 Eng. Reprint, 843, 29 L. J. C. P. N. S. 132, 6 Jur. N. S. 534.

Canada.—O'Connor v. Nova Scotia Teleph. Co. (1893) 22 Can. S. C. 276.

United States.—Banks v. Ogden (1865) 2 Wall. 57, 17 L. ed. 818; Herbert v. Rainey (1892) 54 Fed. 248; Paine v. Consumer's Forwarding & Storage Co. (1895) 19 C. C. A. 99, 37 U. S. App. 539, 71 Fed. 626; Stone v. Waukegan (1913) 123 C. C. A. 563, 205 Fed. 495.

Alabama.—Columbus & W. R. Co. v. Witherow (1886) 82 Ala. 190, 3 So. 23; Moore v. Johnston (1888) 87 Ala. 220, 6 So. 50; Southern Bell Teleph. Co. v. Francis (1895) 109 Ala. 224, 31 L.R.A. 193, 55 Am. St. Rep. 930, 19 So. 1; South & North Alabama R. Co. v. Davis (1914) 185 Ala. 193, 64 So. 606.

Arkansas.—Taylor v. Armstrong (1862) 24 Ark. 102; Dickinson v. Arkansas City Improv. Co. (1906) 77 Ark. 579, 113 Am. St. Rep. 170, 92 S. W. 21.

California. — Moody v. Palmer (1875) 50 Cal. 31; Wehl v. Sonoma Valley R. Co. (1886) 69 Cal. 202, 10 Pac. 510; Fraser v. Ott (1892) 95 Cal. 661, 30 Pac. 793; Merchant v. Grant (1915) 26 Cal. App. 485, 147 Pac. 484.

Colorado.—Overland Mach. Co. v. Alpenfels (1902) 30 Colo. 163, 69 Pac. 574.

Connecticut.—Peck v. Smith (1814) 1 Conn. 103, 6 Am. Dec. 216; Stiles v. Curtis (1810) 4 Day, 328; Chatham v. Brainerd (1835) 11 Conn. 60; Champlin v. Pendleton (1838) 13 Conn. 23; Read v. Leeds (1848) 19 Conn. 182; Church v. Meeker (1867) 34 Conn. 421; Gear v. Barnum (1870) 37 Conn. 229; Benham v. Potter (1884) 52 Conn. 248.

Florida.—Florida Southern R. Co. v. Brown (1887) 23 Fla. 104, 1 So. 512; Jacksonville, T. & K. W. R. Co. v. Lockwood (1894) 33 Fla. 573, 15 So. 327. And see dictum in Garnett v. Jacksonville, St. A. & H. R. Co. (1884) 20 Fla. 889.

Georgia. — Bayard v. Hargrave (1872) 45 Ga. 342; Silvey v. McCool (1890) 86 Ga. 1, 12 S. E. 175; Johnson

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v. Arnold (1893) 91 Ga. 659, 18 S. E. 370.

Idaho.—Shaw v. Johnston (1910) 17 Idaho, 676, 107 Pac. 399.

Illinois.—Illinois & M. Canal v. Haven (1850) 11 Ill. 554; Gebhardt v. Reeves (1874) 75 Ill. 301; Chicago v. Rumsey (1877) 87 Ill. 348; Helmer v. Castle (1884) 109 Ill. 664; Hamilton v. Chicago, B. & Q. R. Co. (1888) 124 Ill. 235, 15 N. E. 854; Thomsen v. McCormick (1891) 136 Ill. 135, 26 N. E. 373; Henderson v. Hatterman (1893) 146 Ill. 555, 34 N. E. 1041; Thompson v. Maloney (1902) 199 Ill. 282, 93 Am. St. Rep. 133, 65 N. E. 236; Chicago & E. I. R. Co. v. Willard (1910) 245 Ill. 391, 92 N. E. 271; Sullivan v. Atchison, T. & S. F. R. Co. (1911) 251 Ill. 113, 95 N. E. 1081; La Salle Varnish Co. v. Glos (1912) 254 Ill. 326, 98 N. E. 538. See dictum in Cicero v. Chicago, B. & Q. R. Co. (1915) 270 Ill. 606, 110 N. E. 811.

Indiana.—Cox v. Louisville, N. A. & C. R. Co. (1874) 48 Ind. 178; Warbritton v. Demorett (1891) 129 Ind. 346, 27 N. E. 730, 28 N. E. 613; Montgomery v. Hines (1893) 134 Ind. 221, 33 N. E. 1100; Haslatt v. New Albany Belt & Terminal R. Co. (1893) 7 Ind. App. 603, 34 N. E. 845; Western U. Teleg. Co. v. Krueger (1905) 36 Ind. App. 348, 74 N. E. 25.

Iowa.—See dictum in Dubuque v. Maloney (1859) 9 Iowa, 450, 74 Am. Dec. 358.

Kansas.—Tousley v. Galena Min. & Smelting Co. (1880) 24 Kan. 328; Atchison, T. & S. F. R. Co. v. Patch (1882) 28 Kan. 470.

Kentucky.—Hawesville v. Lander (1871) 8 Bush, 679; Schneider v. Jacob (1887) 86 Ky. 101, 5 S. W. 350; Jacob v. Woolfolk (1890) 90 Ky. 426, 9 L.R.A. 551, 14 S. W. 415; Coppin v. Manson (1911) 144 Ky. 634, 139 S. W. 860; Williams v. Johnson (1912) 149 Ky. 409, 149 S. W. 821; Blalock v. Atwood (1913) 154 Ky. 394, 46 L.R.A. (N.S.) 3, 157 S. W. 694; Carpenter v. Buckman (1897) 19 Ky. L. Rep. 700, 41 S. W. 579; Dollard v. Louisville, 3 Ky. Ops. 31.

Maine. — Bucknam v. Bucknam (1835) 12 Me. 463; Johnson v. Anderson (1841) 18 Me. 76; Hunt v. Rich (1854) 38 Me. 195; Cottle v. Young (1871) 59 Me. 105; Webber v. Overlock (1876) 66 Me. 177; Oxton v. Graves (1878) 68 Me. 371, 28 Am. Rep. 75; Low v. Tibbetts (1880) 72 Me. 92, 39 Am. Rep. 303. And see dictum in Winslow v. Reed (1896) 89 Me. 67, 35 Atl. 1017. Compare Sutherland v. Jackson (1850) 32 Me. 80 (stated at length infra, in V. b.).

Maryland.—Peabody Heights Co. v. Sadtler (1885) 63 Md. 533, 52 Am. Rep. 519; Baltimore & O. R. Co. v. Gould (1887) 67 Md. 60, 8 Atl. 754.

Massachusetts.—Phillips v. Bowers (1856) 7 Gray, 21; Smith v. Slocomb (1857) 9 Gray, 36, 69 Am. Dec. 274; Newhall v. Ireson (1851) 8 Cush. 595, 54 Am. Dec. 790; White v. Godfrey (1867) 97 Mass. 472; Hollenbeck v. Rowley (1864) 8 Allen, 473; Boston v. Richardson (1866) 13 Allen, 146; Peck v. Denniston (1876) 121 Mass. 17; Dean v. Lowell (1883) 135 Mass. 55; O'Connell v. Bryant (1877) 121 Mass. 557; McKenzie v. Gleason (1904) 184 Mass. 452, 100 Am. St. Rep. 566, 69 N. E. 1076; Gray v. Kelley (1907) 194 Mass. 533, 80 N. E. 651.

Michigan. — Purkiss v. Benson (1874) 28 Mich. 538; Plumber v. Johnston (1886) 63 Mich. 165, 29 N. W. 687.

Minnesota.—Re Robbins (1885) 34 Minn. 99, 57 Am. Rep. 40, 24 N. W. 356; White v. Jefferson (1910) 110 Minn. 276, 32 L.R.A.(N.S.) 784, 124 N. W. 373, 641, 125 N. W. 262.

Missouri.—Snoddy v. Bolen (1894) 122 Mo. 479, 24 L.R.A. 507, 24 S. W. 142, 25 S. W. 932.

Nevada.—Lindsay v. Jones (1890) 21 Nev. 72, 25 Pac. 297.

New Hampshire.—Reed's Petition (1843) 13 N. H. 381; Goodeno v. Hutchinson (1873) 54 N. H. 159; Woodman v. Spencer (1874) 54 N. H. 507.

New Jersey.—Winter v. Peterson (1854) 24 N. J. L. 524, 61 Am. Dec. 678; Hoboken Land & Improv. Co. v. Kerrigan (1864) 31 N. J. L. 13; Salter v. Jonas (1877) 39 N. J. L. 469, 23 Am. Rep. 229; Dodge v. Pennsylvania R. Co. (1887) 43 N. J. Eq. 351, 11 Atl. 751, affirmed in (1889) 45 N. J. Eq. 366, 19 Atl. 622; Hess v. Kenney

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(1905) 69 N. J. Eq. 138, 61 Atl. 464; Lewis v. Pennsylvania R. Co. (1896) — N. J. Eq. —, 133 Atl. 932.

New York.—Bissell v. New York C. R. Co. (1861) 23 N. Y. 61; Perrin v. New York C. R. Co. (1867) 36 N. Y. 120; English v. Brennan (1875) 60 N. Y. 609; Mott v. Mott (1877) 68 N. Y. 246; Re Ladue (1889) 118 N. Y. 213, 23 N. E. 465; Haberman v. Baker (1891) 128 N. Y. 253, 13 L.R.A. 611, 28 N. E. 370; Van Winkle v. Van Winkle (1906) 184 N. Y. 204, 77 N. E. 33, affirming (1904) 95 App. Div. 605, 89 N. Y. Supp. 26; Pell v. Pell (1901) 35 Misc. 472, 71 N. Y. Supp. 1092, affirmed in (1901) 65 App. Div. 388, 73 N. Y. Supp. 81, which is affirmed in (1902) 169 N. Y. 607, 62 N. E. 1099; and see the reported case (RE BRONX PARKWAY, ante, 1).

North Carolina.—See dictum in Hays v. Askew (1860) 53 N. C. (8 Jones, L.) 226.

Oregon.—McQuaid v. Portland & V. R. Co. (1889) 18 Or. 237, 22 Pac. 899.

Pennsylvania. — Paul v. Carver (1856) 26 Pa. 226, 27 Am. Dec. 413; Grier v. Sampson (1856) 27 Pa. 183; Cox v. Freedley (1859) 33 Pa. 124, 75 Am. Dec. 584; Trutt v. Spotts (1878) 87 Pa. 339; Spackman v. Steidel (1879) 88 Pa. 453; Firmstone v. Spaeter (1892) 150 Pa. 616, 30 Am. St. Rep. 851, 25 Atl. 41; Pittsburg, V. & C. R. Co. v. Fischer Foundry & Mach. Co. (1904) 208 Pa. 73, 57 Atl. 191; Oliver v. Ormsby (1909) 224 Pa. 564, 73 Atl. 973; Seibert v. Sebring (1913) 22 Pa. Dist. R. 530, affirmed in (1913) 55 Pa. Super. Ct. 475; Socket v. Norristown Transit Co. (1916) 62 Pa. Super. Ct. 542.

South Carolina.—Witter v. Harvey (1821) 1 M'Cord, L. 67, 10 Am. Dec. 650.

South Dakota.—Sweatman v. Bathrick (1903) 17 S. D. 138, 95 N. W. 422 (by express terms of statute).

Tennessee.—Iron Mountain R. Co. v. Bingham (1889) 87 Tenn. 522, 4 L.R.A. 622, 11 S. E. 705.

Texas.—Mitchell v. Bass (1862) 26 Tex. 372; Guadalupe County v. Poth (1914) — Tex. Civ. App. —, 163 S. W. 1050; Cocke v. Texas & N. O. R. Co. (1907) 46 Tex. Civ. App. 363, 103 S. W. 407; Wiess v. Goodhue (1907) 46 Tex. Civ. App. 142, 102 S. W. 793; Bond v. Texas & P. R. Co. (1897) 15 Tex. Civ. App. 281, 39 S. W. 878.

Utah.—Brown v. Oregon Short Line R. Co. (1909) 36 Utah, 257, 24 L.R.A. (N.S.) 86, 102 Pac. 740 (by express terms of statute).

Vermont. — Morrow v. Willard (1857) 30 Vt. 118; Marsh v. Burt (1861) 34 Vt. 289.

Virginia.—Durbin v. Roanoke Bldg. Co. (1908) 107 Va. 753, 60 S. E. 86. And see dictum in Richmond v. Thompson (1914) 116 Va. 178, 81 S. E. 105.

Washington.—Bradley v. Spokane & I. E. R. Co. (1914) 79 Wash. 455, L.R.A.1917C, 225, 140 Pac. 688.

Wisconsin. — Kimball v. Kenosha (1855) 4 Wis. 331; Gove v. White (1866) 20 Wis. 426; Pettibone v. Hamilton (1876) 40 Wis. 402.

It is a familiar principle of law that "a grant of land bordering on a road or river carries the title to the center of the river or road unless the terms or circumstances of the grant indicate a limitation of its extent by the exterior lines." Banks v. Ogden (1865) 2 Wall. (U. S.) 57, 17 L. ed. 818.

"Where the highway is a boundary, the center line of the street is presumed to be the limit unless the description excludes the soil of the highway. Under ordinary circumstance nothing except express words will prevent the street in front of the premises from passing." Oxten v. Groves (1878) 68 Me. 371, 28 Am. Rep. 75.

"It seems to be the universally recognized rule that the conveyance of land bordering upon a public highway conveys title to the center of the highway, subject to its use by the public, whether it is so expressed in the deed or not; and where a conveyance or bond to convey designates the public highway, (or street) as one of the boundaries of the tract, it will, in the absence of language showing a contrary intention, be construed as including the highway itself to the center or middle thereof." Williams v. Johnson (1912) 149 Ky. 409, 149 S. W. 821.

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"Deeds may expressly exclude the streets, but unless they do, the implication is that the street is included." Bradley v. Spokane & I. E. R. Co. (1914) 79 Wash. 455, L.R.A.1917C, 255, 140 Pac. 688.

In Dodge v. Pennsylvania R. Co. (1887) 43 N. J. Eq. 351, 11 Atl. 751, the court said: "As to the fee of the street in front of the lands conveyed, the law is settled. A grantee, in such case, if his grantor owns the fee of the street in front of the land conveyed, takes to the middle of the street, by mere force of legal construction, unless a contrary intention is apparent on the face of the deed, or is unmistakably shown by the situation of the parties, and the nature and character of the transaction."

In Columbia & W. R. Co. v. Witherow (1886) 82 Ala. 190, 3 So. 23, the court said: "In paragraph 7 it is admitted, on information and belief, that complainant had purchased the lots in question from one Montgomery, for the sum of $100. On this motion, the latter admission is to be taken as true, and must prevail over the former insufficient denial. This being true, it would follow, as an implied inference, that the complainant would also be the owner of the ultimate fee in the avenue adjacent to the lots, to the center of the highway. The property in the soil and freehold in the street would still be hers. This follows from the principle that, in the absence of a statute to the contrary, a conveyance of land bounded by the public highway, or of lots in a city bounded by a public street, carries with it the fee to the center of such road or street, as part and parcel of the grant; and the grantee has the exclusive right to the soil, subject to the right of way implied from the original dedication, whatever that right may be held to embrace, which varies with the decisions of the different courts."

The cases enunciating the general rule heretofore stated ordinarily apply it to city streets and rural highways without reference to any distinction between them. In the case of Re White [1898] 1 Ch. (Eng.) 659, it was held that the rule is applicable equally to streets and highways, the court saying: "Now, it is suggested that that general rule does not apply at all to streets in towns. I have never heard it before argued, and certainly it has never been actually decided, that the presumption does not apply to conveyances of houses bordering on streets in towns; nor do I see any sufficient reason why the general rule should not apply to streets in towns as well as to highways in the country. Why should towns be excluded? And if towns were excluded, where would you limit the exception from the rule? Would a country town be excepted? Would a small town? Would a village? Would a hamlet? Where are you to stop? It seems to me that unless there are certain circumstances connected with the particular town, the rule applies to streets in towns as it does to highways in the country."

So in Hammond v. McLachlan (1848) 1 Sandf. (N. Y.) 323, it was said: "We see no reason for holding a different construction in respect of these deeds, from that which prevails in regard to deeds of lands in the country. The reason for that construction in country deeds was based upon principles of great public convenience, which forbade that one should be the owner of a farm, and another of a road or a stream running through it. The practical inconveniences of a contrary rule have led to this construction uniformly, unless where it expressly appears that the parties intended the contrary."

However, in English v. Brennan (1875) 60 N. Y. 609, the presumption was said to be much less strong in respect to lots abutting on streets in large cities.

In Hochalter v. Manhattan R. Co. (1890) 31 N. Y. S. R. 112, 9 N. Y. Supp. 341, it was held that the presumption was applicable to streets opened by statutory proceedings. In Illinois, however, a statutory dedication vests the fee in the public, and the rule is not applicable. See infra, VI. d.

The presumption that a conveyance of land with respect to a highway on which it abuts presumptively conveys

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the fee to the center is applicable to the conveyance of land abutting on a public alley. Bergan v. Co-Operative Ice & Fuel Co. (1908) 41 Ind. App. 647, 84 N. E. 833; Jacob v. Woolfolk (1890) 90 Ky. 426, 9 L.R.A. 551, 14 S. W. 415; Albert v. Thomas (1890) 73 Md. 181, 20 Atl. 912; Snoddy v. Bolen (1894) 122 Mo. 479, 24 L.R.A. 507, 24 S. W. 142, 25 S. W. 932; Lindsay v. Jones (1890) 21 Nev. 72, 25 Pac. 297; Freeman v. Sayre (1886) 48 N. J. L. 37, 2 Atl. 650; Hennessey v. Murdock (1893) 137 N. Y. 317, 33 N. E. 330; Oliver v. Ormsby (1909) 224 Pa. 564, 73 Atl. 973; Weiss v. Goodhue (1907) 46 Tex. Civ. App. 142, 102 S. W. 793; Richmond v. Thompson (1914) 116 Va. 178, 81 S. E. 105.

The general rule that a description of land with reference to a highway on which it abuts presumptively carries the fee to the center of the highway is applicable to a judgment on condemnation to the same extent as to a deed of conveyance. Atchison, T. & S. F. R. Co. v. Patch (1882) 28 Kan. 470; Challiss v. Atchison Union Depot & R. Co. (1891) 45 Kan. 398, 25 Pac. 894; Michigan C. R. Co. v. Miller (1912) 172 Mich. 201, 137 N. W. 555; Witt v. St. Paul & N. P. R. Co. (1888) 38 Minn. 122, 35 N. W. 862; Pennsylvania S. Valley R. Co. v. Reading Paper Mills (1892) 149 Pa. 18, 24 Atl. 205; Amerman v. Missouri, K. & T. R. Co. (1915) — Tex. Civ. App. —, 182 S. W. 56.

In Snoddy v. Bolen (1894) 122 Mo. 479, 24 L.R.A. 507, 24 S. W. 142, 25 S. W. 932, it was held that where, in dedicating a street, the dedication reserved mineral rights, a subsequent conveyance of abutting lands without reservation passed the mineral rights.

III. Reason for presumption.

It has in a few cases been assigned as a reason for the presumption that the grantee takes to the center of a street designated as a boundary that the street as a whole is a monument within the rule that a boundary line runs through the center of a monument. Illinois & M. Canal v. Havens (1850) 11 Ill. 557; Helmer v. Castle (1884) 109 Ill. 664; Jacob v. Woolfolk (1890) 90 Ky. 426, 9 L.R.A. 551, 14 S. W. 415.

The reason ordinarily assigned is, however, that a mutual intention that the grantee shall take to the center of the street is to be presumed from the fact that retention of the fee to the half of the highway is of little value to the grantor, while it is of distinct value to the grantee. "There is no purpose to be served in the retention by the grantor of a narrow strip of land along the boundaries of the land conveyed." Mott v. Mott (1876) 68 N. Y. 246.

"The rule seems to be based on the supposed intention of the parties and the improbability of the grantor desiring or intending to reserve his interest in the street when he had parted with his title to the adjoining land." Florida Southern R. Co. v. Brown (1887) 23 Fla. 104, 1 So. 512. See to the same effect, Gear v. Barnum (1870) 37 Conn. 229. "It will not be supposed that a man would care to keep title to the highway in himself when he had parted with the land bordering thereon." Henderson v. Hatterman (1893) 146 Ill. 555, 34 N. E. 1041.

In Merchant v. Grant (1915) 26 Cal. App. 485, 147 Pac. 484, it was said that the presumption rests on the unreasonableness of assuming that the grantor intended to retain a right of no use to him, and which might result in serious injury to the grantee.

In Johnson v. Anderson (1841) 18 Me. 76, the court said: "Could the grantor, after these conveyances, contemplate that he was to continue to be the owner of the land over which the road was laid, and that he might, subject to the public rights, cut away or protect at his pleasure the trees, and remove the earth and manure, that might be useful? Could the grantees have imagined that they had not these rights, usually belonging to the owners of the adjoining land? The effect of admitting the principle that a conveyance bounding on a highway does not extend to the center of it would deprive the owners of farms without, and the owners of house lots within, our villages and

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cities, of the power of improving or ornamenting that part of the way adjoining these lands and not used by the public, and of protecting ornamental trees and useful erections already existing. Such results are as undesirable for the public benefit as they would be alarming to the owners of house lots adjoining public highways and streets. A principle which would produce them should not be admitted but upon the clearest and best authority."

In Schneider v. Jacob (1887) 86 Ky. 101, 5 S. W. 350, it was said: "He purchases the lot with the understanding that he may build houses fronting on the street, with windows, doors, and doorsteps, and that the doorsteps may extend beyond the line of the street; also that he may construct vaults below the surface of the street, and vaults in cities of considerable size are nearly always constructed under the sidewalks, and they are sometimes extended to the center of the street. Their construction as depositories for fuel and other necessaries is highly necessary. Shade trees, posts, awnings, etc., are also necessary protections and conveniences. If the grantor held a property right in the street up to the dividing line between the street and the lot, he could deprive his vendee of the right of ingress from the streets into his house, and exit from it, of light and air, and of planting shade trees and erecting posts and awnings, and of constructing vaults. In other words, if the vendor retained the right of property in the street up to the dividing line between the lot and the street, he might prohibit the erection or construction of any of these necessary improvements, and thereby render the lot valueless to the purchaser. Suppose that the street belonged to the original grantor, and that it is vacated as a public thoroughfare; he is then the owner of a strip of ground just the width of the street, and which may be several miles long, and that he has no access to except at each end. This would certainly be a description of property that it is not probable that either party contemplated as remaining in the grantor."

In White v. Jefferson (1910) 110 Minn. 276, 32 L.R.A.(N.S.) 778, 124 N. W. 373, the court said: "The rule is compelled by incontrovertible public policy. The owner of the land platted usually becomes entirely disassociated with the title to the land sold, and has neither a proximate interest in nor a practical use for the qualified fee in the street. The interest of the vendee therein is immediate. It has direct and substantial value to him. Indeed, as Cole, J., said in Kimball v. Kenosha (1855) 4 Wis. 331, the lots would be 'comparatively useless' without the implication of conveyance to the middle of the street. He is logically entitled to improve the property as he chooses. It conduces to the best use of the premises to allow him to do so in reliance on access to the street on the ground itself and for light and air above. So long as the land is used as a street, these rights would be protected, irrespective of who owned the fee. But upon vacation of the street these rights would be legally destroyed unless the vendee had the fee. It is much more reasonable to vest that fee in him than in the usually remote party who originally platted the land. To allow the vendor to retain the fee would be a serious embarrassment to alienation and improvement of property which it consists with public policy to favor. On the other hand, the state itself is concerned, e. g., as to who should determine and pay for improvements to the street, made under the power of taxation, to be paid for in some form of local assessment. The owners of the lots adjoining the street are the natural ones to determine whether improvements should be made and what their character would be. They are the ones who logically would be, and who are, required to discharge the assessment levied for the improvement determined upon. Upon vacation of the street, they are naturally entitled to the street in its improved condition. Other practical considerations justify the reasonableness of the rule."

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In Salter v. Jonas (1877) 39 N. J. L. 469, 123 Am. Rep. 229, it was said: "And this doctrine, although it cannot be said to be sustained by the greatest number of decisions, is, I think, the one that ought to be adopted in this state. In our practice, in the conveyance of lots bounded by streets, the prevailing belief is, that the street to its center is conveyed with the lot. Among the mass of the people it is undoubtedly supposed that the street belongs, as an appurtenance, to the contiguous property, and that the title to the latter carries with it a title to the former. This belief is so natural that it would not be easily eradicated. As a general practice, it would seem preposterous to sever the ownership to these several particles of property. Under ordinary circumstances, the thread of land constituting the street is of great value to the contiguous lots, and is of no value separated from them. It would rarely occur that the vendee of a city lot would be willing to take it separated in ownership from the street, and it would as rarely occur that a vendor would desire to make such a severance. In my own experience, I have never known such an intention to exist, and it is safe to say that whenever it does exist, the conditions of the case are peculiar."

In Paul v. Carver (1856) 26 Pa. 223, 225, 67 Am. Dec. 413, the court said: "Where land is laid out in town lots, with streets and alleys, the owner receives a full consideration for the streets and alleys in the increased value of the lots. The object of the purchasers of lots is to enjoy the usual benefits of the streets. The understanding always is that houses may be erected fronting on the streets, with windows and doors, and doorsteps and vaults. These latter always extended beyond the line of the street, and it is necessary that they should so extend. If a right of property in the streets might, under any circumstances, be exercised by the grantor, he might deprive his grantee of the means of entry into or exit from his house, and of all the enjoyments of light and air, and might thereby deprive him of means of deriving any benefit from his purchase. In large cities vaults under the sidewalks for receiving fuel and other necessaries are almost universally constructed. In some instances where lots are owned by the same person on each side of the street, these vaults extend entirely across it, forming an underground communication between the two properties. Shade trees, posts, awnings, and other convenient structures, are constantly erected. All these might be prohibited by the original grantor, if his right of property remained after parting with the lots. If the streets were to be vacated, of what value would they be to the original grantors, unless for the purposes of annoyance to the lot owners? A long strip of ground 50 or 100 feet wide and perhaps several miles in length, without any access to it except at each end, is a description of property which is not likely either party ever contemplated as remaining in the grantor of the lots on each side of it. Influenced by these considerations, the law has carried out the real intention of the parties by holding that the title passed to the center of the street, subject to the right of passage."

The failure of this reason has been referred to as rebutting the presumption. Hamlin v. Pierpoint Mfg. Co. (1886) 141 Mass. 51, 6 N. E. 531, wherein it was said: "One reason given for the general rule is, that it is not to be presumed that the grantor intends to reserve a narrow strip of land, not capable of any substantial use by him, after having parted with the land by the side of it, and of no considerable value if the way should be discontinued. This reason does not apply in this case. The northerly line of the lot sold to Seabury is several hundred feet long. At the time the deed was made, Howland street covered only about 30 feet of this line, and no extension of the street was legal and none was contemplated. Much the largest part of Seabury's northerly boundary, therefore, was not upon the street, but upon other land of the grantor. No fair inference can be drawn that the grantor did not intend to retain the strip of

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land equal in width to half the width of the street, for it was a part of his other land, and as valuable as any other land."

As to the policy of the rule, it was said in Hunt v. Brown (1892) 75 Md. 481, 23 Atl. 1029: "In the course of time, however,—in a century or half of a century, as in this case, the road is closed as a highway, and then springs up a costly and harassing litigation about the title to this narrow strip of land, which before was practically of little value or no value whatever. And to avoid litigation of this kind, involving the construction as to the intention of the parties, at the best sometimes doubtful, it would be better, it seems to us, to declare by legislative enactment that all grants hereafter made of land bordering on a highway shall carry the fee to the middle of the highway, provided the grantor is the owner of the fee, unless the fee is reserved in express terms to the grantor."

So in Johnson v. Arnold (1893) 91 Ga. 659, 18 S. E. 370, it was said: "It is favorable to the general public interest that the fee in all roads should be vested either exclusively in the owner of the adjacent land on one side of the road, or in him as to one half of the road, and as to the other half, in the proprietor of the land on the opposite side of the road. This is much better than that the fee in long and narrow strips or gores of land scattered all over the country, and occupied or intended to be occupied with roads, should belong to persons other than the adjacent owners. In the main, the fee in such property under such detached ownership would be and forever continue unproductive and valueless. True it is that the fee in a road or in one half the breadth of land occupied by a road is generally not of much value to an adjacent proprietor, but it goes to enlarge his holding and probably enhances somewhat the value of his estate, when a detached ownership would usually leave it of no value whatever. At all events, this much may be asserted confidently, that as the fee in roads has to reside somewhere, it is more desirable that it should be in the owners of the adjacent lands than elsewhere. And detached ownership being less desirable, or not desirable at all, any actual intention to establish it in a particular instance, or in the great mass of instances, is less likely to exist than is an opposite intention."

IV. Rebuttal of presumption generally.

Whether a conveyance with reference to a highway carries title to the center depends on the intention of the parties, to be ascertained from the language of the conveyances, viewed in the light of the surrounding circumstances. Overland Mach. Co. v. Alpensfels (1902) 30 Colo. 163, 69 Pac. 574; Brewster v. Cahill (1902) 199 Ill. 309, 65 N. E. 233; Huff v. Hastings Exp. Co. (1902) 195 Ill. 257, 63 N. E. 105; Warren v. Balek (1864) 54 Me. 276, 89 Am. Dec. 748; Smith v. Slocomb (1857) 9 Gray (Mass.) 36, 69 Am. Dec. 274; Phelps v. Webster (1883) 134 Mass. 17; Re Robbins (1885) 34 Minn. 99, 57 Am. Rep. 40, 24 N. W. 356; Mott v. Mott (1877) 68 N. Y. 246.

Whether a conveyance of land abutting on a street gives title to the center of the street depends "upon the intent of the parties as expressed in the descriptive part of the deed, explained and illustrated by all other parts of the conveyance, and by the localities to which it applies." Codman v. Evans (1861) 1 Allen (Mass.) 443.

Land abutting on a highway may be so conveyed as to exclude the fee in the highway. Chicago v. Rumsey (1877) 87 Ill. 348.

In the absence of anything from which an intent to include the fee of the highway can be inferred, it does not pass, since "land will not pass as appurtenant to other land." Cole v. Haynes (1849) 22 Vt. 588.

"The rule that a conveyance bounded by or upon a street embraces a fee to the center thereof rests upon presumption. As the presumption is not juris et de jure, it may be overcome." Tietjen v. Palmer (1907) 121 App. Div. 233, 105 N. Y. Supp. 790.

"The presumption that the owner of

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the adjoining land intended to convey his interest in the highway may be overcome either by the use of express language excluding it, or by such facts and circumstances as show an intention to exclude it. The intention to exclude the highway must appear from the language of the deed, as explained by surrounding circumstances." Henderson v. Hatterman (1893) 146 Ill. 555, 34 N. E. 1041.

"The grantor, by apt and fitting words, may exclude this presumption and reserve the entire road to himself, subject to the easement of the public." Cottle v. Young (1871) 59 Me. 105.

In Buck v. Squiers (1850) 22 Vt. 484, the court said: "The question, then, whether, in a conveyance of land abutting upon a highway, the highway is included and passes to the grantee, or whether it is excluded and does not pass, becomes in all cases a matter of construction and intention merely, from the language used by the parties, and such surrounding circumstances as are proper to be taken into the account in ascertaining the intentions of the parties,—keeping always in view the legal presumption that the parties intended to include the highway, and that the burden is upon the party who assumes to show that the party intended the contrary."

In Columbus & W. R. Co. v. Witherow (1886) 82 Ala. 190, 3 So. 23, it was said that nothing less than an express reservation or its equivalent will rebut the legal inference that the grantee takes the fee to the center of the street. See to the same effect, Adams v. Saratoga & W. R. Co. (1851) 11 Barb. (N. Y.) 414, reversed on other grounds in (1852) 10 N. Y. 328. Paul v. Carver (1856) 26 Pa. 223, 67 Am. Dec. 413.

In Pell v. Pell (1901) 35 Misc. 472, 71 N. Y. Supp. 1092, affirmed in (1901) 65 App. Div. 388, 73 N. Y. Supp. 81, which is affirmed in (1902) 169 N. Y. 609, 62 N. E. 1099, it was said that it requires "clear and decisive language" to rebut the presumption that the grantee takes to the center of the highway.

The true rule seems to be, however, that the presumption may be overcome either by express words or by the use of such words as necessarily exclude the highway from the description of the premises conveyed. Van Winkle v. Van Winkle (1906) 184 N. Y. 193, 77 N. E. 33, affirming (1904) 95 App. Div. 605, 89 N. Y. Supp. 26.

In Jackson ex dem. Yates v. Hathaway (1818) 15 Johns. (N. Y.) 447, 8 Am. Dec. 263, it was said that a description by such boundaries as exclude the highway prevents the grantee from taking to the center thereof; but that case appears to be inconsistent with the rule of the later New York cases. See Van Winkle v. Van Winkle (N. Y.) supra. A like rule was laid down in Tyler v. Hammond (1830) 11 Pick. (Mass.) 193; but see the Massachusetts cases cited infra in V. e.

In Hoboken Land & Improv. Co. v. Kerrigan (1864) 31 N. J. L. 13, it was said that express words are necessary to exclude the highway only where, independent of such words, a contrary presumption can reasonably be inferred. Compare Salter v. Jonas (1877) 39 N. J. L. 469, 23 Am. Rep. 229, wherein it was said that there must be express words of exclusion to prevent the application of the presumption.

In White's Bank v. Nichols (1876) 64 N. Y. 65, the court said: "No particular words or form of expression is necessary to restrict the grant to the exterior line of a street or margin of a stream, and exclude the soil of each; but that while the presumption is in every case that the grantor does not intend to retain the fee of the soil within the lines of the street or under the water, such presumption may be overcome by the use of any terms in describing the premises granted which clearly indicate an intent not to convey the soil of the street or stream."

So, in Salter v. Jonas (N. J.) supra, the court said: "And it is the very general notion that these two parcels of property are inseparably united, and pass as a whole by force of an ordinary conveyance; that accounts for the absence of any settled formula in general use for the description of city lots in transfer of their title. Up-

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on an examination of such conveyances, it would, I am satisfied, be disclosed that the utmost laxity in this respect prevails. The property conveyed is indiscriminately described as going to the street and running along, or as going to one side of such street and thence running along such side. Such discriminations are not intentional, the purpose being to convey all the interest that the seller has in the property and in its belongings, and the mode of accomplishing this purpose is not the subject of attention, the street lot, as I have said, being regarded as a mere adjunct of the property sold, and worthless for any other use. This being undeniably the practice and general understanding, to give a close and literal meaning to the descriptive terms employed in such instances would serve no useful purpose, but its tendency would be to defeat the object in view, and to call into life a vexatious litigation. The particular words should, in such transactions, be controlled and limited by the manifest intention which is unmistakably displayed in the nature of the affair and the situation of the parties."

Where there is ambiguity with reference to the description, or doubt as to the intent of the grantor, the presumption will prevail. Van Winkle v. Van Winkle (1906) 184 N. Y. 193, 77 N. E. 33, affirming (1904) 95 App. Div. 605, 89 N. Y. Supp. 26.

In the absence of fraud or ambiguity, parol evidence is not admissible to rebut the presumption. Bergan v. Co-operative Ice & Fuel Co. (1908) 41 Ind. App. 647, 84 N. E. 833 (wherein the rule was applied to a description of land by courses and distances which unmistakably identified a tract bordering on a highway); Jacob v. Woolfolk (1890) 90 Ky. 426, 9 L.R.A. 551, 14 S. W. 415 (wherein parol evidence was held to be inadmissible to show intent not to include highway in description by lot number).

Though the presumption is declared by an express statute, it is subject to be rebutted by facts showing a contrary intention. Brown v. Oregon Short Line R. Co. (1909) 36 Utah, 257, 24 L.R.A.(N.S.) 86, 102 Pac. 740.

V. Effect of particular terms in conveyance.

a. Generally.

The use or omission of the term "appurtenances" in a conveyance is of no value in determining whether the fee to the center of a street was conveyed. Overland Mach. Co. v. Alpenfels (1902) 30 Colo. 163, 69 Pac. 574.

So in United States v. Harris (1830) 1 Sumn. 21, Fed. Cas. No. 15,315, it was held that the term "appurtenances" in a conveyance which otherwise excludes the street does not work an inclusion. See to the same effect, Harris v. Elliott (1836) 10 Pet. (U. S.) 25, 9 L. ed. 333.

That the lots conveyed are described as "opposite to" certain other lots does not prevent the grantee from taking to the center of the intervening street. Paine v. Consumers' Forwarding & Storage Co. (1895) 19 C. C. A. 99, 37 U. S. App. 539, 71 Fed. 626, wherein it was said: "These words undoubtedly imply the existence of a passageway or street between the water lots conveyed and the numbered lots, by reference to which the former were designated; and, as already said, the grantor in the deeds and those claiming under him are estopped to deny its existence. But we cannot see how this prevents a construction of the deeds by which the fee in one half the street, whose existence is thus recognized, shall pass with the lots."

The addition of the phrase "excepting the roads laid out over said land" merely excepts the public easement, and does not prevent the grantee from taking the fee to the center of the roads. Wellman v. Dickey (1885) 78 Me. 29, 2 Atl. 133.

So, in Peck v. Smith (1814) 1 Conn. 103, 6 Am. Dec. 216, it was held that a grantee was not prevented from taking to the center of the highway by the following reservation in his deed: "Saving and excepting the road or highway laid out, used, and

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improved, running from the old highway to the bridge over the premises."

But it has been held that where, in connection with the description of premises abutting on a highway, an easement over the highway is expressly granted, the fee to the highway is excluded. Hobson v. Philadelphia (1892) 150 Pa. 595, 24 Atl. 1048; Brown v. Oregon Short Line R. Co. (1909) 36 Utah, 257, 24 L.R.A. (N.S.) 86, 102 Pac. 740.

So, a recital that the road in question was laid out for the "accommodation" of lot owners has been referred to as raising an implication that "the use only of the road was to be accorded by way of accommodation, and that the roadbed was not conveyed." Peabody Heights Co. v. Sadtler (1885) 63 Md. 533, 52 Am. Rep. 519.

By a parity of reasoning it has been held that where, to the description, there are added the words, "reserving to the public the use of" the highway, an intent that the fee shall pass is shown. Richardson v. Palmer (1859) 38 N. H. 212.

In Oliver v. Ormsby (1909) 224 Pa. 564, 73 Atl. 973, the description in question called for an alley as a boundary, and added the following words: "Together with the free use and privilege of the said alley, called Carpenter's alley, as by the plan intended to be recorded in the office for recording of deeds in and for Allegheny county, relation thereunto being had, will more fully appear." It was held that the grantee took the fee to the center of the alley.

Where a deed of property abutting on a street describes the property by lot number and then adds, "also doth quitclaim all title in being or reversion to the land now occupied by" the street, the title to the fee of the street is separated from that to the abutting land, and a subsequent reconveyance to the grantor of the land without mentioning the fee to the street, which had, in the meantime, been vacated, gives no title to the vacated street. Overland Mach. Co. v. Alpenfels (Colo.) supra.

A partition decree appropriating as a street a strip on which all the lots were bounded has been held to give the abutters title to the center of the street. Clark v. Parker (1871) 106 Mass. 554.

But in Codman v. Evans (1861) 1 Allen (Mass.) 443, a deed referring to a street as being "between" the property conveyed and other property was held to pass no rights in the fee of the street.

b. Reference to map or plat.

By the great weight of authority a conveyance of land by lot, block, or tract number, with reference to a map or plat which shows that the property abuts on a highway, gives to the grantee the fee to the center of the highway though the map, by its lines or coloring, shows the lot, block, or tract as extending only to the side line of the highway.

England.—Berridge v. Ward (1861) 10 C. B. N. S. 400, 142 Eng. Reprint, 507, 30 L. J. C. P. N. S. 218, 7 Jur. N. S. 876. Compare Pryor v. Petre [1894] 2 Ch. 11, 63 L. J. Ch. N. S. 531, 7 Reports, 424, 70 L. T. N. S. 331, 42 Week. Rep. 435.

United States.—Banks v. Ogden (1865) 2 Wall. 57, 17 L. ed. 818; Stone v. Waukegan (1913) 123 C. C. A. 563, 205 Fed. 495.

Arkansas.—Taylor v. Armstrong (1863) 24 Ark. 107; Dickinson v. Arkansas City Improv. Co. (1906) 77 Ark. 570, 113 Am. St. Rep. 170, 92 S. W. 21.

California.—Frazer v. Ott (1892) 95 Cal. 661, 30 Pac. 793.

Florida.—Smith v. Horn (1915) 70 Fla. 484, 70 So. 435.

Georgia. — Harrison v. Augusta Factory (1884) 73 Ga. 447.

Idaho.—Shaw v. Johnston (1910) 17 Idaho, 676, 107 Pac. 399.

Illinois.—Thompson v. Maloney (1902) 199 Ill. 276, 93 Am. St. Rep. 133, 65 N. E. 236; Brewster v. Cahill (1902) 199 Ill. 309, 65 N. E. 233.

Indiana.—Cox v. Louisville, N. A. & C. R. Co. (1874) 48 Ind. 178.

Iowa.—Dubuque v. Maloney (1859) 9 Iowa, 450, 74 Am. Dec. 358.

Kentucky. — Jacob v. Woolfolk (1890) 90 Ky. 426, 9 L.R.A. 551, 14

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S. W. 415; Coppin v. Manson (1911) 144 Ky. 634, 139 S. W. 860.

Minnesota.—Re Robbins (1885) 34 Minn. 99, 57 Am. Rep. 40, 22 N. W. 356; Gilbert v. Emerson (1895) 60 Minn. 62, 61 N. W. 820.

Missouri.—Snoddy v. Bolen (1894) 122 Mo. 479, 24 L.R.A. 507, 24 S. W. 142, 25 S. W. 932.

New York.—Bissell v. New York C. R. Co. (1861) 23 N. Y. 61; Perrin v. New York C. R. Co. (1867) 36 N. Y. 120; Hennessy v. Murdock (1893) 137 N. Y. 317, 33 N. E. 330; Sizer v. Devereux (1853) 16 Barb. 160; Lozier v. New York C. R. Co. (1864) 42 Barb. 465; Edsall v. Howell (1895) 86 Hun, 424, 33 N. Y. Supp. 892; Gere v. McChesney (1903) 84 App. Div. 39, 82 N. Y. Supp. 191; Trowbridge v. Ehrich (1906) 116 App. Div. 457, 101 N. Y. Supp. 995, modified in (1908) 191 N. Y. 361, 84 N. E. 297; Woolf v. Woolf (1909) 131 App. Div. 751, 116 N. Y. Supp. 104; Stevens v. New York (1880) 14 Jones & S. 274, affirmed in (1881) 84 N. Y. 296; Pollock v. Morris (1884) 19 Jones & S. 112, affirmed in (1887) 105 N. Y. 676, 12 N. E. 179.

Pennsylvania.—Dobson v. Hohenadel (1892) 148 Pa. 367, 23 Atl. 1128.

Rhode Island.—Tingley v. Providence (1867) 8 R. I. 493; Clark v. Providence (1873) 10 R. I. 437; Faulkner v. Rocket (1911) 33 R. I. 153, 80 Atl. 880.

Virginia.—Durbin v. Roanoke Bldg. Co. (1908) 107 Va. 753, 60 S. E. 86.

Wisconsin.—Kimball v. Kenosha (1855) 4 Wis. 321; Jarstadt v. Morgan (1879) 48 Wis. 245, 4 N. W. 271; Andrews v. Youmans (1890) 78 Wis. 56, 47 N. W. 304; Brown v. Baraboo (1898) 98 Wis. 273, 74 N. W. 223; Smith v. Beloit (1904) 122 Wis. 396, 100 N. W. 877.

A description of lots by their numbers on a plot by which they are shown to bound on a street "is exactly equivalent to express language in a deed giving the street as a boundary." Paine v. Consumers' Forwarding & Storage Co. (1895) 19 C. C. A. 99, 37 U. S. App. 539, 71 Fed. 626.

In Henderson v. Hatterson (1893) 146 Ill. 555, 34 N. E. 1041, the court said that "where a deed refers to a plat or subdivision the particulars shown upon such deed or subdivision are as much a part of the deed as though they were recited in it."

In Cox v. Louisville, N. A. & C. R. Co. (1874) 48 Ind. 178, the court said: "Without citing or examining other authorities, we think it may be laid down that the established inference of law is, that a conveyance of land bounded on a highway carried with it the fee to the center of the road, as part and parcel of the grant, unless such inference shall be expressly excluded, and that this rule is applicable where the land conveyed is a lot or part of a lot in a town or city, designated on the plat by its number, or ascertained by its appropriate description, and abutting on a public street, lane, or alley."

In Jarstadt v. Morgan (1879) 48 Wis. 245, 4 N. W. 27, the description in question was as follows: "Lots 1, 2, 3, and 4 in block 1, 'according to the Clark's Mills village plat on record.'" The plat was not in fact on record. Holding that the grantee took to the center of the street, the court said: "Now upon the facts of this case we are disposed to adopt this rule, namely: Where the owner of a tract of land, which is laid out into blocks and lots that are bounded on what are represented on an unrecorded or defective plat as streets, conveys lots, referring to the plat as containing the true description of the premises, thus making the plat a part of his deed, the grantee will take to the center of the street abutting on his lots, as against his grantor or assigns. It may well be that such grantee would not only take the fee to the center of such streets, but would also acquire the right to use all passageways or streets on which his lots were bounded, and which were thus represented on the plat, as would enable him to reach the public ways in either direction, provided his grantor's title extended thus far. It is not necessary to decide this last point in this case, and it is not decided; but we are clear that, upon the facts of the case, the defendant must be deemed to take, under his deed, to the

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center of River street on the north. There is no doubt that this would be the extent of his rights if the plat had been properly certified and acknowledged, so as to entitle it to record and operate as a conveyance of the streets to the public. But there is the same reason for applying the estoppel, as against the grantor, where the lots conveyed were bounded on the north by River street, 'according to the village plat on record,' which is referred to in the deed as containing a description of the estate granted."

In Anthony v. Providence (1894) 18 R. I. 699, 28 Atl. 766, the court said: "Why cannot the line of a platted lot be construed to be in the middle of the street as well as a line described in words as 'on,' 'by,' or 'along' a street? Is the line drawn any stronger or more sacred than the line described?"

An addition to a description by lot and block number to the effect that the lot "fronts" on a street does not rebut the presumption that the grantee takes to the center. Hamilton County v. Rape (1898) 101 Tenn. 222, 47 S. W. 416.

The fact that lots are described by reference to a plat which states the length of the lots does not prevent the grantee from taking to the center of the street. Paine v. Consumers' Forwarding & Storage Co. (Fed.) supra, wherein the court said: "It might well be that the plat regarded as a statutory dedication and conveyance would make impossible a construction by which a numbered lot should include one half the adjoining street, and this because of the peculiar effect of a statutory dedication; and yet a description of lot number on the plat, after it has ceased to have statutory efficacy, made merely for convenience in showing the boundaries and courses and distances of the land to be conveyed, must be construed without regard to the terms or effect of the statute, and exactly as if the description of the lot on the plat by word and drawing had been incorporated into the deed without reference to the plat."

When to a designation by lot numbers is appended a further description, bounding the property by the side line of the street, the grantee takes only to the side line. Augustine v. Britt (1878) 15 Hun (N. Y.) 395. And see to the same effect, Trowbridge v. Ehrich (1908) 191 N. Y. 361, 84 N. E. 297.

Where the map by reference to which a conveyance is made shows that a space in the center of a street is reserved for railroad purposes, the grantee does not take to the center. Pennsylvania R. Co. v. Ayres (1888) 50 N. J. L. 660, 14 Atl. 901, reversing (1886) 48 N. J. L. 44, 57 Am. Rep. 538, 3 Atl. 885.

In at least two jurisdictions it is held that a description of property by lot and block number with reference to a map gives to the grantee title only to the side line of a street on which the granted premises abut. Sutherland v. Jackson (1850) 32 Me. 80; Palmer v. Dougherty (1851) 33 Me. 502, 54 Am. Dec. 636; Bangor House v. Brown (1851) 33 Me. 315; Hanson v. Campbell (1863) 20 Md. 223. See also Merrill v. Newton (1894) 99 Mich. 225, 58 N. W. 70, wherein, however, the decision that the grantee took only an easement apparently rests on the fact that the dedication of the street was not accepted by the public. See infra, VI. a.

In Sutherland v. Jackson (Me.) supra, it was said: "But the lots are conveyed by a plan, and by the copy of the plan, furnished to us, it does not appear that the lot last mentioned embraces any part of the way. The southern line of the lot separates it from the way, whether that is regarded as the line of the lot or the line of the way, or both; it clearly delineates the limits of each, and a conveyance of the lot by the plan does not carry the fee to the center of the way, for in order to have that effect, the grant must extend beyond the southern line of the lot as laid down on the plan. The boundary of a lot by a wall or fence would limit the grantee to it, although it might also be the boundary of a road. The same rule of construction must apply to a line on a plan."

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In Hanson v. Campbell (Md.) supra, the court said: "The deed being made with reference to the plot of the town, the beginning must be construed to be at the point where the lot as designated on the plot abuts upon the street; and in its true location cannot include any part of the bed of the street. Whatever rights to the soil of the street or to the use thereof, as a street, may have passed by implication under the deed, it is clear to us that the land described in the deed was the lot, as contradistinguished from the street."

c. Call for distances or dimensions.

Where land is described in a conveyance thereof in any manner which raises a presumption of an intent to convey the fee to the middle of a highway on which it abuts, that presumption is not rebutted by the fact that the dimensions of the land are stated, and that those dimensions carry the land only to the side line of the highway. Paine v. Consumers' Forwarding & Storage Co. (1895) 19 C. C. A. 99, 37 U. S. App. 539, 71 Fed. 626; Bergan v. Co-operative Ice & Fuel Co. (1908) 41 Ind. App. 647, 84 N. E. 833; Oxton v. Groves (1878) 68 Me. 371, 28 Am. Rep. 75; Foreman v. Presbyterian Asso. (1894) — Md. —, 30 Atl. 1114; Gould v. Eastern R. Co. (1886) 142 Mass. 85, 7 N. E. 543; Sherman v. McKeon (1868) 38 N. Y. 266; Stevens v. New York (1880) 14 Jones & S. (N. Y.) 274; Pettibone v. Hamilton (1876) 40 Wis. 402; Brown v. Baraboo (1898) 98 Wis. 273, 74 N. W. 223.

On the principle that a call for a monument prevails over one for a distance, if a street is mentioned as a boundary, the grantee takes to the center, though the measurement of the side, as stated in the deed, carries the lines only to the side of the street. Henderson v. Hatterman (1893) 146 Ill. 555, 34 N. E. 1041; Newhall v. Ireson (1851) 8 Cush. (Mass.) 595, 54 Am. Dec. 790.

A call for courses and distances, by which the land does not touch a highway, yields to a subsequent description by metes and bounds, giving the highway as a boundary, and the grantee takes to the center of the highway. Chatham v. Brainerd (1835) 11 Conn. 60.

A call for the street as a boundary establishes a monument which prevails over a call for courses and distances, and the grantee takes to the center of the street, though the stated distance carries the line only to the side thereof. Henderson v. Hatterman (1893) 146 Ill. 555, 34 N. E. 1041.

In Van Winkle v. Van Winkle (1906) 184 N. Y. 193, 77 N. E. 33, affirming (1904) 95 App. Div. 605, 89 N. Y. Supp. 26, the court said: "Where a survey gives the dimensions and quantity of the land conveyed exclusive of the public way, it does not operate to destroy the presumption that the fee to the roadbed was conveyed; for the reason that such dimensions and quantity of the usable land is ordinarily deemed by the purchaser of paramount importance in determining its availability for the uses designed by him."

In Schneider v. Jacob (1887) 86 Ky. 101, 5 S. W. 350, it was said obiter: "The fact that the description only brings the lot to the edge of the street can make no difference, for the description which thus brings the lot to the edge of the street must be merely understood as specifying the land that the purchaser may hold and use as exclusively his own, and as defining the line at which the public easement begins; the purchaser owning, subject to that easement, to the center of the street."

A description of lots as having "a depth of 85 feet to an alley" gives to the grantee title to the center of the alley. Lindsay v. Jones (1890) 21 Nev. 72, 25 Pac. 297.

In Chicago v. Rumsey (1877) 87 Ill. 348, it was held that the fee to the street was not conveyed by the following description: "'Beginning at a point on the east line of lot 1, in block 33, original town of Chicago, 140 feet from the northeast corner of said lot, running thence south along the line of said lot to the alley, thence west 72 feet, thence north 40 feet, more or less, to a point, and west of the point of beginning, thence east to the place of beginning.'" The court

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said: "Here the boundary is fixed by such express terms as necessarily exclude any presumption that it was intended to pass any interest in the soil under the street."

In Grant v. Moon (1895) 128 Mo. 43, 30 S. W. 328, the description in question was by courses and distances which in fact brought the property to a highway. The highway was not mentioned in the deed. It was held that the grantee took the fee to the center of the highway.

A call for quantity may aid in resolving a conflict in other calls. Williams v. Sparks (1873) 24 Ohio St. 141, wherein land was described as lying on the north side of a road, but was bounded by the south side thereof. The fact that the inclusion of the road was necessary to satisfy the call for quantity was referred to in holding that the grantee took the fee to the whole road.

A conveyance for railroad purposes of a strip 100 feet wide, "50 feet on each side of line as now located," gives no rights in the fee of a highway to which the side of the grantee strip extends. Chicago & E. I. R. Co. v. Willard (1910) 245 Ill. 391, 92 N. E. 271.

d. Call for monument or corner.

In construing a description by metes and bounds or courses and distances with respect to its effect to give title to the center of a highway which forms one of the bounds, many of the decisions attach importance chiefly to the language describing the line abutting on the highway, and determine the question chiefly thereby. See the following subdivisions of this note. But where a place of beginning on the highway is designated, this is often deemed a controlling factor in determining whether the grantee takes to the side or the center of the highway. As to the importance of the location of the point of commencement the court said in Van Winkle v. Van Winkle (1906) 184 N. Y. 204, 77 N. E. 33, affirming (1904) 95 App. Div. 605, 89 N. Y. Supp. 26: "The commencement of the description of premises at a corner or a point particularly specified is always considered important, for ordinarily more attention is given by the parties to the locating of the point of commencement of the description than to the other points; but it is not conclusive, and where it is inconsistent with the other lines described, which show an intent to include or exclude the fee of the highway, effect will be given such intent."

Thus, the fact that a description by metes and bounds begins "at a point" on the exterior line of a highway, and returns thereto, has been held to evince an intention that the grantee shall take to the side line only. Warren v. Blake (1866) 54 Me. 276, 89 Am. Dec. 748; Holloway v. Southmayd (1893) 139 N. Y. 390, 34 N. E. 1047, affirming (1892) 64 Hun, 34, 28 Abb. N. C. 190, 18 N. Y. Supp. 704; Holloway v. Delano (1892) 64 Hun, 27, 28 Abb. N. C. 183, 18 N. Y. Supp. 700, appeal dismissed in (1893) 139 N. Y. 412, 34 N. E. 1052; Blackman v. Riley (1893) 138 N. Y. 318, 34 N. E. 214. Compare Brooklyn, Q. C. & Suburban R. Co. v. Bird (1912) 76 Misc. 63, 134 N. Y. Supp. 1, affirmed in (1912) 152 App. Div. 932, 137 N. Y. Supp. 1112, which has reargument denied in (1913) 156 App. Div. 882, 140 N. Y. Supp. 1111 (beginning "at a point on" a highway).

A description which begins "at a point on a southerly side" of a road, thence by various courses "to" and "along" the road to the place of beginning, gives no rights in the fee. Kings County F. Ins. Co. v. Stevens (1882) 87 N. Y. 287, 41 Am. Rep. 361.

In Hoboken Land & Improv. Co. v. Kerrigan (1864) 31 N. J. L. 13, it was held that the fee to the center of a road was not given by a deed which described the property as beginning at a point on the side of the road, and thence by courses and distances, without further mention of the road. The court said: "Here the boundary is limited to strict courses and distances, without mention of any monument but the beginning corner; and it is manifest that if the tract is run, as it would seem it should be, according to the courses and distances as they stand, it will not touch the road except at the beginning corner. And

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even if it can be run so that the last course and distance will correspond with the line of the highway, that alone will not warrant the presumption that it was intended to convey the land to the middle of the highway."

In Tag v. Keteltas (1882) 16 Jones & S. (N. Y.) 241, it was held that no right to the fee was given by a description beginning "at the side" of a road, and after sundry courses returning to the place of beginning "along" the road.

In Maynard v. Weeks (1868) 41 Vt. 617, the fee was held to be excluded by the following description: "Beginning on the west line of Vermont & Canada Railroad, and southeast corner of land west of said railroad, owned by said Philo Weeks. Thence south on the west line of said railroad 28 rods. Thence west, etc." The court said: "In this case the description of the land commences, 'in the west line of the railroad;' thus far there is no room for doubt or construction; the words that follow are, 'and southeast corner of land west of said railroad, owned by said Weeks;' these words, if standing alone, would undoubtedly be construed to mean the southeast corner west of the center line, as Weeks owned to and across the railroad at that point; but, when taken in connection with the words that precede them, and being followed by the words 'thence south on the west line of said railroad,' etc., it seems to us impossible to raise a doubt as to the intention, or to find room for construction. It would have been difficult for the parties to have expressed more clearly an intention to bound the land conveyed on the west line of the road, and not upon the center line."

Where the description runs by courses and distances, or metes and bounds, from a stake or monument at the side line of a highway, it has been held that the grantee takes to the side line only. Walker v. Pearson (1855) 40 Me. 152; Chadwick v. Davis (1886) 143 Mass. 7, 8 N. E. 601; Phillips v. Bowers (1856) 7 Gray (Mass.) 21; Sibley v. Holden (1831) 10 Pick. (Mass.) 249, 20 Am. Dec. 521; Smith v. Slocomb (1857) 9 Gray (Mass.) 36, 69 Am. Dec. 274, followed in (1858) 11 Gray (Mass.) 280; Adams v. Saratoga & W. R. Co. (1851) 11 Barb. (N. Y.) 44, reversed on other grounds in (1852) 10 N. Y. 328; Jackson ex dem. Yates v. Hathaway (1818) 15 Johns. (N. Y.) 447, 8 Am. Dec. 263. Compare Van Winkle v. Van Winkle (1906) 184 N. Y. 193, 77 N. E. 33, wherein the fee to the center of the highway was held to be conveyed by a description stated by the court as follows: "Beginning at a stake by the fence on the crossroad leading to Harlem, 50 links from the southeastern corner of the fence, then running north 45° east, parallel to the boundary fence 10 chains 65 links to lot number 5. The description then continues around the lot, returning on the westerly boundary 'to the public road; thence south . . . along the road . . . to the place of beginning.'" Compare also McKenzie v. Gleason (1904) 184 Mass. 452, 100 Am. St. Rep. 566, 69 N. E. 1076, wherein title to the center of the highway was held to pass by a description from "a stake and stones near" a road, thence "by said road" to a stake.

In Neal v. Hopkins (1898) 87 Md. 19, 39 Atl. 322, the description in controversy began "at a post planted" at the intersection of two streets, thence northward, etc., and finally "thence to a post planted" on the line of the street. It was held that the grantee took only to the street line.

In Van Winkle v. Van Winkle (N. Y.) supra, it was said: "Where a line runs to a stake or mark upon a fence or a tree upon the bank of a stream or upon the side of a highway, and thence along the meandering of the stream or along the highway, the stake, mark, or tree will be deemed to indicate the place of the line, and not the end thereof, by reason of the difficulty of maintaining a visible object marking the corner in the middle of a stream or in the roadbed of a highway, thus vesting the title in the grantee."

In Hunt v. Brown (1892) 75 Md. 481, 23 Atl. 1029, it appeared that land

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was described as "beginning at a post standing at the end of the first line of lot No. 35, and running thence north 65½ degrees, east 24¼ perches to another post, thence north 10 degrees, west 20¼ perches to a post standing on the south side of said Windsor mill road, thence bounding on this road north 87 degrees, west 24 perches to another post, and thence with a straight line to the beginning." It was held that the grantee took to the side line only.

With respect to a call for a stake which conflicted with the presumption from a description bounding the premises on a highway the court said, in Cox v. Freedley (1859) 33 Pa. 124, 75 Am. Dec. 584: "The only thing the learned judge found to control them was the word 'stakes.' At the northeast corner of Egypt and Race streets, and at the south corner of Penn and Race streets, stakes are mentioned. These the learned judge considered fixed monuments. If they were such, they could not be in the street, any more than, in some of the water cases referred to, the marked trees or stakes could have stood in the middle of the stream. Where surveys are bounded on streams or streets, the marks which denote them, if higher than the surface of the water or ground, must necessarily stand on the margin. Sometimes a stone and ring are planted beneath the surface, and they are expected to be at the very corner or line. But what sort of a monument is a stake? It is so unsubstantial that in country surveys it usually indicates a corner which the surveyor never visited, and which exists only on paper. Artificial boundaries which are meant to be fixed monuments are made with more care than merely sticking a stake, which the next wind may blow over, which one of a thousand accidents may destroy, and which must rapidly decay, if not otherwise obliterated. So frail a witness is scarcely worthy to be called a monument, or to control the construction of a deed in so important a particular as that under consideration."

Where there is a call for a monument on the side line of a road, the grantee takes to the side line only. Peabody Heights Co. v. Sadtler (1885) 63 Md. 533, 52 Am. Rep. 519.

A description beginning at the exterior corner of two streets has been construed as equivalent to a beginning at a point on the side of one of them, and to exclude the fee in the street. O'Leary v. Glens Falls (1908) 128 App. Div. 683, 112 N. Y. Supp. 932, affirmed in (1910) 200 N. Y. 218, 93 N. E. 513, 21 Ann. Cas. 633; Morison v. New York Elev. R. Co. (1893) 74 Hun, 398, 26 N. Y. Supp. 641; Kehres v. New York (1914) 162 App. Div. 349, 147 N. Y. Supp. 825; De Baun v. Pardee (1913) 139 N. Y. Supp. 1077, affirmed in (1915) 169 App. Div. 966, 153 N. Y. Supp. 1111; Re Tremont Ave. (1911) 71 Misc. 480, 130 N. Y. Supp. 510; Dexter v. Riverside & O. Mills (1891) 39 N. Y. S. R. 933, 15 N. Y. Supp. 374, affirmed in (1892) 133 N. Y. 684, 31 N. E. 627; Holloway v. Southmayd (1892) 45 N. Y. S. R. 895, 18 N. Y. Supp. 707; Buck v. Squiers (1850) 22 Vt. 484. Thus, in Tietjen v. Palmer (1907) 121 App. Div. 233, 105 N. Y. Supp. 790, a description "beginning at the southeast" corner of two streets, thence "along" one of them, was held to pass title to the side line only. But in Woolf v. Woolf (1909) 131 App. Div. 751, 116 N. Y. Supp. 104, it was held that similar words did not rebut the presumption arising from a previous description of the land by lot and block number.

In Wegge v. Madler (1906) 129 Wis. 412, 116 Am. St. Rep. 953, 109 N. W. 223, it was held that the "northwest corner" of a lot as a place of beginning will be construed to mean the intersection of the side line with the center line of the street on which it abuts.

Title to the center of the highway has been held to be given by a description, "beginning on the southerly side of" a road, and thence running "on said road." O'Connell v. Bryant (1877) 121 Mass. 557, wherein it was said: "By a general and now well-established rule of construction, the boundary 'on the county road' would include the fee in the land to the mid-

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dle of the road, if owned by the grantor; and the first part of the description, 'beginning on the southerly side of' that road, being the only clause in the deed that raises any ambiguity, does not refer to any fixed monument at the edge of the road, and may have effect as indicating on which side of the road the land lay, and is not, in our opinion, sufficient to take the case out of the general rule."

It has been held that the fact that a description by metes and bounds calls for a line beginning at the "corner" of two streets, thence running "along" one of them, does not prevent the grantee from taking to the center. Moody v. Palmer (1875) 50 Cal. 31, wherein the court said: "It is well settled that land described in a deed as bounded by a public highway or street will be considered as extending to the center of the street or highway, unless it clearly appears that it was intended to make a side line instead of the center line the boundary. The highway is a monument, and in legal contemplation the thread of the highway is the monument, unless a contrary intention clearly appears. That this is the rule is established by a multitude of authorities."

Where property is described as bounded by a road, the fact that a point on the side of the road is named as the place of beginning does not prevent the grantee from taking to the center of the road. Low v. Tibbetts (1880) 72 Me. 92, 39 Am. Rep. 303. See to the same effect, Cottle v. Young (1871) 59 Me. 105, wherein the court said: "The termination of the last line, 'at the southerly post in the pair of bars in the southeasterly corner of the piece hereby conveyed; this pair of bars being on the road first named,' does not change the eastern boundary before given. It merely designates the course and place of the line running to the road, but does not limit or restrict it from extending to the center of the road. It runs to a monument on the road, and that is all. It could not well run to one in the road."

In Pell v. Pell (1901) 35 Misc. 472, 71 N. Y. Supp. 1092, affirmed in (1901) 65 App. Div. 388, 73 N. Y. Supp. 81, which is affirmed in (1902) 169 N. Y. 607, 62 N. E. 1099, the presumption of an intent to give title to the side line only from a description of the place of beginning at the "side" of a road was held to be overcome by a further description of the property as "bounded by" the road.

In Everett v. Fall River (1905) 189 Mass. 513, 75 N. E. 946, the fee to the center was held to be conveyed by a deed describing land as beginning "at a point in the line of" a street, the final line running "by" the street to the place of beginning.

Where the place of beginning is in the center of the highway, the grantee takes to the center. Gove v. White (1866) 20 Wis. 426. And a beginning at a monument in the center has been held to prevail over a bound "on the side" of the highway. Putzel v. Van Brunt (1876) 8 Jones & S. (N. Y.) 501; Dodd v. Witt (1885) 139 Mass. 63, 52 Am. Rep. 700, 29 N. E. 475.

In Marsh v. Burt (1861) 34 Vt. 289, the fee to the center was held to be conveyed by the following description: "Beginning on the west side of the road at the end of a wall, running westerly on said wall, and in a straight line therewith to the west line of lot No. 3, thence on said west line to the center of the line of said lot No. 3, thence on said center line to the road, thence on said road to the place of beginning." The court said: "In this description there are three references to the highway. Two of them by the well-established and universally recognized rules of construction apply to the center or thread of the road; the third speaks of the west side of the road as the place of beginning at the end of the wall. By this the party has fixed a definite, tangible, and permanent northern boundary to this piece,—such a boundary as he could not have in the center of the road; and we think it was more for this purpose than with any reference to an intention to exclude the highway that this point was fixed, especially as, in terminating the southerly line, he carries it to the center of the highway, and lays the easterly line upon the center line of the road. The fixing

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of this boundary in the west line of the road, under the circumstances, is not such an expression of an intention to exclude the road as will control the other boundaries, and place the intention beyond reasonable doubt. If the party had entertained an intention to exclude the road, we think he would have expressed it more clearly in his deed. Taking the whole description together, we think the true legal construction to be put upon it is, that it includes the land to the center of the highway."

e. Call for highway as boundary.

1. "Bounded by" highway.

Where land is described as "bounded by" a highway, the grantee takes the fee to the center thereof, in the absence of other words indicating a contrary intent.

England.—Re White [1898] 1 Ch. 659, 67 L. J. Ch. N. S. 430, 78 L. T. N. S. 550, 46 Week. Rep. 479.

Canada.—O'Connor v. Nova Scotia Teleph. Co. (1893) 22 Can. S. C. 276.

California. — Watkins v. Lynch (1886) 71 Cal. 21, 11 Pac. 808.

Florida.—Jacksonville, T. & K. W. R. Co. v. Lockwood (1894) 33 Fla. 573, 15 So. 327.

Illinois.—La Salle Varnish Co. v. Glos (1912) 254 Ill. 326, 98 N. E. 538.

Kentucky. — Schneider v. Jacob (1887) 86 Ky. 101, 5 S. W. 350.

Maine.—Webber v. Overlock (1876) 66 Me. 177.

Maryland.—Gump v. Sibley (1894) 79 Md. 165, 28 Atl. 977.

Massachusetts.—Hollenbeck v. Rowley (1864) 8 Allen, 473. Compare Alden v. Murdock (1816) 13 Mass. 256 (overruled by later cases); Van O'Linda v. Lothrop (1839) 21 Pick. 292, 32 Am. Dec. 261.

Michigan. — Purkiss v. Benson (1874) 28 Mich. 538.

New York.—People v. Law (1860) 34 Barb. 494; Greer v. New York C. & H. R. R. Co. (1885) 37 Hun, 346; Tinker v. Metropolitan Elev. R. Co. (1894) 81 Hun, 591, 30 N. Y. Supp. 1014; Gorham v. Eastchester Electric Co. (1894) 80 Hun, 290, 30 N. Y. Supp. 125; Johnson v. Grenell (1906) 112 App. Div. 620, 98 N. Y. Supp. 629, affirmed in (1907) 188 N. Y. 407, 13 L.R.A.(N.S.) 551, 81 N. E. 161; Van Winkle v. Van Winkle (1903) 39 Misc. 593, 80 N. Y. Supp. 612, affirmed in (1904) 95 App. Div. 605, 89 N. Y. Supp. 26, which is affirmed in (1906) 184 N. Y. 193, 77 N. E. 33; Hennessy v. Murdock (1893) 137 N. Y. 317, 33 N. E. 330; Re Lawrence Street (1912) 136 N. Y. Supp. 845.

Pennsylvania. — Baker v. Chester Gas Co. (1873) 73 Pa. 116; Falls v. Reis (1873) 74 Pa. 439; Firmstone v. Spaeter (1892) 150 Pa. 616, 30 Am. St. Rep. 851, 25 Atl. 41; Lotz v. Reading Iron Co. (1891) 10 Pa. Co. Ct. 497.

Vermont. — Morrow v. Willard (1857) 30 Vt. 118.

Wisconsin. — Brown v. Baraboo (1898) 98 Wis. 273, 74 N. W. 223; Wegge v. Madler (1906) 129 Wis. 412, 116 Am. St. Rep. 953, 109 N. W. 223; Cronin v. Janesville Traction Co. (1916) 163 Wis. 436, 158 N. W. 254.

Thus, a description of land as "bounded easterly in front by Greenwich street" gives title to the center of the street. Mattlage v. New York Elev. R. Co. (1895) 14 Misc. 291, 35 N. Y. Supp. 704, affirmed in (1898) 157 N. Y. 708, 52 N. E. 1124.

In Re Ladue (1890) 118 N. Y. 213, 23 N. E. 465, a description of property as bounded by certain land "intended for a road," to be laid out according to a certain map, was held to give the fee to the center of the proposed road.

A boundary being described as "by the highway and by the land of" the proprietor on the opposite side, the grantee takes the fee to the highway. Thompson v. Major (1878) 58 N. H. 242.

A conveyance of two tracts of land designating a road as the dividing line gives to each grantee title to the center of the road on the side on which his land lies. Witter v. Harvey (1821) 1 M'Cord, L. (S. C.) 67, 10 Am. Dec. 650.

In Leader Realty Co. v. Lakeview Land Co. (1913) 133 La. 646, 63 So. 253, a description of property as a certain tract of land "bounded by" four named streets was held not to pass any part of the fee in the streets.

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2. "Fronting" or "abutting" on highway.

Where property is described in a conveyance thereof as "fronting on" a highway, the presumption is that the fee to the center of the highway is conveyed. Wallace v. Fee (1872) 50 N. Y. 694; Spaine v. Tennessee & A. R. Co. (1865) Thomp. Tenn. Cas. 253, 1 Shannon, Cas. 181; Hamilton County v. Rape (1898) 101 Tenn. 222, 47 S. W. 416; Reeves v. Allen (1898) 101 Tenn. 412, 47 S. W. 495.

A description of property as "abutting on" a highway gives title to the center of the highway. Simpson v. Dendy (1860) 8 C. B. N. S. 433, 141 Eng. Reprint, 1233, 6 Jur. N. S. 1197; Cheney v. Syracuse, O. & N. Y. R. Co. (1896) 8 App. Div. 620, 40 N. Y. Supp. 1103, affirmed in (1899) 158 N. Y. 739, 53 N. E. 1123; Paige v. Schenectady R. Co. (1902) 77 App. Div. 571, 79 N. Y. Supp. 266.

In Reg. v. Board of Works (1863) 4 Best & S. 526, 122 Eng. Reprint, 556, a parish charter describing the parish as "abutting upon" a highway was held to extend its bounds ad medium filum viæ.

In Mappin Bros v. Liberty [1903] 1 Ch. (Eng.) 118, 72 L. J. Ch. N. S. 63, 67 J. P. 91, 51 Week. Rep. 264, 87 L. T. N. S. 523, 19 Times L. R. 51, 1 L. G. R. 167, commissioners who laid out a scheme of street improvements in London, and leased property described as "abutting" on the streets, were held not to intend to give any leasehold in the streets.

In Williams v. Johnson (1912) 149 Ky. 409, 149 S. W. 821, a conveyance of property "fronting and abutting" on a highway was held to give title to the middle line of the highway.

In Phelps v. Webster (1883) 134 Mass. 17, a description of land as "against" and "butting upon" a street was held to carry title only to the side line.

3. "To" and "along" highway.

Where a boundary line is described as running "to" and thence "along" a highway, the grantee takes the fee to the middle of the highway. Silvey v. McCool (1890) 86 Ga. 1, 12 S. E. 175; Freeman v. Sayre (1886) 48 N. J. L. 37, 2 Atl. 650; Child v. Starr (1842) 4 Hill (N. Y.) 369; Re Cathedral Parkway (1897) 20 App. Div. 404, 46 N. Y. Supp. 832, affirmed in (1898) 155 N. Y. 638, 49 N. E. 1100; Transue v. Sell (1884) 105 Pa. 604; Gamble v. Philadelphia (1894) 162 Pa. 413, 29 Atl. 739; Sweatman v. Bathrick (1903) 17 S. D. 138, 95 N. W. 422.

In Greer v. New York C. & H. R. R. Co. (1885) 37 Hun (N. Y.) 346, the court said: "'To the street' goes to the center because the street, as before shown, is a monument. 'Along the cellar wall to the street' does not necessarily mean that the course ends with the wall; therefore we are at liberty to follow that course "to the street;' i. e., to its center. The courses and distances yield to the monuments, unless the contrary intention is made to appear, and it is not in this case. 'Along the street' means along the center line. If it was intended to exclude the street, it would have been easy to have employed words clearly indicating that intent, as 'along the west side of the street,' 'to the west side,' 'bounded against,' or 'butting upon' (Phelps v. Webster (1883) 134 Mass. 17), or some words showing that the entire corpus of the street was excluded."

So, a bound "along" a highway has been held to show an intention to give title to the center. Pratt v. Quirk (1912) 119 Minn. 316, 130 N. W. 38; Haberman v. Baker (1891) 128 N. Y. 253, 13 L.R.A. 611, 28 N. E. 370; Herring v. Fisher (1848) 1 Sandf. (N. Y.) 344; Bird v. New York (1910) 141 App. Div. 155, 125 N. Y. Supp. 1028; Flick's Estate (1891) 6 Kulp (Pa.) 329.

A call for a line running "thence westerly along the line of said road" means the center line of the road. Helmer v. Castle (1884) 109 Ill. 664, wherein the court said: "There is no other line of the road. The sides of the road are quite different, and if the south side of the road had been intended, it is fair to presume the language would have been to that effect."

A description of property as bounded "upon or along" a street gives the grantee title to the center of the

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street. Webber v. California & O. R. Co. (1876) 51 Cal. 425.

A description calling for a stated distance "to" a street carries the fee to the center of the street. Kittle v. Pfeiffer (1863) 22 Cal. 484.

In Goodeno v. Hutchinson (1873) 54 N. H. 159, the description under consideration carried the boundary line "to" a road, and thence to the side line of the granted premises. It was held that the grantee took to the center of the road.

In Winter v. Peterson (1854) 24 N. J. L. 524, 61 Am. Dec. 678, the fee to the center of a road was held to be conveyed by a deed wherein the line was described as beginning "along the middle of the road," and running "along the said road."

In Western U. Teleg. Co. v. Krueger (1905) 36 Ind. App. 348, 74 N. E. 25, the deed under consideration described the land conveyed by metes and bounds, "beginning on" a highway, and, after describing the other three lines, "thence easterly along said road to the place of beginning." It was held that the grantee took to the center of the highway.

4. "On" highway.

A description of the line adjacent to a highway as running "on" the highway carries the title to the center line of the highway. Chatham v. Brainerd (1835) 11 Conn. 60; Johnson v. Anderson (1841) 18 Me. 76; Newhall v. Ireson (1851) 8 Cush. (Mass.) 595, 54 Am. Dec. 790; Peck v. Denniston (1876) 121 Mass. 17. Thus, the fee to the center of both streets is given by a deed of lots "on the corner of" two streets, "being 75 feet on" one street and 90 feet on the other. Sherman v. McKeon (1868) 38 N. Y. 266.

A description of land as bounded "easterly on highway" gives title to the center of the highway. Chatham v. Brainerd (1835) 11 Conn. 60.

So, a description of land as extending "to" a road and "thence bounding on" the road gives title to the center of the road. Foreman v. Presbyterian Asso. (1894) — Md. —, 30 Atl. 1114. See to the same effect, Reed's Petition (1842) 13 N. H. 381; Healey v. Babbitt (1884) 14 R. I. 533.

5. "With" or "by" highway.

Under a deed describing the property by metes and bounds, the call for one line being "thence with said road to starting point" the grantee takes the fee to the center of the road. Johnson v. Arnold (1893) 91 Ga. 659, 18 S. E. 370. See to the same effect, Blalock v. Atwood (1913) 154 Ky. 394, 46 L.R.A.(N.S.) 3, 157 S. W. 694. But in Hoffman v. Shepherdsville (1896) 18 Ky. L. Rep. 302, 36 S. W. 522, a similar description was held to give title only to the side line.

A description of a boundary line as running "to" a street, and thence "parallel with" the street to a place of beginning at the "corner of" that street and another, gives title to the center of the street. Re New York (1902) 73 App. Div. 394, 77 N. Y. Supp. 31.

A description of a boundary as running "to" and thence "by" a highway gives title to the center thereof. Oxton v. Groves (1878) 68 Me. 371, 28 Am. Rep. 75; Phillips v. Bowers (1856) 7 Gray (Mass.) 21; White v. Godfrey (1867) 97 Mass. 472; Lemay v. Furtado (1902) 182 Mass. 280, 65 N. E. 395; Everett v. Fall River (1905) 189 Mass. 513, 75 N. E. 946; Cochran v. Smith (1893) 73 Hun, 597, 26 N. Y. Supp. 103; Re White Plains Road (1808) 170 N. Y. Supp. 1018. Compare Clap v. M'Neil (1808) 4 Mass. 589 (overruled by later cases).

"To" a road, thence "by" the road to a stone wall, gives title to the center of the road, though the wall extends only to the side line thereof. Dean v. Lowell (1883) 135 Mass. 55, wherein it was said: "The side of the road is not mentioned in the deed; but the respondent argues that, as the stone wall terminated at the southeasterly side of the street, the line running to the wall must necessarily run on the southeasterly side of the street, otherwise it could not strike the wall. We think this consideration is not sufficient to rebut the ordinary presumption that the center of the way is the boundary; neither the end nor any other particular part of the wall is mentioned, and by considering the line on the road to run to the line

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of the wall, rather than the end of the wall, harmonizes all parts of the description of the premises better than the construction urged by the respondent."

e. "In line of" highway.

In Healey v. Keely (1903) 24 R. I. 581, 54 Atl. 588, a description running the boundary "in the line of" a street was held to give title to the center thereof. And see Helmer v. Castle (1884) 109 Ill. 664 ("along the line of"). But in Cole v. Haynes (1849) 22 Vt. 588, a tract seized under a levy describing it as running "to" and thence "in the line of" a highway was held to extend only to the side line.

f. Call for side line of highway as boundary.

By the weight of authority if property is described as bounded by the side line of a highway, the grantee takes only to that line, and no right to the fee to the highway is conveyed. Severy v. Central P. R. Co. (1875) 51 Cal. 194 ("along the easterly line"); Warden v. South Pasadena Realty Co. — Cal. —, 174 Pac. 26 ("along the southerly line"); Cottle v. Young (1871) 59 Me. 105 ("running on the westerly line"); Grand Rapids & I. R. Co. v. Heisel (1878) 38 Mich. 62, 31 Am. Rep. 306 ("to" and "along" the east line); Betcher v. Chicago, M. & St. P. R. Co. (1910) 110 Minn. 228, 124 N. W. 1096; Hamlin v. Atty. Gen. (1907) 195 Mass. 309, 81 N. E. 275 ("in the east line"); Hamlin v. Fairpoint Mfg. Co. (1886) 141 Mass. 51, 6 N. E. 531 ("to the line of" and thence "in the line with"); Brainard v. Boston & N. Y. C. R. Co. (1859) 12 Gray (Mass.) 407; Wetmore v. Law (1860) 34 Barb. (N. Y.) 515, 22 How. Pr. 130 ("to the easterly line"); Fearing v. Irwin (1872) 4 Daly (N. Y.) 385 ("along the easterly side"); De Peyster v. Mali (1882) 27 Hun (N. Y.) 439, reversed in (1883) 92 N. Y. 262, 16 N. Y. Week. Dig. 566 (bounded by "the northerly side"); Mitchell v. Einstein (1905) 105 App. Div. 413, 94 N. Y. Supp. 210 (bounded by "westerly line" of road); Schonleben v. Swain (1909) 130 App. Div. 521, 115 N. Y. Supp. 23, affirming (1908) 109 N. Y. Supp. 223, which is affirmed in (1910) 198 N. Y. 621, 622, 92 N. E. 1101, 1103 ("to the westerly side" of a street and thence "along the westerly side" thereof); Jacquemin v. Finnegan (1903) 39 Misc. 628, 80 N. Y. Supp. 207 ("along the northerly side"); Clark v. Rochester City & B. R. Co. (1888) 18 N. Y. S. R. 903, 2 N. Y. Supp. 563 ("on the south line"); Anderson v. James (1866) 4 Robt. (N. Y.) 35 ("to" a street and thence "along the southerly side"); Van Amringe v. Barnett (1861) 8 Bosw. (N. Y.) 357 ("to the side" and thence "along the side"); Jones v. Cowman (1848) 2 Sandf. (N. Y.) 234 ("by the northerly line or side"); Coster v. Peters (1867) 5 Robt. (N. Y.) 192 (bounded by "the easterly line"); Mead v. Riley (1884) 18 Jones & S. (N. Y.) 20, affirmed in (1886) 102 N. Y. 669 (beginning at the exterior corner of two streets and running "along the easterly line" of one of them); Deering v. Reilly (1901) 167 N. Y. 184, 60 N. E. 447 ("on the northeasterly corner of B. alley on the southeasterly side of" a road); Lough v. Machlin (1883) 40 Ohio St. 332 ("by the east line"); Hughes v. Providence & W. R. Co. (1853) 2 R. I. 508 (bounded "by the westerly side"); Iron Mountain R. Co. v. Bingham (1889) 87 Tenn. 522, 4 L.R.A. 622, 11 S. W. 705. See also Alameda Macadamizing Co. v. Williams (1886) 70 Cal. 534, 12 Pac. 530, wherein the same interpretation was given to an assessment describing a line as beginning with the intersection of the "westerly line" of one street with the "northerly line" of another, "thence westerly along said line." Compare Potter v. Boyce (1902) 73 App. Div. 383, 77 N. Y. Supp. 24, affirmed in (1903) 176 N. Y. 551, 68 N. E. 1123, wherein a deed describing a line as running "along the northwest side of" a street was held to give title to the center of the street.

In Baltimore & O. R. Co. v. Gould (1887) 67 Md. 60, 8 Atl. 754, the following description was held to give no right to the fee in the street: "Beginning for the same at the corner formed by the intersection of the north side of Winder street and the

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east side of Johnson (street) and running thence easterly binding on the north side of Winder street 379 feet more or less to the corner formed by the intersection of Winder and Henry streets; thence northerly binding on the west side of Henry street 320 feet more or less to the corner formed by the intersection of Henry street and Wells street as now laid out and widened; thence westerly binding on the south side of Wells street 379 feet more or less to the intersection of Wells and Johnson street; thence southerly binding on the east side of Johnson street to the place of beginning,—containing 2½ acres more or less."

In Lee v. Lee (1882) 27 Hun (N. Y.) 1, it was held that a deed describing the property as beginning "on the east side of" a road and then after various courses "to" and "along" the road to the place of beginning did not give so clear a title to the fee that a purchaser could be compelled to accept it.

In White's Bank v. Nichols (1876) 64 N. Y. 65, it was held that a description of land as commencing at the intersection of the exterior lines of two streets, and thence running along the exterior line of one of them, gave no title to the bed of the street. The court said: "The point thus established is as controlling as any monument would have been, and must control the other parts of the description; all the lines of the granted premises must conform to the starting point thus designated, so that while, but for this designation of the commencement of the survey or boundary, the lines along Garden street and Carolina street might, within the general principles before referred to, be carried to the center of those streets respectively, they are necessarily confined to the exterior lines of the streets, so as to connect at this starting point." See to the same effect, English v. Brennan (1875) 60 N. Y. 609.

A deed describing the line adjacent to an alley as running "southwesterly on the easterly bounds of the alley" does not convey the fee of the alley. Rupprecht v. St. Mary's Roman Catholic Church Soc. (1909) 131 App. Div. 564, 115 N. Y. Supp. 926, affirmed in (1910) 198 N. Y. 576, 92 N. E. 1101.

A description carrying a lien "to the corner of" two streets, and thence "along" one of them, gives no title to the fee in the latter street. Deering v. Riley (1901) 38 App. Div. 164, 56 N. Y. Supp. 704, affirmed in (1901) 167 N. Y. 184, 60 N. E. 447.

Where the termini of a line are stated to be on the side of a street, and the line is described as running "along" the street, the fee to the center is not conveyed. Patten v. New York Elev. R. Co. (1876) 3 Abb. N. C. (N. Y.) 306.

So, in Augustine v. Britt (1878) 15 Hun (N. Y.) 395, it was held that no right to the fee in the street was conveyed by a deed designating the property by lot number, and then giving its bounds as beginning at the exterior corner of two streets, and running along the westerly side of one of them.

A description of granted premises as running "to the side of" a lane and "thence along the same" excludes any right to the fee of the lane. Mott v. Mott (1877) 68 N. Y. 246.

In Kennedy v. Mineola, H. & F. Traction Co. (1902) 77 App. Div. 484, 78 N. Y. Supp. 937, 12 N. Y. Anno. Cas. 189, affirmed in (1904) 178 N. Y. 508, 71 N. E. 102, title to the side line only was held to be given by a description carrying the line "to a point on the northeasterly side of" a highway and thence along the highway to a place of beginning, described as being on the northeasterly side of the highway.

Where land lying mainly on the north side of a road is bounded by the southerly line thereof, the grantee takes the fee to the entire road. Williams v. Sparks (1873) 24 Ohio St. 141.

In Wallace v. Fee (1872) 50 N. Y. 694, a deed bounding the land by the "east line of Clyde street" was held to give no title to the bed of the street.

In Terrett v. New York & B. Steam Saw Mill & Lumber Co. (1872) 49 N. Y. 666, it was held that a deed bounding the property "by the southwester-

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ly line or side" of a street gave the grantee title to the center.

In Salter v. Jonas (1877) 39 N. J. L. 469, 23 Am. Rep. 229, it was held that a description of lands as beginning at the side of a street and running along that side carried the fee to the center. See also Hinchman v. Paterson Horse R. Co. (1864) 17 N. J. Eq. 75, 85 Am. Dec. 252, followed and explained in Salter v. Jonas (N. J.) supra.

In Tuskegee Land & Secur. Co. v. Birmingham Realty Co. (1909) 161 Ala. 542, 23 L.R.A.(N.S.) 992, 49 So. 378, it was said: "The three lots were described as a whole, and not separately, and as described formed a parallelogram, the corresponding sides of which were, respectively, 100 feet and 140 feet. The northern boundary of the lots was described as the southern boundary of Avenue A, the eastern boundary as the western boundary line of Seventeenth street of such city, the southern boundary as the northern margin line of a '20-foot alley,' and the western boundary described as a straight line 140 feet long, and parallel with the eastern boundary and Seventeenth street. It will be observed that this property abuts Avenue A on the north, Seventeenth street on the east, and an alley on the south, but extends no farther than the southern margin of Avenue A, the western margin of Seventeenth street, nor the northern margin of the alley; thus rebutting what might otherwise be a presumption that the deed passed the fee, subject to the public easement of right of way to the center of the avenue, street, and alley, which were named as three of the boundaries of the property. While the avenue, street, and alley constitute three of the four boundaries, there is no presumption in this case, because of these recitals, that it was contemplated or intended to pass title to any part of the soil of such thoroughfares."

In two jurisdictions no distinction is made between a call for a street and a call for the side line of a street, and the designation of the side line of a street, as the boundary gives title to the center line of the street. Cox v. Freedley (1859) 33 Pa. 124, 75 Am. Dec. 584; Lehigh Street's Appeal (1872) 81* Pa. 85; Ott v. Kreiter (1885) 110 Pa. 370, 1 Atl. 724; Pittsburg, V. & C. R. Co. v. Fisher Foundry & Mach. Co. (1904) 208 Pa. 73, 57 Atl. 191; Kneeland v. Van Valkenburgh (1879) 46 Wis. 434, 32 Am. Rep. 719, 1 N. W. 63. Compare Union Burial Ground Soc. v. Robinson (1839) 5 Whart. (Pa.) 18, wherein, however, it did not appear that the street had ever been opened.

In Paul v. Carver (1856) 26 Pa. 223, 67 Am. Dec. 413, the court said: "A rule founded upon policy, and tending to guard against inconveniences of the most alarming character, ought not to be frittered away by distinctions founded on differences in phraseology, which might readily escape attention. The paramount intent of the parties, as disclosed from the whole scope of the conveyance, and the nature of the property granted, should be the controlling rule."

In Neely v. Philadelphia (1905) 212 Pa. 551, 61 Atl. 1096, a description carrying the line to the center of one adjacent street, and to and "along the side" of another by courses and distances very accurately marked, was held to give title only to the side line of the latter street.

In Woodman v. Spencer (1874) 54 N. H. 507, it was held that though the boundary was described as running "on the easterly side of said road," the grantee took to the center of the road. The court said: "In the case before us the language is, 'thence on the easterly side of the road;' and it is upon this expression that so much stress is laid, the contention being that the parties meant a different thing when they said on the side of the road, from what they would have meant had they said on the road. What is there in the nature of the thing described to suggest any such difference in meaning? I see nothing. The bounding of one piece of land by or upon another fixes the line at the margin of such other piece. Carrying the line over to the center of a strip used for a highway is, as we have seen, an anomaly in the construction

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of deeds which rests upon a presumed intention not to exclude, or, perhaps, the want of a distinctly formed intention to exclude, what neither party may have known could come within the operation of the deed at all. It is manifest that, if we were to apply the usual canon of construction, the words 'on the road' just as clearly denote an intention to bound the land by the marginal line of the highway, as do the words 'on the side of the road.' Considering only the nature of the thing and the commonly received import of the words, the two expressions are substantially identical, and might be used interchangeably without altering the sense. Generally speaking, that portion of the land of a farm which is available for the purposes of husbandry in this state includes no part of the highways that cross it. Those strips of land are ordinarily and naturally looked upon as being, to all practical intents, withdrawn as well from the control as from the beneficial enjoyment of the adjoining owner, by the servitude to which they are subject. For this reason it is to be expected that the expressions, 'on the road,' or, 'on the side of the road,' will find their way into deeds, when, in fact, nothing was further from the minds of the parties than that they were in that way excluding from the operation of the instrument any part of the roads, or that the roads could in any event be affected by the deed one way or the other; and I confess it looks little less than absurd to me to attempt a distinction between two forms of expression evidently intended to convey the same idea, and which, in the common and correct use of the language, do convey the same idea to the professional as well as the unprofessional mind."

g. Failure to mention highway.

Where property as described by courses and distances or metes and bounds actually abuts on a highway, the fact that the highway is not mentioned as a boundary does not indicate an intention that the grantee shall not take to the center thereof. Merchant v. Grant (1915) 26 Cal. App. 485, 147 Pac. 484; Champlin v. Pendleton (1838) 13 Conn. 23; Florida Southern R. Co. v. Brown (1887) 23 Fla. 104, 1 So. 512; Sizer v. Devereux (1853) 16 Barb. (N. Y.) 160; Bissell v. New York C. R. Co. (1861) 23 N. Y. 61; Wise v. Curry (1901) 35 Misc. 634, 72 N. Y. Supp. 165; Pettibone v. Hamilton (1876) 40 Wis. 402; Wegge v. Madler (1906) 129 Wis. 412, 116 Am. St. Rep. 953, 109 N. W. 223; Hannon v. Kelly (1914) 156 Wis. 509, 146 N. W. 512.

In Van Winkle v. Van Winkle (1906) 184 N. Y. 193, 73 N. E. 33, affirming (1904) 95 App. Div. 605, 89 N. Y. Supp. 26, it was said: "Where a deed gives the boundaries of the land conveyed by courses and distances, without mentioning a street by which the same is bounded on one side, but where it appears that the distance given does in fact carry the boundary to the street and along it, it is the same as though the boundary were described as running to the street and along the same, thus extending the title to the center."

In Gear v. Barnum (1870) 37 Conn. 229, the rule was applied to a deed describing the property merely as a "store building and the land it stands on."

In Warren v. Blake (1866) 54 Me. 276, 89 Am. Dec. 748, the fact that the highway was not mentioned was adverted to as indicating an intention to exclude it, but the decision was governed by a description which clearly excluded the street.

Where land is conveyed by metes and bounds without reference to a street, the grantee has no title to the fee of a street subsequently opened by the grantor adjacent to the granted premises. Knott v. Jefferson Street Ferry Co. (1881) 9 Or. 530.

With reference to the effect of a conveyance by lot or block numbers, see supra, V. b.

VI. Effect of particular circumstances.

a. Failure to accept or open highway.

Where property is conveyed with reference to a highway in such manner that the grantee would ordinarily take to the center thereof, it is held in some jurisdictions that the result is not affected by the fact that the dedi-

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cation of the highway has not been accepted and the highway has not been opened. Paine v. Consumers' Forwarding & Storage Co. (1895) 19 C. C. A. 99, 37 U. S. App. 539, 71 Fed. 626; Harrison v. Augusta Factory (1884) 73 Ga. 447; Johnson v. Arnold (1893) 91 Ga. 659, 18 S. E. 370; Miner v. New York (1874) 5 Jones & S. (N. Y.) 171; Trowbridge v. Ehrich (1906) 116 App. Div. 457, 101 N. Y. Supp. 995, modified in (1908) 191 N. Y. 361, 84 N. E. 297; Andrews v. Youmans (1890) 78 Wis. 56, 47 N. W. 304.

In Manchester v. Hodge (1908) 74 N. H. 468, 69 Atl. 527, it appeared that a street had not been laid out, but the location thereof was in the minds of the parties. It was held that the grantee took to the center of the street when it was laid out.

In Pettibone v. Hamilton (1876) 40 Wis. 402, it was said: "We agree with counsel for the plaintiffs, that the recording of the plat operated to place the owners of the front lots which Dr. Darling had previously conveyed by metes and bounds on the same footing in respect to the alley and 'Darling place,' as though such conveyances had been made after the plat was recorded."

In Clark v. Providence (1873) 10 R. I. 437, the court said: "This is the mode in which additions to our cities are generally made. It is contemplated that the strips marked as streets shall in time become highways. And the same reasons of public policy which have led to the decisions that, as a general rule (with some exceptions), a deed of a lot upon an acknowledged highway is presumed, in the absence of facts or declarations to the contrary, to carry the fee to the center, would apply to a case of the sort we have described. Upon any other principle, whenever, through some legal defect, a supposed highway was decided not to be a highway, the decision would have a retroactive effect upon the construction of all the deeds of land bordering upon it."

In Bissell v. New York C. R. Co. (1861) 23 N. Y. 61, the court said: "If, as regards these grantees, it is a street, and if, in his conveyances, he intended it as a street, as all the cases hold he did, I am not able to see why the legal inference, as regards his conveyance, is not the same as if it were a public highway. There is no more reason to presume the intention in the grantor in such a case to withhold his interest in the road to the center of it, after conveying all his right and title to the adjoining lands, than there would be were this to all intents and purposes a public street. The question in each case becomes one of presumed intention arising upon the conveyance itself; and I am not able to perceive how it is possible to deduce a different intention in one case from that which, the law has settled, shall be inferred in the other. Did not Mumford, when he caused these lots to be laid out on either side of this street, and this street designated, named, and put down on the map, and these lots numbered, and when he conveyed these lots to purchasers with a reference to this allotment and survey, intend that this should be a street, by the name of Erie street? No one will pretend that he did not. Did he not, by selling these lots to purchasers with reference to this map and street, and conveying the lots to them on both sides of the street, thereby, so far as these grantees are concerned, dedicate this as a street? No one can claim to the contrary. All the cases affirm it. Did he not, then, in making these conveyances to these purchasers, intend to convey lands upon a street, so far as the grantees in these deeds are concerned, and did not these purchasers so understand it? No one can doubt it for a moment. If such was the intention of the parties to these conveyances, then I am not able to perceive why the conveyance does not carry with it the usual legal inference that a conveyance bounded by a highway does; to wit, that it carries with it the fee to the center of the road."

In a jurisdiction wherein an accepted statutory dedication rests the fee in the municipality, it has been held that a conveyance, often an offer to dedicate, gives the grantee a fee to the center of the street, subject to the ac-

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ceptance of the outstanding offer to dedicate. Hamilton v. Chicago, B. & Q. R. Co. (1888) 124 Ill. 235, 15 N. E. 854.

But in Plumer v. Johnston (1886) 63 Mich. 165, 29 N. W. 687, it was held that where an offer to dedicate had not been accepted at the time of the conveyance, the grantee took only to the side of the proposed street, the court saying that the doctrine that the fee to the center is conveyed "is applied to actual highways, and not to mere paper highways." See to the same effect, Merrill v. Newton (1894) 99 Mich. 225, 58 N. W. 70.

The majority of the Pennsylvania decisions hold that a conveyance of land bounded by an unopened street gives title only to the side line. Neely v. Philadelphia (1905) 212 Pa. 551, 61 Atl. 1096; Daughters of American Revolution v. Pennsylvania R. Co. (1911) 229 Pa. 636, 79 Atl. 127; Andreas v. Steigerwalt (1905) 29 Pa. Super. Ct. 1; Spencer v. Carlisle (1916) 63 Pa. Super. Ct. 513.

It has been said in that jurisdiction that the street must either be open or referred to in the deed as existing. Bliem v. Daubenspreck (1895) 169 Pa. 282, 32 Atl. 337. And see to the same effect, Patterson v. Harlan (1887) 3 Pa. Co. Ct. 560, on rule for new trial in (1888) 5 Pa. Co. Ct. 211; Falls v. Reis (1873) 74 Pa. 439.

In Clymer v. Roberts (1908) 220 Pa. 162, 69 Atl. 548, it was held that though the street has not been opened, if the deed expressly bounds land by the center line thereof, the grantee takes the fees to the center. But, in another case, a description of land as bounded by a street which was plotted but not opened was held to carry only an easement in the street. Cole v. Philadelphia (1901) 199 Pa. 464, 49 Atl. 308.

b. Abandonment or vacation of highway before conveyance.

In Ott v. Kreiter (1885) 110 Pa. 370, 1 Atl. 724, land bounded by a street was conveyed after the passing of an ordinance vacating the street, but before the street was actually closed. It was held that the grantee took to the center of the street. See to the same effect, Amerman v. Missouri, K. & T. R. Co. (1916) — Tex. Civ. App. —, 182 S. W. 54, wherein it was said: "Appellants' contention that the Amerman deed did not pass title to appellee to the center of that portion of Pearl street upon which the property described in said deed abuts is based upon the proposition that, because the city had released its rights in the street prior to the execution of said deed, the street had ceased to exist, and therefore the general rule that the conveyance of property bordering on a street or public highway, which calls for such street or highway, passes title to the vendee to the center of the street or highway, is not applicable. The contention is not sound. The abandonment by the city of any rights it may have had in said street in no way affected the existence of the street. The rights of all persons owning property abutting thereon or adjacent thereto, and who held under conveyances referring to and calling for said street, to keep the street open, were not dependent upon whether the public accepted the dedication or abandoned its rights thereto."

In Terrett v. New York & B. Steam Saw-Mill & Lumber Co. (1872) 49 N. Y. 666, it was held that the grantee took to the center, though the street had been discontinued by an act of the legislature at the time of the conveyance.

In Overland Mach. Co. v. Alpenfels (1902) 30 Colo. 163, 69 Pac. 574, the question was discussed, but not decided.

But it has been held that a conveyance of land bounded by a street after the abandonment of the street gives no title to the fee therein. White v. Jefferson (1910) 110 Minn. 276, 32 L.R.A.(N.S.) 778, 124 N. W. 373, wherein it was said: "What had been a street would be mere land. It would be taxable as land and so descend. Its transfer would be subject to the appropriate section of the Statute of Frauds. That it was not numbered nor properly named on the plat would be wholly insignificant. The case would be the same as if no street had

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ever existed; and, instead of being designated as 'street,' the tract had been marked 'sand hole,' or 'mound,' or any other name, or had had no name. The land which had been a street assumed exactly the same legal status as any other land which had not been impressed with a public easement. There is neither mystery nor magic in the word 'street.' The easement of use is the significant fact." See to the same effect Empenger v. Fairly (1912) 119 Minn. 186, 137 N. W. 1110.

c. Location of premises with respect to highway.

Where land as conveyed does not extend to a highway, the subsequent dedication of the intervening strip by the grantor does not extend the grantee's title to the center of the highway. Valley Pulp & Paper Co. v. West (1883) 58 Wis. 599, 17 N. W. 554.

So, in Huff v. Hastings Exp. Co. (1902) 195 Ill. 257, 63 N. E. 105, it appeared that land was conveyed to a line 25 feet from the line of a street. The intervening strip was subsequently dedicated by the grantor. It was held that the grantee took no rights in the fee of the street.

If a highway is laid off entirely on a tract of land, running along the margin thereof, a conveyance of the tract vests in the grantee the fee in the whole of the soil of the highway. Taylor v. Armstrong (1863) 24 Ark. 102; Re Robbins (1885) 34 Minn. 99, 24 N. W. 356, 57 Am. Rep. 40; Wait v. May (1892) 48 Minn. 453, 51 N. W. 471; Healey v. Babbitt (1884) 14 R. I. 533.

d. Ownership of fee in highway.

Where the grantor of premises abutting on a highway owns only an easement therein, his conveyance of the premises of course does not, no matter what may be the description, give any right to the fee of the highway. McDonald v. Kummer (1913) 56 Colo. 153, 160, 137 Pac. 51; Somerville v. Johnson (1882) 36 N. J. Eq. 211; Humphreys v. Eastlack (1902) 63 N. J. Eq. 136, 51 Atl. 775; Dunham v. Williams (1867) 37 N. Y. 251; Webber v. Gillies (1908) 112 N. Y. Supp. 397; Day v. Chambers (1884) 62 Tex. 192; Church v. Stiles (1887) 59 Vt. 642, 10 Atl. 674; Burbach v. Schweinler (1882) 56 Wis. 386, 14 N. W. 449.

In Dunham v. Williams (1867) 37 N. Y. 251, the court said: "In the present instance, the presumption in favor of the adjacent owners was repelled by affirmative and decisive proof that the fee of the roadbed was not vested in them nor in the parties through whom their title was deduced."

In Burbach v. Schweinler (Wis.) supra, it was said: "But if the fee, by the law governing the platting of villages at the time, became vested in the county, nothing is conveyed within such alley, and it is wholly excluded from the operation of the deeds. This position is assumed and ably urged by the learned counsel of the respondent, and supported by the citation of numerous decisions of this and other courts. The principle is that the purchaser buys with full notice of the streets and alleys on the plat, and subject to them."

In Church v. Stiles (1887) 59 Vt. 642, 10 Atl. 674, it was said: "The rule is one of construction, and is limited to those cases where the 'grantor owns the fee' of the highway; for if it was covered by the description in the deed there would be no necessity of calling in the aid of a presumption. The grantor owning the fee, the law presumes he intended to convey it, and not retain a narrow and oftentimes a long strip of land which, for all practical purposes, would be of no value to him. But where the grantor does not own the fee of the land, the law will not presume that he intended to convey that which he did not own."

Where a statutory dedication of a street is made, the fee passes to the municipality, and a subsequent purchaser of abutting property "is estopped by the solemn act of his grantor, from claiming title to the center of the street." Illinois & M. Canal v. Haven (1850) 11 Ill. 554; Gebhardt v. Reeves (1874) 75 Ill. 301; Helm v. Webster (1877) 85 Ill. 116.

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VII. Conveyance by state or municipality.

It has been held that a conveyance by a municipality of land abutting on a street stands on the same footing as a private conveyance with respect to the rights of the grantee to the fee. Ryerson v. Chicago (1910) 247 Ill. 185, 93 N. E. 162, following Chicago v. Rumsey (1877) 87 Ill. 348, on the ground that it had become a rule of property.

On the other hand, it has been said: "Where the grantor is a corporation, holding a street for public purpose and disposing of the adjacent lots for private use, the boundary of the private property by that held for public purposes will be the dividing line between the two, the same as when one lot is bounded by another." McDonald v. Kummer (1913) 56 Colo. 153, 137 Pac. 51.

In Graham v. Stern (1901) 168 N. Y. 517, 85 Am. St. Rep. 694, 61 N. E. 891, it was said: "There is an obvious and a material distinction between the case of a conveyance by an individual of lands bounded upon or by a street, and that of a similar conveyance by municipal authorities. The presumption that obtains, ordinarily, in the one case, I think, should be regarded as offset, in the other, by another presumption that the municipality would not part with the ownership and control of a public street once vested in it for the public benefit. The city was the proprietor of these common lands and they were mapped out for the municipal advantage, in their improvement by future grantees. There was an obvious purpose to subserve, when making grants of lands, in the retention of the ownership of the soil of the streets, which would be absent in the case of a grant by an individual. The municipality was vested with the fee in the soil of the streets and the trust attached that they should be held and kept open as public streets. It is, altogether, the sounder proposition, in my opinion, that the grant of title to property bounded by or upon a city street, derived from the public authorities, in the absence of any more definite description, carries only to the line of the street; inasmuch as, in legal intendment, the street was held as, and should remain, a public highway."

In Gere v. McChesney (1903) 84 App. Div. 39, 82 N. Y. Supp. 191, the case of Graham v. Stern was construed obiter as holding that "the city has an interest in retaining the fee of the street, and cannot be presumed to have intended to convey the same to its grantees."

But in Paige v. Schenectady R. Co. (1904) 178 N. Y. 102, 70 N. E. 213, involving a conveyance by the state, that case was distinguished on the ground that it therein appeared that the city held the fee of the streets in trust for street purposes, and the general rule was declared as follows: "In this state, as between a grantor and grantee, the conveyance of a lot bounded upon a street carries the land to the center, and there is not a distinction, in this respect, between the streets of a city and country highways. The rights of the public in a street or highway are no higher or other than those of a mere easement, and the proprietors on each side presumptively own the soil in fee to the center thereof. . . . The same rule applies where the conveyance is from the state or commonwealth and the land is described as abutting upon a street, without any reservation, or declaration of intention not to convey to the center. Such a conveyance, like a conveyance between individuals, is presumed to carry the title to the center of the street, subject to the public right of way over it." See to the same effect, as to conveyances by the state, Ex parte Jennings (1826) 6 Cow. (N. Y.) 518; Chenango Bridge Co. v. Paige (1880) 83 N. Y. 178, 38 Am. Rep. 407; Smith v. Rochester (1883) 92 N. Y. 463, 44 Am. Rep. 393; Cheney v. Syracuse, O. & N. Y. R. Co. (1896) 8 App. Div. 620, 40 N. Y. Supp. 1103; Syracuse Solar Salt Co. v. Rome, W. & O. R. Co. (1899) 43 App. Div. 203, 60 N. Y. Supp. 40, affirmed in (1901) 168 N. Y. 650, 61 N. E. 1135; Gere v. McChesney (1903) 84 App. Div. 39, 82 N. Y. Supp. 191.

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In Pennsylvania, in a conveyance by the state, it has been held that the grantee takes the fee to the center of a highway as in case of a private conveyance. Hines v. Kingston Coal Co. (1898) 186 Pa. 43, 40 Atl. 151; Willock v. Beaver Valley R. Co. (1909) 222 Pa. 590, 72 Atl. 237. In the case last cited it was said: "The town of Beaver was not laid out by the exercise of the sovereign power of the state, but by express legislative authority, directing the proper officers of the commonwealth, the owner of the soil, to lay out the same for the purpose of sale to private purchasers. The purpose was to encourage the building of a town at that point. The officers of the commonwealth had no power to act in the premises except such as was conferred by the legislature, and this power, when conferred, authorized the laying out of a town, and provided for the sale of lots. If the plan of lots in the present case had been laid out by an individual in precisely the same manner as the commonwealth has done, and lots had been sold with streets as boundaries, the title of the fee to the center of the streets would have passed to the purchasers. This is the rule of our cases from Paul v. Carver (1856) 26 Pa. 223, to Neely v. Philadelphia (1905) 212 Pa. 551, 61 Atl. 1096. There is no sufficient reason why the same rule should not apply to the commonwealth under the facts of the case at bar. The reasonable construction to be placed upon the acts of assembly authorizing the laying out of the town and the sale of lots in this case, and of the acts of the officers intrusted with the execution of these powers, is that the legislature intended the purchasers of lots to enjoy every privilege and be invested with every legal right passing to any purchaser of a lot abutting on a public street, and this would pass the title of the fee to the center of the street to the purchaser, as in the case of a purchase from an individual grantor."

In Schutze v. Dabney (1918) — Tex. Civ. App. —, 204 S. W. 342, the court, after referring to the rule applicable to private conveyances, said: "The reasons for this rule, however, do not apply when the government, state or municipal, owns the land, and makes a conveyance calling for a highway. It is the duty of the government to maintain such highway,—a duty which is not imposed upon an individual owning land contiguous thereto. Accordingly it is held that, where a government owns land, including a highway, and conveys the same, calling for such highway, such conveyance does not convey the fee to any portion of the highway, in the absence of language showing such intent."

W. A. S.

DUTCH CRUSE et al., Appts.,
v.
DOUGLASS W. KIDD et al.

Alabama Supreme Court — November 4, 1915.

(195 Ala. 22, 70 So. 166.)

Adverse possession — by stranger against trustee.

1. Title sufficient to defeat ejectment may be secured by adverse possession under color of title against executors to whom real property was devised with directions to turn it over to trustees for a certain named beneficiary, which direction was never complied with, and also against persons claiming by descent and not under the will.

[*See note on this question beginning on page* 41.]

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Ejectment — necessity of title.

2. Heirs of testator cannot recover in ejectment land in possession of adverse claimants, the title to which remains in the trustee.

Wills — construction — estate created.

3. No estate is vested in the wife by a provision in a will, "I hereby give and bequeath to my wife certain real estate," if the provision is immediately followed by a provision directing the executors to convey the property to trustees for the use of the wife for life.

Trust — authority of law court.

4. A court of law cannot deal with an unexecuted trust, otherwise than to adjust damages for certain breaches thereof.

Limitation of actions — beneficiaries of trust.

5. An action by beneficiaries to recover trust property is barred when an action by the trustee is barred.

Same — failure to compel action.

6. A beneficiary who neglects to compel the trustee to take steps to recover trust property which has passed into the possession of adverse holders is barred when the statute bars an action by the trustee to recover.

APPEAL by defendants from a judgment of the County Court for Shelby County in favor of plaintiffs in an action brought to recover possession of certain real estate. *Reversed.*

The will in question, so far as material, is as follows: "Third, whereas, I have in the province of God been twice married and have children by each marriage. My first children have all left me and have, by way of advancement, received a part of my estate hereinafter more particularly set forth, and I have by deed heretofore conveyed to my beloved wife, Mary Georgiana, and my children by her, through John M. Kidd and William Singleton, trustees, and in that deed given to said trustees power and authority to demand of my executors such legacy or bequest as I might, in my will, give to my said beloved wife and children in said deed mentioned now, hereby ratifying and confirming said deed, and as the bequest therein alluded to, I hereby give and bequeath unto my said beloved wife whatever real estate I may die seised and possessed of, situated in Shelby county; and four mules and one horse to be selected by said John M. Kidd and William Singleton out of my stock of mules and horses at my death, four cows and calves, thirty hogs, selected in like manner, and four beds and furniture to be selected by my said wife, and direct that my executors convey to said trustees said land, if any such be owned by me at my death, and deliver to them all the above-mentioned property for the use of my beloved wife, Mary Georgiana, and her children William Douglas, James White, and Anna Philida, during the natural life of my said beloved wife, and at her death to our children forever. I also give to my beloved wife one buggy and harness and wagon."

Further facts appear in the opinion of the court.

Messrs. **Cecil Browne** and **Haynes & Wallace** for appellants.

Messrs. **J. M. Kidd** and **Riddle & Ellis** for appellees.

Mayfield, J., delivered the opinion of the court:

This is an action of ejectment brought by appellees against appellants. It is conceded that the legal title to the land involved, and the right of either party to recover or to hold the same against the other, depends upon the construction of the will of John W. Kidd, made the 8th day of November, 1859, and probated August 17, 1866.

This will has been before this court for construction once before. See report of the case of Kidd v. Borum, 181 Ala. 144, 61 So. 100, Ann. Cas. 1915C, 1226. In this case, as in that of Kidd v. Borum, a trustee was introduced in evidence, not as one passing the title, but

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as an aid in the proper construction of the will, both instruments being executed on the same day, and each referring to the other. The instruments will be found in the report of the former case, 181 Ala. 144. The former case, however, was one in equity, and between parties all of whom claimed title through persons who took under the will. In the opinion in that case it was said, among other things: "The will was not drawn by a skilful hand, and, standing alone, its provisions are to some extent contradictory and of doubtful import in respect to the estate conferred upon the widow. But, when considered in connection with the deed, it makes, in our judgment, the widow and her children at the time of testator's death tenants in common of an estate for her life (Chandler v. Jost, 81 Ala. 411, 2 So. 82), with the remainder in fee of the whole estate to all her children. These purposes and dispositions the testator intended and attempted to accomplish through the intervention of trustees. There was never any conveyance of the land in question to trustees; but whether the trust which the testator intended to create was a dry trust, or was of such character as to require activity and discretion of the trustees, equity will consider, and treat the beneficial interest as having acquired the intended status in the first case because the trustees would have been useless encumbrances of the plan; in the second, because no trust can be permitted to fail for lack of a trustee."

It is thus seen that the rights of the parties in that case were determined upon equitable grounds, as between parties to the will or those who either claimed under the will or claimed through others claiming through the same instrument.

Adverse possession was held not to be availing in that case, for that the title of the claimant was based upon a deed from one of the life tenants, and that no such notice of the adverse holding was brought home to the cotenants as to defeat their title as to the remainder. It was, as to this, said: "These facts show a possession by complainant and Flippin hostile in its inception and exclusive during its continuance, such as would set the Statute of Limitations to running as against strangers and would ripen into title after ten years. Customary acts of ownership are sufficient to impute notice to all not claiming in privity with the possessor. But the rule is that the possession of a tenant in common, without more, does not operate as a disseisin of cotenants, for in contemplation of law he holds for them. Fielder v. Childs, 73 Ala. 567. To operate as a disseisin in such case there must be a repudiation of the rights of cotenants and a claim of exclusive ownership brought home to their knowledge; that is, there must be positive information of the facts, however informally communicated or acquired." Kidd v. Borum, supra.

It was decided in that case, however, that as to the estate for the life of the widow, the adverse possession had ripened into title; but that as to the remainder it had not, because not adverse to that title, as the deed to which the possession must be referred was from the widow, who had only a life estate. To this end, it was there said: "The estate in remainder must be disposed of on still different principles. As to that, defendants have never at any time been in a position to ask for any judgment or decree presently operative upon the possession of the property or the enjoyment of its usufruct. In such case laches cannot be predicated on the ground of mere delay because there can be no delay where there is no right to move. In such case the remainderman cannot be barred pending the life estate by the Statute of Limitations, nor is there field for the operation of the doctrine of prescription. See the cases cited in Jackson v. Elliott, 100 Ala. 669, 13 So. 690, and our recent case of Winters v. Powell,

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180 Ala. 425, 61 So. 96." Kidd v. Borum, 181 Ala. 162, 61 So. 100, Ann. Cas. 1915C, 1226.

Without either affirming or denying the correctness of the application to the facts in that case, of the proposition of law above quoted, which proposition is stated in the cases cited, to the effect that the possession of life tenants and those holding under them is not adverse to the remainderman, we observe that we have now quite a different case. This is an action at law, and not in equity. We are now concerned with the legal title only; nor do we have to deal with the possession of one tenant in common, as against the others. The adverse possession here, which is claimed to have ripened into title against the plaintiffs, who claim to have taken remainders under the will, is not that of a tenant in common with them, nor of the life tenant.

In this case it is agreed as follows: "The plaintiffs' evidence shows that the power granted by testator in the will to convey to the named trustees by the named executors was never executed. Here it was agreed by the plaintiffs and the defendants that the defendants, and those under whom they claim and hold, had had continuous, open, notorious, exclusive, adverse possession (pedis possessionem) of the lands sued for, for twenty-one years next before the bringing of this suit, and that such possession was under claim of ownership, and under color of title, but not under color of title or conveyance from the plaintiffs."

This clearly distinguishes this case from that of Kidd v. Borum, supra. Under these facts we think it clear that these plaintiffs could not recover; because if the legal title ever vested in them it was not by virtue of the will, but by descent; and if by descent, it was unquestionably devested by the adverse possession for twenty-one years, admitted in the agreed statement of facts. If it be held that the will passed the legal title to the executors, it is admitted or shown that it never passed out of them by a conveyance to the trustees as the will directed, and if it remained in them it was likewise devested by adverse possession; and if in them now, these plaintiffs could not recover. The plaintiffs therefore utterly failed to show that the legal title ever passed to them by virtue of the will; and, if it passed by descent, it was defeated and passed out by adverse possession long before this action was brought. Not only the Statute of Limitations, but the rule of prescription, had forever barred any relief against these defendants.

Adverse possession—by stranger against trustee.

It is perfectly clear that there is no separate and distinct gift or devise of the lands in question to the wife for life, and remainder to the children. There are in the will words which, standing alone and unmodified by other clauses of the will, would amount to a devise of the life estate to the wife for life. These words are: "I hereby give and bequeath unto my said beloved wife whatever real estate I may die seised and possessed of in Shelby county;" but, as was decided before, these words are both preceded and followed by words in the will, and by words in the deed of trust, which preclude the idea that the will vested any legal title in the wife or in the children to these lands. The language which precludes the idea is immediately following that quoted above. The land here involved is a part of the residue in Shelby county, and the language is that wherein the testator directs that his executors convey it to his trustees for the use of the wife and children named, during the life of wife, and after her death, to the children forever.

Wills—construction—estate created.

It is clear that the will itself does not pass the legal title as above indicated, nor create the trust; but it either passes the title to the executors, and on them enjoins the duty and confers the power to convey it by trust deed to the trustees, in the

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manner indicated, and exactly as he, the testator, had conveyed by a trust deed other property to the same trustees, for the same uses and benefits, and for the same persons; or it fails to pass the title, and only enjoins the duty and confers the power on the executors to convey to the trustees, thus creating the trust in favor of the plaintiffs.

It is unnecessary, however, to now decide whether the legal title to the lands in question passed by the will to the executors, or whether it passed to the heirs of the testator by descent, subject to be defeated or cut off by the exercise of the powers conferred and the duties enjoined by the will, for the reason that these plaintiffs cannot recover in ejectment in either case.

Ejectment—necessity of title.

It is likewise unnecessary for us to now decide the nature or character of the trust attempted to be created by the will, for the reason that the bill of exceptions informs us that the trust was never created, that is, that the executors never conveyed; and a court of law cannot deal with an unexecuted trust, otherwise than to adjudge damages for certain breaches thereof. It is therefore made to appear by this record that if the legal title to the land, either as to the life estate or as to the remainder, was ever vested in these plaintiffs, it was by descent and not by devise; and, if by devise, that it was only since lost by adverse possession.

Trust—authority of law court.

Moreover, if the trust was created by the will, that is, if the legal title was by it invested in the executors, or even in the trustees for the use and benefit of the children, the plaintiffs could not recover in this case, because the trustees would then certainly be barred by adverse possession for twenty-one years, and they, being the beneficiaries, would likewise be barred.

Limitation of actions—beneficiaries of trust.

As between the trustee and the cestui que trust, in case of an express trust, lapse of time does not bar the trust estate; but the rule is different as to third parties or strangers to the trust. Where the trustee and the cestui que trust are both out of possession for the time limit fixed by the statute, the party in possession acquires a good title against both. 1 Am. & Eng. Enc. Law, 2d ed. 814; 1 Cyc. 1068. As between a trust estate and a stranger, the Statute of Limitations runs as in other cases, and if the trustee is barred the cestui que trust is also barred. 19 Am. & Eng. Enc. Law, 2d ed. 186.

In this case the statute has certainly run against the trustees, and as it was shown or agreed that the legal title never passed out of the trustees (if it ever passed into them), then it must follow that these plaintiffs, who are cestuis que trustent, cannot recover in this action of ejectment.

If the statute did not run against the plaintiffs, for that they had no right to enter because the legal title was in the trustees, who held it to preserve and enforce the trust created by the will, then they did have the right at any time to require the trustees to make an entry or bring an action for the recovery of the estate for them, the beneficiaries of the remainder, or the estate after the estate of the mother was terminated, or while it was in existence. The remedy of the cestui que trust, in such case, is against the trustee, and, failing to exercise it, he is barred by the statute. 1 Cyc. 1069; Waterman Hall v. Waterman, 220 Ill. 569, 4 L.R.A. (N.S.) 776, 77 N. E. 142.

Same—failure to compel action.

If this were a contest in a court of equity, and between parties to the trust or those who claimed under and by virtue of such trust, as was the case in Kidd v. Borum, 181 Ala. 144, 61 So. 100, Ann. Cas. 1915C, 1226, then the result might be different; but this is a contest in a court of law, in which we must look to the legal and not to the equitable

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title, and the contest is between the beneficiaries of the trust and strangers; and we have no doubt that the plaintiffs in this case showed no right to recover, and that the trial court should have directed a verdict for the defendants.

It is therefore unnecessary to discuss, much less to decide, the intricate and vexed questions of merger of the estate for life of the wife in that of the remainder, and the character and nature of the trust, whether active or naked, as to which questions there is so much dry learning in the books and so much argument in the briefs in this case. No matter what we should decide as to these questions, the plaintiffs show no right to recover in this action against these defendants. The only theory upon which they could recover, in this action of ejectment against strangers to the will, would be that the legal title to the estate for the life of the wife was in another, and not in them, and that the defendants acquired it by adverse possession, but did not the legal title to the remainder, which was in plaintiffs, and that, on account of the legal title during the life of the wife being outstanding in others, they could enter, or bring an action to recover the land, and during the twenty-one years it was held by the defendants, and for that reason the possession of the defendants was not adverse to the estate in remainder. But we have shown that the record does not bear out this theory, for several reasons stated herein, now unnecessary to restate.

In no event, and under no possible theory, did these plaintiffs have any greater right to recover from these defendants after the death of the testator's wife, than they had during the twenty-one years of adverse possession admitted, except as to the one-fifth interest of the wife during her life. If they can now sue and recover, they could and should have done so twenty years ago, except as to the one-fifth interest of the wife, during her life. The only interest they could have recovered before the death of the wife of the testator, which they could recover thereafter, was the interest of the wife; and it is conceded and decided that this was only an undivided one-fifth interest during the life of the wife, and it is shown that that interest was terminated by the death of the wife when the action was brought.

It therefore follows that the trial court erred in directing a verdict for the plaintiffs, and that the court, at the request of the defendants, should have given the affirmative charge in their favor.

Reversed and remanded.

Anderson, Ch. J., and **Somerville** and **Thomas**, JJ., concur.

ANNOTATION.

Adverse possession by third party or stranger of property held in trust.

I. General rule:
a. Rule stated, 41.
b. Application of rule, 44.
II. Death of or failure to appoint trustee, 49.
III. Disability of cestui que trust, 50.
IV. Cestui que trust also remainderman, 55.

I. General rule.

a. Rule stated.

The rule is uniformly recognized that title by adverse possession may be acquired to property held in trust, and that, if a trustee delays the assertion of his rights until the statute effects a bar against him, the cestui que trust will also be barred.

England.—Wych v. East India Co. (1734) 3 P. Wms. 309, 24 Eng. Reprint, 1078; Earl v. Huntingdon (1719) 3 P. Wms. 310, 24 Eng. Reprint, 1078; Lewellin v. Mackworth (1740) 2 Eq. Cas. Abr. 579, ¶ 8, 22 Eng. Reprint, 488, 15 Vin. Abr. 125, note; Pentland v. Stokes (1814) 2 Ball & B. 75. Compare Lechmere v. Carlisle (1733)

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3 P. Wms. 211, 24 Eng. Reprint, 1033, 21 Eng. Rul. Cas. 81, an early case holding to the contrary.

United States.—Meeks v. Olpherts (1880) 100 U. S. 564, 25 L. ed. 735, affirming (1874) 3 Sawy. 206, Fed. Cas. No. 9,393.

Alabama.—Colburn v. Broughton (1846) 9 Ala. 351; Bryan v. Weems (1856) 29 Ala. 423, 65 Am. Dec. 407; Molton v. Henderson (1878) 62 Ala. 426; Love v. Love (1880) 65 Ala. 554; Clark v. Snodgrass (1880) 66 Ala. 233; Smith v. Gillam (1885) 80 Ala. 296; Gindrat v. Western R. Co. (1892) 96 Ala. 162, 19 L.R.A. 839, 11 So. 372. And see the reported case (CRUSE v. KIDD, ante, 36).

Arkansas. — Chase v. Cartright (1890) 53 Ark. 358, 22 Am. St. Rep. 207, 14 S. W. 90; Hibben v. Malone (1908) 85 Ark. 584, 109 S. W. 1008.

California. — McLeran v. Benton (1887) 73 Cal. 329, 2 Am. St. Rep. 814, 14 Pac. 879; Patchett v. Pacific Coast R. Co. (1893) 100 Cal. 505, 35 Pac. 73.

Georgia. — Pendergrast v. Foley (1850) 8 Ga. 1; Worthy v. Johnson (1851) 10 Ga. 358, 54 Am. Dec. 393; Wingfield v. Virgin (1874) 51 Ga. 139; Brady v. Walters (1875) 55 Ga. 25; Varner v. Gunn (1878) 61 Ga. 54; Dean v. Central Cotton Press Co. (1880) 64 Ga. 670; Ford v. Cook (1884) 73 Ga. 215; Knorr v. Raymond (1884) 73 Ga. 749; Crawley v. Richardson (1886) 78 Ga. 213; Salter v. Salter (1887) 80 Ga. 178, 12 Am. St. Rep. 249, 4 S. E. 391; McCrary v. Clements (1895) 95 Ga. 778, 22 S. E. 675.

Illinois.—Waterman Hall v. Waterman (1906) 220 Ill. 569, 4 L.R.A. (N.S.) 776, 77 N. E. 142.

Kentucky. — Barclay v. Goodloe (1886) 83 Ky. 493; Stillwell v. Leavy (1886) 84 Ky. 379, 1 S. W. 590; Willson v. Louisville Trust Co. (1897) 102 Ky. 522, 44 S. W. 121; Edwards v. Woolfolk (1856) 17 B. Mon. 376; Maddox v. Allen (1859) 1 Met. 495.

Maryland.—Crook v. Glenn (1869) 30 Md. 55; Weaver v. Leiman (1880) 52 Md. 708; Stoll v. Smith (1916) 129 Md. 164, 98 Atl. 530.

Massachusetts.—Merriam v. Hassam (1867) 14 Allen, 516, 92 Am. Dec. 795; Atty.-Gen. v. Federal Street Meeting-House (1854) 3 Gray, 1.

Mississippi. — Nelson v. Ratliff (1895) 72 Miss. 656, 18 So. 487.

Missouri. — Ewing v. Shannahan (1892) 113 Mo. 188, 20 S. W. 1065; Walton v. Ketchum (1898) 147 Mo. 209, 48 S. W. 924.

New Jersey.—Prudden v. Lindsley (1878) 29 N. J. Eq. 615, reversing (1877) 28 N. J. Eq. 378; Snyder v. Snover (1893) 56 N. J. L. 20, 27 Atl. 1013.

New York.—Brown v. Doherty (1904) 93 App. Div. 190, 87 N. Y. Supp. 563.

North Carolina.—Blake v. Allman (1860) 58 N. C. (5 Jones, Eq.) 407; Herndon v. Platt (1862) 59 N. C. (6 Jones, Eq.) 327; Swann v. Myers (1876) 75 N. C. 585; Clayton v. Cagle (1887) 97 N. C. 300, 2 Am. St. Rep. 293, 1 S. E. 523; King v. Rhew (1891) 108 N. C. 696, 23 Am. St. Rep. 76, 13 S. E. 174; Kirkman v. Holland (1905) 139 N. C. 185, 51 S. E. 856; Cameron v. Hicks (1906) 141 N. C. 21, 7 L.R.A. (N.S.) 407, 53 So. 728; Wellborn v. Finley (1859) 52 N. C. (7 Jones, L.) 228.

Pennsylvania. — Smilie v. Biffle (1845) 2 Pa. St. 52, 44 Am. Dec. 156; Maus v. Maus (1876) 80 Pa. 194; Thompson v. Carmichael (1888) 122 Pa. 478, 15 Atl. 867.

South Carolina.—Waring v. Cheraw & D. R. Co. (1881) 16 S. C. 416; Benbow v. Levi (1897) 50 S. C. 120, 27 S. E. 655; Young v. McNeill (1907) 78 S. C. 143, 59 S. E. 986.

Tennessee. — Goss v. Singleton (1858) 2 Head, 67; Woodward v. Boro (1886) 16 Lea, 678; Watkins v. Specht (1870) 7 Coldw. 585; Williams v. Otey (1847) 8 Humph. 563, 47 Am. Dec. 632; Shelby v. Shelby (1813) Cooke, 179, 5 Am. Dec. 686; Ferguson v. Kennedy (1824) Peck, 321, 14 Am. Dec. 761; Wooldridge v. Planters' Bank (1853) 1 Sneed, 297; Johnston v. Hoyall (1911) 2 Tenn. C. C. A. 163.

Texas.—Collins v. McCarty (1887) 68 Tex. 150, 2 Am. St. Rep. 475, 3 S. W. 730; Appel v. Childress (1909) 53 Tex. Civ. App. 607, 116 S. W. 129.

Utah.—Jenkins v. Jensen (1901) 24

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Utah, 108, 91 Am. St. Rep. 783, 66 Pac. 773.

Virginia. — Sheppard v. Turpin (1847) 3 Gratt. 373.

In Lewellin v. Mackworth (1740) 2 Eq. Cas. Abr. 579, ¶ 8, 22 Eng. Reprint, 488, it was said: "The rule . . . that the Statute of Limitations does not bar a trust estate holds only as between cestui que trust and trustees, not betwen cestui que trust and trustee on one side and strangers on the other, for that would be to make the statute of no force at all, because there is hardly any estate of consequence without such trust, and so the act would never take place; therefore, where a cestui que trust and his trustee are both out of possession for the time limited, the party in possession has a good bar against them both."

In Clayton v. Cagle (1887) 97 N. C. 300, 2 Am. St. Rep. 293, 1 S. E. 523, the court, holding that where the creator of the trust subsequently deeded the land to a third person, who in good faith entered and exercised exclusive and adverse proprietary rights over the land for the requisite period, both the trustee and the cestui que trust were barred from attacking his title, stated the rule as follows: "The annexation of trusts to the legal estate cannot arrest the operation of the rule which, under the circumstances, ripens an imperfect into a perfect title; since, during all this period, the defendant was exposed to the action of the true owner, and his negligence in bringing it tolls his entry and bars his right of action. The interest of the cestui que trust is, as against strangers to the deed, under the protection of the trustee, and shares the fate that befalls the legal estate by his inaction or indifference."

In Smilie v. Biffle (1845) 2 Pa. St. 52, 44 Am. Dec: 156, the court, after declaring the rule that, where the cestui que trust and trustee are both out of possession for the prescribed time, the party in possession acquires a good title against both, said: "Indeed, the wonder is that so plain a proposition should ever have been doubted. A party obtains an inceptive title by an adverse holding, subject to be defeated only by the entry of the owner of the legal estate at any time within twenty-one years. And the trustee may be compelled by the cestui que trust to enter, so as to avoid the adverse possession; and the cestui que trust may himself enter as a defeasor. . . . The title of Nicholson, the purchaser, is manifestly defective. But Nicholson took possession of the premises in pursuance of the contract, and held the same for upwards of twenty-one years. He therefore held adversely to both cestui que trust and trustee, and, consequently, obtained by the Statute of Limitations an indefeasible title, which cannot now be disturbed or gainsaid. The Statute of Limitations is emphatically a statute of repose. . . . When the act commences running it continues to run, as is well settled. It would strike me to be an anomaly that the owner of the legal estate should be barred, and that the owner of the equitable title, whether his interest be an interest in possession or by way of remainder, should nevertheless be entitled to enter. Equity follows the law, and courts of equity have adopted the Act of Limitations by analogy. If a trustee is negligent of his duty (as he may be), the cestui que trust is not without remedy."

The reason for the rule was stated in Edwards v. Woolfolk (1865) 17 B. Mon. (Ky.) 376, as follows: "The principle is, that the legal cause of action is in the trustee, and it is his duty to sue a stranger who has obtained the possession of the trust property, and is holding it adversely; and the cestui que trust may require him to perform this duty; and, upon his refusal, may bring an action in equity against the trustee and the person in the possession of the property, for its restoration to the custody of the trustee. For this reason, the equitable right is barred by the statute whenever the legal right is barred."

In Molton v. Henderson (1878) 62 Ala. 426, it was said: "The reason of the rule is, that the trust exists only as between trustee and cestui que trust; as to strangers, the legal and equitable estate are one; and a bar of

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the legal comprehends a bar of the equitable estate."

Mere ignorance on the part of the cestui que trust of the existence of his rights in the trust property will not serve to stop the running of the statute. Waterman Hall v. Waterman (1906) 220 Ill. 569, 4 L.R.A. (N.S.) 776, 77 N. E. 142; Merriam v. Hassam (1867) 14 Allen (Mass.) 516, 92 Am. Dec. 795. In the case last cited it was said: "It is agreed as a fact that she had no actual knowledge of the creation or existence of a trust in her favor. But while this would be an answer to a defense based upon laches or acquiescence merely, we cannot find in it a sufficient objection to the operation of the limitation. The deed which created the trust was upon record, and she had the means of ascertaining her rights under it by the use of due diligence."

In Stoll v. Smith (1916) 129 Md. 164, 98 Atl. 530, it was insisted that the rule did not apply to a trust estate created by order of court, but only to such an estate created by deed. Holding that the mode of appointment of the trust was immaterial, the court said: "It is sufficient to say in regard to this that none of the adjudicated cases draw any such distinction, and no sufficient reason appears why a different standard should be applied in one case than in the other."

b. Application of rule.

Possession under invalid conveyance by trustee.

Where a purchaser of trust property from a trustee, under a deed which is void for want of strict conformity to the law, goes into possession of the property, and, without objection on the part of the trustee, holds the property openly and exclusively as his own for a sufficient period of time to acquire title by adverse possession, neither the trustee nor the cestui que trust can attack it. Clark v. Snodgrass (1880) 66 Ala. 233; Brady v. Walters (1875) 55 Ga. 25; Varner v. Gunn (1878) 61 Ga. 54; Knorr v. Raymond (1884) 73 Ga. 749; Waterman Hall v. Waterman (1906) 220 Ill. 569, 4 L.R.A.(N.S.) 776, 77 N. E. 142; Brown v. Doherty (1904) 93 App. Div. 190, 87 N. Y. Supp. 563.

Thus, in Stoll v. Smith (1916) 129 Md. 164, 98 Atl. 530, it was held that a purchaser of trust property from the trustee, whose deed was defective for want of ratification by the court, who entered into possession and held the land adversely for the time limited, acquired a good title as against both the trustee and the cestui que trust.

In Herndon v. Pratt (1862) 59 N. C. (6 Jones, Eq.) 327, wherein it appeared that property held in trust by an executor was improperly conveyed to a purchaser who took possession and held it for the required period of time to acquire title by adverse possession, the court, holding that the cestui que trust as well as the trustee was barred, said: "Statutes of Limitation, and statutes giving title by adverse possession, would be of little or no effect, if their operation did not extend to cestuis que trust as well as trustees who hold the title for them, and whose duty it is to protect their rights. If, by reason of neglect on the part of the trustees, cestuis que trust lose the trust fund, their remedy is against the trustees; and, if they are irresponsible, it is the misfortune of the cestuis que trust, growing out of the want of forethought on the part of the maker of the trust, under whom they claim."

In Ewing v. Shannahan (1892) 113 Mo. 188, 20 S. W. 1065, it appeared that, after land was conveyed in trust for the benefit of the grantor and his heirs, the trustee reconveyed the land to the grantor, who subsequently conveyed it by general warranty deed to third parties, who held the same for a sufficient period to acquire title by adverse possession. Holding that such possession was a bar both to the trustee and the cestui que trust, the court said: "In the case now in hand the plaintiff took an equitable contingent remainder by force and effect of the deed of trust. Until the death of the donor, the entire legal title, a title in fee simple, was vested in the trustee. It was the duty of the trustee to protect the title for those who should take upon the death of the donor, as

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well as for the donor during his life. To this end the entire legal title was vested in the trustee, and the right of possession was in him. As the trustee held the legal fee-simple title and the right of possession for all of the beneficiaries, he was the proper person to sue for possession; and we think the case comes within the rule that, where the trustee is barred by lapse of time, the beneficiaries are also barred, and that, too, though the beneficiaries are minors. That which bars the legal title here bars the equitable title. The acceptance of a trust like this is not a meaningless affair, and, if the trustee has made breach of the trust and wronged the plaintiff, the remedy is against the trustee. The Statute of Limitations is one of repose, and should be applied in this case."

Similarly, where a trustee, joining with the cestui que trust, mortgaged the trust estate and allowed the mortgagee to enter into possession of the property and, ignoring the mortgage, to hold it adversely and as his own for a sufficient period of time to acquire title by adverse possession, it was held that the trustee and the cestui que trust were both barred from asserting any right of redemption in the property. Crook v. Glenn (1869) 30 Md. 55.

In Patchett v. Pacific Coast R. Co. (1893) 100 Cal. 505, 35 Pac. 73, it was held that where a trustee conveyed to a railroad a right of way through the trust property, in violation of the terms of the trust, the railroad, taking possession and holding it adversely for the period limited, acquired a good title, both as against the trustee and the cestuis que trust.

In Chase v. Cartright (1890) 53 Ark. 358, 22 Am. St. Rep. 207, 14 S. W. 90, wherein it appeared that land was sold by one of several executors who held it in trust, and the purchaser entered and held possession for the statutory period, it was held that both the trustee and the cestui que trust were barred.

A trustee is not estopped from bringing an action to recover property because of the fact that he was a party to the instrument conveying the property; and therefore, the right of action remaining in the trustee, he and the cestui que trust are barred by his failure to act within the proper time. Meeks v. Olpherts (1880) 100 U. S. 564, 25 L. ed. 735; Chase v. Cartright (Ark.) supra; Worthy v. Johnson (1851) 10 Ga. 358, 54 Am. Dec. 393; Stillwell v. Leavy (1886) 84 Ky. 379, 1 S. W. 590; Willson v. Louisville Trust Co. (1898) 102 Ky. 522, 44 S. W. 121; Smilie v. Biffle (1845) 2 Pa. St. 52, 44 Am. Dec. 156.

In Meeks v. Olpherts (1880) 100 U. S. 564, 25 L. ed. 735, wherein it appeared that the legal title to the trust property was vested in an administrator, who sold the same under an order of the probate court, which was attacked as void, the court held that, whether the sale was valid or not, the adverse possession on the part of the purchaser gave him a perfect title, and the fact that the sale was made by the administrator did not estop him from bringing an action to recover the property. On this point it was said: "Nor can it be said that either this right or this duty to sue for and recover possession of the lot was lost or abridged by his sale, as administrator, to the defendants. Instances are numerous of persons, making sales that are valid, avoiding them by the very act of bringing an action of ejectment. Such are the cases of infants and married women, who have made conveyances and received the consideration, whose acts are void or voidable by reason of infancy or of defective acknowledgment of the deeds."

But see Parker v. Hall (1859) 2 Head (Tenn.) 641, wherein it appeared that the guardian of certain minor children sold the property he held in trust for them. The court, holding that by reason of his making the bill of sale to the purchaser he was estopped from suing to recover the property, and therefore that the rule that adverse possession against the trustee bars also the cestui que trust, though an infant, did not apply, said: "The position that when the trustee is barred all the beneficiaries are barred, though they may be under disability, has no application here.

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That doctrine only applies where the trustee could sue, but fails to do so, as where a stranger intrudes himself into the trust estate and holds wrongfully, and adversely, both to the trustee and the beneficiaries. In such a case, if the trustee fails to sue and is barred, the beneficiaries, though infants, etc., are also barred. But here George H. Parker, the trustee and owner of the legal estate, had estopped himself from suing by his bill of sale. He had turned against his wards, and united with the defendant in a breach of trust. The wrong was to them, not to him. He could not sue for or represent them. In such a case . . . the beneficiaries can alone sue, and if they are under disability when the cause of action accrues, they will not be barred until they are allowed the time given in the statute after the disability is removed."

However, in two cases, wherein it appeared that the trustee had made or joined in the instrument conveying the trust property, the court, without discussing the question of estoppel, applied the general rule, and held that both the trustee and the cestui que trust were barred by the statute. Williams v. Otey (1847) 8 Humph. (Tenn.) 563, 47 Am. Dec. 632; Watkins v. Specht (1870) 7 Coldw. (Tenn.) 585.

In the case last cited, wherein it appeared that the adverse holder claimed title under a deed from the trustee and the life tenant and her husband, which was later declared void because of the improper appointment of the trustee, it was held that the purchaser had nevertheless acquired a good title by his adverse possession, which could not be attacked either by the trustee or the cestui que trust, the court saying: "Patterson took possession of the premises under his deed from E. F. Watkins, Mildred B. Watkins, and David T. Johnson, in November, 1850. This deed conveyed to him no title as against the legal estate of the trustee, or against the equitable interest in remainder of the complainants. But it was sufficient to constitute a color of title in Patterson, and under it he and his grantees held possession, claiming title in fee simple, and adversely to the trustee, for more than seven years thereafter. The legal estate of the trustee was thereby barred, under our Statute of Limitations; and, under repeated decisions of this court, this operated as a bar to the equitable estate of the cestui que trust."

In Woodward v. Boro (1886) 16 Lea (Tenn.) 678, wherein it appeared that, after conveying certain land in trust, the grantor by another deed conveyed the same land to a third person, who entered into possession and held the land for a sufficient period to acquire title by adverse possession, it was held that the failure of the trustee to bring an action to recover the land barred both himself and the cestui que trust.

In Jenkins v. Jensen (1901) 24 Utah, 108, 91 Am. St. Rep. 783, 66 Pac. 773, it appeared that in a compromise settlement of a number of disputes the lot of land in question was given to the adverse claimant, who held it continuously and adversely for the statutory period. Because the agreement was never fully carried out the cestui que trust brought suit to recover the land, but it was held that, as the trustee had allowed the title to ripen by adverse possession, all parties were barred from further action.

Where it appeared that a mortgage had been given at the instance of a guardian and trustee to secure a debt due the estate of his wards, and that the mortgagor had afterwards conveyed the property to a third person, who held it adversely to all parties for the period of time required to ripen into a perfect title, it was held that, the guardian being barred by his failure to act, the wards or cestuis que trust were also barred from attacking the title so acquired. Smith v. Gillam (1885) 80 Ala. 296.

Possession under conveyance by cestui que trust.

In Thompson v. Carmichael (1888) 122 Pa. 478, 15 Atl. 867, wherein it appeared that land held in trust for a married woman and her husband was conveyed by them, though without the joinder of their trustee, it was held that the purchaser, after adverse possession for the requisite period of

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time, acquired a good title as against both the trustee and the cestuis que trust.

Possession under judicial sale.

Where a trustee stands by and allows a purchaser of the trust property at a sheriff's sale, made to satisfy an execution against a stranger to the trust, to take possession and hold it adversely for a sufficient period of time to ripen into title, he is barred from attacking the title thus acquired, and the cestui que trust holding the equitable title is also barred. Colburn v. Broughton (1846) 9 Ala. 351; Wellborn v. Finley (1859) 52 N. C. (7 Jones, L.) 228; Wooldridge v. Planters' Bank (1853) 1 Sneed (Tenn.) 297; Sheppards v. Turpin (1847) 3 Gratt. (Va.) 373.

Possession under conveyance by third person.

In Young v. McNeill (1907) 78 S. C. 143, 59 S. E. 986, it was held that a purchaser of trust property from the life tenant, who held it adversely for the required period, obtained a good title against both the trustee of the remainderman and the cestui que trust.

In King v. Rhew (1891) 108 N. C. 696, 23 Am. St. Rep. 76, 13 S. E. 174, it was held that where the husband of the cestui que trust conveyed the trust property to a third person, who took possession and held it adversely for the time limited, the trustee was barred by his failure to bring an action to recover the property within the proper time, and that, the trustee being barred, the cestui que trust was also barred.

In Barclay v. Goodloe (1886) 83 Ky. 493, it appeared that a purchaser of trust property from two sons of the testator creating the trust took possession and held it adversely to all parties for a sufficient period to acquire a good title. The action was brought against the purchaser by the children of a third son of the testator, claiming an interest in the trust estate, and it was insisted that the deed by the other two sons was unauthorized and void. It was held that, even if the deed were to be declared void, the trustee had lost his right to recover the land, by failure to bring the action within the proper time, and that, the trustee holding the legal title being barred, the cestuis que trust were also barred, although they were laboring under the disability of infancy.

Possession by intruder.

In Snyder v. Snover (1893) 56 N. J. L. 20, 27 Atl. 1013, it was held that, where church trustees allowed an adverse user of a way across a corner of the trust property to be continued for fifty years, both they and the cestuis que trust were barred.

Similarly, in Prudden v. Lindsley (1878) 29 N. J. Eq. 615, reversing (1877) 28 N. J. Eq. 378, it was held that an uninterrupted and adverse public use of a highway over trust property for a period of twenty years would establish an easement, and both the trustee and cestui que trust would be barred; and this was true, although the trust was created for the benefit of a portion of the public.

In Benbow v. Levi (1897) 50 S. C. 120, 27 S. E. 655, wherein it appeared that a trustee, after bringing an action for the recovery of land held in trust, suffered a nonsuit and failed to bring a second action within the time prescribed by the statute, the court, holding that both the trustee and the cestui que trust were barred, stated the doctrine as follows: "One of the duties of a trustee is to hold the legal title, and it is his duty, if any interference is made by anyone with lands to which he holds the legal title, to prevent such interference ripening into any rights prejudicial to his cestui que trust. He has the power to act. Now, if such trustee, while holding the legal title, in order to protect the lands confided to him and to recover the same from one who is claiming it against him and his cestuis que trustent, brings an action against one wrongfully in possession, he is but doing his duty. But once he comes into court, he can throw about him no sacred shield to protect him and his suit against the rules of pleading and the ordinary risks in every respect, incident to a lawsuit. So, if a statute exists which says that in case of a nonsuit to an action brought for land that a second suit

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must be brought in two years from the date of nonsuit, he must conform to it; and if such statute prescribes, as a condition precedent to such second suit, that the costs must be paid in the first, why, he must comply with the law. And if such trustee brings the second suit and is cast, his right of action in that regard is gone forever, and his cestuis que trustent must suffer the consequences. If an executor, or administrator, or committee of a lunatic, or a guardian of a tender infant has a chose in action properly in his hands belonging to the estate of his cestui que trust, and such personal representative allows time enough to elapse from maturity of the chose to bar a recovery thereon, and he brings an action thereon and fails to recover, his right of action is gone, and with his loss of such right, so goes that of his cestui que trust. So, as to land; if trustees who hold the legal title allow the Statute of Limitations to bar them, or a presumption of a grant to arise, the right of action for the land is barred and their cestuis que trustent are barred also."

In Love v. Love (1880) 65 Ala. 554, wherein it appeared that a person entered property adjoining her own, there being a dispute as to the correct boundary, and held the same openly and exclusively for the required period of time to acquire title by adverse possession, it was held that the trustee and the cestui que trust were both barred from asserting any interest in the property.

In Hibben v. Malone (1908) 85 Ark. 584, 109 S. W. 1008, wherein it appeared that a state issued a certificate of purchase of swamp land before a patent was issued to the state, the purchaser thus acquiring the equitable title, and the state standing in the position of trustee, charged with the duty of issuing a patent at the proper time, it was held that a person holding the land adversely for the prescribed period of time acquired a good title against all parties.

Where a surety on the bond of a trustee purchasing public lands caused the grant from the state to be made out in his name, and entered into and held possession of the land for the time limited, it was held that the trustee and the cestui que trust were both barred by the statute. Blake v. Allman (1860) 58 N. C. (5 Jones, Eq.) 407.

In Maddox v. Allen (1858) 1 Met. (Ky.) 495, it appeared that a testator by his will directed that all his slaves under a certain age should be hired out by his executor, and their hire applied to the support of the old and infirm slaves. In pursuance of this direction a contract was made with the claimants for their hire, but possession of the slaves was retained by the widow and her devisees. The court held that such possession was adverse, and the administrator, who was in this case also a trustee, having failed to bring an action for the recovery of the slaves within the time limited, was barred, and by his neglect he had rendered himself liable to the old and infirm slaves.

Where a trustee allowed slaves, a part of the trust estate, to remain in the possession of the husband of the cestui que trust, who disposed of them by will, and they were afterward sold by his executor, it was held that the purchaser holding the slaves adversely for the period limited acquired a good title as against both the trustee and the cestui que trust. Bryan v. Weems (1856) 29 Ala. 423, 65 Am. Dec. 407.

Where a husband, on the death of his wife, took possession of property held in trust for her and her children, and held it as his own openly and adversely, it has been held that he acquired a good title against both the trustee and the cestuis que trust. Walton v. Ketchum (1898) 147 Mo. 209, 48 S. W. 924.

In Atty.-Gen. v. Federal Street Meeting-House (1854) 3 Gray (Mass.) 1, wherein it appeared that property was conveyed in trust for a religious association worshiping under the doctrines of the Presbyterian faith, and that the congregation later adopted the doctrines of another religious denomination, it was held that long adverse possession of the property after the change in faith gave the pos-

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sessors a perfect title as against the trustees and any members of the congregation, adhering to the Presbyterian faith, and claiming as cestuis que trust.

In Appel v. Childress (1909) 53 Tex. Civ. App. 607, 116 S. W. 129, wherein it appeared that the land in dispute was included in a tract fenced off for grazing purposes, and was later sold by the person so using it, and the purchasers built on it and occupied it as a home for a sufficient length of time to acquire title by adverse possession, it was held that a person claiming title to the land through an executor who held the legal title to the land as executor and trustee, but who had failed to take any action to protect his interest in the land, was barred by the adverse possession.

II. Death of or failure to appoint trustee.

Once the Statute of Limitations begins to run in favor of an adverse holder of trust property, the death of the trustee will not suspend its operation so as to relieve the cestui que trust of the bar. Molton v. Henderson (1878) 62 Ala. 426; McLeran v. Benton (1887) 73 Cal. 329, 2 Am. St. Rep. 814, 14 Pac. 879; Cushman v. Coleman (1893) 92 Ga. 772, 19 S. E. 46; Ewing v. Shannahan (1892) 113 Mo. 188, 20 S. W. 1065; Woolridge v. Planters' Bank (1853) 1 Sneed (Tenn.) 297; Watkins v. Specht (1870) 7 Coldw. (Tenn.) 585.

In Wooldridge v. Planters' Bank (1853) 1 Sneed (Tenn.) 297, supra, the court, holding that the failure to appoint a successor of a deceased trustee did not stop the running of the statute after it had commenced, said: "The statute . . . having commenced running, its operation could not be arrested or suspended otherwise than by a suit in law or equity effectually prosecuted. . . . The death of White in 1844, and the neglect to appoint another trustee in his place, can therefore have no effect in preventing the bar of the statute in the present case, and it is well settled that if a trustee, having the legal title, is barred by operation of the Statute of Limitations, the cestui que trust is also barred though an infant."

However, it has been held that if on the death of the trustee his heirs, who acquire his rights as trustee, are laboring under the disability of infancy, the statute ceases to run until they, or rather any one of them, reaches the age of majority. Clayton v. Rose (1882) 87 N. C. 106; Cameron v. Hicks (1906) 141 N. C. 21, 7 L.R.A. (N.S.) 407, 53 S. E. 728. Thus, in the case first cited, wherein it appeared that after the death of the original trustee, leaving only minor heirs, the life tenant, who was also one of the cestuis que trust, attempted to convey the trust estate, and the purchaser entered into possession. In answer to the contention that he had held the land adversely for a sufficient period of time to acquire a perfect title, the court said: "It is conceded that, where the right of entry is barred and the right of action lost by the trustee or person holding the legal estate through an adverse occupation, the cestui que trust is also concluded from asserting a claim to the land. . . . And the correlative must be accepted that when the trustee is not barred, neither can the cestui que trust be, since as against strangers they are identified in interest. The alleged hostile possession by the defendant began after the death of the original trustee, and when the legal estate had descended, clothed with the trust, to his infant children; and this disability prevents the statute from starting to run to their prejudice."

But, if any one of several cotrustees is free from disability, the disability of the others will not stop the running of the statute. Thus, in Cameron v. Hicks (N. C.) supra, wherein it appeared that one of the infant heirs of the original trustee reached her majority at a period of more than twenty-one years before the beginning of the action, and one month and eleven days thereafter married, it was held that during this period, she being under no disability, the statute began to run, even though there were other trustees who were still infants; nor did the fact that she acquired a subse-

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quent disability by her marriage stop the statute.

It has been held that where the adverse possession commenced after the death of the trustee, there being no other person with title against which limitations could run, the adverse possession for the statutory period could not ripen into title. Jones v. Rountree (1912) 138 Ga. 757, 76 S. E. 55, wherein it was said: "If it began to ripen in his lifetime, under the ruling in Cushman v. Coleman (1893) 92 Ga. 772, 19 S. E. 46, his death alone would not suspend its operation, unless for some reason expressly declared by law. But that decision did not change the general rule that, if there is no person in life against whom prescription can commence to run, it cannot be begun and ripened against a dead trustee, so as to affect a beneficiary in contingent remainder, with no right of entry, possession, or recovery of possession during the continuance of the life estate."

However, it has been held that even though no trustee was named in a will creating a trust estate, nor anyone appointed by order of court, title by adverse possession could be acquired as against the cestui que trust. Maus v. Maus (1876) 80 Pa. 194, wherein it appeared that a purchaser of trust property at a void sheriff's sale took possession, and held it adversely for the required period of time. The court, holding that as the cestuis que trust could have had a trustee appointed, and then compelled him to take the necessary steps to protect their interest, their failure to do so barred them, said: "As the testator named no trustee of this trust, it was one to be filled by the proper court, on application of any of the parties in interest. By the terms of the will, the trustee (on his appointment) would have a power to enter on the land and take the rents, issues, and profits, in order to create the trust fund contemplated for the brothers in necessitous circumstances. This being so, it was in the power of anyone having an interest in the estate to procure the appointment of a trustee, and then compel him to enter, if an entry be necessary to bar the Statute of Limitations, against a stranger who had entered into possession. Smilie v. Biffle (1845) 2 Pa. St. 52, 44 Am. Dec. 156. Had there been an existing trustee at the death of Elizabeth Maus, that case is a direct authority that not only the legal estate, but the trust itself, would be barred by the statute, unless entry be made in time to bar the statute. But the fact that there was no existing trustee could make no difference in the case, for the power to fill the trust by appointment being plenary, and at the will of the persons in interest, they stood in a position to be visited by their own laches, as much as if there was a trustee. Not only the surviving brothers, after the death of Elizabeth, whose interest was most immediate, but any of the testator's lawful heirs, whose interest was direct, though more distant in the time of enjoyment, would have the power to procure the appointment of a trustee, and to compel him to enter into possession, to save the estate from the bar of the statute."

III. Disability of cestui que trust.

The rule that, where a trustee holding the legal title is barred by adverse possession from asserting his rights in the trust estate, the cestui que trust is also barred, is equally applicable whether the cestui que trust is sui juris, or is laboring under a disability such as coverture, infancy, insanity, etc. Thus, in Wingfield v. Virgin (1874) 51 Ga. 139, wherein it appeared that certain property conveyed by a husband in trust for his wife and her children was afterwards conveyed by a void deed given by the husband, as trustee for the wife, to a third party, who held it for the requisite period to acquire title by adverse possession, it was held that, as the actual trustee had stood by and allowed the trust property to be entered and possessed adversely, he was barred from bringing an action to recover it, and so likewise were the infant cestuis que trust. In this case the court said: "When the legal title to the property is vested in a trustee who can sue for it, and

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fails to do so within the time prescribed by law, and his right of action is barred, the infant cestuis que trust, who have only an equitable interest in the property, will be also barred; but when the legal title to the property is vested in the infants, or cast upon them by operation of law, then the statute does not run against them during their infancy. In the case before us, the legal title to the property in controversy never was in complainants, and could not be until the death of Weems, their father; and therefore Wylie's title by prescription was good as against Wingfield, the trustee, who had the legal title to the property, and, he being barred from recovering the possession of it, the complainants, his infant cestuis que trust, are also barred."

The reason of the rule is that, as the trust exists only as between the trustee and the cestui que trust, public policy forbids that the exceptions contained in the Statute of Limitations should be ingrafted on it. Molton v. Henderson (1878) 62 Ala. 426; Wych v. East India Co. (1734) 3 P. Wms. 309, 24 Eng. Reprint, 1078. In the case last cited it was said: "The administrator during the infancy of the plaintiff had a right to sue; and though the cestui que trust was an infant, yet he must be bound by the trustee's not suing in time; for I cannot take away the benefit of the Statute of Limitations from the company, who are in no default, and are entitled to take advantage thereof as well as private persons, since their witnesses may die, or their vouchers be lost. And as to the trust, that is only between the administrator and the infant, and does not affect the company."

In Crook v. Glenn (1869) 30 Md. 55, the court, after quoting with approval the case of Wych v. East India Co. (Eng.) supra, said: "The reasoning of that case applies with full force to this; and though it was a case in which the rights of an infant were concerned, still the principle of it is equally applicable to the case of a feme covert. The trustee being competent, and having the right to sue, but failed to do so, and allowed a period of time to elapse greater than that prescribed for limiting the right of entry at law in cases of legal title, without any recognition of the rights of the cestuis que trust on the part of those holding the possession, the bar was complete at the time of the institution of this suit; and, if the right were otherwise clear, this defense of lapse of time would be fatal to the claim of the appellants."

And in McLeran v. Benton (1887) 73 Cal. 329, 2 Am. St. Rep. 814, 14 Pac. 879, wherein it appeared that the executor was deprived of the possession of the property by order of court, it was held that the adverse possession of the defendants barred not only the executor, but also the infant heirs. On this point the court said: "The executors took possession of the property, and retained the same until put out by the sheriff, under order of the court, made in the action for divorce and division of the property. If the entry of the defendants was wrongful, the devisees of Harmon could not maintain an action, for that right existed exclusively in the executors, who in all suits for the benefit of the estate, represented both the creditors and the heirs. . . . It would seem to follow, therefore, that when the executor is barred of his action the heir is barred, although the heir or devisee be laboring under a disability. . . . The general rule is that, when a trustee is barred by the Statute of Limitations, the cestui que trust is likewise barred, even though an infant . . . and that the heir or devisee is dependent upon the diligence of the executor for the maintenance of his rights with respect to the real property; but is not without a remedy by an action for damages against his executor and his sureties, or by a proper proceeding to compel him to bring suit."

And in Thompson v. Carmichael (1888) 122 Pa. 478, 15 Atl. 867, the court, holding that as the cestui que trust, though laboring under the technical disability of coverture, was really under no disability in so far as the enforcement of her rights in that case was concerned, the trustee

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having the sole right to sue, said: "The legal title was in the trustee of Phœbe Thompson. Both he, and she through him, had a remedy at law to assert and maintain her rights. The possession of John Carmichael under the deed of 1858 was a disseisin of the trustee, and being kept up for twenty-one years it ripened into a perfect title. So far as Phœbe was concerned, she was really under no disability; she could look to her trustee, and through him regain her lost possession within the proper time."

In Meeks v. Olpherts (1880) 100 U. S. 564, 25 L. ed. 735, affirming (1874) 3 Sawy. 206, Fed. Cas. No. 9,393, it appeared that the adverse holder acquired possession through a void administrator's sale, and held such possession beyond the time specified by statute (§ 190 of the Probate Act) in which such a sale might be attacked. It was insisted by the heirs that they were not barred by the failure of the administrator to bring suit within the required time, as they were protected by the saving clause in the statute (§ 191), making it inapplicable to minors "or others under any legal disability to sue" at the time when the right of action first accrued. Holding that the right of action was in the administrator, and not in the heirs, and that, therefore, they did not come within the saving clause, the court said: "As the plaintiff in this case claims title as heir and by purchase from other heirs of the decedent, and brings his suit sixteen years after an administrator's sale sanctioned by a probate court, it would seem at first blush that the case came within the provision of the first section. Counsel for plaintiff, however, has argued with much earnestness and force: 1. That no suit could be brought by the heirs, or anyone claiming through them, until the order of distribution was made, because until that time, or until administration was closed, the right of possession was in the administrator. 2. That until then the heirs were under a disability which, by § 191, protected their right of action from the operation of § 190. The first proposition, and, indeed, the argument of the learned counsel, concedes that, by virtue of the statutes of California, the real estate of a person dying intestate comes to the possession and control of his administrator as personal property does, and that while the administrator can only sell real estate upon an order of the probate court, the possession and control, the reception of the rents and profits, and the right to sue to recover possession of it when held adversely, belong solely to the administrator. . . . While it must be conceded that no right of action existed in the heirs of Harlan until the order of distribution, the reason of this is that the right of action to recover possession of the lots wrongfully held under the invalid probate sale was in the administrator. He was the representative of the rights of the heirs and of the creditors of the estate and, as such, had the same power to sue for and recover the lot as if he had been the intestate himself. Not only was it his right, but it was his exclusive right and his duty. For any failure to perform this duty he laid himself liable to the heirs, or anyone else injured by that failure. . . . The legal disability mentioned in § 191 manifestly has reference to a well-known class of persons in whom a right to redress exists, but who for special reasons are incapable of acting for themselves; such as infancy, coverture, and the like. Whatever is a disability under the general Statute of Limitations is a disability under this statute. Section 352 of the Code of Civil Procedure of California describes this class, among which are minors, femes covert, insane persons, and persons imprisoned, and it describes them as persons entitled to bring an action. The disability cannot have reference to a person in whom no right of action exists. Such use of the term 'disability' is without support in reason or precedent. The right of action on the title which the plaintiff now asserts was in the administrator, and the statute, therefore, ran against him and against all whose rights he represented. 'In all suits for the benefit of the estate he represents both the creditors and the heirs,' said the supreme court in Beckett v. Sel-

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over (1857) 7 Cal. 215, 68 Am. Dec. 237. Whatever doubt may have existed at one time on the subject, there remains none at the present day that, whenever the right of action in the trustees is barred by the Statute of Limitations, the right of cestui que trust thus represented is also barred."

And in Benbow v. Levi (1897) 50 S. C. 120, 27 S. E. 655, the court, holding that the disability of coverture under which the cestui que trust was laboring could not protect her, said: "We cannot see that the fact that Mrs. Ann R. Benbow was under the disability of marriage affects this question. Legal title was never in her, but it was in her husband. She had the right to use the lands during life and widowhood. She had the right, even as a married woman, to apply to the court of equity from 1st January, 1869, to 1st March, 1895, when her husband died, to protect her right to the use of said lands. It was to recover this power for her that P. G. Benbow brought his two actions against H. B. Richardson. She is bound by his failure."

In Nelson v. Ratliff (1895) 72 Miss. 656, 18 So. 487, wherein it appeared that the adverse holder acquired possession through purchase at a void foreclosure sale, it was held that the trustee, by his neglect to bring an action for the recovery of the land within the proper time, was barred, and, under the rule that when the trustee holding the legal title is barred the cestui que trust, though an infant, is also barred, which was embodied in a statute enacted in 1880 (Miss. Code 1880, § 2694), the infant grandson of the creator of the trust could not maintain an action for the recovery of his interest in the land. But see, to the contrary, Bacon v. Gray (1851) 23 Miss. 140, which, however, was decided prior to the enactment of the statute, at which time the contrary rule seems to have prevailed in Mississippi.

However, it is only in cases where the full legal title is held by the trustee that the holder of the equitable title who is under disability is barred by the bar against the trustee. Collins v. McCarty (1887) 68 Tex. 150, 2 Am. St. Rep. 475, 3 S. W. 730, wherein the rule was stated as follows: "To debar the owner of the equitable title from a right of action, the legal title must be fully barred. This cannot be effected except through the laches of the one in whom that title is fully vested. The neglect of an administrator or guardian to bring suit in proper time cannot, therefore, prejudice the title of the ward or heir who is under disability, and against whom, therefore, the Statute of Limitations cannot run. But when the full legal title is vested in a trustee, to be held for the sole use and benefit of another, and subject to no other consideration except that it shall be conveyed to such other person on demand, when suit by the grantee is barred, the full legal title is barred, and, according to well-established principles, the legal estate being barred, the equitable estate is also. Whether there may not be sound reasons for an opposite doctrine we shall not pause to consider. The principle seems thoroughly embedded in the jurisprudence of this country; and, being supported by reasoning which is persuasive of its correctness, we feel disposed to give it our sanction and keep within the line of the authorities. But it cannot be extended beyond the case made, and those to which the principles announced are precisely applicable. . . . It cannot affect the rights of a person laboring under disabilities when the cause of action arose, if at that time the legal title existed in him, though the control of the property was intrusted to another nor to a case when the cause of action arose from any breach of trust on the part of the trustee other than the mere failure to sue within the period of limitation."

And in Wiess v. Goodhue (1904) 98 Tex. 274, 83 S. W. 178, it was held that where, on the death of one spouse, the community property passed by will, with one half to the surviving spouse and one half to the children, the surviving spouse being made executor and given control of the entire estate, a trespasser going into possession of the property, and holding the same ad-

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versely for a period of time sufficient to acquire title, could defeat an action by the executor in so far as his half of property was concerned; but as to the half willed to the children, the legal title was in them, and not in the executor as trustee, and so, if under disability, the statute would not run against them.

In each of the following cases a cestui que trust, though laboring under the disability of infancy, was held to be barred by adverse possession against his trustee:

England. — Earl v. Huntingdon (1719) 3 P. Wms. 310, 24 Eng. Reprint, 1078; Wych v. East India Co. (1734) 3 P. Wms. 309, 24 Eng. Reprint, 1078; Pentland v. Stokes (1814) 2 Ball & B. 75.

California. — McLeran v. Benton (1887) 73 Cal. 329, 2 Am. St. Rep. 814, 14 Pac. 879; Patchett v. Pacific Coast R. Co. (1893) 100 Cal. 505, 35 Pac. 73.

Georgia. — Pendergrast v. Foley (1850) 8 Ga. 1; Worthy v. Johnson (1851) 10 Ga. 358, 54 Am. Dec. 393; Wingfield v. Virgin (1874) 51 Ga. 139; Brady v. Walters (1875) 55 Ga. 25; Knorr v. Raymond (1884) 73 Ga. 749; Crawley v. Richardson (1886) 78 Ga. 213; Salter v. Salter (1887) 80 Ga. 178, 12 Am. St. Rep. 249, 4 S. E. 391; McCrary v. Clements (1895) 95 Ga. 778, 22 S. E. 675.

Illinois.—Waterman Hall v. Waterman (1906) 220 Ill. 569, 4 L.R.A.(N.S.) 776, 77 N. E. 142.

Kentucky.—Edwards v. Woolfolk (1856) 17 B. Mon. 376; Barclay v. Goodloe (1885) 83 Ky. 493; Stillwell v. Leavy (1886) 84 Ky. 379, 1 S. W. 590; Willson v. Louisville Trust Co. (1898) 102 Ky. 522, 44 S. W. 121.

Maryland. — Weaver v. Leiman (1880) 52 Md. 708.

Mississippi. — Nelson v. Ratcliff (1895) 72 Miss. 656, 18 So. 487.

Missouri. — Ewing v. Shannahan (1892) 113 Mo. 188, 20 S. W. 1065; Walton v. Ketchum (1898) 147 Mo. 209, 48 S. W. 924.

North Carolina.—Blake v. Allman (1860) 58 N. C. (5 Jones, Eq.) 407; Kirkman v. Holland (1905) 139 N. C. 185, 51 S. E. 856; Wellborn v. Finley (1859) 52 N. C. (7 Jones, L.) 228.

Tennessee. — Williams v. Otey (1847) 8 Humph. 563, 47 Am. Dec. 632; Goss v. Singleton (1858) 2 Head, 67; Wooldridge v. Planters' Bank (1853) 1 Sneed, 297.

Utah.—Jenkins v. Jensen (1901) 24 Utah, 108, 91 Am. St. Rep. 783, 66 Pac. 773.

But it has been held that an infant cestui que trust was not barred from bringing suit to recover the trust property, where it appeared that the adverse possessor acquired the property through a bill of sale from the trustee, the court basing its opinion on the theory that the trustee was estopped by his bill of sale from bringing suit to recover the property, and consequently, there being no right of action in the trustee, the statute did not run. Parker v. Hall (1859) 2 Head (Tenn.) 641.

But see Williams v. Otey (1847) 8 Humph. (Tenn.) 563, 47 Am. Dec. 632, wherein it was held that, even though a trustee exceeded his authority in selling the trust property, the purchaser could acquire a perfect title by holding the property adversely for the time limited, and that the trustee, by his failure to sue until the Statute of Limitations had run, being barred, the cestui que trust was also barred, though laboring under the disability of infancy.

And in Hunter v. Hunter (1902) 63 S. C. 78, 90 Am. St. Rep. 663, 41 S. E. 33, the court, without any discussion of the point, held that a purchaser of land from an executrix holding land in trust could not acquire title by adverse possession against the cestuis que trust where some of them were minors.

And in Merriam v. Hassam (1867) 14 Allen (Mass.) 516, 92 Am. Dec. 795, although it appeared that the cestui que trust was under no disability, the court, in stating the general rule, included as one of the prerequisites for its operation the want of disability on the part of the cestui que trust. The rule here was set out as follows: "Where the trustee sells the trust estate to a purchaser for value, with warranty, and without any intimation in the deed of conveyance of

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a subsisting trust, and the vendee enters and occupies the estate, doing no act which recognizes in any manner the existence of the trust, and there is no fraud or concealment, and the cestui que trust is under no disability, the possession must be regarded as adverse, both to the trustee and the cestui que trust; and the time which would bar the legal right is equally effectual to bar the equitable right."

Likewise, in Allen v. Sayer (1699) 2 Vern. 368, 23 Eng. Reprint, 832, wherein it appeared that a stranger had entered on an infant's trust estate and levied a fine, and the trustee had failed to bring an action of ejectment within the time limited, it was held that the fine and nonclaim did not run against the infant during his minority, and that he was not barred by the laches of his trustee.

And in the following cases it was held that the disability of coverture would not operate to save the cestuis que trust from the bar of the statute, where their trustee was barred: Chase v. Cartwright (1890) 53 Ark. 358, 22 Am. St. Rep. 207, 14 S. W. 90; Crook v. Glenn (1869) 30 Md. 55; Herndon v. Pratt (1862) 59 N. C. (6 Jones, Eq.) 327; Thompson v. Carmichael (1888) 122 Pa. 478, 15 Atl. 867. And in Smilie v. Biffle (1845) 2 Pa. St. 52, 44 Am. Dec. 156; Benbow v. Levi (1897) 50 S. C. 120, 27 S. E. 655; Collins v. McCarty (1887) 68 Tex. 150, 2 Am. St. Rep. 475, 3 S. W. 730; Appel v. Childress (1909) 53 Tex. Civ. App. 607, 116 S. W. 129.

In Molton v. Henderson (1878) 62 Ala. 426, wherein it appeared that the purchaser of certain land held in trust for the support of an insane person, under a judicial sale afterward declared void, had occupied the land so purchased adversely for the period of time sufficient to raise the statutory bar, it was held that both the trustee and cestui que trust were barred from disputing the title, and the fact that the cestui que trust was laboring under the disability of insanity did not stop the running of the statute. On this point the court said: "It would be a strange anomaly, if the statute would clothe the adverse possessor with the legal estate, which he acquires and holds and asserts in hostility to the equitable estate, and yet subject the legal estate to be defeated by that equitable estate. As to equitable estates, the statute would be shorn of all strength, and they would remain a cloud on the alienation of the legal estate, narrowing the sphere of the operation of the Statute of Limitations, and subjecting the possessor to the perils of injury, from the sense of security a long and open possession naturally begets, and which the law intends to inspire and encourage. On principle and authority, therefore, we must say the fact the appellee was non compos mentis, and yet so remains, cannot prevent the operation of the general rule to which we have referred. If his trustees have been negligent in asserting the legal title, the law affords him remedies against them, which are without the operation of the statute. These remedies, if he has been wronged, he must pursue."

IV. Cestui que trust also remainderman.

Where a remainder is held in trust, an adverse possession against the trustee will also be effective as against cestuis que trust. Meeks v. Olpherts (1880) 100 U. S. 564, 25 L. ed. 735; Gindrat v. Western R. Co. (1892) 96 Ala. 162, 19 L.R.A. 839, 11 So. 372. And see the reported case (CRUSE v. KIDD, ante, 36); Chase v. Cartright (1890) 53 Ark. 358, 22 Am. St. Rep. 207, 14 S. W. 90; Dean v. Central Cotton Press Co. (1880) 64 Ga. 670; Ford v. Cook (1884) 73 Ga. 215; Waterman Hall v. Waterman (1906) 220 Ill. 569, 4 L.R.A.(N.S.) 776, 77 N. E. 142; Edwards v. Woolfolk (1856) 17 B. Mon. (Ky.) 376; King v. Rhew (1891) 108 N. C. 696, 23 Am. St. Rep. 76, 13 S. E. 174; Cameron v. Hicks (1906) 141 N. C. 21, 7 L.R.A.(N.S.) 407, 53 S. E. 728; Waring v. Cheraw & D. R. Co. (1881) 16 S. C. 416; Watkins v. Specht (1870) 7 Coldw. (Tenn.) 585.

In Watkins v. Specht (Tenn.) supra, the rule was stated as follows: "A person entitled to a legal estate in remainder is not barred by an adverse possession, accruing and continuing only during the particular estate; for his right to the possession, and his

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right of action, do not accrue until the determination of the particular estate. But, in the case where the entire legal estate in fee is vested in a trustee, the legal right of possession and right of action is in the trustee, and not in the cestui que trust, and the action to recover the possession must be in the name of the trustee: . . . There is no right to sue at law for the recovery of the possession, either in the tenant of the equitable life estate, or the person entitled to the equitable remainder. Both are represented by the trustee of the legal estate, and both are barred by such adverse possession as will bar the legal estate of the trustee."

And in Edwards v. Woolfolk (1856) 17 B. Mon. (Ky.) 376, supra, wherein it appeared that the adverse holder entered into possession under a deed from the husband of the life tenant, the court, holding the remaindermen, whose interests were also covered by the trust, to be barred by the adverse possession, said: "But is the equitable right of those who are entitled in remainder, as well as that of the tenant for life, defeated in consequence of the right of action of the trustee being barred by the Statute of Limitations? The trustee holds the legal title in fee as well for the benefit of the particular estate as the estate in remainder. When his legal right is barred, both estates are thereby clearly affected, and it is difficult to perceive any ground upon which the estate in remainder can be withdrawn from the operation of the statute. A right of action exists in the trustee for the benefit of both estates; and in this respect there is a clear distinction between a case of this kind, and that where the legal title to the estate is in the tenant for life and also in the remainderman. In the latter case, the cause of action does not accrue until the estate for life is determined. But in the former, it exists, not only in the trustee, but also in the holder of the equitable title in remainder, who may bring an action in equity to re-establish his right from the first moment of the breach of trust, or as soon as the trust property has come into the hands of a stranger, who holds it in opposition to the trust."

And in Chase v. Cartright (1890) 53 Ark. 358, 22 Am. St. Rep. 207, 14 S. W. 90, supra, it was said: "The executors had no beneficial interests in the property, but, holding the legal title to the fee in trust, they were trustees for all persons who had equitable interests carved out of the fee, whether in possession or in remainder. If the conveyance by Cannavan was void, and the grantees entered under it, a right then accrued to the executors to dispossess them, and, being trustees of an express trust, they could have sued in their own names."

In Gindrat v. Western R. Co. (1892) 96 Ala. 162, 19 L.R.A. 839 11 So. 372, supra, wherein it appeared that a tenant for life, under a deed creating a trust estate for the life tenant with remainder to children then unborn, had improperly conveyed the trust estate, the court held that, the remainder being contingent and therefore subject to the operation of the trust, an adverse possession against the trustee was effective against the contingent remaindermen. On this point it was said: "In such case, the trustee would have active duties to perform in the protection of the contingent remainder, and would hold the legal title in trust for the remaindermen, and to become vested in them as they come into being. The trustee is thus the representative of the tenants in remainder. There is a privity between them and him. In the protection of their contingent interest he may interpose during the life estate, if need be, and to any extent necessary to that end. He has a right of entry in case of any wrongful alienation by the tenant for life, or whenever his estate for life determines in his lifetime by any other means than alienation. And being thus in privity with the remaindermen, and representing them for the preservation of the remainder, until the happening of the condition upon which it is to vest, his laches is the laches of the tenants in remainder; acquiescence by him binds them, and adverse possession against him bars

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their right of entry. In the case at bar, the possession of the defendant and those under whom it claimed was such a destruction of the life estate, while the tenant of that estate was still alive, as entitled the trustee to enter for the preservation of the contingent remainders, which otherwise would be also destroyed by reason of the intervening estates not continuing up to the time they were to vest; and he, having a right of action, is barred of its assertion after the lapse of ten years from the inception of defendant's possession in the latter part of July, 1845."

However, where the entire legal estate and the sole right to sue is not in the trustee, the rule does not apply. Moseley v. Hankinson (1886) 25 S. C. 519; Doe ex dem. Williams v. Driscoll (1858) 9 N. B. 176. M. B.

DALLIE L. RILEY, Appt.,
v.
INTERSTATE BUSINESS MEN'S ACCIDENT ASSOCIATION.

Iowa Supreme Court — November 22, 1918.

(— Iowa, —, 169 N. W. 448.)

Insurance — accident — death from poison.

No recovery can be had for death from strychnine mixed in some unaccountable way, without the knowledge of insured, in medicine which he took, under an accident policy relieving the insurer from liability for death resulting from poison voluntarily or involuntarily taken.

[*See note on this question beginning on page* 61.]

APPEAL by plaintiff from a judgment of the District Court for Linn County in favor of defendant in an action brought to recover the amount alleged to be due on an accident insurance policy. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Edwards, Longley, Ransier, & Smith and **Fourtellot, Donnelly, & Swab** for appellant.

Messrs. **Dunshee, Haines, & Brody,** for appellee:

The excepting clause with reference to the taking of poison is all-inclusive, and the facts bring the case within the exception.

Riley v. Interstate Business Men's Acci. Asso. — Iowa, —, 152 N. W. 617; Kennedy v. Ætna L. Ins. Co. 31 Tex. Civ. App. 509, 72 S. W. 602; Cole v. Accident Ins. Co. 61 L. T. N. S. 227; Fidelity & C. Co. v. Waterman, 161 Ill. 632, 32 L.R.A. 654, 44 N. E. 283; Paul v. Travelers' Ins. Co. 112 N. Y. 472, 3 L.R.A. 443, 8 Am. St. Rep. 758, 20 N. E. 347; Pickett v. Pacific Mut. L. Ins. Co. 144 Pa. 79, 13 L.R.A. 661, 27 Am. St. Rep. 618, 22 Atl. 871; Kasten v. Interstate Casualty Co. 99 Wis. 73, 40 L.R.A. 651, 74 N. W. 534; Fidelity & C. Co. v. Loewenstein, 46 L.R.A. 450, 38 C. C. A. 29, 97 Fed. 17; Porter v. Preferred Acci. Ins. Co. 109 App. Div. 103, 95 N. Y. Supp. 682, affirmed in 186 N. Y. 599, 79 N. E. 1114.

The excepting clause with reference to the administering of poison is all-inclusive, and the facts bring the case within the exception.

Early v. Standard Life & Acci. Ins. Co. 113 Mich. 58, 67 Am. St. Rep. 445, 71 N. W. 500; State v. Moothart, 109 Iowa, 133, 80 N. W. 301; State v. Stafford, 145 Iowa, 285, 123 N. W. 167.

The injury was occasioned by medical treatment.

Westmoreland v. Preferred Acci. Ins. Co. 75 Fed. 244; Flint v. Travelers' Ins. Co. — Tex. Civ. App. —, 43 S. W. 1079; Travelers' Ins. Co. v. Murray, 16 Colo. 296, 25 Am. St. Rep. 267, 26 Pac. 774; Vernon v. Iowa State Traveling Men's Asso. 158 Iowa, 597, 138 N. W. 696; Bayless v. Travelers' Ins. Co. 14 Blatchf. 143, Fed. Cas. No. 1,138.

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Stevens, J., delivered the opinion of the court:

This case is before us on a second appeal. A demurrer to plaintiff's petition was sustained by the district court, and judgment entered against plaintiff for costs. Upon appeal, an opinion affirmed the judgment was first filed. — Iowa, —, 152 N. W. 617. Upon rehearing, a different conclusion was reached and the judgment reversed. 177 Iowa, 449, 159 N. W. 203. A substituted petition was then filed, and a trial had upon the merits, resulting in the dismissal of plaintiff's petition and judgment in favor of the defendant for costs. The case was tried upon an agreed statement of facts, from which it appears that the insured, on January 16, 1912, went to a drug store in Germania, Iowa, owned and conducted by one Dr. T. S. Waud, a regularly licensed and practising physician and surgeon, and stated to him that he was still suffering from a bowel trouble, for the alleviation of which he had previously obtained Squibb's cholera mixture, and requested Dr. Waud to mix him up a "hot one," by which the doctor understood him to mean a strong dose of Squibb's cholera mixture. The mixture was poured by the druggist into a graduate, from which the same was drunk by deceased.

It is further stipulated that Squibb's cholera mixture did not contain strychnine, or other drug producing the effect thereof, but that it did contain tincture of opium and chloroform, both of which are poisonous. In less than an hour after taking the mixture, insured went into convulsions and died. It is conceded his death was due to poison from strychnine received in the mixture. The presence of strychnine in the mixture is not accounted for. No claim is made by counsel for appellee that deceased committed suicide, or that he consciously or intentionally took a fatal dose of poison. For defense, defendant relied upon the following, among other provisions of the policy, to wit: "This association shall not be liable to any member of the accident department, nor to any person claiming by, through, or under any certificate issued to a member, for the payment of any benefits or indemnity on account of disability or death resulting from poison voluntarily or involuntarily taken, administered, absorbed, or inhaled. . . ."

Counsel for appellant appear to rely, to some extent, upon our former decision in this case to sustain their claim. Nothing said in our former opinion is in any way inconsistent with what is here said, as is apparent from the following extracts therefrom. In its first opinion, the court proceeded to dispose of the case upon the facts stated in the petition and deemed admitted by the demurrer; but, upon rehearing, the conclusion was reached that the demurrer was improperly sustained by the court, and the judgment reversed. Upon this question the court said: "We add that the demurrer admitted the statement in exhibits that the death was due to accidental poisoning. We should not now decide, and do not, whether accidental poisoning is or is not the voluntary or involuntary taking of poison within the meaning of the provisions of this certificate. We hold the petition does not show affirmatively any of the defeasances upon which appellee relies. We are of opinion that there should be a trial on the petition, and that defendant may thereon show, if it can, that the death resulted from conditions which defeat recovery under the contract." Riley v. Interstate Business Men's Acci. Asso. 177 Iowa, 449, 159 N. W. 203.

Referring to the foregoing exception, the court further said: "The words that single out the voluntary or involuntary taking of poison were put into the contract by the defendant, and it must be assumed they were intended to be effective, and to state the exemptions of defendant to the uttermost extent intended. Therefore, they

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cannot mean that the naked fact of death by poison absolves from liability. It must have been intended there could be some deaths from poison for which defendant is liable. Had it been the intention that the mere fact that death was due to poison defeated recovery, a statement that the defendant was not liable if death so resulted would have been plenary and would have covered any death from poison, no matter how caused. If that was the intent, it is peculiar it should be effectuated by a provision that there should be an exemption if the poison was taken voluntarily or involuntarily, which was merely the stating of part, where all was intended. It follows that an admission which admits no more than that death may have been caused by strychnine is not an affirmative admission that the poison was taken either voluntarily or involuntarily. This follows because, as said, the very language of the contract recognizes that there may be poisoning from poison which was taken neither voluntarily nor involuntarily."

For the purpose of what is here said with reference to the above exceptions, we may assume that the death of the insured was effected solely by external, violent, and accidental means, the contention of counsel for appellee being that insured died from the effect of strychnine poisoning "voluntarily or involuntarily taken" by him, and that no recovery can therefore be had on the policy. Many different clauses in policies providing indemnity for accidental death have been considered by the courts of last resort, but the language used in the exception under consideration appears to have been considered in but few cases.

The supreme court of Illinois, in Travelers' Ins. Co. v. Dunlap, 160 Ill. 642, 52 Am. St. Rep. 355, 43 N. E. 765, in considering a clause in an accident policy providing exemption for liability in case death resulted "wholly or partly, directly or indirectly, from . . . taking poison, contact with poisonous substances, inhaling gas," etc., held that the foregoing language referred to death from poison voluntarily or intentionally taken, and did not include a case where death resulted from accidental poisoning. And again in Metropolitan Acci. Asso. v. Froiland, 161 Ill. 30, 52 Am. St. Rep. 359, 43 N. E. 766, the same court similarly construed the following clause: "I agree that the insurance shall not be held to extend . . . to poison in any way taken, administered, absorbed, or inhaled," and held that the words "in any way taken" related to the mode or manner in which the poison was taken, and not to the motive of the insured in taking it.

In Paul v. Travelers' Ins. Co. 112 N. Y. 472, 3 L.R.A. 443, 8 Am. St. Rep. 758, 20 N. E. 347, the insured met his death from gas escaping into a room in a hotel in which he was sleeping. The poison clause contained in the policy was as follows: "Provided, always, that this insurance shall not extend . . . to any death or disability which may have been caused . . . nor by the taking of poison, contact with poisonous substances, or inhaling of gas. . . ."

The court, in the course of the opinion, said: "But, in expressing its intention not to be liable for death from 'inhaling of gas,' the company can only be understood to mean a voluntary and intelligent act by the insured, and not an involuntary and unconscious act. . . . To hold that the death of plaintiff's intestate was caused by the inhaling of gas, within the meaning of this policy, would be to construe its terms contrary to the usual import of language, and in fact to hold, against the finding, that the death was not accidental."

The supreme court of Pennsylvania, in Pickett v. Pacific Mut. L. Ins. Co. 144 Pa. 79, 13 L.R.A. 661, 27 Am. St. Rep. 618, 22 Atl. 871, construing a similar clause, adopted the same construction. To the same effect see Fidelity & C. Co. v. Lowenstein, 38 C. C. A. 29, 46 L.R.A.

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450, 97 Fed. 17, and Travelers' Ins. Co. v. Ayers, 217 Ill. 390, 2 L.R.A. (N.S.) 168, 75 N. E. 506.

Many more cases of similar import are reported. It will be observed that in each of the above cases the court limited the application of the exception to cases in which the poison or gas was voluntarily taken or inhaled, and declined to give effect thereto, in cases where it was shown that death resulted from the unconscious or involuntary taking of poison, or inhalation of gas. The language of the clause in the case at bar provides exemption from liability from death resulting from poison "voluntarily or involuntarily taken." It is conceded that deceased did not voluntarily or intentionally take poison. Strychnine in sufficient quantity to produce death in some unknown manner got into the mixture which deceased drank from a graduate in the drug store, and was unintentionally taken by him. In Kennedy v. Ætna L. Ins. Co. 31 Tex. Civ. App. 509, 72 S. W. 602, the Texas court of appeals, construing the identical language under consideration, said:

"Death having resulted from the taking of poison, the main contention arises from that portion of the clause which exempts the company from liability for death resulting from the 'voluntary or involuntary taking poison.' The appellant contends that the terms 'voluntary' and 'involuntary,' as used in the policy, do not include the 'accidental' taking of poison. The taking of poison in this instance, being unintentional, was not a voluntary taking, as that term is used in the policy; therefore, the taking was accidental. The taking of poison being accidental, liability would accrue, unless such an accidental taking is excluded by the term 'involuntary.' The definition or meaning of this term, as used, is limited by counsel for appellant to an act that is forced upon one, which he cannot help. It is true that the term embraces that meaning. It, however, as commonly used, has a broader and more comprehensive meaning, and there is nothing in the policy limiting it to the restricted sense contended for by counsel. The term is defined in the Century Dictionary and Cyclopedia as, 'Not voluntary or willing; contrary or opposed to will or desire; independent of volition or consenting action of mind; unwilling; unintentional.' The presence of these very elements in taking the poison is what constitutes the taking accidental. Without these there could be no accident. He did not intend to take poison; he took it by mistake; hence the taking was not willed, but unintentional, and therefore involuntary. One of the definitions given by the Century Dictionary and Cyclopedia of 'voluntary' is 'not accidental.' 'Involuntary' is an antonym of 'voluntary,' and therefore, in this sense, includes 'accidental.'

"It is difficult for us to conceive of a case of taking poison that is not included in either the term 'voluntary' or 'involuntary,' as used in the policy. The usual and ordinary meaning of the terms would include, in one or the other, every manner of taking poison; therefore, we do not feel warranted in giving to them a meaning less restricted than they usually import."

The New York court of appeals in Porter v. Preferred Acci. Ins. Co. 186 N. Y. 599, 79 N. E. 1114, affirmed the holding of the lower court reported in 109 App. Div. 103, 95 N. Y. Supp. 682, that death from gas involuntarily inhaled by deceased while sleeping in a room in a hotel came within the exception of a policy, providing exemption from liability in case death resulted from the "voluntary or involuntary inhalation of any gas or any anaesthetic, ... or injury fatal or nonfatal, resulting from any poison or infection accidentally or otherwise taken, administered, absorbed, or inhaled." As bearing upon the question here presented, attention is also called to the following cases: Early v. Standard Life & Acci. Ins. Co. 113 Mich. 58, 67 Am. St. Rep. 445, 71 N. W.

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500; Pollock v. United States Mut. Acci. Asso. Ins. Co. 102 Pa. 230, 48 Am. Rep. 204; Kasten v. Interstate Casualty Co. 99 Wis. 73, 40 L.R.A. 651, 74 N. W. 534.

There is a long line of authorities in harmony with Paul v. Travelers' Ins. Co. supra, and like cases cited, but the language of the policy involved in none of them was identical with that in the case at bar. As suggested, the basis for the holding in each of this line of cases is that the clause excepting the insurer from liability was designed to cover only cases where the poison was consciously or voluntarily taken. Nothing is contained in any of them to indicate that the conclusion would not have been different if the clause had specifically exempted the insured from liability for death resulting from poison voluntarily or involuntarily taken. The word "involuntary," as defined in Funk & Wagnall's New Standard Dictionary, means: "Lacking will or power to choose; not under the control of the will or volition; taking place independently of one's will or volition; not willed."

Deceased could not have intended to take a fatal dose of strychnine. He did not voluntarily do so. Its presence in the mixture was unknown to him. There was no exercise of the volition of the will in the act of taking the poison, except in so far as the same was a necessary part of the taking of the concoction. The poison was taken independently of his will or volition, and therefore involuntarily. Thus construed, the language employed in the exception contained in the policy is given its usual and ordinary meaning. We cannot, therefore, escape the conclusion that the poison contained in the mixture, and which caused the death of the deceased was involuntarily taken by him, and that the facts bring the case clearly within the exception of the policy, and that no recovery can be had thereon. As what is here said disposes of the case, other questions argued by counsel need not be considered. The judgment of the court below is therefore affirmed.

Insurance—accident—death from poison.

Preston, Ch. J., and **Ladd**, **Gaynor**, and **Evans**, JJ. concur.

ANNOTATION.

Accident insurance: provision exempting from or limiting liability where death or injury results from poison.

I. Where insured took poison by mistake, 61.
II. Where blood poisoning follows accidental injury, 64.
III. Where insured comes in contact with poisonous substance, 65.
IV. Miscellaneous, 66.

Scope.

As appears from the title, this note is confined to cases involving the application of specific policy provisions with respect to death or injury from poison, and is not concerned with cases involving the question whether death or injury from poison falls within other provisions which do not deal specifically with the subject.

Cases involving exemptions from liability in case of death from inhaling gas are excluded.

I. Where insured took poison by mistake.

It will be noted that in the reported case (RILEY V. INTERSTATE BUSINESS MEN'S ASSO. ante, 57), a provision of the accident policy that the insurer should not be liable for the payment of any benefits "on account of disability or death resulting from poison voluntarily or involuntarily taken, administered, absorbed, or inhaled," was held to preclude a recovery for death caused by the insured's taking medicine prepared by a physician, which by mistake contained poison.

The question whether death caused by taking poison by mistake was included within exceptions relating to poison, contained in accident policies, has been considered in a number of

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cases. While the decisions are not altogether in harmony, a part of the apparent conflict in the conclusions reached may be explained by the difference in the phraseology employed in the provisions of the policies.

In the following cases where the insured took poison by mistake, the exceptions indicated were held to include death from such a cause, and a recovery on the policy was therefore denied. McGlother v. Providence Mut. Acci. Co. (1898) 32 C. C. A. 318, 60 U. S. App. 705, 89 Fed. 685 (where the policy provided that it should not cover death "resulting wholly or in part from hernia . . . or disease, or from poison, contact with poisonous substances"); Early v. Standard Life & Acci. Ins. Co. (1897) 113 Mich. 58, 67 Am. St. Rep. 445, 71 N. W. 500) (where it was provided that the policy did not cover death resulting wholly or partly, directly or indirectly, " from any of the following acts, causes, or conditions when affected by any such act, cause, or condition," and among the causes were included "poisons, contact with poisonous substances"); Hill v. Hartford Acci. Ins. Co. (1880) 22 Hun (N. Y.) 187 (where liability was excepted for death "by the taking of poison"); Pollock v. United States Mut. Acci. Asso. (1883) 102 Pa. 230, 48 Am. Rep. 204 (provision that policy should not extend to death or disability which might have been caused "by the taking of poison"); Kennedy v. Ætna L. Ins. Co. (1903) 31 Tex. Civ. App. 509, 72 S. W. 602 (where the policy excepted liability for death "resulting wholly or partially, directly or indirectly, from any of the following causes . . . voluntarily or involuntarily taking poison"); Cole v. Accident Ins. Co. (1887) 61 L. T. N. S. (Eng.) 227 (where there was a proviso that the insurance should not extend to death by poison).

The court in Kennedy v. Ætna L. Ins. Co. (Tex.) supra, said: "It is a general rule of construing insurance policies where there is any ambiguity that renders the terms susceptible of two constructions, to give that construction which is most favorable to the insured, always adhering to the principle that in interpreting contracts the inquiry should be, what obligations the parties intended to assume, giving to the language used its usual signification in connection with the subject-matter and the circumstances under which it was made. Thus construing the contract under consideration, is the company exempted from liability, the deceased having come to his death by unintentionally taking poison? The allegations of the petition show that death was produced by an accident. The policy was issued to cover accidents, and unless the exemption clause is sufficiently broad and comprehensive as to cover such an accident, then the company should be held liable. The courts which have passed upon similar clauses are not in harmony, some of them going to the extreme limit in construing them against the companies. There is no reasonable theory upon which the conflict can be reconciled. We will, therefore, follow that line which, in our opinion, conforms to the well-recognized principles governing the construction of contracts. Death having resulted from the taking of poison, the main contention arises from that portion of the clause which exempts the company from liability for death resulting from the 'voluntary or involuntary taking poison.' The appellant contends that the terms 'voluntary' and 'involuntary' as used in the policy do not include the 'accidental' taking of poison. The taking of poison in this instance, being unintentional, was not a voluntary taking as that term is used in the policy, therefore the taking was accidental. The taking of poison being accidental, liability would accrue unless such an accidental taking is excluded by the term 'involuntary The definition or meaning of this term, as used, is limited by counsel for appellant to an act that is forced upon one, which he cannot help. It is true that the term embraces that meaning. It, however, as commonly used, has a broader and more comprehensive meaning, and there is nothing in the policy limiting it to the restricted sense contended for by counsel. The term is defined in the Century Diction-

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ary and Cyclopedia as: 'Not voluntary or willing; contrary or opposed to will or desire; independent of volition or consenting action of mind; unwilling; unintentional.' The presence of these very elements in taking the poison is what constitutes the taking accidental. Without these there could be no accident. He did not intend to take poison; he took it by mistake; hence the taking was not willed, but unintentional, and therefore involuntary. One of the definitions given by the Century Dictionary and Cyclopedia of voluntary is 'not accidental.' Involuntary is an antonym of voluntary, and therefore, in this sense, includes 'accidental.' It is difficult for us to conceive of a case of taking poison that is not included in either the term 'voluntary' or 'involuntary,' as used in the policy. The usual and ordinary meaning of the terms would include, in one or the other, every manner of taking poison; therefore we do not feel warranted in giving to them a meaning less restricted than they usually import."

And it has been held that death caused by accidentally eating spoiled oysters is clearly within a clause of an accident policy providing that it should not cover injuries resulting from poison, or anything accidentally or otherwise taken or absorbed. Maryland Casualty Co. v. Hudgins (1903) 97 Tex. 124, 64 L.R.A. 349, 104 Am. St. Rep. 857, 76 S. W. 745, 1 Ann. Cas. 252.

In Dezell v. Fidelity & C. Co. (1903) 176 Mo. 253, 75 S. W. 1102, an exception in a policy that it did not cover "injuries, fatal or otherwise, resulting from poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled" was held not to preclude a recovery, it appearing that the insured's death was caused by taking an overdose of morphine which had been prescribed by a physician to relieve pain. The court in this case said: "It will be observed that it is not limited to poison, but extends to 'anything,' and is not confined to poison or anything taken, but includes poison or anything not only taken, but also such as may be administered, absorbed, or inhaled; and that it applies whether the same be accidentally or intentionally done. Literally construed, it would cover everything known to man that would injure or kill, whether taken by the assured himself, or administered to him by a physician, or whether absorbed or inhaled without and in spite of himself or with the aid of anyone else, or as the result of natural laws. It would also cut off recovery where the poison or anything was taken or administered to save life and was given for the best and most scientific reasons, as fully and completely as if it was taken with suicidal intent. If this was the true meaning and intent of the insurer, it ought to have been expressed in such unequivocal and plain words that there could be no misunderstanding its meaning. Instead of employing the negative form of expression and clothing the intention in such general terms, it should have been affirmatively stated that the policy meant that no recovery could be had, unless the physical evidences of the cause of the injury were apparent to the naked eye, and that the company would not pay for any injury unless the gaping wound told its own tale. The better reason supports the rule that such exceptions in such policies do not cover medicine (even though it contain poison) or anything taken or administered in good faith to alleviate physical pain, even though it results in unexpected and unintentional death."

This case was followed in Beile v. Travelers' Protective Asso. (1910) 155 Mo. App. 629, 135 S. W. 497, where the insured died as a result of chloroform administered by a physician preparatory to an operation and, a provision that the policy should not cover injuries, "fatal or otherwise, resulting from any poison or infection, or from anything accidental or otherwise taken, administered, absorbed, or inhaled," was held not to cover medicine, even though it contained poison, or anything taken or administered in good faith to alleviate physical pain, even though it resulted in unexpected and unintentional death.

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And in Mutual Acci. Asso. v. Tuggle (1890) 39 Ill. App. 509, reversed on another point in (1891) 138 Ill. 428, 28 N. E. 1066, where the insured took an overdose of laudanum which caused his death, recovery was sustained, notwithstanding an exception from liability in case of "the taking of poison in any manner," the court stating, in answer to the argument that this clause had been overlooked by the lower court, that although it was not discussed in the opinion they could not assume that it was overlooked.

And in Metropolitan Acci. Asso. v. Froiland (1896) 161 Ill. 30, 52 Am. St. Rep. 359, 43 N. E. 766, affirming (1895) 59 Ill. App. 522, following Travelers' Ins. Co. v. Dunlap (Ill.) infra, a recovery for death resulting from the taking of chloral by mistake for water was held not excluded by a provision that the insurance should "not be held to extend . . . to poison in any way taken, administered, absorbed, or inhaled," it being held that the words "in any way" related to the mode or manner in which the poison was taken, and not to the motive of the insured in taking it.

And in Travelers' Ins. Co. v. Dunlap (1896) 160 Ill. 642, 52 Am. St. Rep. 355, 43 N. E. 765, a provision that the insurance should not cover death or disability from "taking poison" was held not to exclude liability for death caused by taking carbolic acid by mistake for peppermint, such provision being held to mean the voluntary taking of poison, and not to include cases of accidental taking. And it was further held in that case that the exception should not be construed as meaning the accidental taking of poison, on the theory that if the death or injury was not accidental it was not within the scope of the policy, the court stating that it was clear that the exception was something more than an exclusion of what would otherwise be included as accidents, it appearing that the exception also expressly excluded suicide by a sane person, which could not be said to be an accident, and also other causes of death and injury not accidental. And it was also held that the argument was erroneous that the term "taking poison" could not be limited to the intentional taking of poison, for the reason that death so caused was covered by the clause excluding liability in case of suicide, and that to so construe it would give no force to the words "taking poison," the court stating that when the entire provision was considered it was clear that it recognized that death might result from voluntarily taking poison without suicidal intent, and that such death would not be excepted by the suicide clause.

II. Where blood poisoning follows accidental injury.

A situation, which in a number of cases has given rise to the question whether an exclusion in an accident policy of liability for injury from poison, etc., prevents a recovery, has arisen where blood poisoning ensued as a result of an accidental injury.

In the following cases, where death resulted from blood poisoning following an accidental wound, it was held that the blood poisoning was not an injury within the meaning of the exceptions indicated, the theory being that the death in such cases was the result of the wound, and that the infection was merely an incident to the original injury. Central Acci. Ins. Co. v. Rembe (1906) 220 Ill. 151, 5 Ann. Cas. 155, 5 L.R.A.(N.S.) 933, 110 Am. St. Rep. 235 (where the provision was "taking of poison, or contract with poisonous substances"); United States Health & Acci. Ins. Co. v. Harvey (1906) 129 Ill. App. 104 (where the provision limited liability in cases of "poison or infection"); Simpkins v. Hawkeye Commercial Men's Asso. (1910) 148 Iowa, 543, 126 N. W. 192 (where liability was excepted for injuries "from the intentional taking of poison, and from contact with poisonous substances"); Omberg v. United States Mut. Acci. Asso. (1897) 101 Ky. 303, 72 Am. St. Rep. 413, 40 S. W. 909 (where the policy excluded liability for injuries or death "from poison in any form or manner," or "from contact with poisonous substances"); Garvey v. Phœnix Preferred Acci. Ins. Co. (1908) 123 App. Div. 106, 108 N. Y.

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Supp. 186 (where there was a limitation of liability in the event of injuries or disability resulting directly or indirectly from poison or infection); Cary v. Preferred Acci. Ins. Co. (1906) 127 Wis. 67, 5 L.R.A.(N.S.) 926, 115 Am. St. Rep. 997, 106 N. W. 1055, 7 Ann. Cas. 484 (where there was an exemption of liability for injuries "resulting from any poison or infection, or from anything accidentally or otherwise taken, administered, absorbed, or inhaled").

And in Ballagh v. Interstate Business Men's Acci. Asso. (1915) 176 Iowa, 110, L.R.A.1917A, 1050, 155 N. W. 241, it was held that full liability on an accident policy could not be avoided in case of death from blood poisoning, resulting from infection of a wound which was within the terms of the policy, because of a provision that there should be no liability for death resulting from infection, except that whenever, as a direct result of an injury, the skin should be abraded, and there should be introduced into the system through the abrasion, and by the instrument causing it, any specific facteria which should produce blood poisoning, the insurer's liability should be a percentage of the face of the policy.

In Finucane v. Standard Acci. Ins. Co. (1918) 184 App. Div. 280, 171 N. Y. Supp. 1018, where a policy insuring against death resulting directly or indirectly, exclusively and independently of all other causes, from accidental bodily injuries, contained a provision for limited liability, "where either the injury causing the loss or the loss itself results from or is contributed to by any poison, disease, infection," etc., this provision was held to apply only to poison, disease, or infection from which the insured was suffering prior to and at the time of an accident, and not to be applicable where the insured accidentally struck her leg and caused an abrasion of the skin which became infected, and resulted in blood poisoning and death.

In Farner v. Massachusetts Mut. Acci. Asso. (1907) 219 Pa. 71, 123 Am. St. Rep. 621, 67 Atl. 927, where the policy insured against accidental injuries resulting in death, and also provided for indemnities in case of certain sicknesses, and provided that all cases of "contact with poison or poisonous or infectious substances are covered only under the health provisions of this policy," it was held that the policy was prima facie an accident policy, and that the insured's death, which resulted from poisonous inoculation, due to the bite of a dog, was proximately due to the bite, and that recovery should therefore be allowed under the accident provisions of the policy.

And where a policy provided that "in the event of any claim arising under this policy (irrespective of its cause) due directly or indirectly, wholly or in part, to sunstroke, peritonitis, . . . blood poisoning, . . . then and in all such cases benefits shall be paid solely under illness benefits, as provided under clause 5 of this policy; except that in the event of claim arising, due to infection or blood poisoning following immediately after and as a direct result of accident, such infection or poisoning having its inception while insured is under the care of a physician, then, in such case, benefits shall be paid under accident benefits," as provided in designated clauses, it was held, it appearing that the insured died of peritonitis, resulting from infection, which in turn was caused by an accident and followed immediately thereafter and as a direct result of it, that accident benefits might be recovered. Pacific Mut. L. Ins. Co. v. McCabe (1914) 157 Ky. 270, 162 S. W. 1136.

In Gertz v. Clover Leaf Casualty Co. (1916) 197 Ill. App. 462, it is stated in an abstract of the opinion that, under a policy of accident and health insurance, which provided for a payment in case of death from sickness, a provision that disability from ulcers and blood poisoning should be classified as sickness excluded any claim for payments for accidental death from an ulcer of the foot, alleged to have been due to blood poisoning as the result of coal striking the foot.

III. Where insured comes in contact with poisonous substance.

In Railway Mail Asso. v. Dent

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(1914) L.R.A.1915A, 314, 130 C. C. A. 387, 213 Fed. 981, affirming (1910) 183 Fed. 840, the insured's death, which was due to his contact with poison ivy, which resulted in the spread of an eruption over his whole body, was held not due to poison or other injurious matter "taken or administered," accidentally or otherwise.

But in Preferred Acci. Ins. Co. v. Robinson (1908) 45 Fla. 525, 61 L.R.A. 145, 33 So. 1005, 3 Ann. Cas. 931, under a policy providing that, subject to all of the provisions and conditions therein, it insured against the effects of bodily injury caused solely by external, violent, and accidental means, and further providing that it did not cover an injury "resulting from any poison or infection, or from anything accidentally or otherwise taken, administered, absorbed, or inhaled," it was held that there could be no recovery for an injury to the insured's eye from poison absorbed by accidentally coming in contact with poison ivy, since such injury came within the exception.

And in Kasten v. Interstate Casualty Co. (1898) 99 Wis. 73, 40 L.R.A. 651, 74 N. W. 534, where the accident policy contained a condition that the liability of the insurer should not extend to injuries, fatal or otherwise, resulting wholly or in part from poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled, it was held that death caused by blood poisoning, from the effects of absorption of septic poisoning from germs in cotton inserted by a dentist to stop hemorrhage was clearly within the condition, and precluded a recovery on the policy.

In Bacon v. United States Mut. Acci. Asso. (1887) 44 Hun (N. Y.) 599, an exception in an accident policy that it "shall not extend . . . to any death or disability which may have been caused wholly or in part . . . by poison in any manner or form," was held not to include death from blood poisoning which was due to malignant pustule, communicated from the skin or bodies of animals, the expression "death by poison" being well understood in the ordinary language, and not extending to such a case.

IV. Miscellaneous.

In Miller v. Fidelity & C. Co. (1899) 97 Fed. 836, where the insured died from injuries sustained by swallowing hard, pointed, and resistant substances of food, which perforated his intestinal canal, it was held that recovery was not excluded by a provision of the policy that it should not cover injuries "resulting from poison, or anything accidentally or otherwise taken, administered, absorbed, or inhaled," it being held that the food was eaten, and not "taken," within the meaning of the provision.

In Meehan v. Trader & Travelers' Acci. Co. (1901) 34 Misc. 158, 68 N. Y. Supp. 821, where the policy provided that the insurer should not be liable for "injuries, fatal or otherwise, resulting directly or indirectly from or in any wise contributed to by . . . poison in any form or manner, or contact with poisonous substances," it was held that no recovery could be had for injuries sustained because of carbolic acid, which was thrown on the insured by another, the court refusing to sustain the insured's contention that the word "poison" meant a substance taken internally, and the further contention that the words, "contact with poisonous substances," meant a voluntary and conscious action of the insured.

In Preferred Mut. Acci. Asso. v. Beidelman (1889) 1 Monaghan (Pa.) 481, where the insured was bitten, or stung by a venomous insect, and thereby disabled, the question whether the injury resulted from poison, within a provision exempting the insurer from liability for any injury resulting from poison in any form or manner, was held properly left to the jury, and a verdict for the insured was sustained.

The plaintiff, in an action on a contract of insurance which excepts liability where death was caused by the "intentional or unintentional taking of poison," must show that the insured's death did not come within the exception. Pixley v. Illinois Commercial Men's Asso. (1915) 195 Ill. App. 135.

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In this case where it was stipulated that the insured's death was due to "an overdose of morphine," and it appeared that morphine was a narcotic, an overdose of which was poisonous, and that at the time of death the insured was under the influence thereof, such stipulation was held to preclude the plaintiff from recovering, it appearing that the application for the insurance, which was signed by plaintiff, expressly excepted as grounds of liability such injuries as insured might receive "while under the influence of . . . narcotics, or in consequence thereof . . . or from intentional or unintentional taking of poison;" since the stipulation necessarily admitted that the insured's death was due to a poisonous dose of morphine.

In Bernays v. United States Mut. Acci. Asso. (1891) 45 Fed. 455, an averment that the policy sued on was not to extend to or cover death resulting from or caused by poison or contact with poisonous substances, and that the alleged injury was caused by poison and contact with poisonous substances, was held merely an argumentative denial of a material allegation of the petition, and it was held not good as a plea in bar to the action.

J. T. W.

S. DOLMAN et al., Doing Business as S. Dolman & Son, Appts.,

v.

KAW CONSTRUCTION COMPANY.

Kansas Supreme Court — November 9, 1918.

(103 Kan. 635, 176 Pac. 145.)

Evidence — authority of agent — account stated.

1. On the facts stated in the opinion, held, that the chief engineer and the general manager of a railway construction company, which was the debtor, had authority to make a settlement, which it is held embraced all the essential elements of a stated account.

[*See note on this question beginning on page* 71.]

Same — sufficiency.

2. A finding that the parties, before the action was brought, had arrived at a full and complete settlement of their differences under the contract upon an "account stated," is held to be sustained by the evidence.

Account stated — when payable.

3. Where the account is stated in writing, the law implies an agreement to pay; the time when there must be an agreement, express or implied, for the payment of the balance, is when the settlement is agreed upon.

Same — subsequent disagreement.

4. The debtor cannot destroy the legal effect of a stated account by refusal to pay at a subsequent time; and, on the other hand, neither can the creditor avoid its effect by refusing to accept the amount as the balance due, nor avoid the force and legal effect of the settlement on the ground of some new disagreement with the debtor.

Headnotes by PORTER, J.

APPEAL by plaintiffs from a judgment of the District Court for Douglas County in favor of defendant in an action brought to recover for work and material furnished in the construction of an interurban railway. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. S. D. Bishop and John E. Dolman, for appellants:

Under the pleadings in said cause plaintiffs were entitled to recover whatever sum the evidence disclosed them to be entitled to upon their original contract and cause of action.

Ritchie v. Topeka, 91 Kan. 623, 138 Pac. 618; 1 Am. & Eng. Enc. Law, 2d ed. 437; Bloomley v. Grinton, 1 U. C.

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C. P. 309; Stewart v. St. Louis & Suburban R. Co. 157 Mo. App. 245, 137 S. W. 46; Rutledge v. Moore, 9 Mo. 537; Risk v. Dale, 188 Mo. App. 726, 176 S. W. 529; State, Weigel, Prosecutor, v. Hartman Steel Co. 51 N. J. L. 452, 20 Atl. 67; Volkening v. DeGraaf, 81 N. Y. 268.

If there was fraud, gross mistake, or failure to exercise an honest judgment, the final estimate of the chief engineer would not be binding upon plaintiffs.

Edwards v. Hartshorn, 72 Kan. 19, 1 L.R.A.(N.S.) 1050, 82 Pac. 520; Ritchie v. Topeka, 91 Kan. 623, 138 Pac. 618.

Messrs. **John E. McFadden** and **O. Q. Clafin** for appellee.

Porter, J., delivered the opinion of the court:

The action was originally begun by plaintiffs against the Kansas City, Kaw Valley, & Western Railway Company to recover for work and material in the construction of an interurban line extending from Kansas City to Lawrence. The Kaw Valley Construction Company, which was the general contractor and had sublet a portion of the work to the plaintiffs, was not originally a party to the action, but subsequently was made a party, and the court sustained a motion to dismiss the action as to the railway company.

The case was tried by the court and findings of fact were made, among which is a finding that the parties had agreed upon an account stated, showing a certain balance due from the defendant to the plaintiffs, for which the court gave judgment in plaintiffs' favor. From the judgment, plaintiffs appeal.

The findings of fact, some of which we summarize and others quote, are as follow:

"The contract between the plaintiffs and the construction company was entered into on the 19th day of March, 1915, and was for the construction of the roadbed for the railroad from Bonner Springs to Lawrence. As the work progressed monthly estimates were given to the plaintiffs by the chief engineer of the construction company, who was also the chief engineer of the railway company; the work was completed about December 1, 1915. From about October 1, 1915, until February 1, 1916, plaintiffs had employed a firm of engineers to check up the work and ascertain the true condition of the account against the defendant. While the work was in progress, they had an engineer in their employ as a clerk, who gave his entire time to the work connected with the contract. The plaintiffs are old contractors, thoroughly familiar with the work they were required to do in carrying out their contract.

"From some time in the latter part of December, 1915, up until the 2d day of February, 1916, the plaintiffs and the defendant construction company were engaged from time to time in an endeavor to arrive at a settlement of this entire matter, and on February 2, 1916, had a full, complete, and final settlement, and it was at that time ascertained that there was due to the plaintiffs from the defendant construction company $6,246.32. In arriving at this settlement the construction company had the assistance of its chief engineer, and the plaintiffs had the assistance of their clerk heretofore mentioned, as also the figures of the special engineer employed by them as above stated. After arriving at the settlement, the plaintiffs demanded the amount due as ascertained in that settlement, but were advised by the general manager of the Kaw Construction Company that certain unpaid bills had been presented to it for payment, and the general manager insisted that the plaintiffs should pay these bills, or permit the construction company to deduct them from the amount so found due. To this the plaintiffs objected, for the reason that said bills were not properly chargeable against them, and not properly chargeable against either the construction company or the railway company, and this was the only matter of disagreement between the parties.

"The evidence does not disclose

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that these unpaid bills were properly chargeable against the plaintiffs, or against either the construction company or the railway company. Neither does it disclose that the general manager was acting in bad faith when he insisted upon their payment, and no claim is made at the trial of this cause that such bills were properly chargeable against the plaintiffs, the construction company, or the railway company. When this final settlement was arrived at, it was reduced to writing, but was never signed by the parties."

As conclusions of law the court found:

"The parties having arrived at a full and complete settlement of their differences under the contract in suit, the amount thus found due from the construction company to the plaintiffs is the measure of the plaintiffs' recovery.

"There should be a judgment in this case in favor of the plaintiffs against the defendant construction company for $6,246.32, with interest thereon at 6 per cent from February 2, 1916, and for such costs of this action as accrued from and after the date the defendant construction company was made a party to this action."

There are several complaints with respect to rulings of the trial court, but the only question necessary for us to determine is whether the parties agreed upon the amount due under the contract, and this involves a consideration of what constitutes a stated account.

There is but little conflict in the testimony of the parties with respect to what occurred at the time of the settlement. It appears that on January 27, 1916, C. L. Dolman, who had charge of the matter for the plaintiffs, and his engineer, Swope, met with the chief engineer of the construction company in Dolman's room in the hotel in Bonner Springs for the purpose, as Dolman testified, "of making a complete and final settlement." He went over the notes of his engineer, and "figured different places where I thought it was an error, and checked it." At this conference it was found that the figures of the engineer for the plaintiffs and the figures of the chief engineer of the construction company should be compared again, and Mr. Dolman authorized his engineer to go over the figures. A typewritten statement of the result was made up and given to Dolman, which showed the result reached by the chief engineer. Afterwards, on February 2d, Dolman met with the chief engineer and Mr. Taylor, manager of the defendant company, and there was an agreement that the balance due the plaintiffs was $6,246.32. The amount was agreed upon and reduced to writing, but the writing was not signed by either of the parties. It seems that this was late at night, and the parties agreed to meet the next day, when payment was to be made. They did meet on the following day, and Taylor called the attention of Dolman to the fact that some unpaid bills had been presented by subcontractors, and asked him to arrange for their payment. The defendant's testimony tended to show that Dolman became angry at this, and left the room, saying that, if they did not pay the amount agreed upon, he would bring suit. Dolman himself testified that at the meeting next morning he made a demand for the $6,246.32, the amount due on what he calls "the estimate" of the day before, and was informed that they "couldn't pay it until some of these bills were settled," and that he threatened to sue them if the amount was not paid, and then left the meeting.

Mr. Taylor, the manager of the construction company, testified: That at the meeting at the bank next morning he told Dolman they were ready to pay him, but wanted him to take care of some bills for claims of various kinds, and that Dolman said he expected to be paid the full amount that was due him, and that he would not stand for their having any further charge of

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his affairs,—wanted the full amount, without regard to the bills. "I told him that he could give these men orders on us to pay the money due them, or we would forward the money to them and pay him the balance. He said he would pay him the full amount, or he would sue us. He referred to the balance due on the estimate, the only amount I ever heard mentioned."

The facts show all the essential elements of a stated account, a meeting of the minds of the parties upon the correctness of the account, and, when this is shown, the law implies an agreement to pay.

"An account stated is an agreement, express or implied, between parties, . . . fixing and determining the amount due from one to the other on account, and, when such agreement is made, such account stated becomes a new obligation." Syl. 1, Harrison v. Henderson, 67 Kan. 202, 62 L.R.A. 760, 100 Am. St. Rep. 386, 72 Pac. 878.

The definition given by 1 C. J. 678 is:

"An account stated is an agreement between parties, who have had previous transactions of a monetary character, that all the items of the account representing such transactions, and the balance struck, are correct, together with a promise, express or implied, for the payment of such balance."

"The meeting of the minds of the parties upon the correctness of an account stated is usually the result of a statement of account by one party and an acquiescence therein by the other. The form of the acquiescence or assent is, however, immaterial, and may be implied from the conduct of the parties and the circumstances of the case." 1 C. J. 687.

"The statement of the account need not be in writing, nor need the agreement, if oral, be based upon writings evidencing transactions between the parties; and it is no objection that a part thereof is in writing and a part oral. So, if the account is stated in writing, it is not necessary that it be signed or acknowledged in writing." 1 C. J. 682.

The main contention of the plaintiffs is that there was a failure to show an account stated because the defendant, through Mr. Taylor, its general manager, "not only refused to agree that the sum so certified was the balance due, or to promise to pay the same, but expressly refused to pay it, claiming that about $4,000 of claims against appellants' subcontractors should be deducted therefrom." It is insisted that every essential element of the definition of a stated account was lacking. We do not concur in this contention. The findings do not show that the general manager refused to agree that the sum certified was the balance due, or to promise to pay the same *when the settlement was agreed upon.* The findings and the evidence are to the contrary, nor is there a finding that the representatives of the defendant "expressly refused to pay it" when the matter of the subcontractors' claim was discussed. The evidence of both sides is that, when Dolman demanded the $6,246.32, he was told they were ready to pay him, but wanted him to take care of certain bills.

Evidence—sufficiency.

The time when there must be an express or implied agreement to pay is when the parties agree on the amount due from the debtor to the creditor. The contention that the refusal to pay on the day following destroyed the legal effect of the agreement entered into when the account was stated is not sound. An action may be brought on an account stated, where the debtor refuses to comply with his agreement to pay. The settlement set at rest all controversy as to the amount the plaintiffs were entitled to receive from defendant.

Account stated—when payable.

The debtor cannot destroy the legal effect of the settlement by his refusal to pay at a subsequent time;

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and, on the other hand, neither can the creditor avoid the effect of his agreement by refusing to accept the amount as the balance due, nor can he avoid the force and legal effect of the settlement on the ground of some new disagreement with the debtor. Were it otherwise, either party could subsequently destroy the binding force of the contract of settlement by provoking a disagreement, and thus take advantage of his own wrong; and settlements of disputed accounts would amount to nothing until payment was actually made and accepted.

Same—subsequent disagreement.

Another contention is that the chief engineer of the railway company was without authority to enter into a binding contract between the original contractor and the subcontractors. First, it is said that a stated account creates a new obligation, and Harrison v. Henderson, 67 Kan. 202, 62 L.R.A. 760, 100 Am. St. Rep. 386, 72 Pac. 878, is cited, in which it was said that the stated account "becomes a new obligation and takes the place of the one on the prior account." (Syl. 1.) Next, it is said that the duties and powers of a chief engineer of a railway company, as between contractors and subcontractors, are such that he had no authority to make a contract for either, and the case of Ritchie v. Topeka, 91 Kan. 615, 622, 138 Pac. 618, 620, is cited, in which it was said: "The fact that the engineer was vested with supervising power and authority to interpret specifications and determine disputed questions that might arise between the city and the contractor gave him no authority to make a new contract."

The completed sentence reads: "Nor to approve claims for work and material not furnished."

In that case the engineer, by fraud and collusion with the contractor, had approved claims of the latter, which the city paid, for removing solid rock, where in fact he had removed only loose rock. In the present case, Taylor, the general manager of the construction company, made the settlement, and the court finds that he was assisted by the chief engineer of the construction company. Moreover, the parties were not making a new and independent contract for the construction of the railway, but merely a settlement between the construction company and the plaintiffs as to the sum due to plaintiffs upon the original contract. The stated account became a new obligation, taking the place of the former obligation for payment, but not the place of the contract for constructing the railway.

The finding that there was a full and complete settlement and an account stated between the parties is supported by abundant evidence and cannot be disturbed.

Evidence—authority of agent—account stated.

In view of the settlement between the parties, the other rulings of the court, of which complaint is made, become of no importance.

The judgment is affirmed.

Petition for rehearing denied December 14, 1918.

ANNOTATION.

Authority of agent to assent to account stated.

I. Generally, 71.
II. Particular agents in general, 74.
III. Officers of corporations, 77.
IV. Bookkeepers and clerks, 79.
V. Husband and wife, 81.

This note does not embrace questions as to the authority of arbitrators, public officers, partners, and other joint debtors, or such representatives as executors, administrators, receivers, and assignees for the benefit of creditors.

I. Generally.

An authorized agent may, of course, participate in the settlement of an ac-

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count, or assent to an account so as to make it a stated account as against his principal.

United States.—Davis v. Georgetown Bridge Co. (1803) 1 Cranch, C. C. 147, Fed. Cas. No. 3,637.

Alabama.—Stowe v. Sewall (1832) 3 Stew. & P. 67; Powell v. Wade (1895) 109 Ala. 95, 55 Am. St. Rep. 915, 19 So. 500.

Arkansas.—St. Louis, I. M. & S. R. Co. v. Camden Bank (1886) 47 Ark. 541, 1 S. W. 704.

California.—Smith v. Sinbad Development Co. (1909) 11 Cal. App. 253, 104 Pac. 706; E. W. McLellan Co. v. East San Mateo Land Co. (1913) 166 Cal. 736, 137 Pac. 1145.

Colorado.—Gutshall v. Cooper (1910) 48 Colo. 160, 109 Pac. 428.

Hawaii.—Scott v. Hawaiian Tobacco Plantation (1913) 21 Haw. 493.

Illinois.—Pick v. Slimmer (1897) 70 Ill. App. 358; Concord Apartment House Co. v. Alaska Refrigerator Co. (1898) 78 Ill. App. 682.

Kansas.—DOLMAN v. KAW CONSTR. CO. (reported herewith) ante, 67.

Minnesota.—Moody v. Thwing (1891) 46 Minn. 511, 49 N. W. 229.

Mississippi.—Klotz v. Butler (1879) 56 Miss. 333; McCormick v. Altneave (1895) 73 Miss. 86, 19 So. 198.

Missouri. — Alexander v. Scott (1910) 150 Mo. App. 213, 129 S. W. 991.

New York.—Farmers' Loan & T. Co. v. Mann (1867) 4 Rob. (N. Y.) 356; Wiley v. Brigham (1878) 16 Hun, 106; Sariol v. James P. McDonald Co. (1908) 127 App. Div. 648, 111 N. Y. Supp. 796; Williams v. Rutherfurd Realty Co. (1913) 159 App. Div. 171, 144 N. Y. Supp. 357.

North Dakota.—Dowagiac Mfg. Co. v. Hellekson (1904) 13 N. D. 257, 100 N. W. 717.

South Carolina.—Providence Mach. Co. v. Browning (1904) 70 S. C. 148, 49 S. E. 325.

Utah.—Burraston v. First Nat. Bank (1900) 22 Utah, 328, 62 Pac. 425.

Wisconsin.—Batavian Bank v. Minneapolis, St. P. & S. Ste. M. R. Co. (1904) 123 Wis. 389, 101 N. W. 687.

Canada. — Rhodes v. Crawford (1844) 1 U. C. Q. B. 257.

As stated in Klotz v. Butler (1879) 56 Miss. 333, supra, an agent may agree to an account or participate in its settlement so as to make it a stated account, "provided it be within the scope of his agency, and occur during the transaction of the business, dum fervet opus."

In Sariol v. James P. McDonald Co. (1908) 127 App. Div. 648, 111 N. Y. Supp. 796, supra, where evidence as to the authority of an agent to bind his principal was excluded, the court said: "An account stated being simply an agreement between parties who have had previous monetary transactions that all the items of the accounts representing such transactions are true, such agreement need not necessarily be made by the parties personally, but may be made in behalf of either party by an agent having authority (citing cases). The defendant may have clothed Wheeler with such authority as to bind it by a statement of account respecting work performed and money due for construction of the railroad which it was building. In any event, plaintiff should have been permitted to prove such authority as he was able, whether any one fact sought to be established in itself showed complete authority or not."

So, where there was evidence that plaintiff's husband had agreed to the amount claimed by defendant as compensation for legal services, it was held error to refuse an instruction that an account stated might be made by an agent with proper authority, as well as by a principal. Williams v. Rutherfurd Realty Co. (1913) 159 App. Div. 171, 144 N. Y. Supp. 357, supra.

And the statement of an account by the bookkeeper of a corporation, showing a settlement of the account by the giving of notes, was held admissible against the corporation where it had been adopted by the treasurer, who had authority to make or alter contracts entered into by the company. Providence Mach. Co. v. Browning (1904) 70 S. C. 148, 49 S. E. 325, supra.

And see also Last West Lumber Co. v. Haddad (1915) 8 Sask. L. R. 407,

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25 D. L. R. 529, 9 West. Week. R. 578, 33 West. L. R. 15, holding that where a lumber company's local manager had authority to settle disputed accounts, his settlement of a disputed account for a less sum than that due was binding on the company, though he had no authority to discount accounts without obtaining authority from the home office.

But see Knapp v. Smith (1897) 97 Wis. 111, 72 N. W. 349, where a party making an assignment for the benefit of creditors was placed in charge of the assigned property by the assignee as "custodian." The assignee continued the business for some time, and it is, perhaps, inferable, though it is not directly stated, that the assignor acted as his agent in carrying on the business. Goods were sold to the assignor by plaintiff, and he subsequently sent the assignor statements of account in which the assignee was named as debtor. The court approved an instruction that such statements were not evidence against the assignee if he had no knowledge of them, saying that the assignee could not be charged nor his liability in any way affected by any such written memorandum of which he had no notice or knowledge.

But if the person assenting to an account had no authority to do so, there is no account stated. Moore v. Maxwell (1908) 155 Ala. 299, 46 So. 755; St. Louis, I. M. & S. R. Co. v. Camden Bank (1886) 47 Ark. 541, 1 S. W. 704; Charlesworth v. Whitlow (1905) 74 Ark. 277, 85 S. W. 423; Gutshall v. Cooper (1910) 48 Colo. 160, 109 Pac. 428; Peterson v. Wachowski (1900) 86 Ill. App. 661; Spears v. Turpin (1844) 9 Rob. (N. Y.) 293; Kalamazoo Novelty Mfg. Co. v. McAlister (1877) 36 Mich. 327; Mink v. Morrison (1880) 42 Mich. 567, 4 N. W. 302; Chicago & C. S. R. Co. v. Peters (1881) 45 Mich. 636, 8 N. W. 584; Moody v. Thwing (1891) 46 Minn. 511, 49 N. W. 229; Harvey v. West-Side Elev. R. Co. (1878) 13 Hun (N. Y.) 392; Richmond v. Standard Oil Co. (1899) 8 Ohio S. & C. P. Dec. 583; Holmes v. Page (1890) 19 Or. 232, 23 Pac. 961; Wilson v. Investment Co. (1916) 80 Or. 233, 156 Pac. 249; Tarbuck v. Bispham (1836) 6 L. J. Exch. N. S. 49, 2 Mees. & W. 2, 150 Eng. Reprint, 643; Brettel v. Williams (1849) 4 Exch. 623, 154 Eng. Reprint, 1363, 19 L. J. Exch. N. S. 121.

So, where section foremen had no authority to finally settle accounts with laborers, and issued certificates showing the time worked merely as memoranda, or for the information of the roadmaster, who alone was authorized to finally settle the accounts, and the certificates expressly stated that they would not be paid, but were given to be exchanged for roadmaster's time checks, the certificates did not constitute accounts stated. St. Louis, I. M. & S. R. Co. v. Camden Bank (1886) 47 Ark. 541, 1 S. W. 704, supra.

And where plaintiffs' former agent, who purchased their sawmill, had, to defendant's knowledge, ceased to be their agent in winding up their affairs with respect to lumber already sawed or cut, it was held that whatever accounts were thereafter rendered to the agent were not rendered to plaintiffs, and that what he did or said with reference to them could not bind plaintiffs by way of an account stated, unless ratified by them. Charlesworth v. Whitlow (1905) 74 Ark. 277, 85 S. W. 423, supra.

And a judgment against a railroad company for the value of sheep killed by a train, rendered on the theory that persons who agreed on the value of the sheep were appraisers or arbitrators, was reversed where there was no evidence that the railroad company was a party to the appraisement, that it took any part in the choice of the appraisers, or in any way recognized them as authorized to bind it, they having acted, so far as appeared, solely at plaintiff's instance. Chicago & C. S. R. Co. v. Peters (1881) 45 Mich. 636, 8 N. W. 584, supra.

And it was held error to exclude evidence that defendant's bookkeeper, who acquiesced in the account sued on, was without authority so to do. Richmond v. Standard Oil Co. (1899) 8 Ohio S. & C. P. Dec. 583, supra.

See also Missouri P. R. Co. v. B. F. Coombs & Bro. Commission Co. (1897) 71 Mo. App. 299, where the court said that unless an account was delivered

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to an officer or agent authorized to receive and adjust it, it was quite difficult to understand how the party's silence could be regarded as evidence that it was correct, or as making out a prima facie case, throwing the burden or rebutting it on the plaintiff. The court, however, decided against the existence of the account stated on a different ground.

As to the effect of a debtor's acknowledgment of an indebtedness to a third person, not the agent of the creditor, see Hoffar v. Dement (1847) 5 Gill (Md.) 132, 46 Am. Dec. 628; Breckon v. Smith (1834) 1 Ad. & El. 488, 110 Eng. Reprint, 1294; Hughes v. Thorpe (1839) 9 L. J. Exch. N. S. 109, 5 Mees. & W. 656, 151 Eng. Reprint, 278.

II. Particular agents in general.

So far as third persons are concerned, it is, of course, the law that an agent has such authority as is conferred upon him expressly or impliedly, and such additional authority as he appears to have by reason of the principal knowingly permitting him to exercise, or holding him out as possessing, such authority. (21 R. C. L. 854.) The cases dealing with the question under annotation are in harmony with this principle, and it is, therefore, impossible in most cases to deduce from them any general rules as to the authority of particular agents. For example, it cannot be said that a secretary, a treasurer, or a bookkeeper has or has not authority, under all circumstances, to assent to an account stated, since an agent's authority to do a particular act is not wholly dependent upon the name or title by which he is designated.

An agent may, of course, be specially authorized to settle an account. So, where an agent of a manufacturer of farm machinery was expressly authorized to settle with a dealer with whom there was a dispute, including a dispute as to the amount due from the dealer, the settlement was binding on the manufacturer, though the contract between the manufacturer and the dealer provided that settlements of accounts were to be consummated only with the written approval of the manufacturer, from its home office. Dowagiac Mfg. Co. v. Hellekson (1904) 13 N. D. 257, 100 N. W. 717.

And where an attorney employed by a bank depositor to examine his account with the bank had authority to "straighten out the account," he was the depositor's agent, and his expression of satisfaction with the account as it appeared on the books of the bank was evidence admissible in support of the bank's allegation that there was an account stated. Burraston v. First Nat. Bank (1900) 22 Utah, 328, 62 Pac. 425.

But where the accounts between a person and his solicitor and agent were long and complicated, and the principal gave a power of attorney to a third person to settle all accounts in which the principal was interested, it seems that the holder of the power of attorney could not agree upon an amount as due the solicitor without requiring the rendition of an account by him for examination. Jenkins v. Gould (1827) 3 Russ. Ch. 385, 38 Eng. Reprint, 620.

And the settlement of the account between plaintiff and defendant by persons selected to make a statement of the account, but not authorized as arbitrators to decide what was right as between the parties, did not bar an action subsequently brought to settle the account. Whitehead v. Darling (1887) 9 Ky. L. Rep. 340, 5 S. W. 356.

The agent of a brewing company who negotiated a sale of saloon property on which it had a mortgage, and who was claimed to have represented to the purchaser that there were no liens thereon, had no authority, when subsequently sent by the company to collect an account for beer, to agree that the purchaser might pay the amount of a tax lien and have credit on the account for the amount of such lien, and such agreement was not such a settlement as prevented the company from collecting the whole bill. The court said: "The agent was not attempting to carry out any previous contract he had made with the defendant, nor had he authority to do more than collect the balance due on the bill for beer. In such circumstances

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he would have no implied power to settle past items of dispute, nor could he receive anything but cash for his principal. Plaintiff was denying all liability for fraud or deceit on the part of its agent, and did not vest in him power to make any compromise or settlement thereof. Armed with no other authority than to collect the amount of plaintiff's bill for goods sold, its agent had no power to settle prior disputes or to accept anything in payment save the usual medium of exchange." John Gund Brewing Co. v. Peterson (1906) 130 Iowa, 301, 106 N. W. 741.

But a solicitor with whom an account is placed for collection has authority as agent for the creditor to receive the debtor's admission of the debt sued on as an account stated. Grundy v. Townsend (1888) 36 Week. Rep. (Eng.) 531. The master of the rolls said: "If a solicitor is authorized to make a claim, I am of opinion that he is by that alone made the agent to receive the answer to that application, if the answer is an admission, to receive that admission."

Where, however, a claim was placed in the hands of an attorney, and, in reply to a demand for payment, the debtor's attorney mentioned that statements of certain alleged offsets had been furnished the creditor, the failure of the creditor's attorney to reply could not prejudice the creditor in the absence of testimony that he had authority to admit the offsets, or knew anything about them. "If it could [prejudice the client], there would be no safety in placing a claim in the hands of an attorney for collection." Verrier v. Guillou (1881) 97 Pa. 63. In this case the court assumed, for the purposes of the decision, that the creditor's own failure to object to the statements mentioned admitted the accounts, the decision being that they had never been applied on the creditor's claim as payment, and hence did not constitute offsets after they were barred by limitations.

The manager of a tobacco plantation who, as such, directed all the industrial operations on the plantation, made purchases for the corporate owner, had charge of the laborers, made contracts for cultivation, adjusted the amount due laborers and contractors, and directed payment for labor and material, had authority to enter into an account stated with persons clearing land on the plantation, under a contract with the corporation, and his power was not restricted by the fact that the work was done during the incumbency of his predecessor as manager. Scott v. Hawaiian Tobacco Plantation (1913) 21 Haw. 493.

And where a person carrying on business at Mobile under a firm name, being about to leave for New York, appointed an agent "with full power to transact all business pertaining to the firm" during his absence, the agent could act beyond the limits of the state in stating an account, and if an account was made out in Mobile, where the books were kept, and signed by the agent in New York, it was none the less valid as an account stated, even though the principal was then present. Stowe v. Sewall (1832) 3 Stew. & P. (Ala.) 67.

An agent authorized to purchase material for his principal has no authority subsequently to admit the correctness of the account for such material, and the rendition of the account to him and his admission of its correctness without the authority or knowledge of the principal would not render the principal liable upon an account stated. "It would be a legal absurdity to hold that the subsequent conduct of Biggers [the agent] amounted to a new or subsequent promise on the part of the defendant to pay the account notwithstanding he may have originally authorized the purchase of material. It could as well be said that the defendant would be liable upon the promissory note executed by Biggers in settlement of the account for material. Authority to purchase did not, of itself, authorize Biggers to make subsequent promises or agreements for the defendant." Moore v. Maxwell (1908) 155 Ala. 299, 46 So. 755.

But see Batavian Bank v. Minneapolis, St. P. & S. Ste. M. R. Co. (1904) 123 Wis. 389, 101 N. W. 687, as to the

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authority of a railway purchasing agent. In that case it appears that a party selling goods to a railroad company and assigning the accounts against that company to a bank, made a practice of sending the invoice and account to the railroad purchasing agent, accompanied by a blank on which he acknowledged receipt of invoice and account in a specified sum and promised to pay the net amount, after deducting certain charges to the bank when adjusted. The purchasing agent was known as a general officer of the road, purchased all material for the road, and for twelve or thirteen years had both purchased such goods and sold scrap to the seller of the goods, and made the agreements in question monthly. The items were regularly entered in the railroad books without any secrecy and each monthly account was thereafter, in due time, paid by check or draft. It was held that the purchasing agent had apparent authority to make such agreements, which might be safely relied upon by the bank, though the by-laws conferred no such power, and he had received no express authority from his superior officers to execute such agreements.

Where a railroad division roadmaster had authority to finally audit the accounts with section men and put them in shape for payment by the company's paymaster, and did this by issuing so-called "roadmaster's time checks," showing the time worked and the amount due, and stating that this amount would appear on the pay roll for the proper month, the auditing of the account by the roadmaster and the acceptance of the statement by the laborer constituted an account stated. St. Louis, I. M. & S. R. Co. v. Camden Bank (1886) 47 Ark. 541, 1 S. W. 704.

Where goods were consigned to defendants for sale and they rendered their account-sales to the consignors, who raised no objection thereto, there was an account stated, so that limitations commenced to run, though, to defendants' knowledge, a third person had an equitable or contingent interest in the consignment. "By the well-settled principle of law and commercial usage, the account of sales is forwarded to the legal owner of the goods; the consignee is not bound to notice the equitable or contingent owner. The presumption is, that the former advises the latter of the state and condition of the consignment, and if he be prejudiced by his neglect, the remedy is against him." Bevan v. Cullen (1847) 7 Pa. 281.

A duebill given an agent selling goods upon a settlement between him and the debtor's agent, though not available to the creditor as a promissory note, because not negotiable, was evidence of an account stated with the creditor, where the debtor knew that the person selling the goods and taking the duebill was an agent of the creditor. Rhodes v. Crawford (1844) 1 U. C. Q. B. 257. It should be noted that in this case the authority of the debtor's agent was apparently not in dispute, the question being as to the right of the creditor to rely on the settlement made with his agent.

See also the following cases in which accounts stated were upheld, apparently without any dispute as to the authority of the agent who assented thereto: Murray v. Toland (1818) 3 Johns. Ch. (N. Y.) 569 (supercargo of packet having entire direction and management of shipment consigned to debtor for sale for creditor); Fickett v. Cohu (1888) 14 Daly, 550, 1 N. Y. Supp. 436 (attorney in fact for cestui que trust, who regularly received and receipted for income without questioning the accuracy of the trustee's account); Ware v. Manning (1888) 86 Ala. 238, 5 So. 682 (account stated with agent of party relying on the account stated).

But see Croft v. Graham (1863) 5 Giff. 1, 66 Eng. Reprint, 897, affirmed in (1863) 2 De G. J. & S. 155, 46 Eng. Reprint, 334, 9 L. T. N. S. 589, holding that there was no account stated where the account was examined by a solicitor and approved for the purposes of a mortgage for the balance, which was never given and where it contained exorbitant charges of interest, and the solicitor did not observe that interest was charged at

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the rate of 5 per cent per month instead of per annum.

See also Southwestern Teleg. & Teleph. Co. v. Benson (1896) 63 Ark. 283, 38 S. W. 341, infra, V.

And see also the cases cited under I., supra.

III. Officers of corporations.

For subordinate agents and employees of corporations below the grade of officer, see other subdivisions.

It seems that if directors of a corporation are its authorized agents for the purpose of making contracts, their signatures to an account prepared by the treasurer is proper evidence in support of the issue in an action against the corporation on an account stated. Davis v. Georgetown Bridge Co. (1803) 1 Cranch, C. C. 147, Fed. Cas. No. 3,637.

As said in Wilson v. Investment Co. (1916) 80 Or. 233, 156 Pac. 249, the mere fact that a man is president of a corporation does not give him any power to bind the corporation in any way, and hence his assent to an account against the corporation does not make it an account stated in the absence of any by-law, special order of the directors, or any usage or custom authorizing him to bind it by contract. While this is doubtless the general rule, it is little more than an academic rule, as the claim that the president has authority to bind the corporation seldom rests on the "mere fact" that he is president.

The president of a corporation engaged in subdividing a tract of land for purposes of sale, who, by resolution of the board of directors, was appointed general manager of the corporation, with full power to make and enter into all contracts on behalf of the company, had power to agree to an account stated with a contractor employed to grade streets and do similar work. His authority in this respect was not restricted by by-laws making it his duty to sign all contracts and other instruments in writing which had been first approved by the board of directors, and making it the duty of the secretary to affix the corporate seal to all documents requiring such seal. E. W. McLellan Co. v. East San Mateo Land Co. (1913) 166 Cal. 736, 137 Pac. 1145.

But an account between a corporation and its president and manager, made and placed on the books of the corporation by such president and manager, was not an account stated, where, as soon as a third person became president, he challenged the correctness of the account. And the fact that such third person knew of the account before the change of officers did not make the account binding on the corporation where at that time he had no official connection with the corporation, and consequently no power to protest, though he was the beneficial owner of most of the stock. Jones v. University Research Extension (1910) 157 Ill. App. 132.

And, conceding that the president and active manager of a terminal railroad company had authority to bind it by a settlement of the account of a contractor when done in good faith, such settlement was not binding on a mortgagee of the company's property where the contractor's claim was intentionally allowed for a sum in excess of that due, for the purpose of giving him a lien sufficient to protect subcontractors at the expense of the mortgagee. Beach v. Wakefield (1898) 107 Iowa, 567, 76 N. W. 688, modified on rehearing in (1899) 107 Iowa, 591, 78 N. W. 197.

It was held in Pick v. Slimmer (1897) 70 Ill. App. 358, that the president and secretary of a mercantile corporation were presumed to have authority to make and render a statement of the account of one performing services for it, amounting to an account stated.

The by-laws of the trust company involved in Farmers' Loan & T. Co. v. Mann (1867) 4 Robt. (N. Y.) 356, provided that all business relating to real estate securities, and the holding, managing, and selling of land granted to the company or taken in payment of debts, should be managed by a finance committee and that such committee should audit all accounts against the company; they further provided, however, that the president should be a member of all committees, in-

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cluding the finance committee, and should have the general direction and superintendence of the affairs of the company; for eleven years, during which defendant acted as the company's attorney in collecting debts, foreclosing mortgages, and managing and selling land, he repeatedly consulted with, and received instructions from, the president and secretary, and never received instructions from any other officer or director, and he settled a prior account with the president. It was held that the president and secretary had authority to settle his account against the company, in which he charged interest to which he would not have been entitled except for such settlement. The court said that the facts clearly established a fixed intention and design on the part of the company to waive and abandon its by-laws so far as that part of the business was concerned.

As to the authority of the president and treasurer of a corporation, see Thompson Bros. Feed Co. v. Neiman Bros. Co. (1917) 203 Ill. App. 317 (abstract).

It was within the authority of the secretary of an oil company to make and deliver to an employee a statement of the amount due him for services and expenses, whether regarded as a pay roll, a time sheet, or an account stated. This related merely to the bookkeeping of the corporation, which was a matter clearly within the duties of the secretary. Smith v. Sinbad Development Co. (1909) 11 Cal. App. 253, 104 Pac. 706. In this case the secretary was described in the articles of incorporation as secretary and general manager, but the by-laws subsequently adopted made no provision for a general manager; and the case was decided on the assumption that he was merely secretary when the account was delivered.

And though the secretary of an apartment house corporation testified that he had no authority to approve an account for refrigerators for the apartment house, his authority was a question for the jury, and the jury was justified in finding that he had authority to bind the corporation by an account stated, where there was evidence that the contract for the refrigerators was executed in the corporation's name, by him, and by no other officer, and that he acted for the corporation in receiving notice of an assignment of the contract, in furnishing references to the assignee, and in other respects regarding the contract. Concord Apartment House Co. v. Alaska Refrigerator Co. (1897) 78 Ill. App. 682.

In an action against a corporation on an account stated in the handwriting of the corporation's treasurer, and certified by three of its directors, the court told the jury that if the account was in the handwriting of such person and he was the treasurer, or authorized to settle the corporation's accounts, the account was proper evidence in support of the issue. Davis v. Georgetown Bridge Co. (1803) 1 Cranch, C. C. 147, Fed. Cas. No. 3,637.

But where plaintiff's salary as a corporation's superintendent was fixed by resolution of the board of directors, which resolution also designated the treasurer of the corporation as "consulting director," with whom the superintendent was to advise, the treasurer had no authority, either as treasurer or as consulting director, to bind the corporation by a paper certifying that a specified amount was due plaintiff as salary, where it was not a mere transcript of the entries in the corporation's books. Kalamazoo Novelty Mfg. Co. v. McAlister (1877) 36 Mich. 327. The court said: "His position as consulting director implied no power to liquidate and fix the sum which the company should pay McAlister, or to state the amount fixed as a fact admitted by the company. Moreover, the paper in question, though made, as McAlister insists, on much deliberation, was neither drawn or received as performed by Kellogg in character of consulting director. On its face it professes expressly to have emanated from his authority as treasurer. That it was within his power and province in that capacity cannot be assumed. The document is not a mere transcript or brief

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from the company's books, and was not adduced as such. It imports that it was ascertained and determined that the company was in fact the debtor of McAlister to the specified amount, and it was put in evidence as an admission of the company to that effect. The general duty of the treasurer of a private corporation is to collect, receive, hold, and disburse the funds, and unless specially empowered, his authority could not be supposed to extend so far as to allow him to settle and audit disputed claims brought for salaries by other agents of similar grade, and to issue written admissions of his determination, binding on the corporation. Such duties would regularly fall on the board of directors, and the evidence in the case goes to strengthen the inference that such was the fact here. The resolution relied on by McAlister tends to show that it was for the board to speak on the part of the company concerning his wages, and not the treasurer, and he testified that it was the board who called on him to quit."

The bookkeeper of a corporation who also performs the duties of secretary and assistant treasurer has no authority to render an account to a creditor of the corporation, showing a balance due from the corporation, which will be binding on the corporation as an account stated, in the absence of evidence of express authority. "Even if such an authority might be implied from the general duties of a treasurer or assistant treasurer when such officer has rendered an account to a debtor of the corporation, it by no means follows that actual authority need not be shown when the legal effect of the act would be to liquidate or establish unsettled demands against the corporation. An officer who does not possess the power to create a debt against the corporation directly cannot do it indirectly by sending an account which shows a balance due to the person to whom it is sent." Harvey v. West Side Elev. R. Co. (1878) 13 Hun (N. Y.) 392.

In the reported case (DOLMAN v. KAW CONSTR. Co. ante, 67), it was held that the chief engineer and general manager of a railway construction company had authority to make a settlement with a contractor, which was upheld as an account stated.

See also the following cases in which the assent to an account stated appears to have been given by a corporate officer: Fee v. McPhee Co. (1916) 31 Cal. App. 295, 160 Pac. 397 (president and manager who also owned most of the stock); Jacksonville, M. P. R. & Nav. Co. v. Warriner (1895) 35 Fla. 197, 16 So. 898 (board of directors); United States Health & Acci. Ins. Co. v. Batt (1912) 49 Ind. App. 277, 97 N. E. 195 (president); Porter v. Chicago, I. & D. R. Co. (1896) 99 Iowa, 351, 68 N. W. 724 (board of directors); St. Mary's Church v. Cagger, (1849) 6 Barb. (N. Y.) 576 (trustees); Wood v. Green (1914) 131 Tenn. 583, 175 S. W. 1139 (vice president); Generes v. Security L. Ins. Co. (1914) — Tex. Civ. App. —, 163 S. W. 386 (secretary).

But see Loewer v. Lonoke Rice Mill Co. (1913) 111 Ark. 62, 161 S. W. 1042, where an account between a corporation and a director employed by it as superintendent and purchasing agent was held not final because the entries in the account were made by the corporation's bookkeeper, under the direction of the director himself, who thus made the settlement with himself on behalf of the corporation.

And see also Wier v. American Locomotive Co. (1913) 215 Mass. 308, 102 N. E. 481, where an agreement between an automobile manufacturer and its corporate selling agent, represented by its "officers," was held not an account stated, without any discussion of the officers' authority.

As to authority of railroad purchasing agents, see Batavian Bank v. Minneapolis, St. P. & S. Ste. M. R. Co. (1904) 123 Wis. 389, 101 N. W. 687, supra, II. And see Providence Mach. Co. v. Browning (1904) 70 S. C. 148, 79 S. E. 325, supra, I.

IV. Bookkeepers and clerks.

The rendition by a party's clerk or bookkeeper of an account showing a balance due the person to whom the account is rendered is not obligatory and binding upon the principal, in the absence of any showing that the book-

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keeper or clerk had any other authority than that conferred by law upon an agent of that description. Gutshall v. Cooper (1910) 48 Colo. 160, 109 Pac. 428; Spears v. Turpin (1844) 9 Rob. (La.) 293; Peterson v. Wachowski (1899) 86 Ill. App. 661.

In Spears v. Turpin (1844) 9 Rob. (La.) 293, supra, the court said: "The business of a bookkeeper is to make such entries in the books of his employer as he is ordered to do, to keep the accounts, and when he is directed, to draw off or copy from the books any that may be wanted and submit them to his principal, and then do with them as he may be directed. A mere clerk or bookkeeper has no more right, of his own accord, to state an account in the name of his principal, and acknowledge a balance as being due, than he has to create a debt by signing a promissory note. The obligation is only different in form, but equally binding. No man would ever be safe if it were permitted that he should be bound by any and every account his clerk or bookkeeper might state and deliver to another person, acknowledging that a balance was due or owing on it, without any other authority than that conferred by law upon an agent of that description."

And in Peterson v. Wachowski (1899) 86 Ill. App. 661, supra, the court said: "There is no evidence that appellant [the employer] ever saw the statement of January 3d after it was made out by the bookkeeper, or that the bookkeeper had any authority to in any respect change or abrogate the provisions of the contract. Nor is there any evidence that appellant and appellee ever agreed upon such statement as being final and correct. The only evidence in such respect is that appellee requested appellant to give him a statement of how much was due him, and that the bookkeeper made out and gave to appellee the account of January 3d." It was held that there was no account stated.

But if the employee is not only the employer's bookkeeper, but his manager or personal representative, in the very transaction concerning which the account is stated, it seems that he has authority to state the account. Gutshall v. Cooper (1910) 48 Colo. 160, 109 Pac. 428, supra.

So, where a contractor's bookkeeper stationed at the place where work was being carried on was in the general management of the business in the absence of his employer, and particularly that part of the business connected with the accounts, and was directly in charge of the accounts, an account stated between him and a subcontractor was binding on the contractor. Alexander v. Scott (1910) 150 Mo. App. 213, 139 S. W. 991.

And the rendition of an account to plaintiff, an employee, by the employer's bookkeeper, and the acceptance of it by plaintiff, constituted an account stated where the employer knew that the bookkeeper was accustomed to render statements of account to workmen and jobbers, and knew that plaintiff was in the habit of receiving such statements from the bookkeeper from time to time, and regarded his books as correct, though the bookkeeper testified that he had no authority to agree on any balance. Wiley v. Brigham (1878) 16 Hun (N. Y.) 106.

And see Goodin v. Armstrong (1850) 19 Ohio, 44, in which it was held that where plaintiff and defendants were partners in a particular venture under an agreement that defendants should receive the avails of the investment and divide the net profits, and defendants' clerk and bookkeeper gave plaintiff a transcript of the account, showing the net profit, one half of which was placed to plaintiff's credit, this was such prima facie evidence of a settlement of the partnership accounts as authorized plaintiff to sue at law for the acknowledged balance in his favor.

In Brettel v. Williams (1849) 4 Exch. 623, 154 Eng. Reprint, 1363, 19 L. J. Exch. N. S. 121, one member of a firm of contractors gave a guaranty for goods sold by plaintiff to a subcontractor; plaintiff sued on the guaranty and also relied on letters written by a person described only as the "clerk" of the firm of contractors, as evidence of an account stated; it was not proved

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that the partners other than the one giving the guaranty authorized the clerk to write such letters. The direction of a verdict for defendants was upheld, the court saying that there was no evidence of an admission of the account by defendants.

But see Martine v. Huyler (1890) 55 Hun, 611, 29 N. Y. S. R. 535, 8 N. Y. Supp. 734, where, however, the court's holding is somewhat obscure. Plaintiff had acted as defendant's agent in managing certain property and collecting rents, and had rendered monthly accounts; he sued for an alleged balance due for salary, claiming that the agreed salary was $2.50 a day after the first year; defendant claimed the agreed salary was $48 a month, and it appeared that plaintiff for thirty-nine months deducted that amount in his monthly settlement, but that he thereafter deducted $54 for three months and $52 for forty-three months. The court said: "The retention of a sum beyond $48 a month would be very forcible evidence against the defendant, if it had been brought to her knowledge; but it never was, and neither the defendant nor her husband ever had knowledge of the increased deduction, and cannot therefore be charged with acquiescence therein. The settlements of the plaintiff were all made with clerks, who assumed the correctness of the charge for salary all through." This would seem to mean that defendant and her husband were not chargeable with acquiescence in the deduction of more than $48 a month, but the court subsequently, in holding that the accounts were binding on plaintiff, added that when accepted, as they were, by the clerks of defendant's husband, they were conclusive upon both parties. This was probably obiter, as defendant does not seem to have been attempting to recover any overpayment, and was not challenging the conclusiveness of the accounts.

As to the authority of a clerk of stockbrokers to bind his employers by a statement of a client's account showing a payment by the client of the price of stock, see Robb v. Gow, 8 F. (Scot. Ct. Sess.) 90, 11 Mews, Eng. Case Law Dig. 1898–1910, col. 1861.

In the following cases accounts stated with clerks or bookkeepers were enforced without any ruling as to the agent's authority: Rice v. Schloss (1889) 90 Ala. 416, 7 So. 802 (account stated between plaintiff's "agent" and defendant's bookkeeper); Bee v. Tierney (1895) 58 Ill. App. 552 (bookkeeper and cashier); Chisman v. Count (1841) 2 Mann. & G. 307, 133 Eng. Reprint, 763, 2 Scott, N. R. 569, 10 L. J. C. P. N. S. 124.

See also Providence Mach. Co. v. Browning (1904) 70 S. C. 148, 49 S. E. 325; Richmond v. Standard Oil Co. (1899) 8 Ohio S. & C. P. Dec. 583, supra, I.; Loewer v. Lonoke Rice Mill. Co. (1913) 111 Ark. 62, 161 S. W. 1042; Harvey v. West-Side Elev. R. Co. (1878) 13 Hun (N. Y.) 392, supra, III.

V. Husband and wife.

Though by statute family expenses are chargeable against both husband and wife, and it is immaterial to which party goods sold for family use are charged, the husband's assent to an account for such goods does not render it an account stated as against the wife. "To so hold is to make her husband her agent against her will, and to enable him to bind his wife without her assent, express or implied. The principle is elementary that it is only the parties to a contract and their representatives that are bound by it. That a husband may be agent for his wife is not doubted; but, as has been said, 'a husband has, by virtue of his relation alone, no implied power to act as agent of his wife in the transaction of her business. Whatever authority he exercises in that capacity must be derived from her prior appointment or subsequent ratification.' Mechem, Agency, § 63. It is not disputed that if the goods were bought for family expenses and were used by the family but that the defendant is liable, but she cannot be made liable on a contract based on an account stated between her husband and the plaintiff, to which she has not as-

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sented." Holmes v. Page (1890) 19 Or. 232, 23 Pac. 961.

But an account stated for plantation supplies, assented to by the husband, is binding on the wife under a statute providing that all contracts made by either husband or wife for supplies for the wife's plantation may be enforced against the wife's separate estate, thus making the husband the agent of the wife in purchasing plantation supplies, but further providing that no judgment shall be rendered against the wife unless the liability of her separate property is first established. Klotz v. Butler (1879) 56 Miss. 333. The court said: "All contracts made by the husband for plantation supplies are declared to be obligatory upon the property of the wife. There is no stipulation or specification of the form which the contract must take. Why may it not be by note, as well as by account? Why not by account stated, as well as by open account? The statutory test of the obligatory force of the contract is the purpose for which, and not the mode in which, it is made. By what right can we say that a verbal contract shall be binding, and a written one not? How can we declare that if he buy on twelve months' credit, and in such form that an action of assumpsit will be barred in three years, the property of the wife may be subjected, but if his contract is for five years' credit, and assume such form that an action of debt may be maintained upon it, there is no liability? Men, in the conduct of their own affairs, frequently find it highly beneficial to execute notes and agree to stated accounts, and we can see no reason why the same thing might not occur in the management of that portion of their wives' estate which the law has devolved upon them. Nor is it perceived how any harm can come to the estate of the wife, except that to some extent it shifts the burden of proof. The contract of the husband, whether oral or written, is only prima facie binding on the wife; nor does it assume even that dignity until it has been shown to have been for plantation supplies. That clause of the statute which declares that the liability of the wife's property must be established before any judgment can be rendered against her opens the contract, no matter what shape it has assumed, to full inquiry; so that, in a suit upon a note or other evidence of debt, the plaintiff must first show that it is a contract for supplies for the wife's plantation. But, having shown this, he may rest his case. It will then be for the defendant to controvert the fact that it was executed for that purpose, or that the amount is correct. She will not be bound by the amount specified in it, because her liability, depending upon the consideration of the contract, cannot be extended beyond the amount actually embraced in that purpose."

See also McCormick v. Altneave (1895) 73 Miss. 86, 19 So. 198, in which a note executed by a husband, as agent for his wife, for the balance of an account for plantation supplies, was treated as an account stated on which there could be a recovery, though some of the items of the account were barred by limitation.

Evidence that the husband of the owner of buildings was the only person who had anything to do with making payments under a building contract, or looking over the contractor's accounts, warranted the trial court in finding that he was her agent to transact the business, and had authority to give a duebill constituting an account stated, though he denied that he had such authority. Moody v. Thwing (1891) 46 Minn. 511, 49 N. W. 229.

But where an account is kept in the name of a husband and is rendered to him in that form, no presumption of its correctness arises against the wife from the retention of the account by him without objection. Powell v. Hopson (1858) 13 La. Ann. 626.

See also Southwestern Teleg. & Teleph. Co. v. Benson (1896) 63 Ark. 288, 38 S. W. 341 (account stated between agent and manager of telephone company and husband of contractor),

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and Styart v. Rowland, 1 Shower, K. B. 215, 89 Eng. Reprint, 545 (account stated between defendant and plaintiff's wife), in which cases, however, the question of authority was not discussed.

And see also Williams v. Rutherfurd Realty Co. (1913) 159 App. Div. 171, 144 N. Y. Supp. 357, supra, I.; Martine v. Huyler (1890) 55 Hun, 611, 8 N. Y. Supp. 734, 25 N. Y. S. R. 585, supra, IV. A. McT.

STATE OF NEW JERSEY
v.
JOHN B. SCARLETT, Plff. in Err.

New Jersey Court of Errors and Appeals — October 12, 1917.

(91 N. J. L. 200, 102 Atl. 160.)

Check — certification — overdraft.

1. The certification of a check of a director of a trust company which overdraws his account is, after he has parted with the check, an effective overdraft within the meaning of a statute imposing a penalty on such officer for overdrawing his account.

[*See note on this question beginning on page* 86.]

Corporation — resignation of director — delivery to secretary.

2. Delivering to the secretary of a trust company a resignation as director which is intended for the board of directors is not sufficient to effect a resignation if it never reaches the board.

Bank — authority to certify overdraft.

3. A trust company cannot dispute the authority of its secretary to certify a check of a customer on the ground that it is an overdraft after it has passed into the hands of a bona fide holder for value.

Check — payment — necessity of stamping.

4. A check is paid when the holder receives the money on it, although it is taken from the paying teller's cash by officers of the bank and carried in a safe deposit box without being stamped "paid."

Appeal — harmless error.

5. One who claims that a secretary of a trust company had misapplied a check which should have gone to his credit is not harmed by a statement of the trial judge that the secretary's testimony that the check was applied to what he claimed to be an existing indebtedness of the depositor was corroborated.

ERROR to the Supreme Court to review a judgment affirming a judgment convicting defendant of overdrawing his account. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. McCarter & English for plaintiff in error.

Messrs. John A. Bernhard, J. Henry Harrison, and Wilbur A. Mott for the State.

Swayze, J., delivered the opinion of the court:

We think the judgment was properly affirmed, and should add nothing but for the further argument here which calls for some amplification of the reasons given by the supreme court.

The indictment was under § 171 of the Crimes Act against a director of a trust company for overdrawing his account. The peculiarity of the case is that the overdraft was by means of a certified check, although the depositor's account was not good for the amount. The certification was by the treasurer of the trust company. The check came back to the trust company in due course through other banks, was taken by the treasurer out of the paying tell-

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er's cash, and placed in a safe deposit box in the trust company's vault. It is not questioned that the holder of the check received the money thereon, nor that the funds of the trust company were short by that amount, but it is argued that the check was never in fact paid by the trust company, since it was never stamped "paid" in the usual way, but held by the treasurer as if it were his own, and the suggestion is that he robbed other depositors to make the payment, and that, whatever crime the treasurer may have committed, the present defendant was not guilty of an overdraft under § 171.

A preliminary question of primary importance was whether the defendant was a director at the time the check was drawn and certified. He had been elected a director in the preceding January, and took the oath of office in February. His claim was that he had resigned the same day. He testified that he caused to be sent to Smith, the secretary and treasurer of the trust company, a letter of resignation, of which he produced a carbon copy; the letter was addressed to the directors. Smith testified that he did not remember having received such a letter, and did not remember the fact that the defendant tendered his resignation as director. The defendant testified that some messenger, not named, from his office, took up the letter of resignation at the same time he took up the oath of office; that it was in the same envelope. In this state of the evidence the trial judge charged that there was no evidence that the letter of resignation was ever received by the board of directors. This, we think, was correct. We need not consider whether, under any circumstances, evidence of no greater probative force would require a submission of the fact to the jury; nor need we consider what is necessary to constitute a resignation of his office by a director. It is enough to say that Scarlett's attempt was to present his resignation to the board of directors; his letter was addressed to the board. He sent it, however, to the secretary, and there is no proof that it ever reached the board. It would, we think, be going too far to hold that communication to the secretary (if we can even go so far as to say it was communicated to the secretary) was communication to the board. This is not a case of constructive notice. In such a case, justice to third parties often requires that the corporation itself be charged with knowledge possessed by its officers. A resignation of a director is different. While he has a right to resign and differs in that respect from a public officer (State ex rel. Reeves v. Ferguson, 31 N. J. L. 107; Fryer v. Norton, 67 N. J. L. 537, 52 Atl. 476), the board of directors or the stockholders, as the case may be, are like the public authorities in having the right, sometimes the duty, to fill the vacancy. This they cannot do, unless they have actual knowledge of its existence. The resignation must be communicated to them, or, to use the language of the charge, must reach them. To hold otherwise might subject directors to the duty of filling a vacancy of which they had no knowledge. Scarlett put his resignation, if his testimony is believed, in the way of reaching the board, but he took the chance of its actually reaching them. It was for him, if he desired to escape further responsibility as director, to see to it that his resignation reached the board to whom it was addressed. We need not consider whether presentation to any other officer of the trust company would suffice; the defendant undertook to present his resignation to the board; he failed to accomplish it.

Corporation—resignation of director—delivery to secretary.

The next question of importance is whether the check was ever paid by the trust company so that there was an effective overdraft of the account. The supreme court held that

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the certification of the check was in effect payment. With this we agree. The importance of the question justifies further remark. The question now is not that which often arises as to the effect of a certified check as payment of a debt from drawer to holder and a discharge of the drawer from liability. The answer to that question may depend on whether the certification is at the request of the drawer before the check is issued, or at the request of the holder after the check is issued. Times Square Auto Co. v. Rutherford Nat. Bank, 77 N. J. L. 649, 134 Am. St. Rep. 811, 73 Atl. 479. The question here is not as to the effect of the check as payment between others, but whether the check has itself been paid by the bank. We think it is settled in other jurisdictions, for reasons that command our assent, that after a drawer of a certified check has parted with it, the situation as to him is "precisely as if the bank had paid the money on this check instead of making a certificate of its being good." The language is quoted from the opinion of Judge Peckham in First Nat. Bank v. Leach, 52 N. Y. 350, 11 Am. Rep. 708, and is justified by the authorities he cites; the opinion itself was concerned with the same question that we dealt with in the case already cited, and was there referred to by us as authority.

Check—certification—overdraft.

It is argued, however, that Smith's certification could not amount to payment by the bank, since he was without authority to certify a check when the drawer's account was not good for the money. Trust companies, under our statute, are authorized to receive money on deposit, to be subject to check or to be repaid in such manner and on such terms as may be agreed upon by the depositor and the trust company; and, in view of our own decisions, we must take notice of the fact that they do a banking business. Mechanics' Nat. Bank v. Baker, 65 N. J. L. 549, 48 Atl. 582. It is too late now to claim that banks (or trust companies doing a banking business) may not certify checks. If it is necessary to prove that the secretary and treasurer of a trust company has, by virtue of his office, powers as great and extensive as the powers of a cashier of a bank, such proof is present, since it is proved and not disputed that the secretary and treasurer was also the manager of this trust company. The question then is, What is the effect of a certification by one clothed with these powers when the depositor's account is not in fact good for the check? It must be conceded that no power to overcertify is to be implied; if the power exists, it must be by the express action of the board of directors or of the stockholders, or by a course of dealing acquiesced in by the directors or stockholders. No express authority is shown in this case, and we are therefore face to face with the question of the effect on the liability of the trust company of an unauthorized certification by the secretary and treasurer. This question was presented fifty years ago and decided by the Supreme Court of the United States following earlier cases in New York, and resting upon well-established principles of the law of agency and the law of estoppel. Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. 604, 644, 645, 19 L. ed. 1008, 1018; Farmers & M. Bank v. Butchers & D. Bank, 14 N. Y. 623, id., 16 N. Y. 127, 69 Am. Dec. 678; Meads v. Merchants' Bank, 25 N. Y. 143, 82 Am. Dec. 331. These cases were thoroughly discussed both by eminent counsel and by the court. It is unnecessary to repeat the arguments. It is enough to quote from the Federal case to indicate the principle that governed: "If the contract can be valid under any circumstances," says the court, "an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them. . . . Corporations are liable for the acts of their servants while engaged in the business of their employment in the same man-

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ner and to the same extent that individuals are liable under like circumstances. Estoppel in pais presupposes an error or a fault, and implies an act in itself invalid. The rule proceeds upon the consideration that the author of the misfortune shall not himself escape the consequences and cast the burden upon another. . . . Those who created the trust, appointed the trustee, and clothed him with the powers that enabled him to mislead, if there were any misleading, ought to suffer rather than the other party."

Upon these principles the trust company must be held. It put Smith in the position where he had power to certify checks when the depositor's account was good for the amount. Whether it was good or not was a fact known to him. Innocent parties who took the check relying on his certification ought not to suffer, since they had necessarily to rely upon the statement of the officer charged with the duty. The trust company, having put him in a position to mislead, is estopped to deny the truth of his statements. This reasoning applies only to the case of an innocent holder, and not to Scarlett himself. The holder in this case is not shown to have been other than innocent, and as to him the certification was equivalent to payment. It is, however, not necessary to rely on the certification as equivalent to payment, since the check was in fact paid. Smith testified and was uncontradicted, that he took the check from the paying teller's cash. This of itself would require an inference that it had been paid and was carried as a cash item; it hardly needed Smith's positive testimony that the check had been paid by the trust company. The fact that, instead of stamping it "paid," he put it in the safe deposit box, is not material. The holder had had his money and that is payment. Counsel for the defendant argues that if the check was paid by cash received from some other depositor, it was paid by that depositor rather than by the trust company. This is obviously fallacious, since the title to all money deposited passes with the deposit to the trust company, which thereupon becomes debtor to the depositor. The source of the cash is unimportant; it was the obligation of the trust company by reason of its certification that was satisfied, and it must be assumed that it was satisfied with the trust company's money. The necessary result was that Scarlett's account was in fact overdrawn.

Bank—authority to certify overdraft.

Check—payment—necessity of stamping.

One of the questions that arose was whether Smith had applied a certain check properly. Scarlett claimed it should have gone to his credit. Smith had applied it to what he said was an existing indebtedness of Scarlett. The judge, in the course of his charge, told the jury that Smith was corroborated in his testimony regarding the application made by him of the $3,000 check by Mr. Ferguson. If this was anything more than mere comment, it was certainly harmless to the defendant. His own claim was that Smith had misapplied the money. Proof that it had been applied elsewhere than to his account was proof of just what he claimed.

Appeal—harmless error.

The judgment must be affirmed.

ANNOTATION.

Banks: effect of overcertification of check.

I. Civil liability:
 a. As between bank and bona fide holder, 86.
 b. As to others than bona fide holders, 88.
II. Criminal liability, 89.

I. Civil liability.

a. As between bank and bona fide holder.

The general rule which is adhered to in the reported case (STATE v. SCARLETT, ante, 83) is that a drawee bank

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is liable to a bona fide holder of a check it has certified regardless of the state of the drawer's account, the implication being that the check is drawn upon sufficient funds, and the bank being estopped to deny that such is the case. The following cases support this rule: Merchants Nat. Bank v. State Nat. Bank (1870) 10 Wall. (U. S.) 604, 19 L. ed. 1008; Bowen v. Needles Nat. Bank (1898) 87 Fed. 430, affirmed in (1899) 36 C. C. A. 553, 94 Fed. 925; Born v. First Nat. Bank (1889) 123 Ind. 78, 7 L.R.A. 442, 18 Am. St. Rep. 312, 24 N. E. 173 (holding that the bank could not defeat the right of the holder to payment upon the ground that the drawer had no funds on deposit); Union Trust Co. v. Preston Nat. Bank (1904) 136 Mich. 399, 112 Am. St. Rep. 370, 99 N. W. 399, 4 Ann. Cas. 347; Robinett v. Bank of Willow Springs (1914) 178 Mo. App. 422, 163 S. W. 248; Ozark Sav. Bank v. Bank of Bradleyville (1918) — Mo. App. —, 204 S. W. 570; Farmers' & M. Bank v. Butchers' & D. Bank (1857) 16 N. Y. 127, 69 Am. Dec. 678, affirming (1855) 4 Duer, 219 (the opinion delivered in this case by Denio, Chief Justice, is reported in (1856) 14 N. Y. 623, and the opinion of Brown, J., is reported in (1863) 28 N. Y. 425 and 26 How. Pr. 1; Claflin v. Farmers' & C. Bank (1862) 25 N. Y. 293, reversing (1861) 36 Barb. 540 (holding that such is the rule as to checks of ordinary depositors in the bank); Cooke v. State Nat. Bank (1873) 52 N. Y. 96, 11 Am. Rep. 667 (so holding although the drawer had no funds in the bank at the time of the certification which was fraudulent); Pope v. Bank of Albion (1871) 59 Barb. (N. Y.) 226, reversed in (1874) 57 N. Y. 126 (the reversal was upon the ground that the check showed on its face that the certification was by a subordinate officer who had no authority to certify checks); Goshen Nat. Bank v. Bingham (1890) 118 N. Y. 349, 7 L.R.A. 595, 16 Am. St. Rep. 765, 23 N. E. 180; Willets v. Phœnix Bank (1853) 2 Duer (N. Y.) 121; Rankin v. Colonial Bank (1900) 31 Misc. 227, 64 N. Y. Supp. 32, affirmed without opinion in (1901) 60 App. Div. 629, 69 N. Y. Supp. 1144; Baldinger & K. Mfg. Co. v. Manufacturers'-Citizens' Trust Co. (1915) 93 Misc. 94, 156 N. Y. Supp. 445 (dictum); Security State Bank v. State Bank (1915) 31 N. D. 454, 154 N. W. 282; Hill v. Nation Trust Co. (1884) 108 Pa. 1, 56 Am. Rep. 189 (holding that where a check is certified by a bank when the drawer thereof has no funds, the consequences of the bank officer's infidelity or blunder should be visited not upon the innocent holder of the check so certified, but upon the agent's employers who put it in his power to commit the wrong); Farmers' & M. Nat. Bank v. Elizabethtown Nat. Bank (1906) 30 Pa. Super. Ct. 271; Andrews v. German Nat. Bank (1872) 9 Heisk. (Tenn.) 211, 24 Am. Rep. 300; French v. Irwin (1874) 4 Baxt. (Tenn.) 401, 27 Am. Rep. 769.

And this is the rule with respect to any national bank which overcertifies a check, in violation of U. S. Rev. Stat. § 5208, Comp. Stat. 1916, § 9770, which provides that "it shall be unlawful for any officer, clerk or agent of any national banking association to certify any check drawn upon the association unless the person or company drawing the check has on deposit with the association at the time such check is certified an amount of money equal to the amount specified in such check. Any check so certified by duly authorized officers shall be a good and valid obligation against the association, but the act of any officer, clerk or agent of any association in violation of this section shall subject such bank to the liabilities and proceedings on the part of the comptroller," etc. Thompson v. St. Nicholas Nat. Bank (1889) 113 N. Y. 325, 21 N. E. 57, affirmed in (1892) 146 U. S. 240, 36 L. ed. 956, 13 Sup. Ct. Rep. 66.

And in Michigan an overcertified check is valid in the hands of a bona fide holder, notwithstanding a statute declaring it unlawful to certify a check for an amount greater than the drawer's deposit, and making such a certification a crime, and this even though the statute does not provide, as does the National Bank Act, that such a check shall be good as against

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the bank. Union Trust Co. v. Preston Nat. Bank (1904) 136 Mich. 460, 112 Am. St. Rep. 370, 99 N. W. 399, 4 Ann. Cas. 347; First Nat. Bank v. Union Trust Co. (1909) 158 Mich. 94, 133 Am. St. Rep. 362, 122 N. W. 547, both of which construe and apply Mich. Comp. Laws 1897, § 6108. And see First Nat. Bank v. Currie (1907) 147 Mich. 72, 9 L.R.A.(N.S.) 698, 118 Am. St. Rep. 537, 110 N. W. 499, 11 Ann. Cas. 241.

And in at least one state where it is made a felony for any officer, agent, clerk, or employee of a bank wilfully to certify a check unless the amount called for actually stands to the credit of the drawer on the books of the bank, it is expressly provided that any such check so certified by a duly authorized person shall be a good and valid obligation of the bank in the hands of an innocent holder. See Smith v. Field (1911) 19 Idaho, 558, 114 Pac. 668, Ann. Cas. 1912C, 354, construing Idaho Rev. Codes, § 2988.

But where a bank, because of a mistake of fact, certifies a check for an amount greater than the drawer has on deposit at the time, it may upon discovering the mistake, cancel the certification as between the holder and the bank, provided no rights of other parties have intervened and the holder has in no way changed his position or rights between the certifying and the cancelation. Dillaway v. Northwestern Nat. Bank (1899) 82 Ill. App. 71 (in this case the bank, after certifying the check, delivered it to the holder, and upon again getting temporary possession of it, canceled the certification); Brooklyn Trust Co. v. Toler (1892) 65 Hun, 187, 19 N. Y. Supp. 975, affirmed without opinion in (1893) 138 N. Y. 675, 34 N. E. 515 (holding that a certification could be revoked except in so far as it had caused a change of circumstances); Security Sav. & T. Co. v. King (1914) 69 Or. 228, 138 Pac. 465. At least where the check is still in the hands of the person who procured the certification thereof, and the rights of third parties have not intervened, such holder can recover from the bank only for the balance the drawer had on deposit when the certification was made. Rankin v. Colonial Bank (1900) 31 Misc. 227, 64 N. Y. Supp. 32, affirmed without opinion in (1901) 60 App. Div. 629, 69 N. Y. Supp. 1144. And for a better reason, where a bank has been induced by fraud to certify the check of a depositor for an amount in excess of his deposit, it may countermand payment unless the rights of other parties have intervened. Farmers' Sav. Bank v. American Trust Co. (1918) 199 Mo. App. 491, 203 S. W. 674; Bank of the Republic v. Baxter (1858) 31 Vt. 101. Of course, neither mistake (see Ozark Sav. Bank v. Bank of Bradleyville (1918) — Mo. App. —, 204 S. W. 570, holding that where a bank certified a check of a depositor having a balance of $350, believing that it was for $200 when in fact it was for $2,000, it was liable to an innocent purchaser who paid full value therefor) nor fraud (Cooke v. State Nat. Bank (1873) 52 N. Y. 96, 11 Am. Rep. 667) constitutes a defense as against an innocent holder for value.

b. As to others than bona fide holders.

In the absence of statutory influence, the view seems to be that the reasoning upon which the general rule is based does not apply as between the drawer and the drawee bank, the rule being limited to innocent holders for value. See the reported case (STATE V. SCARLETT, ante, 83); Cooke v. State Nat. Bank (N. Y.) supra; and Baldinger & K. Mfg. Co. v. Manufacturers'-Citizens' Trust Co. (1915) 93 Misc. 94, 156 N. Y. Supp. 445. And the same is true as to a holder who is in the same position as the drawer. Stevens v. Corn Exch. Bank (1874) 3 Hun (N. Y.) 147, 48 How. Pr. 351, 5 Thomp. & C. 283. And in New York it has been held that where a check in favor of the drawer is transferred by him without indorsement, a bank which has fraudulently been induced to overcertify the check is not estopped by the certification from questioning the validity of the check. Goshen Nat. Bank v. Bingham (1890) 118 N. Y. 349, 7 L.R.A. 595, 16 Am. St. Rep. 765, 23 N. E. 180. And it has been held that the fact that a check shows on its face that the certification was made

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by a subordinate officer who ordinarily is not invested with authority to certify checks prevents one becoming a bona fide holder where the certification was in fact made by such an officer, if the drawer did not have sufficient funds on deposit to cover the check. Pope v. Bank of Albion (1874) 57 N. Y. 126, reversing (1871) 59 Barb. 226. And even under § 5208 (above set out), a bank certifying a check is not liable to one not a bona fide holder, it having been held that the provision, "any check so certified by duly authorized officers shall be a good and valid obligation against the association," does not apply where the check is in the hands of the original payee, who knows or is chargeable with constructive notice that the check was drawn and certified in violation of law. Bowen v. Needles Nat. Bank (1898) 87 Fed. 430, affirmed on other points in (1899) 36 C. C. A. 553, 94 Fed. 925. However, it has been held that the prohibition in this section of the Revised Statutes of the United States against certifying any check drawn upon a national banking association unless there is a sufficient deposit at the time to meet the check does not affect the validity of a contract even as between the parties to such an extent that a violation of the provision by a national bank in overcertifying a check precludes the bank from enforcing its claim out of collaterals pledged to secure the debt created by the certifying of the check. Thompson v. St. Nicholas Nat. Bank (1892) 146 U. S. 240, 36 L. ed. 956, 13 Sup. Ct. Rep. 66, affirming (1889) 113 N. Y. 325, 21 N. E. 57, which affirmed (1888) 47 Hun, 621. The Supreme Court of the United States in this case said that the only penalty incurred for violation of the provisions of this statute is a forfeiture of the bank's charter and the winding up of its affairs, and that the validity of transactions falling within such provision can be questioned only by the United States, and not by private parties.

But for the purposes of the general rule a creditor who accepts a cashier's check drawn to his own order in payment of his individual debts and unlawfully certified by himself takes the risk of such lack of authority and is not a bona fide holder, since such a course of dealing is sufficiently out of the line of ordinary conduct of the cashier of a bank to put the payee upon notice. Gale v. Chase Nat. Bank (1900) 43 C. C. A. 496, 104 Fed. 214. So, in the New York case of Claflin v. Farmers' & C. Bank (1862) 25 N. Y. 293, reversing (1861) 36 Barb. 540, it was held that where a personal check is drawn by a bank officer and certified by himself, it shows on its face an attempt to use his official character for his private benefit, so that one to whom it comes is put on inquiry precluding his recovery as a bona fide holder when the certification is false. And generally to the effect that a personal check drawn by a bank officer and certified by himself is void on its face, so that one accepting it cannot claim that he is a bona fide holder, see Lee v. Smith (1884) 84 Mo. 304, 54 Am. Rep. 101. And in New Brunswick it has been ruled that the payee of a check is placed on strict inquiry as to the authority of a manager of a bank to bind the bank by a certification of a check which there was no deposit to meet when such payee knew that the drawer gave the check in the interest of the manager, who certified it. McIntosh v. Bank of New Brunswick (1913) — N. B. —, 15 D. L. R. 375.

II. Criminal liability.

In some jurisdictions a question has been made as to the criminal liability, if any, of one who certifies a check in violation of a statutory prohibition.

Thus it has been held that § 5208 of the United States Revised Statutes (Comp. Stat. 1916, § 9770) which is set out supra, does not create any criminal offense. United States v. Heinze (1908) 161 Fed. 425. And see Thompson v. St. Nicholas Nat. Bank (1892) 146 U. S. 240, 36 L. ed. 956, 13 Sup. Ct. Rep. 66, affirming (1889) 113 N. Y. 325, 21 N. E. 57, as set out supra.

But § 5208 of the Revised Statutes was supplemented by the Act of July 12, 1882 (22 Stat. at L. 166, chap. 290, § 13, Comp. Stat. 1916, § 9771), so as

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to make it a misdemeanor for any officer, clerk, or agent of any national banking association to wilfully violate the provisions of § 5208, as enacted in 1869. Construing the Amendatory Act of 1882, it has been held that, to constitute the offense by a bank officer of certifying a check without a sufficient deposit to meet it, there must be on the part of the officer knowledge and a purpose to do wrong in addition to the certification, wrongful intent being the essence of the crime. Potter v. United States (1894) 155 U. S. 438, 39 L. ed. 214, 15 Sup. Ct. Rep. 144, reversing (1892) 56 Fed. 83; Spurr v. United States (1899) 174 U. S. 728, 43 L. ed. 1150, 19 Sup. Ct. Rep. 812, reversing (1898) 31 C. C. A. 202, 59 U. S. App. 663, 87 Fed. 701 (holding that specific intent to violate the statute may be imputed, as where the officer purposely keeps himself in ignorance of whether the drawer has money in the bank or not, or is grossly indifferent to his duty in respect to the ascertainment of that fact); United States v. Heinze (1908) 161 Fed. 425 (holding that § 5208 should be read with § 13 of the Act of 1882, and that, when so read, a criminal offense is created).

And under the Federal "Conspiracy Act" (U. S. Rev. Stat. § 5440, Comp. Stat. 1916, § 10,201), which imposes a penalty upon all the parties to a conspiracy to commit any offense against the United States where one or more of such parties has done any act to effect the object of the conspiracy, it has been held that it is not essential, in order to obtain a conviction under an indictment charging a conspiracy with officers of a national bank for the certification of a check when the drawer had insufficient funds on deposit, in violation of § 5208, that the defendant should have had knowledge that such false certification was in violation of law, since the necessary criminal intent will be imputed where it is shown that the parties have acted without knowledge of the facts. Chadwick v. United States (1905) 72 C. C. A. 343, 141 Fed. 225.

And for illustrations of state statutes which expressly make it a criminal offense for a bank to overcertify a check drawn upon it, see Smith v. Field (1911) 19 Idaho, 558, 114 Pac. 668, Ann. Cas. 1912C, 354, and Union Trust Co. v. Preston Nat. Bank (1904) 136 Mich. 460, 112 Am. St. Rep. 370, 99 N. W. 399, 4 Ann. Cas. 347, as set out supra. G. J. C.

S. BANE, Appt.,
v.
NORFOLK & SOUTHERN RAILROAD COMPANY.

North Carolina Supreme Court — October 23, 1918.

(— N. C. —, 97 S. E. 11.)

Carrier — language of notice — inability of passenger to read.

That a passenger cannot read the English language in which a carrier prints a notice required by statute, warning passengers not to ride upon the platforms of the cars, does not relieve him from the operation of a statute providing that, in case a passenger is injured while on the platform in violation of the printed regulations, the company shall not be liable for his injury, if the statute does not require the printing of the notice in other than the English language.

[*See note on this question beginning on page* 93.]

APPEAL by plaintiff from a judgment of the Superior Court for Durham County in favor of defendant in an action brought to recover damages for

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personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Bryant & Brogden, for appellant:

To constitute contributory negligence, plaintiff must have committed a negligent act, and such negligent conduct must have been the proximate cause of the injury. A failure to establish proximate cause, although negligence be proved, is fatal.

Ramsbottom v. Atlantic Coast Line R. Co. 138 N. C. 38, 50 S. E. 448; Brewster v. Elizabeth City, 137 N. C. 394, 49 S. E. 885; Hoaglin v. Western U. Teleg. Co. 161 N. C. 398, 77 S. E. 417; Henderson v. Durham Traction Co. 132 N. C. 785, 44 S. E. 598; Pritchard v. Southern R. Co. 157 N. C. 101, 72 S. E. 828; Paul v. Atlantic Coast Line R. Co. 170 N. C. 230, L.R.A. 1916B, 1079, 87 S. E. 66; Lea v. Southern Public Utilities Co. 175 N. C. 459, 95 S. E. 894.

Even if plaintiff was on the platform in violation of the statute, or in violation of the printed rules of the company, it would not prevent his recovery unless such violation was the proximate cause of the injury.

Ledbetter v. English, 166 N. C. 129, 81 S. E. 1066; Ferrell v. Durham Traction Co. 172 N. C. 682, L.R.A.1917B, 1291, 90 S. E. 893; Boney v. Atlantic Coast Line R. Co. 155 N. C. 95, 71 S. E. 87.

Messrs. W. B. Rodman and W. B. Guthrie for appellee.

Clark, Ch. J., delivered the opinion of the court:

The plaintiff, a passenger on the east-bound train from Raleigh to Norfolk, had paid his way to Farmville, North Carolina. At Stantonsburg, a small station just before reaching Farmville, where there was a pass track, the plaintiff got out on the platform, and on the left side of the train, which was on the opposite side to the station, while his train was still moving, when a freight train coming from the west moved into the siding, pushing ahead of it three cars already on the siding, which ran over a section hand, thereby derailing the front box car, which was empty. This car, leaning over towards the main track, bouncing along on the ties, struck the side of the passenger coach, where the plaintiff was holding to the grabiron as he stood on the platform with one foot on the top step. This box car, striking the passenger train, broke some of the windows in the forward colored coach, the engine and baggage car passing safely, and knocked off the grabiron which the plaintiff was holding, and the plaintiff received a slight scratch or wound on the hand. The coach in which the plaintiff was riding was not injured at all; no windows broken, and none of the passengers in any of the coaches were hurt; and plaintiff admits that, if he had kept his seat in the car, he would not have been hurt. The court charged the jury, as requested by plaintiff, that

"The mere announcement of the name of a station is not an invitation to alight; but, when such an announcement is followed by a stoppage of the train soon thereafter, it is ordinarily notification that the train has arrived at the usual place for landing passengers, and under such circumstances a passenger may reasonably conclude that it has stopped at the station, and endeavor to get off, unless the circumstances and indications are such as to render it manifest that the train has not reached the proper and usual landing place."

"The court charges you that, if you find from the evidence in this case, and the greater weight, that the train upon which plaintiff was riding was struck by an engine or box car owned and operated by the defendant, this would be negligence; and if this was the proximate cause of injury to the plaintiff, and you so find, you would answer the first issue, 'Yes.'"

"If you find from the evidence in this case, and by the greater weight thereof, that the plaintiff was a passenger on the defendant's train going from Raleigh to Farmville, North Carolina, that he had not had

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breakfast, and as the train was approaching Stantonsburg the porter called out the station, and soon afterwards the train slowed down and came to a stop at the usual stopping place; that plaintiff, after the train stopped, stepped upon the platform of the train to get or seek something to eat; that he then caught the iron rails or grabirons for the purpose of alighting, and while in this position a derailed car on a pass or side track was run or pushed by the defendant against the passenger train upon which the plaintiff was traveling and thereby caused the injury to the plaintiff, this would be negligence on the part of the defendant; and if this was the proximate cause of injury to the plaintiff, and you so find, you will answer the first issue, 'Yes.'"

The court then instructed the jury that the legislature had seen fit to enact the following statute (Revisal, § 2628) with reference to passengers riding on the platform of trains: "In case any passenger on any railroad shall be injured while on the platform of a car, or on any baggage, wood or freight car, in violation of the printed regulations of the company posted up at the time in a conspicuous place inside the passenger cars then in the train, such company shall not be liable for the injury: Provided, said company at the time furnish room inside its passenger cars sufficient for the proper accommodation of its passengers."

The evidence was uncontradicted and the jury found that the defendant had complied with the statute by posting up in a conspicuous place the required notice, forbidding passengers to ride upon the platform while the train was in motion, and that there was room within the car for the accommodation of the plaintiff and all other passengers. The court correctly told the jury that it was immaterial whether the plaintiff was a Hebrew and read Yiddish, but could not read English, for the statute did not require the notice to be printed in any other language.

Carrier—language of notice—inability of passenger to read.

In Shaw v. Seaboard Air Line R. Co. 143 N. C. 312, 55 S. E. 713, it was held that though the plaintiff stepped out on the platform under a bona fide belief that the train was not moving, and a reasonably prudent person under similar circumstances would have so believed, yet, if in fact the train was still moving, the plaintiff could not recover damages sustained by a sudden and violent jerking of the train, which would not have caused the injury if the passenger had remained in the car till the train actually stopped. In Wagner v. Atlantic Coast Line R. Co. 147 N. C. 315, 19 L. R. A. (N. S.) 1028, 61 S. E. 171, commenting on Shaw v. Seaboard Air Line R. Co., it was held prima facie negligence to ride on the platform of a moving train after a station is called, but before it has come to a stop, or very nearly so.

This is not the case of stepping off a slowly moving train by the invitation of the conductor, as in Nance v. Carolina C. R. Co. 94 N. C. 619, and cases cited thereto in Anno. ed. 6 Am. Neg. Cas. 98. In Wallace v. Norfolk Southern R. Co. 174 N. C. 171, 93 S. E. 731, it was held that the railroad company is not relieved of the requirement of a high degree of care to a passenger who steps off the train during a stop at an intermediate station, even though without notice to the conductor and for purposes of his own. The jury were so instructed in this case by the court giving the prayer of the plaintiff to that effect.

The jury found, as to the second issue, that the train was still moving when the plaintiff was hurt, and that he was on the platform in violation of the statutory notice in the car. It being admitted by the plaintiff that he would not have been hurt if he had remained in the car till the train stopped, the finding of the jury on the first issue that he was not injured by the negligence of the de-

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fendant, taken in connection with the charge, is a finding that the negligence of the defendant was not the proximate cause of the injury.

The exceptions as to contributory negligence and on other grounds are, therefore, immaterial.

No error.

ANNOTATION.

Liability of carrier as affected by inability of passenger to read language employed in notice or warning.

No case other than the reported case (BANE v. NORFOLK & S. R. Co. ante, 90) has been found which passes on the specific question as to the effect of the fact that a passenger could not read a notice, or warning, published in the English language, upon the question of his contributory negligence in violating the notice or warning.

Attention is, however, called to two cases of interest in this connection, although not passing upon the specific point. In Renaud v. New York, N. H. & H. R. Co. (1912) 210 Mass. 553, 38 L.R.A.(N.S.) 689, 97 N. E. 98, it is said that, "a common carrier of passengers has a right, inherent from the nature of its undertaking, to make reasonable rules to govern the conduct of its passengers. . . . Its public duty requires the common carrier to transport only persons who are willing to regard such rules, and its invitation to become passengers is confined to those who are prepared to conduct themselves according to regulations reasonably necessary for the protection of passengers for the safe and convenient transaction of the business of the carrier in the light of its severe obligations. . . . Violation of a reasonable rule with knowledge of its existence precludes recovery by the person whose violation was a contributing cause of his injury. . . . It has also been held that no duty of care rests on the carrier toward a passenger who disobeys the rules. . . . Where a railroad company seeks to justify the conduct of its servants by a rule, it is not necessary to show that notice of it was given to the plaintiff. . . . It is the law in some jurisdictions that [such regulations] need not, in all instances, be brought home to the knowledge of the passenger in order to bind him. But sounder reason supports the view that a regulation, in order to be binding upon the passenger must be known to him. There need not be positive evidence that it was expressly called to his attention. Knowledge may be inferred from widely posted notices, from the experience of the passenger in traveling, from the nature of the rule itself as according with the dictates of common prudence, and from other significant circumstances."

And in Coburn v. Moline, E. M. & W. R. Co. (1909) 243 Ill. 448, 134 Am. St. Rep. 377, 90 N. E. 741, wherein it is said that, conceding that a passenger may be guilty of contributory negligence in disregarding a rule of the company of which he had knowledge, still he is under no duty to use due diligence to find out what the rules are. In this case there was a warning or notice hanging in the vestibule of the street car, warning passengers not to stand in the vestibule. This notice hung above the head of the motorman, and it was dark, and the passenger testified that he did not see the notice or rule, and knew nothing about it, and it was held that the notice did not affect his right to recover for injuries due to the negligence of the carrier, where the conductor collected his fare while he was in the vestibule, and said nothing about the rule.

The doctrine of the foregoing case is not in conflict with the decision in the reported case (BANE v. NORFOLK & S. R. Co. ante, 90) holding that it is immaterial that the passenger could not read English and hence could not read the notice, for in the BANE CASE the carrier was relying upon a statute which, in express terms, exonerated the carrier from liability for injury to any passenger,

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injured while on the platform of a car in violation of the printed regulations of the company, posted up at the time in a conspicuous place inside the passenger cars then in the train.

A. G. S.

MUSKOGEE ELECTRIC TRACTION COMPANY, Plff. in Err.,
v.
EDWARD E. DOERING.

Oklahoma Supreme Court — April 30, 1918.

(— Okla. —, 172 Pac. 793.)

Railroad — interurban electric road — liability for injury to stock.

1. Where a corporation is chartered to and operates and maintains an electric street railway and a suburban or interurban line, for the purpose of transporting passengers, mail, and freight, and in pursuance of such power builds and operates a line from without the limits of a municipal corporation to another point without such municipality, for a distance of 5½ miles, through an agricultural section, such line of road being built and operated along private rights of way of said corporation, and not along a public road, such corporation is liable for damages for the killing of stock in the event that such corporation fails to fence and erect cattle guards along said line, without such municipal corporation, as provided by § 1435, Revised Laws of 1910, regardless of the fact that it is not guilty of other negligence than the failure to erect such fence and build such cattle guards.

[*See note on this question beginning on page* 98.]

Same — definition.

2. A railroad within the meaning of § 1435 is any road laid out and graded, having parallel rails of iron or steel for the wheels of carriages or cars to run upon, and on which a car is operated for the carriage of passengers or freight, without regard to the motive power by which its cars are propelled.

Headnotes by COLLIER, C.

ERROR to the District Court for Muskogee County to review a judgment affirming a judgment of the Justice's Court in favor of plaintiff in an action brought to recover damages for the killing of a horse. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. **B. B. Blakeney and J. H. Maxey**, for plaintiff in error:

An electric street or suburban railway is not within the meaning and purview of the general railroad laws of the state, requiring railroad companies to fence their rights of way and build cattle guards at crossings.

Missouri, K. & T. R. Co. v. Savage, 32 Okla. 376, 122 Pac. 656; Davis Bros. & Burke v. LeFlore, 26 Okla. 729, 110 Pac. 782, 3 N. C. C. A. 566; Midland Valley R. Co. v. Hardesty, 38 Okla. 559, 134 Pac. 400; Ross County v. Scioto Valley Traction Co. 75 Ohio St. 548, 80 N. E. 176; Little Rock R. & Electric Co. v. Newman, 77 Ark. 599, 92 S. W. 864; Lincoln Street R. Co. v. McClellan, 54 Neb. 672, 69 Am. St. Rep. 786, 74 N. W. 1074; Helena Light & R. Co. v. Helena, 47 Mont. 18, 130 Pac. 446; Louisville & P. R. Co. v. Louisville City R. Co. 2 Duv. 175; Bloxham v. Consumers' Electric Light & Street R. Co. 36 Fla. 519, 29 L.R.A. 507, 51 Am. St. Rep. 44, 18 So. 444; San Antonio Street R. Co. v. Wray, — Tex. Civ. App. —, 37 S. W. 461; O'Malley v. Riley County, 86 Kan. 752, 121 Pac. 1108, Ann. Cas. 1913C, 576; Riley v. Galveston City R. Co. 13 Tex. Civ. App. 247, 35 S. W. 826; State v. Hartman General Electric

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Co. 76 Minn. 96, 57 L.R.A. 63, 78 N. W. 1032; Funk v. St. Paul City R. Co. 61 Minn. 435, 29 L.R.A. 208, 52 Am. St. Rep. 608, 63 N. W. 1099, 16 Am. Neg. Cas. 326; Railway Comrs. v. Market Street R. Co. 132 Cal. 683, 61 Pac. 1065; Fidelity Loan & T. Co. v. Douglas, 104 Iowa, 532, 73 N. W. 1039; Illinois C. R. Co. v. Hudson, 136 Tenn. 1, 188 S. W. 589; Cedar Rapids & M. C. R. Co. v. Cedar Rapids, 106 Iowa, 476, 76 N. W. 728; Pascougla Street R. & Power Co. v. Brondum, 96 Miss. 28, 50 So. 97; Georgia R. & Electric Co. v. Joiner, 120 Ga. 905, 48 S. E. 366.

Mr. **William A. Killey**, for defendant in error:

It was the duty of defendant to fence this line of road, and its failure to so fence rendered it liable for all damages to plaintiff's stock injured or killed on its line.

Diebold v. Kentucky Traction Co. 117 Ky. 146, 63 L.R.A. 637, 111 Am. St. Rep. 230, 77 S. W. 674, 4 Ann. Cas. 445; Hannah v. Metropolitan Street R. Co. 81 Mo. App. 78; Simoneau v. Pacific Electric R. Co. 159 Cal. 494, 115 Pac. 320, 2 N. C. C. A. 137; Louisville & P. R. Co. v. Louisville City R. Co. 2 Duv. 175; Railroad Comrs. v. Market Street R. Co. 132 Cal. 683, 64 Pac. 1067; Bloxham v. Consumers' Electric Light & Street R. Co. 36 Fla. 539, 29 L.R.A. 507, 51 Am. St. Rep. 44, 18 So. 444; Aurora v. Elgin, A. & S. Traction Co. 227 Ill. 485, 118 Am. St. Rep. 284, 81 N. E. 544; Spalding v. Macomb & W. I. R. Co. 225 Ill. 585, 80 N. E. 327; Zehren v. Milwaukee Electric R. & Light Co. 99 Wis. 83, 41 L.R.A. 575, 67 Am. St. Rep. 844, 74 N. W. 538.

Collier, C., filed the following opinion:

This action was originally commenced in a justice's court by the defendant in error, the plaintiff below, against the plaintiff in error, the defendant below, to recover damages for the killing of a horse. Hereinafter the parties will be referred to as they appeared in the court below. The case was tried in the justice's court, and a judgment for $100 was given in favor of the plaintiff and against the defendant. From this judgment an appeal was prosecuted to and tried in the district court. Upon the conclusion of the evidence, the court directed the jury to return a verdict for the plaintiff for the reasonable market value of the horse, as shown by the evidence, at the time it was killed, and the jury returned a verdict for plaintiff for the sum of $85, to which the defendant duly excepted. Timely motion was made for a new trial, which was overruled, excepted to, and error brought to this court.

It was admitted in evidence that the defendant is a corporation, and the articles of incorporation of the defendant were introduced in evidence, and showed the nature of defendant's business to be as follows: "The general nature of the business to be transacted by this corporation is to construct, own, acquire, operate and maintain an electric street railway, and suburban and interurban lines for the purpose of transporting passengers, mails and freight, and to acquire right of way, station, and terminal grounds for the same by condemnation or purchase, to buy and sell real estate, to manufacture or produce electricity for furnishing light, heat and power and to sell and furnish the same to customers, to prospect for and produce natural gas, and to sell and furnish the same to consumers for heating and lighting."

The uncontradicted evidence is that the defendant constructed and operated its lines in the city of Muskogee, and a line of road from Muskogee, beyond its corporate limits, to Hyde Park, a distance of 5½ miles; that its road from without the corporation of Muskogee did not travel along any public road; that the lines were equipped with the usual electrical overhead equipment, and cars were propelled thereon by means of electricity in the usual way; that five or six years prior to the accident, the defendant had permitted the Missouri, Oklahoma, & Gulf Railway Company to haul a few cars of freight over this line with a steam engine, but the defendant owned no steam railway equipment of its own and operated none; that the defendant had also moved, at rare intervals, carloads of freight for certain manufacturing establishments locat-

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ed at Hyde Park, but at the time of the accident these manufacturing establishments were closed down, and no carload lots were being moved; that the defendant owned no box cars of its own, nor other similar railway equipment; that the defendant also carried small packages of freight on its passenger cars for anyone who desired to have them transported; however, its principal business over this line was that of carrying passengers; that some years prior to the accident the defendant had erected a fence along the south line of plaintiff's property, but the fence had gotten in bad repair and would not have constituted a lawful fence within the meaning of the General Railroad Laws of the state; that on February 6, 1915, the plaintiff left his horses in the barn lot on his farm, and left the gate of the barn open; that the plaintiff knew that the horses could go out on the defendant's right of way; that, at one particular place between his stalk field and the defendant's right of way, the fence was not over a foot high; that plaintiff had known that this condition of the fence had existed for a long time; that the horses left the barn lot and went into the stalk field, and sometime during the night strayed upon the defendant's right of way; that sometime during the night, while a car was coming from Hyde Park to Muskogee, a horse belonging to the plaintiff jumped on the tracks in front of the car, not far from the plaintiff's farm, and was struck and killed. It was also shown by the evidence that the value of the horse was from $75 to $100. The plaintiff announced in open court that he did not claim any negligence on the part of the defendant except the failure to maintain a fence and cattle guards, required by the General Railway Law. It was stipulated and agreed that plaintiff's farm was in Harris township, Muskogee county, and not within the incorporate limits of the city of Muskogee.

There are very many assignments of error; but, in view of the assertion in plaintiff's brief, there is only one question involved in the case, and that is, Is an electric street or suburban railway, such as the defendant in this case, within the meaning and purview of the General Railroad Laws of the state, requiring railroad companies to fence their rights of way? It is further stated in plaintiff's brief "that, if the defendant is a railway company within the meaning of the statutes, the plaintiff was entitled to recover, and the court should have directed a verdict in his favor. If this defendant is not a railway within the meaning of such statute, and not required by that statute to fence its right of way and maintain cattle guards, then the defendant was entitled to a judgment."

It is therefore unnecessary to consider any question involved in this appeal, other than whether or not the defendant, under the statutes of this state, was required to fence its line outside of the incorporation of Muskogee, and to erect cattle guards. Section 1435, Revised Laws 1910, is as follows: "It shall be the duty of every person or corporation owning or operating any railroad in the state of Oklahoma to fence its road, except at public highways and station grounds, with a good and lawful fence."

Section 1438, Revised Laws 1910, is as follows: "Whenever any railroad corporation or the lessee, person, company or corporation operating any railroad, shall neglect to build and maintain such lawful fence, such railroad corporation, lessee, person, company or corporation operating the same, shall be liable for all animals killed by reason of the failure to construct such fence."

We are of the opinion, under the facts in this case, that, to avoid liability for killing stock, it was the duty of the defendant to fence its road from without the corporation of Muskogee to Hyde Park; that it was a railroad within the meaning of said section; and that having failed to do so, it was liable to the

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plaintiff for damages for the killing of his horse, without other negligence on the part of the defendant. And, there being no conflict in the testimony, the court did not err in instructing the jury to find for the plaintiff for such an amount as might by shown by the evidence was the market value of the horse. The question involved in this appeal has not been directly decided by this court, and we are not unmindful that the authorities are in conflict, but we think that the rule announced by us is fully sustained by the weight of authority. Whether or not it is a railroad cannot be determined by the power with which its cars are operated, and if otherwise coming within the definition of a railroad, it is entirely immaterial whether its cars be operated by steam or electricity, or any other power. In 33 Cyc. 33A, the railroad is defined as a road specially laid out and graded, having parallel rails of iron or steel for the wheels of carriages or cars, drawn by steam or other motive power, to run upon. In Massachusetts Loan & T. Co. v. Hamilton, 32 C. C. A. 46, 59 U. S. App. 403, 88 Fed. 588, it is held: "The word 'railroad' has no such fixed definition as to enable a court to determine whether, by its mere use in a statute, it applies to street railways or not. It may be used in its broad sense, which includes a street railroad, and any other kind of a road on which rails of iron are laid for the wheels of cars to run upon, whether propelled by steam, electricity, horse, or other power, or it may be used in its technical sense, which does not apply to street railroads. As a general rule, statutes are presumed to use words in their popular sense; but the safest rule of construction is to take the entire provisions of the statute, and thereby ascertain, if possible what the legislature intended. The meaning must depend upon the context, and be ascertained from the occasion and necessity of the law, the mischief felt, and the object and remedy in view."

Railroad—interurban electric road—liability for injury to stock.

Same—definition.

It is very clear that the law under review imposes upon a railroad company, whether its cars are propelled by steam or electricity, and regardless of the fact that its principal business may be the operation of street cars within a municipality, to fence and erect cattle guards on an interurban line operated by it without a municipality, in order to avoid liability for killing stock, where stock is killed without other negligence than said corporation's failure to comply with said § 1435, Revised Laws 1910. In Riggs v. St. Francois County R. Co. 120 Mo. App. 335, 96 S. W. 707, it is held. "In determining whether the term 'railroad corporation' as used in § 1105, Revised Statutes of 1899, applies to a street railway in a given instance, the court must consider the context and purpose of the statute, the character of mischief sought to be prevented by it, and the use to which the railroad is put. A street railway organized under article 3, chap. 12, of the Revised Statutes of 1899, with authority to operate its railroad by 'animal, cable, electric or other motive power' to 'transport passengers, express and mails,' and running, the greater portion of its length, through an agricultural country, is a 'railroad corporation' within the meaning of § 1105, Revised Statutes of 1899, and liable for double damages for animals killed by its failure to fence its track, where it runs through inclosed or cultivated fields or uninclosed lands."

In the case of Hannah v. Metropolitan Street R. Co. 81 Mo. App. 78, in defining a "street railway" the court says: "A street railway has been variously defined. As the name indicates, the primary meaning of street railway, or street railroad, is one constructed and operated on and along the streets of a city or town for the carriage of persons from one point to another in such city or town or to and from its suburbs. It is peculiarly . . . for

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the accommodation of people in cities or towns; its tracks are ordinarily laid to conform to street grades; its cars run at short intervals, stopping at street crossings to take on and discharge passengers, and in its business is confined to the carriage of passengers and not freight. Booth, Street Railways, § 1; Elliott, Roads & Streets, p. 557; Williams v. City Electric Street R. Co. (C. C.) 41 Fed. 556; Funk v. St. Paul City R. Co. 61 Minn. 435, 29 L.R.A. 208, 52 Am. St. Rep. 608, 63 N. W. 1099, 16 Am. Neg. Cas. 326. The road in question is quite a different thing from that just described. It is not strictly local in its character; it is not used to carry passengers from corner to corner, or from one section or portion of the city to another, or to transport persons from 'down town' to and from the suburbs; it pays little attention to streets and roads, but takes its course through the country just as any other railroad. . . . That defendant has changed the motive power from steam to electricity can make no difference; it still remains a railroad within the meaning of the act. Booth, Street Railways, § 1, and notes. The law was intended as a protection to stock and to human life. The change from steam power to electricity may lessen the chances for accident, but, as the present case shows, has not rendered the operation of the road entirely safe. The danger still remains, though possibly in a less degree."

In Simoneau v. Pacific Electric R. Co. 159 Cal. 494, 115 Pac. 320, 2 N. C. C. A. 137, the court cites Century Dict.; Standard Dict.; Railroad Comrs. v. Market Street R. Co. 132 Cal. 683, 64 Pac. 1065; Bloxham v. Consumers' Electric Light & Street R. Co. 36 Fla. 539, 29 L.R.A. 507, 51 Am. St. Rep. 44, 18 So. 444; Hannah v. Metropolitan Street R. Co. 81 Mo. App. 78, and many other authorities, and says: "Whether or not a railway is a street railway does not depend on the motive power. Nichols v. Ann Arbor & Y. Street R. Co. 87 Mich. 361, 16 L.R.A. 371, 49 N. W. 538; McNab v. United R. & Electric Co. 94 Md. 719, 51 Atl. 421, 11 Am. Neg. Rep. 240. Various features are to be considered. Among these are the location and method of construction of the track, the manner of the operation of the cars, and the general purpose of the enterprise."

Finding no error in the record, this case is affirmed.

Per Curiam:

Adopted in whole.

ANNOTATION.

Liability of interurban road for killing or injuring live stock running at large.

I. General rule, 98.
II. Proof of negligence:
a. In general, 99.
b. Excessive speed—failure to check speed of car, 99.
c. Failure to sound gong, etc., 100.
III. Failure to fence right of way or maintain guards, 101.

I. General rule.

Where the killing of or injury to live stock in the operation of cars on an interurban line is the proximate result of negligence on the part of employees of the company, and there is an absence of contributory negligence on the part of the owner of the stock, the rule is well settled that the company is liable for the injury done.

Alabama.—Anniston Electric & Gas Co. v. Hewitt (1904) 139 Ala. 442, 101 Am. St. Rep. 42, 36 So. 39.

Arkansas.—Little Rock Traction & E. Co. v. Hicks (1906) 79 Ark. 248, 96 S. W. 385; Little Rock R. & E. Co. v. Newman (1906) 77 Ark. 599, 92 S. W. 864.

Illinois.—Stewart v. Bloomington, C. & D. R. Co. (1913) 180 Ill. App. 608.

Indiana.—Terre Haute, I. & E. Traction Co. v. Combs (1918) — Ind. App. —, 118 N. E. 976; Chicago, S. B. & S. I. R. Co. v. Ness (1914) 56 Ind. App. 285, 105 N. E. 250, 6 N. C. C. A. 167; Terre Haute, I. & E. Traction Co. v. Phillips (1912) 49 Ind. App. 643, 97

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N. E. 1014; Indianapolis & C. Traction Co. v. Smith (1908) 42 Ind. App. 605, 86 N. E. 498; Campbell v. Indianapolis & N. W. Traction Co. (1906) 39 Ind. App. 66, 79 N. E. 223.

Iowa.—Swisher v. Interurban R. Co. (1911) 151 Iowa, 384, 130 N. W. 404; Fullerton v. Cedar Rapids & M. C. R. Co. (1897) 101 Iowa, 156, 70 N. W. 106, 1 Am. Neg. Rep. 234.

Kentucky.—Byrd v. Central Ky. Traction Co. (1910) 136 Ky. 766, 125 S. W. 174.

Michigan.—Nissly v. Detroit, J. & C. R. Co. (1911) 168 Mich. 676, 131 N. W. 145, 135 N. W. 268, Ann. Cas. 1913C, 719; Airikainen v. Houghton County St. R. Co. (1904) 138 Mich. 194, 101 N. W. 264; Kotila v. Houghton County St. R. Co. (1903) 134 Mich. 314, 96 N. W. 437.

Missouri.—Walker v. Southwest Missouri R. Co. (1918) — Mo. App. —, 198 S. W. 441; Riggs v. St. Francois County R. Co. (1906) 120 Mo. App. 335, 96 S. W. 707; Hannah v. Metropolitan St. R. Co. (1899) 81 Mo. App. 78.

New Hampshire.—Laronde v. Boston & M. R. Co. (1905) 73 N. H. 247, 60 Atl. 684.

New York.—Craft v. Peekskill Lighting & R. Co. (1907) 121 App. Div. 549, 106 N. Y. Supp. 232; Evans v. Utica & M. V. R. Co. (1904) 44 Misc. 345, 89 N. Y. Supp. 1089; Rubein v. Brooklyn Heights R. Co. (1901) 61 App. Div. 478, 70 N. Y. Supp. 577.

Oklahoma. — MUSKOGEE ELECTRIC TRACTION CO. v. DOERING (reported herewith) ante, 94.

Pennsylvania.—Horne v. West Chester St. R. Co. (1916) 63 Pa. Super. Ct. 362.

Canada.—Bondy v. Sandwich, W. & A. R. Co. (1911) 24 Ont. L. Rep. 409, 19 Ont. Week. Rep. 860.

II. Proof of negligence.

a. In general.

In an action to recover compensation for killing or injuring an animal in the operation of cars on an interurban line, the burden of proof is upon the plaintiff to show the negligence of the defendant; and it must not only appear that the defendant was negligent, but also that such negligence was the proximate cause of the injury. Little Rock R. & Electric Co. v. Newman (1906) 77 Ark. 599, 92 S. W. 864.

The presumption of negligence arising from the killing of an animal by a railway company, due to statutory provisions relating to such cases, does not apply to street railway companies, and hence the negligence of such company must be proven. Ibid.

And see Craft v. Peekskill Lighting & R. Co. (1907) 121 App. Div. 549, 160 N. Y. Supp. 232, holding that evidence that a cow strayed along a country highway, and was killed upon a crossing by an electric car, is not sufficient to render the traction company liable for the injury.

In Horne v. West Chester Street R. Co. (1916) 63 Pa. Super. Ct. 362, it was also held that, where a horse was a trespasser on a private right of way when it was struck by a car, and there was no evidence to show that the accident was the result of any recklessness or wilfulness on the part of the company, it was not responsible therefor.

And see Bondy v. Sandwich, W. & A. R. Co. (1911) 24 Ont. L. Rep. 409, 19 Ont. Week. Rep. 860, holding that, where a horse was struck by a car and killed while trespassing upon a right of way of a street railway company, the latter is not liable, where the only negligence shown was the alleged failure to keep a lookout for animals.

Even though the fact of killing live stock raises a presumption of negligence on the part of the traction company, nevertheless this presumption may be overcome by introducing satisfactory and consistent proof that the killing could not have been avoided by the exercise of ordinary care. Byrd v. Central Kentucky Traction Co. (1910) 136 Ky. 766, 125 S. W. 174.

For example, where, owing to weather conditions, a motorman could not see a horse standing upon a track in time to stop a car which he was not running at an unsafe speed, the company is not shown to have been guilty of negligence, and any statutory presumption of negligence arising from killing the animal is rebutted by proof of these facts. Ibid.

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b. Excessive speed—failure to check speed of car.

The question whether, under all the circumstances, the speed at which an interurban car was being run along the highway was reasonable, is one for the jury. Nissly v. Detroit J. & C. R. Co. (1911) 168 **Mich.** 676, 131 N. W. 145, 135 N. W. 268, Ann. Cas. 1913C, 719.

Evidence that a car was running at a speed exceeding the limit fixed by ordinance, and that it could not be stopped in time to prevent hitting a cow which the motorman first saw about twenty steps ahead of the car, makes a prima facie case of liability on the part of the company. Anniston Electric & Gas Co. v. Hewitt (1904) 139 **Ala.** 442, 101 Am. St. Rep. 42, 36 So. 39.

It is error to instruct the jury that, if a car could not be stopped in time to avoid striking an animal on the track, the traction company is liable, for it takes from the jury all question as to the negligence of the defendant in operating the car. Fullerton v. Cedar Rapids & M. C. R. Co. (1897) 101 **Iowa,** 156, 70 N. W. 106, 1 Am. Neg. Rep. 234.

If there is no evidence to show that the injured animal was on the track far enough ahead of the car to permit the motorman to see it in time to stop the car, plaintiff fails to make a case against the company. Little Rock R. & Electric Co. v. Newman (1906) 77 **Ark.** 599, 92 S. W. 864.

And see Kotila v. Houghton County Street R. Co. (1903) 134 **Mich.** 314, 96 N. W. 437, holding that it amounts to negligence to permit a cow to run at large, and the owner cannot recover for its killing by an electric car, unless it appears that the motorman, after he discovered it, or by the exercise of due care might have discovered it, could, by the use of the appliances at hand, have stopped the car, or so checked its speed as to prevent the injury.

Evidence that a motorman could have seen an animal 100 yards away if it had been standing on the track, or 4 or 5 feet therefrom, and 100 feet away, had it been on the sidewalk, together with evidence that the car was running at excessive speed, is sufficient to make it a prima facie case against the company. Little Rock Traction & Electric Co. v. Hicks (1906) 79 **Ark.** 248, 96 S. W. 385.

If a motorman, while running a car, saw an animal on the track, or in such close proximity to the track as to be in peril, and he could have avoided injuring it by slowing down or by stopping, it was his duty to do so, and his failure in this regard amounted to gross negligence, rendering the company liable. Airikainen v. Houghton County Street R. Co. (1904) 138 **Mich.** 194, 101 N. W. 264.

It has been held that the question, whether a motorman could see an animal upon the track a sufficient distance away so that he might have stopped the car, is one for the jury, although the evidence is to the effect that the motorman did not actually discover the animal until he was so close to it that he could not stop the car. Swisher v. Interurban R. Co. (1911) 151 **Iowa,** 384, 130 N. W. 404.

It is error to instruct the jury that, if the employees of the traction company did not stop the car as soon as they could do so after discovering an animal on the track, the defendant is liable, where the petition does not aver, in substance or effect, that the traction company or its employees operating the car were negligent in failing to discover the animal, but merely charged that, with knowledge of the animal's presence on the track, they negligently ran the car into and upon it. Fullerton v. Cedar Rapids & M. C. R. Co. (**Iowa**) supra.

c. Failure to sound gong, etc.

Where, by statute, motormen operating interurban cars across the highway are required to ring the bell and sound the whistle, the failure of a motorman to do so amounts to negligence per se, rendering the company liable for injury to animals on the highway. Swisher v. Interurban R. Co. (1911) 151 **Iowa,** 384, 130 N. W. 404.

Under ordinary circumstances, it is the duty of the motorman to sound the gong in order to frighten an animal from the track, and the failure to do so will be evidence of negligence; but the circumstances may be such that his failure in this regard may be ex-

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plained and excused, as where the sudden appearance of the animal on the track required the immediate effort on the part of the motorman to stop the car, and to which matter he devoted his entire attention. Nissly v. Detroit J. & C. R. Co. (1911) 168 Mich. 676, 131 N. W. 145, 135 N. W. 268, Ann. Cas. 1913C, 719.

III. Failure to fence right of way or maintain guards.

Where an animal was injured upon the right of way of an interurban line, and it got upon the right of way because it was not fenced by the company as required by statute, the company is liable for the injury to such stock. Riggs v. St. Francois County R. Co. (1906) 120 Mo. App. 335, 96 S. W. 707; Hannah v. Metropolitan Street R. Co. (1899) 81 Mo. App. 78; Evans v. Utica & M. Valley R. Co. (1904) 44 Misc. 345, 89 N. Y. Supp. 1089; Rubein v. Brooklyn Heights R. Co. (1901) 61 App. Div. 478, 70 N. Y. Supp. 577; MUSKOGEE ELECTRIC TRACTION CO. v. DOERING (reported herewith) ante, 94.

The negligence of an interurban traction company in failing to fence its right of way, as required by statute, will render it liable for injury to an animal straying on the right of way, where the injury is due to the further negligent act of the company, in driving the animal ahead of one of its cars to and upon a bridge unfitted and dangerous for animals to cross. Campbell v. Indianapolis & N. W. Traction Co. (1906) 39 Ind. App. 66, 79 N. E. 223; Chicago, S. B. & S. I. R. Co. v. Ness (1914) 56 Ind. App. 285, 105 N. E. 250, 6 N. C. C. A. 167.

So, where a traction company was under contract with the owner of land, to which it had a right of way, to construct and maintain certain crossings and cattle guards, and the company negligently failed to keep the same in repair after they were constructed, and such negligence resulted in the killing of the stock of the owner without fault or negligence on his part, it is liable therefor. Terre Haute, I. & E. Traction Co. v. Combs (1918) — Ind. App. —, 118 N. E. 976.

The fact that, by statute, interurban traction companies were given one year in which to fence their right of way, does not relieve such a company from liability for killing stock on an unfenced right of way, where the killing was due to its negligence. Terre Haute, I. & E. Traction Co. v. Phillips (1912) 49 Ind. App. 643, 97 N. E. 1014.

It has been held that, where stock came upon the right of way of a traction company at a place it was not required to fence, it is not liable for injury thereto. Walker v. Southwest Missouri R. Co. (1918) — Mo. App. —, 198 S. W. 441.

Where animals got upon a right of way through gates provided by a traction company for the use of owners of land abutting the right of way, but the escape of the animals was not due to the negligence of the company, it is not liable for killing them, where no negligence on its part is shown. Indianapolis & C. Traction Co. v. Smith (1908) 42 Ind. App. 605, 86 N. E. 498.

Where the owner of land abutting the right of way of an interurban line was required by statute to maintain gates opening upon private crossings, and a gate thus maintained was pushed open by his stock, and in this manner they got upon the right of way and were injured, he cannot hold the company responsible therefor. Terre Haute, I. & E. Traction Co. v. Combs (Ind.) supra.

Where the question has been specifically raised, it has been held that the mere fact that an animal was wrongfully on the track did not relieve the traction company of liability for injuring it, where the injury was due to its negligence. Laronde v. Boston & M. R. Co. (1905) 73 N. H. 247, 60 Atl. 684.

Where an animal was killed on the right of way of an electric railway company, and it got there by crossing a cattle guard from the highway, it is erroneous to charge the jury that, if it got on the right of way without negligence on the part of the owner, the defendant is liable; for the latter is not liable if the cattle guard was sufficient and suitable to turn stock, and it was not otherwise guilty of negligence. Stewart v. Bloomington, C. & D. R. Co. (1913) 180 Ill. App. 608.

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M. W. DAVIS, Respt.,
v.
ATLANTIC COAST LINE RAILROAD COMPANY, Appt.

South Carolina Supreme Court — March 17, 1916.

(104 S. C. 63, 88 S. E. 273.)

Carrier — excess baggage — absence of excess check.

1. Failure of a railroad company to put on a piece of excess baggage the check required by its rules, to show payment of excess fare, does not preclude the owner of the baggage from showing that he had in fact made the excess payment.

[*See note on this question beginning on page* 109.]

Damages — punitive — refusal to deliver baggage.

2. Punitive damages may be allowed for refusal to deliver excess baggage to a passenger under circumstances imputing bad faith to him, without inquiring from reliable sources as to whether or not he had paid the excess charge for its transportation after he had truly stated that he had done so.

Evidence — similar offenses.

3. Upon the question whether or not a railroad company refused to deliver excess baggage to a passenger, although he had paid the excess charge for its transportation, evidence is not admissible that on a subsequent occasion his baggage came into a terminal station without excess checks upon it.

(Hydrick, J., dissents in part.)

APPEAL by defendant from a judgment of the Common Pleas Circuit Court for Marion County in favor of plaintiff in an action brought to recover damages for alleged wrongful withholding by defendant of plaintiff's trunks. *Affirmed.*

The facts are stated in the opinion of the court.

The exceptions referred to in the opinion were as follows:

1. Because his Honor, the presiding judge, erred, it is respectfully submitted, in refusing to direct a verdict for the defendant on the cause of action based upon wilfulness and in refusing to grant a new trial, on the following grounds:

First. That there is no proof of any wilful or wanton conduct on the part of the defendant which would warrant a verdict for punitive damages.

Second. That the entire proof shows that the acts of the railroad employees were nothing more than an honest effort on their part to enforce the provisions of the statute laws of the state, and the rules of the Railroad Commission prohibiting discrimination against different passengers in the carriage of baggage.

2. Because his Honor erred, it is respectfully submitted in charging the jury as follows:

"Now, Mr. Foreman, I charge you that it is the duty of the agent in receiving baggage for checking—the receiving agent—to ascertain, under the rule put in in this case, the weight of the baggage for himself. But if he chooses to do so he may accept the passenger's statement; but that would be a breach of the rule when he does. But, Mr. Foreman, it is the receiving agent's duty to collect this excess fare for transporting a trunk at the time he checks it; and if he checks a trunk the very fact of its being checked is prima facie evidence that the law has been complied with; that the excess has

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been paid. So, when a party presents a check issued by the railroad company at a point of destination and calls for a particular trunk, the very fact that he has that check in his possession and presents it raises the prima facie presumption that he has paid for all excess due on that particular trunk. It is not a conclusive presumption; it may be overcome by testimony; but it casts upon the railroad who disputes the payment of the excess, if there be excess, the burden of showing by the greater weight of the evidence that the excess has not been paid. In other words, the railroad must satisfy the jury by such evidence as would overcome, by such weight as would overcome, the prima facie presumption that the excess baggage had been paid, by reason of the fact that the passenger had in his possession a check calling for that particular piece of baggage."

"I charge you that under rule 19 of the railroad company, put in evidence in this case, that the prima facie presumption is that where the railroad checks baggage that the excess has been collected by the receiving agent of the railroad checking it. That is merely prima facie presumption, not an irrebuttable presumption. It may be overcome by evidence of such weight in the judgment of the jury as would overthrow the presumption arising from the mere fact that it had been checked. If you find the plaintiff did have a check for his baggage and presented that at Marion and the railroad withheld his baggage because of the claim that the excess had not been paid, then I charge you that the burden is on the railroad company to overcome the presumption arising from the mere fact of having the checks, by testimony sufficiently strong for that purpose. Failing to do that, the presumption is that the plaintiff paid the excess baggage or he would not have had the checks."

In that: (a) Under the rule of the defendant company introduced in evidence, where excess charges are collected by the forwarding agent, the same must be plainly indicated on an excess baggage check; and the uncontradicted evidence in this case was that the plaintiff's checks for the baggage in question were ordinary checks, and did not show that any excess charges had been paid, and, therefore, there was no presumption that such charges were paid by the plaintiff to the forwarding agent.

(b) Under the rule of the defendant company introduced in evidence, it is the duty of the agent at the point of destination to weigh all baggage when in doubt as to whether same is more than free allowance, and if found over weight, and the forwarding agent has not assessed proper excess charge, to collect proper charges; hence, the presentation of an ordinary check showing no payment of excess creates no presumption that the excess charges were paid to the forwarding agent.

(c) The plaintiff's right to the transportation of the baggage in question did not arise out of the ordinary contract of passage made by the payment of his railroad fare, but arose out of a special contract for the transportation of baggage in excess of the amount required by law to be carried free of charge; and, therefore, the burden was upon the plaintiff to prove compliance by him with the special contract and the payment of the excess charges required by said special contract.

(d) It was the duty of the agent of the defendant company at the point of destination to comply with the company's rule, introduced in evidence, and collect the excess charges pursuant to the said rule, the same being in accordance with the rules of the Railroad Commission and the statutory law of the state; and the failure to comply with said rule of the company would be a violation of the statutory law of the state and the rules of the Railroad Commission, prohibiting discrimination among different passengers in the transportation of baggage.

3. Because his Honor erred, it is

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respectfully submitted, in charging the jury as follows: "The duty of the agent of the railroad company is to heed the reasonable explanation of the passenger not only as to the rights of personal transportation, but to his right to the transportation of his personal property, and any reasonable explanation they are bound to heed, to the extent that if they go forward and act in contravention of the reasonable explanation of the passenger they do it at the railroad's risk, if it should turn out that the passenger was right. Then the railroad would be wrong, and the railroad must pay the damages of the result. To that extent they must heed the reasonable explanation of the passenger. Now, if there is opportunity to investigate, they must investigate and find out whether or not the passenger's statement is correct."

In that: (a) The said charge was irrelevant to the issues in the case, inapplicable to the evidence, and tended strongly to mislead the jury to the prejudice of the defendant, because there was no evidence that the plaintiff gave to the agents of the railroad company any reasonable explanation whatever as to why the checks presented by him for the baggage in question were ordinary checks, and showed no payment of excess charges.

(b) The charge was a charge on the facts, plainly indicating to the jury that plaintiff had offered a reasonable explanation.

(c) There was no evidence that the defendant company did not make such investigation as was possible in the circumstances.

4. Because his Honor erred, it is respectfully submitted, in charging the jury as follows: "I charge you, Mr. Foreman, that the check for a particular piece of baggage merely is the evidence of the passenger's right to demand that baggage, and the passenger is not bound to examine the check; if he has made a contract with the railroad company to transport his baggage from one point to another, he is under no obligation to examine the check to see whether or not it is right. He had the right to assume that the railroad agent had done his duty, and he had given him such check as was right under their contract. The supreme court of this state has passed on that question, and has laid down the law as follows: Quoting from a New York case, the court says: 'In the case of Isaacson v. New York C. & H. R. R. Co. 94 N. Y. 278, 46 Am. Rep. 142, which was very similar to this case, the court said: In this case the request to check over the Mobile route was made to the baggage master and assented to by him, and he assumed to give checks in accordance with the request. This constituted, we think, an agreement binding on the company, and unless the plaintiff's omission to examine the checks was contributory negligence, we are of opinion that the nonsuit was erroneous. The primary purpose of giving the passenger a duplicate check is to enable him to identify and claim his baggage at the end of the route. It has never, we think, been regarded as embodying the contract of carriage, but only as a voucher or token for the purpose mentioned. See Quimby v. Vanderbilt, 17 N. Y. 306, 72 Am. Dec. 469; Van Buskirk v. Roberts, 31 N. Y. 661; Blossom v. Dodd, 43 N. Y. 264, 3 Am. Rep. 701; Rawson v. Pennsylvania R. Co. 48 N. Y. 212, 8 Am. Rep. 543. The plaintiff had a right to repose upon the representation of the baggage master, without examining the checks.'"

In that: (a) The said charge was irrelevant to the issues in the case, inapplicable to the evidence, and tended strongly to mislead the jury to the prejudice of the defendant, because the evidence clearly shows that the plaintiff knew the checks given him by the forwarding agent of the company were not excess baggage checks, and did not show the payment of excess baggage charges, while the principle laid down by the court applies only to a case where a party does not examine the check given him, and it transpires that

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such check was not the kind that should have been given him under his contract; and, further, does not apply to a special contract for the transportation of baggage, exceeding in weight the amount required by law to be carried free of charge.

(b) While the possession of a duplicate check enables a passenger to identify and claim his baggage at the end of the route if there are no charges due thereon, the possession of an ordinary check which does not show the payment of excess charges affords no presumption that the excess charges were paid, when the party holding such check knew that if he had paid the excess charges he was entitled to a check showing the payment of same.

5. Because his Honor erred, it is respectfully submitted, in refusing to permit M. V. Orr, agent of the defendant company, at Marion, South Carolina, the point of destination, to testify that he reported to counsel of the defendant company that the baggage in question had come through his office, since the institution of this suit, without the excess checks, in that the plaintiff testified that his trunks had gone through on other occasions without the excess checks, without being "held up," and the testimony offered by the defendant would have tended to show the reason for this occurrence and the motives of the plaintiff in instituting this suit.

Messrs. H. E. Davis and L. D. Lide, for appellant:

The possession of an ordinary check is not prima facie evidence that the excess baggage charges have been paid.

Park v. Southern R. Co. 78 S. C. 304, 58 S. E. 931; 3 Am. & Eng. Enc. Law, 2d ed. 580; Moore, Carr. p. 721; 6 Cyc. 669; Talcott v. Wabash R. Co. 159 N. Y. 461, 54 N. E. 1.

If the agents of defendant made a mistake they acted in good faith, and where an act has been done in good faith, though it may result in injury, there can be no recovery of exemplary damages.

Gwynn v. Citizens' Teleph. Co. 69 S. C. 444. 67 L.R.A. 111, 104 Am. St. Rep. 819, 48 S. E. 460.

The duty of being reasonable rested as much upon the plaintiff as upon defendant's agents.

Saunders v. Atlantic Coast Line R. Co. 101 S. C. 11, 85 S. E. 167.

Messrs. L. M. Gasque and A. F. Woods, for respondent:

It was defendant's business, and not the business of the plaintiff, to properly check the baggage, and plaintiff had a right to presume that the railroad company would give him the proper kind of check.

Strange v. Atlantic Coast Line R. Co. 77 S. C. 184, 57 S. E. 724; Smith v. Southern R. Co. 88 S. C. 426, 34 L.R.A. (N.S.) 708, 70 S. E. 1057; Fleischman v. Southern R. Co. 76 S. C. 241, 9 L.R.A.(N.S.) 519, 56 S. E. 974; Webb v. Atlantic Coast Line R. Co. 76 S. C. 198, 9 L.R.A.(N.S.) 1218, 56 S. E. 954, 11 Ann. Cas. 834; Sullivan v. Southern R. Co. 74 S. C. 377, 54 S. E. 586; Smith v. Southern R. Co. 88 S. C. 425, 34 L.R.A.(N.S.) 708, 70 S. E. 1057; Corley v. Southern R. Co. 89 S. C. 432, 71 S. E. 1035; Mills v. Southern R. Co. 90 S. C. 373, 73 S. E. 772.

The forwarding agent did not attach to the trunks the check usually attached when excess has been paid; but if the excess was paid this was an omission of duty of defendant's agent, with which plaintiff had nothing to do.

Smith v. Southern R. Co. 88 S. C. 426, 34 L.R.A.(N.S.) 708, 70 S. E. 1057.

A check in the possession of a passenger is evidence that his baggage has been delivered to the company, and the object in giving the check is to identify the holder at the end of the journey as the person to whom the delivery of the baggage should be made.

Dill v. South Carolina R. Co. 7 Rich. L. 158, 62 Am. Dec. 407; Park v. Southern R. Co. 78 S. C. 306, 58 S. E. 931; Strange v. Atlantic Coast Line R. Co. 77 S. C. 184, 57 S. E. 724; Brunson v. Atlantic Coast Line R. Co. 76 S. C. 14, 9 L.R.A.(N.S.) 577, 56 S. E. 538; Fleischman v. Southern R. Co. 76 S. C. 247, 9 L.R.A.(N.S.) 519, 56 S. E. 974; Jenkins v. Southern R. Co. 73 S. C. 291, 53 S. E. 480; Meyer v. Atlantic Coast Line R. Co. 92 S. C. 101, 75 S. E. 209; Prescott v. Southern R. Co. 99 S. C. 424, 83 S. E. 781.

The carrier must heed the reasonable explanation of the passenger to the extent that, if the explanation is correct, the railroad company is wrong and is responsible for its wrong.

Richardson v. Atlantic Coast Line R.

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Co. 71 S. C. 444, 51 S. E. 261; Smith v. Southern R. Co. 88 S. C. 421, 34 L.R.A.(N.S.) 708, 70 S. E. 1057; Corley v. Southern R. Co. 89 S. C. 432, 71 S. E. 1035.

Plaintiff was in fact and technically a passenger.

Martin v. Southern R. Co. 51 S. C. 150, 28 S. E. 303, 3 Am. Neg. Rep. 501; DuBose v. Atlantic Coast Line R. Co. 81 S. C. 271, 62 S. E. 255.

The refusal of the court to permit the defendant's agent at Marion to testify as to certain communications between him and the counsel for the railroad was not prejudicial.

Minshew v. Atlantic Coast Lumber Corp. 98 S. C. 8, 81 S. E. 1027.

Gage, J., delivered the opinion of the court:

Action for the denial of the plaintiff's right to have possession of his trunks. Verdict for the plaintiff for $900 punitive damages and $100 actual damages, the latter reduced by the circuit court to $25. Appeal by the defendant.

History: The plaintiff is of middle age, resides at Marion, and has traveled as a commercial salesman for nineteen years. He went from Walterboro to Marion, over the defendant's lines, and carried two "drummer's trunks" with him. The trunks confessedly weighed in excess of the 200 pounds free allowance for such baggage; in avoirdupois, the excess was 200 pounds, and for that the plaintiff was due to pay the defendant $1.70. The plaintiff and trunks reached Marion on Saturday, and the trunks remained in the station house there nine days, uncalled for. At the end of that period of time the plaintiff essayed to go from Marion to Columbia, and he presented the checks he received at Walterboro and his mileage book, and requested that the trunks be rechecked to Columbia. The baggage agent at Marion demanded payment of excess fare on the trunks from Walterboro to Marion, which the plaintiff declined, and thereout this suit arose.

The appellant has argued three questions, and we shall discuss them rather than the exceptions, for they embody the exceptions; but the exceptions may be reported. The appellant's three postulates are these:

(1) The presiding judge erred, it is respectfully submitted, in holding that the possession of an ordinary check is prima facie evidence that the excess baggage charges have been paid.

(2) The presiding judge erred, it is respectfully submitted, in refusing to direct a verdict for defendant as to punitive damages, and in his charge to the jury relating to such damages.

(3) The presiding judge erred, it is respectfully submitted, in the exclusion of certain testimony.

These in their order:

1. The testimony tends to show, and there is no difference about it, that on trunks like these there are sometimes put, if not generally put, two sorts of checks,—one the ordinary paper model issued to a passenger who carries baggage; the other an excess check of a different model from the ordinary baggage check. The excess check indicates on its face the payment of the excess fare, and possibly the amount of it. It is not clear from the testimony if a duplicate of the excess check is furnished to the passenger, as is done in case of an ordinary baggage check. Rule 19, hereinafter set out, is silent on the subject. The court asked Orr: "Does the check given to the passenger show whether the excess has been paid or not?" and the witness answered: "Yes, sir; it does, and possibly the amount." But it is not plain from this answer what check was referred to, the ordinary check or the excess check. The plaintiff testified: "I have seen checks that show excess fare, and they generally put them on." The exhibit B, which sets out the form and contents of the excess check, indicates that there was issued on it a "strap check," and a "duplicate check," presumably one for the trunk and one for the passenger.

The rule of the company on the subject of excess checks is as fol-

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lows: "(19) Weighing Baggage and Collecting Excess Charges.—Agents must not accept statements of passengers as to weight of their baggage. Unless agent is positive the weight of a passenger's baggage is within the regulation allowance, he must weigh it, and collect proper excess for all overweight. The amount collected must be plainly indicated on the excess baggage check. Should an agent forward baggage weighing in excess of the free allowance without making proper collection, he will be charged with the amount he should have collected. Receiving agents will weigh all baggage when in doubt as to whether same is over free allowance, and, if found overweight and forwarding agent has not assessed proper excess charge, collect proper charge."

In the instant case, without controversy, there was issued to the plaintiff at Walterboro only the ordinary baggage check, with no markings on it of excess weight or payment of money. There is no evidence that the plaintiff knew of the rules of the company. The plaintiff testified that at Walterboro he paid the agent $4.50 for an ordinary passenger ticket from that point to Marion, and $1.70 excess fare on his trunks for the same journey, and that the agent issued to him the two ordinary baggage checks which he presented at Marion. The agent at Walterboro swore to a totally different transaction. He said the plaintiff was accompanied by a lady; that he presented a South Carolina mileage book and bought also a cash ticket from Walterboro to Marion; that he presumed the two were traveling together, and without looking at their baggage he issued to them two duplicate checks, presumably one for the plaintiff and one for the lady, and a clerk put the originals on the trunks; that plaintiff gave the cash ticket to the lady; that the witness did not see the trunks and did not ask if there was any excess, because he did not think there was any. The plaintiff flatly denied this account of the transaction. The charge of the court was made with reference to this testimony, and the issues of fact made by it.

If the trunks had been ordinary passenger's baggage, then the check that was issued would have confessedly constituted only the prima facie evidence of the receipt of the trunk by the defendant. Dill v. South Carolina R. Co. 7 Rich. L. 158, 62 Am. Dec. 407. The case is not altered that the trunks were "drummer's trunks." Fleischman v. Southern R. Co. 76 S. C. 237, 9 L.R.A.(N.S.) 519, 56 S. E. 974. But about the custody of the trunk there is no issue; the carrier admits the receipt, the carriage, and the delivery of the trunk at Marion.

The issue here is: Was the excess fare paid? Manifestly, if as a fact it was paid, then checks cut no figure in the case. If it be true, as the carrier contends for, that by rule of the company and by custom of the company there ought to have been put on the trunks an excess check, and that its absence is prima facie evidence of nonpayment (and upon that we need express no opinion), yet, if that was not done, and if nevertheless the plaintiff did pay the excess fare, then the fact must overcome the presumption; that is to say, the rights of people are not always dependent upon appearances.

Carrier—excess baggage—absence of excess check.

The court charged the jury that "the plaintiff has got no case unless he paid that excess for transportation of his baggage." It would be unpardonable to conclude that, even though a passenger had paid his excess, the absence of paper evidence of it, in a case like this, should defeat his right not to pay a second time. The prima facies, therefore, went out of the case, and the bald issue was made, independent of checks: Did the plaintiff pay the excess at Walterboro? The plaintiff did not rest upon the effectiveness of a check to fix his right. He testified in the first instance to a

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transaction he saw to fix his right; he testified to payment.

2. Upon the second issue, that of the allowance of punitive damages, we also concur with the circuit court. There is no need to repeat the testimony before recited, though it is relevant to the issue of law now considered. The theory of the defendant was, as testified to by the witness Kirton, the Walterboro agent, that the plaintiff had gotten his trunk carried through by a false pretense. That was the theory of one of the appellant's counsel; for, in his oral argument before this court, he characterized the plaintiff as a "deadbeat," and in the printed argument it is said the plaintiff had "the ineradicable disposition to seek an advantage against the defendant company." The unvarnished issue for the jury was: Did the plaintiff consciously use, to get the trunks through without the payment of excess fare, a mileage book for himself and a cash-fare ticket for a lady who merely happened to be going the same route, or did he buy a cash-fare ticket for himself, and pay the excess fare on his trunks? It might have been asked what legal right did the carrier have to charge excess if the two trunks went through, as they say, on two paid-for passenger fares.

The appellant's counsel further contend that it was the duty of the plaintiff at Marion to make a true explanation to the defendant's agents, or at least to give some reasonable account of the transaction to guide the defendant's servants in their action. We think that is true, though that issue was not made before the trial court. But the testimony on this particular phase of the case is not all one way; it tends to sustain the view of both sides. So far as the record goes, the plaintiff was not asked on the direct examination whether or not he had stated his side of the case to the agents at Marion; he testified directly: "I don't owe you any excess from Walterboro, and won't pay it." He further testified directly that one of the agents said: "There was nothing on those checks to show that the excess had been paid;" and that the witness answered: "That is none of my business." On the cross-examination the plaintiff was not asked if he had told the agents at Marion the true transaction.

The witness Orr testified directly that the plaintiff refused to pay excess at Marion, "on the ground that the agent at Walterboro checked the baggage, and gave me the checks," and that the witness Orr then replied: "If that is the only reason you have, we will have to insist that you pay these charges;" and the witness further testified that Davis said: "I have other reasons which I refuse to give." On cross-examination, Orr told plaintiff's counsel: "Mr. Davis absolutely did not tell me that he had paid the excess."

The witness Andrews testified: I asked Davis did he pay any excess on them. He never told me whether he did or not.

On the reply the plaintiff was asked this question:

Q. Mr. Davis, it has been testified here by Mr. Orr and Mr. Andrews that you refused to say whether you had paid the excess or not, and that as you went out you said: "I have other reasons which I refuse to give;" is that correct?

A. Not a word of truth in it.

Had the plaintiff testified in chief about this, a reply would not have been necessary.

Thus, the square issue of fact was made whether Davis did tell the agents that the excess had been paid. It may be Davis did not tell them; it may be he did. Of the truth, the jury, which knew the witnesses, was and is the only judge.

If Davis did inform the agents of the true facts, if they nevertheless, without further inquiry from reliable sources, did hold the trunks and exact the excess charges, and if the excess charges had been in fact

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paid, and if the theory of the defendant's servants was that the plaintiff's actions had been in bad faith, and they were not, then the jury might find punitive damages. All these matters were put in issue. The learned judge, who saw the witnesses, had the power and it was his duty to set aside or to reduce the verdict had it been manifestly wrong. He did neither, and we concur in his action.

Damages—punitive—refusal to deliver baggage.

3. The third postulate of the appellant has reference to the exclusion of certain proffered testimony of the witness Orr.

On the redirect examination he was asked this question:

It has happened since, on one particular occasion, that Mr. Davis's baggage came through without the excess checks. This was since this suit was commenced.

Q. You reported it to the counsel of the company? (Objected to, and objection sustained.)

The printed argument of counsel is: "Indeed, it was a most convincing circumstance, not only upon the question as to whether plaintiff paid the excess in the case at bar, but also to show the ineradicable disposition of the plaintiff to seek an advantage against the defendant company."

We think the testimony was plainly irrevelant and incompetent. The answer to the question would have raised other and independent issues; in fact, another case of like import as the one at bar.

Evidence—similar offenses.

We are of the opinion that the judgment below must be affirmed.

It is so ordered.

Gary, Ch. J., Watts and Fraser, JJ., concur in the opinion of the court.

Hydrick, J., concurs in affirming the judgment for actual damages, but thinks the judgment for punitive damages should be reversed.

ANNOTATION.

Extra or excess baggage.

Generally.

This note is designed to discuss the carriage of baggage for which, by reason of its weight or bulk, an extra charge is made by the carrier. The limitation by a carrier of the amount of its liability for loss of or damage to baggage is not considered.

A common carrier of passengers may fix the maximum weight of baggage which will be carried free of charge, and impose a charge for any excess. Dibble v. Brown (1852) 12 Ga. 217, 56 Am. Dec. 460; Gulf, C. & S. F. R. Co. v. Ions (1893) 3 Tex. Civ. App. 619, 22 S. W. 1011. In the case last cited it was said: "There was no separate and distinct contract from that named in the ticket, but only an additional consideration demanded and paid for the extra weight of the baggage, not known to exist when the ticket was sold. All tickets for passage on railroads are bought with the knowledge that, under the laws of Texas, the railway company has the right to pay for extra weight of all baggage over 100 pounds; and a demand for and the receipt of pay for the extra baggage is neither a violation, change, nor substitute of the original contract made in the purchase of the ticket."

The charges made by a carrier for excess baggage have been held to be subject to regulation by a public service commission. Michigan C. R. Co. v. Wayne Circuit Judge (1909) 156 Mich. 459, 120 N. W. 1073. In Michigan C. R. Co. v. Michigan R. Commission (1910) 160 Mich. 355, 125 N. W. 549, the court sustained an order of the Commission holding to be unreasonable a flat rate for excess baggage for any distance up to 45 miles, it appearing that most of the charges for excess were paid by traveling sales-

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men whose trips were ordinarily of but a few miles.

In Arkansas the rates chargeable for excess baggage have been fixed by statute. In Kansas City, P. & G. R. Co. v. State (1898) 65 Ark. 363, 41 L.R.A. 333, 67 Am. St. Rep. 933, 46 S. W. 421, it was held that the statute applied to the carriage of personal baggage only, and was not violated by a charge of the regular freight rate for articles which were not personal baggage, though they were carried as baggage.

In Hamberg-American Packet Co. v. Gattman (1889) 127 Ill. 598, 20 N. E. 662, it was said that the making of an extra charge for the carriage of baggage does not ordinarily convert the contract into one for the carriage of freight; but it was held that the articles involved in that case were carried as freight, the court saying: "But in the case of an emigrant who carries with her trunks and other ordinary baggage, and also turns over to the common carrier a number of boxes of goods for transportation, and pays freight for the weight in excess of her baggage allowance, and the general character of the shipment is known to such carrier, it would be unjust to conclusively presume the entire shipment was as baggage, and that there could, in case of loss, be no recovery except for such articles contained in the boxes as would properly be designated as necessary baggage."

In the reported case (DAVIS V. ATLANTIC COAST LINE R. CO. ante, 102) it is held that the fact that the baggage check does not show that an excess baggage charge was paid is not conclusive against the passenger, and that under those circumstances, if the passenger actually paid the charge, he is entitled to demand the baggage at his destination without additional payment.

Liability for loss of baggage.

It is so obvious as apparently never to have evoked a decision on the point that the liability of a carrier for loss of or injury to articles which constitute personal baggage, and are shipped as such, is in no manner affected by the fact that on account of their weight an excess baggage charge is made. It has, however, been contended in a number of cases that though articles shipped as baggage are, in fact, merchandise, the carrier is liable if an excess baggage charge is paid for carrying them. In a few cases where merchandise was shipped as baggage without notice to the carrier of the true nature of the articles shipped, it has been held that, by receiving an extra baggage charge, the carrier became liable as a bailee for hire. Baldraff v. Camden & A. R. Co. (1851) Fed. Cas. No. 794, affirmed in (1851) 16 Pa. 67, 55 Am. Dec. 481; Tamarin v. Pennsylvania R. Co. (1914) 244 Pa. 100, 90 Atl. 433. Compare the dictum in Merritt v. Lehigh Valley R. Co. (1912) 49 Pa. Super. Ct. 219, wherein the decision turned on the fact that the baggage had reached its destination, and had not been removed within a reasonable time. Thus, in Tamarin v. Pennsylvania R. Co. (Pa.) supra, it appeared that a passenger tendered two trunks containing merchandise. The agent asked no information as to the contents of the trunks, and the passenger volunteered none. The agent collected a small sum as excess baggage on account of the weight of the trunks, and issued a baggage check. In holding the company to be liable for the loss of the merchandise, the court said: "The defendant received the property of the plaintiff and undertook to transport it to New Castle. It received compensation for such undertaking, the measure of the compensation being fixed by itself. The property was safely carried until the junction point referred to was reached. There it was injured or destroyed by the negligent act of the defendant. Under these facts, that the defendant becomes a bailee for hire seems to us to be undeniable. In such case its liability would certainly be at least that of an individual bailee or private carrier." The court emphasized the fact that the loss was due to the defendant's negligence.

In other jurisdictions, however, it seems to be assumed that the rule that a carrier is not liable for articles

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shipped as baggage, which are not properly within that term, unless it has notice of their nature, is not affected by the fact that excess baggage is paid. See the cases cited infra in this subdivision. Thus, it has been held that the fact that the weight of packages checked as baggage is such as to necessitate the payment of excess baggage is not notice to the carrier that articles other than personal baggage are included therein. Humphrey v. Perry (1893) 148 U. S. 627, 37 L. ed. 587, 13 Sup. Ct. Rep. 711; Illinois C. R. Co. v. Matthews (1903) 114 Ky. 973, 60 L.R.A. 846, 102 Am. St. Rep. 316, 72 S. W. 302. In the case first cited it was said: "The 25 cents extra paid by Mr. Perry on account of the weight of the trunk was paid merely for the overweight, and not at all in respect of the contents of the trunk. It was paid for so much overweight of personal baggage."

Where a carrier has notice, either actual or constructive, that articles of merchandise are checked as baggage, and it charges and receives an excess baggage fee, it becomes a common carrier for hire of those articles, and is liable as such for loss or injury. In such a case, it is held, the baggage agent of the carrier has implied authority to enter into a contract for the carriage of the goods as baggage, for the prescribed excess baggage charge. Strouss v. Wabash, St. L. & P. R. Co. (1883) 17 Fed. 209; Louisville & N. R. Co. v. Dickson — Ala. App. —, 73 So. 750 (carriage of hunting dogs as baggage); Stoneman v. Erie R. Co. (1873) 52 N. Y. 429; Perley v. New York C. & H. R. R. Co. (1875) 65 N. Y. 374; Sloman v. Great Western R. Co. (1876) 67 N. Y. 208; Millard v. Missouri K. & T. R. Co. 86 N. Y. 441; Talcott v. Wabash R. Co. (1899) 159 N. Y. 461, 54 N. E. 1, reversing (1892) 66 Hun, 456, 21 N. Y. Supp. 318; Trimble v. New York C. & H. R. R. Co. (1900) 162 N. Y. 84, 48 L.R.A. 115, 56 N. E. 532; Glovinsky v. Cunard S. S. Co. (1894) 6 Misc. 388, 26 N. Y. Supp. 751; Wasserberg v. Cunard S. S. Co. (1894) 8 Misc. 78, 28 N. Y. Supp. 520; Butler v. Hudson River R. Co. (1854) 3 E. D. Smith (N. Y.) 571; Missouri P. R. Co. v. York (1885) 2 Tex. App. Civ. Cas. (Willson) 557. Compare St. Louis, I. M. & S. R. Co. v. Miller (1912) 103 Ark. 37, 39 L.R.A.(N.S.) 684, 145 S. W. 889.

The notice to the carrier that trunks or other containers offered for checking contain articles other than personal baggage need not be express. It may be implied from the appearance of the containers themselves, taken in connection with known usages of travel. Sloman v. Great Western R. Co. (1876) 67 N. Y. 208; Trimble v. New York C. & H. R. R. Co. (1900) 162 N. Y. 84, 48 L.R.A. 115, 56 N. E. 532; Fleischman v. Southern R. Co. (1907) 76 S. C. 237, 9 L.R.A.(N.S.) 519, 56 S. E. 974.

In Sloman v. Great Western R. Co. (N. Y.) supra, it appeared that a passenger presented two trunks, which were of the general appearance of sample trunks, and were different from ordinary traveling trunks. When asked by the baggage agent where he wanted them checked to, he said that he did not know yet, as he was awaiting an answer to a despatch to a customer. Later, he checked the baggage, and paid $2 for extra weight. It was held that the carrier was put on notice that the trunks contained samples, and, having accepted the excess fee for carrying them, was liable as a bailee for hire. Under similar circumstances a recovery was sustained in Trimble v. New York C. & H. R. R. Co. (1900) 162 N. Y. 84, 48 L.R.A. 115, 56 N. E. 532, the court saying: "The recovery in this case was not on the contract of passage entered into when the plaintiff's agent purchased his ticket, but on an independent agreement for the transportation of the sample trunk as freight."

In Fleischman v. Southern R. Co. (1907) 76 S. C. 237, 9 L.R.A.(N.S.) 519, 56 S. E. 974, it was said: "The reason of the general rule that a traveler cannot take merchandise as baggage, and hold the carrier liable, is that the cost of carrying merchandise is not included in the passage money; and to allow it to be carried as baggage, and make the carrier liable for

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it as such, would be to sanction a fraud on the carrier, in depriving it of its legitimate freight charges. But railroad companies themselves have chosen to modify this rule, for the advancement of their own business, by carrying the sample trunks of traveling salesmen as baggage, charging for the excess, when it, with personal baggage, is over a certain weight. It is true there was no proof in this case of the custom, but the court will take judicial notice of it. Courts do not require proof of the established business customs of the people whose affairs come before them; for, as has been well said: Courts will not profess to be more ignorant than the rest of mankind. This custom of carriers as to salesmen's trunks of samples is as universal and as well known as the custom of checking ordinary baggage, and it would be as absurd for courts to require proof of one as of the other. It does not seem material how such trunks with their contents are designated, whether as baggage or freight. The vital fact is that the railroads, with full knowledge of their character, receive them for transportation, carry them with the passenger on their passenger trains, and undertake to deliver them at his destination. In doing so, the carriers themselves place sample trunks on the same footing as baggage, and as to such trunks and their contents they must be held to the same liability." W. A. S.

MARTIN BARLIN, Appt.,
v.
KNOX COUNTY.

Tennessee Supreme Court — October 24, 1916.

(136 Tenn. 238, 188 S. W. 795.)

License — discrimination — shoe-shining parlor.

1. Exempting barber shops from a statute imposing a license tax on shoe-shining parlors is not an unconstitutional discrimination so as not to be the law of the land, because a barber shop shining shoes as incidental to its other business is not a shoe-shining parlor.

[*See note on this question beginning on page* 114.]

Same — suspension of general law.

2. A proviso exempting barber shops in a statute imposing a license tax on shoe-shining parlors is not an unconstitutional suspension of a general law, so as to confer special rights, privileges, and immunities on individuals, since a barber shop is not a shoe-shining parlor, although shoes are shined as incidental to its regular business.

APPEAL by plaintiff from a decree of the Chancery Court for Knox County dismissing a bill and dissolving an injunction restraining defendant from attempting to enforce collection of the balance of a privilege tax alleged to be due it. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **Bowen & Anderson** for appellant.

Mr. **James G. Johnson**, for appellee:

Persons may be classed, and valid laws passed for the particular classes.

Stratton Claimants v. Morris Claimants (Dibrell v. Lanier) 89 Tenn. 522, 12 L.R.A. 70, 15 S. W. 87; State v. Schlier, 3 Heisk. 286; Fulgum v. Nashville, 8 Lea, 635; Demoville v. Davidson County, 87 Tenn. 214, 10 S. W. 353; Miller v. Strahl, 239 U. S. 426, 60 L. ed. 364, 36 Sup. Ct. Rep. 147; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206; Quong Wing v. Kirkendall, 223 U. S. 59, 56 L. ed. 350, 32 Sup. Ct. Rep. 192.

The court will uphold the statute in

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question, if it is possible to do so, under any view of the same, even to the extent of eliminating the objectionable portions.

Malone v. Williams, 118 Tenn. 439, 121 Am. St. Rep. 1002, 103 S. W. 798; Rinehart v. State, 121 Tenn. 435, 117 S. W. 508, 17 Ann. Cas. 254; State ex rel. Cummings v. Trewhitt, 113 Tenn. 572, 82 S. W. 480; Neely v. State, 4 Lea, 316; Stratton Claimants v. Morris Claimants (Dibrell v. Lanier) 89 Tenn. 534, 12 L.R.A. 70, 15 S. W. 87; Green v. State, 83 Tenn. 708.

Buchanan, J., delivered the opinion of the court:

This case involves the validity of a privilege tax declared by the Revenue Act of 1915 (see chapter 101, pp. 263-290, Public Acts of that year), worded as follows:

"Shoe-Shining Parlors. Each person, firm or corporation conducting a shoe-shining parlor in cities or towns of . . . sixty thousand inhabitants or over, each foot rest, per annum, $2. In cities, or towns of thirty thousand inhabitants, and not more than sixty thousand, each foot rest, per annum, $1. In cities or towns of less than thirty thousand inhabitants, each foot rest, per annum, $.50. Space for one person shall be construed as two foot rests: Provided, this shall not apply to barber shops."

Barlin is the owner and operator of five shoe-shining parlors located in the city of Knoxville, and the aggregate number of foot rests in the parlors is sixty-eight. He insists that so much of the Revenue Act as is above set out is void, on the ground that it is arbitrary and capricious class legislation, and contravenes § 8 of articles 1 and 11 of the state Constitution. His argument is that barber shops, operating where shoe shining is also done, fall within the class of shoe-shining parlors, and that the proviso effects an exemption of barber shops from the payment of the privilege tax, and therefore works an arbitrary and capricious classification, and accordingly is not the law of the land, within the meaning of § 8 of article 1 of the Constitution; also that the proviso suspends the operation of the act, which is a general law, so as to save or exempt barber shops from the payment of the privilege tax, and is therefore the suspension of a general law for the benefit of a particular individual or individuals, or the passage of a general law for such benefit, and confers rights, privileges, and immunities, or exemptions, to such individual or individuals, to wit, those conducting barber shops, within the meaning of § 8, art. 11, of the state Constitution. We think both of these contentions must fail, because we cannot agree that conducting a barber shop, where is also done shoe shining, but only as a mere incident of the business, is a shoe-shining parlor within the meaning of the legislation. Of course, wherever shoe shining is conducted on such a scale in a barber shop that it becomes the main feature or object of the business there conducted, such business would cease to be a barber shop, and become a shoe-shining parlor within the meaning of the statute; and, vice versa, a shoe-shining parlor by the same process might be converted into a barber shop within the meaning of the act. But the conduct of a barber shop is a well-known business, a fact of which the court may take judicial cognizance; and likewise it is with the conduct of the business of a shoe-shining parlor. There are also well-known incidents or acts of business usually conducted in connection with the principal business of shining shoes, and carrying on the activities of a tonsorial artist, such as the sale of shoestrings, brushing the clothing of customers, etc., yet it seems clear to us that between the two main businesses there is such a substantial and material difference in the character of the service rendered that each belongs in a separate and distinct class, and, this being true, the classification made by

License—suspension of general law.

Same—discrimination—shoe-shining parlor.

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the act is not arbitrary or capricious. Demoville v. Davidson County, 87 Tenn. 214, 10 S. W. 353; Stratton Claimants v. Morris Claimants (Dibrell v. Lanier) 89 Tenn. 497, 12 L.R.A. 70, 15 S. W. 87, and cases cited. Under the view we take of the legislation the proviso was mere surplusage. If it had been omitted the privilege tax declared against shoe-shining parlors could not have been exacted from one conducting a barber shop, unless, of course, the shining of shoes was conducted in the barber shop to such an extent as to become the main business there conducted; in which event it would, of course, be a shoe-shining parlor within the meaning of the act, whatever it might be called by the proprietor.

The decree of the Special Chancellor who tried the case contains some different reasoning from ours, but by the decree the bill of Barlin was dismissed, and the injunction issued was dissolved, which we think was the correct result, and therefore the decree is affirmed, at Barlin's cost.

ANNOTATION.

State or municipal regulation of bootblacks.

While there appears to be no case other than the reported case (BARLIN v. KNOX COUNTY, ante, 112) which passes on a regulation of bootblacks by the state, or by a municipality, the decision in that case, that a statute imposing a license tax on shoe-shining parlors is not invalid because it exempts barber shops where shoe shining is done as an incident to the principal business, seems to be sustained by the general rules as to the regulation of a business by a municipality in the exercise of its police power. As is stated in 17 R. C. L. p. 518: "Under the rule that classification of occupations or forms of business may be made wherever the difference or distinction on which it is founded is not wholly without reason, it is an established rule that those who follow a commonly designated business or vocation may, where a basis for reasonable distinctions exists, be reclassified or subdivided into new and separate classes. In this connection it has been declared that the legislative classification may be founded on the nature of the articles sold, as well as on the manner of conducting the business."

It was held in Burks v. Bosso (1905) 180 N. Y. 341, 105 Am. St. Rep. 762, 73 N. E. 58, that a Civil Rights Statute (Laws 1895, chap. 1042, McKinney's Consol. Laws, bk. 8, p. 37), securing equal rights in "places of accommodation" did not include a boot-blacking stand, and that a refusal to shine the shoes of a colored man, upon the ground of his color, did not subject the proprietor to the penalties imposed by the act.

W. A. S.

WILLIAM L. DENTON et al., Doing Business as William L. Denton & Son,

v.

ARTHUR BOOTH et al., Plffs. in Err.

Michigan Supreme Court—July 18, 1918.

(— Mich. —, 168 N. W. 491.)

Name — fictitious — failure to file certificate — right to maintain action.

1. Failure of a partnership to comply with the statute requiring the filing of a certificate containing information as to the details of the part-

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nership does not prevent it from maintaining an action for wrongful conversion of firm property by a stranger.

[*See note on this question beginning on page* 119.]

Trial — jury — completion of contract.

2. The jury must determine whether or not there was a completed sale of horses, in an action for their conversion by the alleged buyer, where the payment was to be made upon the turning over of certain papers relating to the horses, and those tendered were rejected upon advice of the buyer's attorney.

Pleading — form of action — amendment.

3. Under a liberal statute for the allowance of amendments to pleadings, an action in assumpsit for the purchase price of horses may be regarded as one in tort for their conversion.

ERROR to the Circuit Court for Chippewa County to review a judgment in favor of plaintiffs in an action brought to recover the value of certain horses alleged to have been unlawfully converted by defendants. *Affirmed.*

Statement by **Brooke, J.:**

The plaintiffs in this case were copartners, doing business under the firm name of W. L. Denton & Son, and so described themselves in the declaration. Defendants are likewise copartners. Both plaintiffs and defendants were engaged in the buying and selling of horses. On April 1, 1916, plaintiffs were in possession of thirteen horses which had been the subject of negotiations between themselves and defendants for some time.

With reference to what occurred on that day, plaintiff Ernest L. Denton testified:

They looked them over carefully; took each horse by itself out of the barn in the open air. I finally agreed that I would accept $1,900 for the entire lot. It was to be a spot cash deal.

Q. What, if anything, was said at that time about the delivery of the horses?

A. Why, the transaction took place on Saturday, after banking hours. They came to my barn, and we came to an understanding for $1,900 for the horses, and they insisted that they should take part of the horses, which I submitted to, and they did. I was to furnish certain papers for these horses, and on turning over the papers they were to pay me $1,900. They were to meet me in the Central Savings Bank after supper that evening, which was done. They gave me a check payable to A. Denton, and I objected to the check at the time, and they said: "Keep it, we want to have Judge Holden look over the papers; we know nothing about the breeding of the horses." I replied: "Well, you can keep the check, too; I care nothing about a check in this way." They said: "We will pay the $1,900 as soon as Judge Holden looks over the papers." . . .

Q. And in the evening, before making payment, what did they require about the examination of the papers?

A. They required that I should turn over the papers to them, and wait until Monday morning to let Judge Holden look at them, as they didn't know anything about the breeding of horses themselves.

Defendant Booth testified in part as follows:

I said: "Here, now, before we go any further, is everything O. K. on those horses?" First, I asked him if he owned the horses, and he said he did; that there wasn't a cent against them. Then I told him that we didn't want to have any baby plays. We wanted to know if the papers were right, if everything was right before we would go any further, and he answered me that he had everything, because we claimed that the horses— . . . I asked him if he had all the necessary papers; also, if he owned the horses. He said he owned the

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horses, and there wasn't a cent against them, and he had all the necessary papers for the stallions and the mares. At that time there was nothing said about the exact minute he was to get his money; simply the price agreed upon $1,900. . . . We met Denton again on Monday, and I spoke to him along the lines of the papers. I told him of the conversation I had with Royce, and I spoke to him about the papers and the transfers, and he took some of the papers out of his pocket, and he wanted to transfer the horses to us on the side of the building there, on the corner of Oka and Spruce streets, and we suggested that we had better go to somebody else, and have it done in the proper way. He was going to make the transfers and everything there, on the side of the building. There was nothing to that, he said. So, at that time, we suggested that he go to Holden's office, and come to us with proper papers, and we would give him his check for $1,900. Right after the conversation we, Denton, Levine, and myself, went to Holden's office. When we went to Holden's office, Denton had the papers, and he talked to Holden along the lines of getting the papers. Holden looked the papers over and said: "The papers for three of them, the three mares, are all right, but for the two stallions the proper transfers have not been made to Denton," and that he could not transfer them to us until they had been transferred to him; and he produced a form at that time with some signatures on it, and Holden turned it down.

Q. Well, you didn't personally say anything about the papers, whether they were good or bad?

A. I don't care what was said, anything about the papers—

Q. Well, did you, or didn't you?

A. Why, I didn't say very much about the papers.

Q. Well, what did you say about the papers, if you said something?

A. Well, I don't think I said anything about the papers.

Q. Well, Ike did then, didn't he?

A. Why, he just looked the papers over, and—

Q. I am talking about what Ike said about the papers, if you didn't say anything.

A. I don't know what he said about them.

Q. Did he say something?

A. I don't know, I'm sure.

Q. Did Ike say he was satisfied with the papers that night?

Q. Well, you don't know about that?

A. Yes, sir.

Q. Said he was satisfied?

A. Yes, sir. . . .

Q. Well, then, it was definitely arranged that you would pay him the money Tuesday?

A. Yes, sir.

Q. That was absolutely definite?

A. Yes, sir.

Q. And the deal was closed?

A. And he would return the check for $500.

Q. And that was the end of it; there wasn't anything more to do, except to turn over the money?

A. As far as I remember now.

Q. Now, did you accept those papers on your own judgment, or on Ike's?

A. On Ike's.

Q. What?

A. Well, on Ike's judgment more than on mine. . . .

Q. Then after talking with Denton at the bank, you knew that same evening there were some papers missing which ought to be there, did you?

A. These transfers?

Q. Yes.

A. Yes, sir.

Q. You knew they were missing this same evening?

A. Yes, sir.

Isaac Levine, another defendant, testified:

Afterwards, we accepted the papers and closed the deal. I did not look those papers over and accept them from my own knowledge of the papers; I accepted them from Mr. Denton's knowledge. He said that the papers were all right, and

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that he would furnish everything.

. . .

Q. And I understand you to say that in some one of the talks on Monday or Tuesday it would be perfectly satisfactory if Mr. Denton got these transfers on the stallions within thirty or sixty days?

A. Yes, sir.

Q. And then, before the sale was had, your understanding was that Mr. Denton was to get the transfers?

A. Yes, sir.

Q. And any time within thirty or sixty days would be sufficient?

A. Would be sufficient, providing he promised to do it.

Q. Did he promise to do it?

A. No.

Q. Then I understand you that he didn't promise to do it?

A. He didn't promise later in the week, but he promised on Saturday night.

Q. Then do I understand on Saturday night he promised to get the transfers?

A. Yes, sir.

It appears that after the talk on the evening of the 1st of April, which was Saturday, plaintiffs and defendants met in the office of Judge Holden on April 3d, where it was discovered that as to the two horses, Picador and Lord of the Vail, Second, plaintiffs had no transfer of title from their vendors to themselves. Defendants then demanded that they leave $400 of the purchase price which had been agreed upon, in some bank, to be forfeited in case they did not secure such transfers. Plaintiffs offered to leave $100 for such purpose, but this was not agreeable to defendants. In the meantime some of the horses had been transferred to the possession of the defendants on Saturday, and some on Monday morning. Being unable to agree, a verbal demand for the return of the horses was made by plaintiffs on defendants on April 3d, and on April 5th a written demand was served upon them in the following language:

Referring to our negotiations in reference to the proposed sale by W. L. Denton & Son to yourselves of thirteen head of horses, it now appears that for various reasons you are unwilling to pay the purchase price, although at your suggestion the horses were taken to your barn to be kept, pending an examination of certain papers by your attorney. We now demand immediate return of the horses, and in case of your refusal to return them to us we will hold you responsible for the full value of the horses, and in that connection we will not be bound by the proposed sale price.

Yours very truly,
William L. Denton & Son,
by Ernest L. Denton.

Redelivery of the horses was refused by the defendants, and they were on April 8th, sold at public auction by defendants for their own account for $2,206. On the same day suit was commenced by plaintiffs in assumpsit for the value of the horses, under the claim that defendants had unlawfully converted them to their own use. To this declaration defendants filed a plea of the general issue, with notice thereunder that they would show, among other things, "that plaintiffs are not entitled to maintain this suit, because they have not made and filed with the county clerk of said county a statement showing their copartnership and who constitutes it, as provided by law."

The case came on to be heard before the court and a jury, when a motion was made that plaintiff's suit be dismissed because, while suing as copartners, they have not filed an affidavit of copartnership as required by law. This question was reserved, and the case proceeded. Under the evidence the court submitted to the jury the question whether there had been a completed sale, charging them that, if they found a completed sale had been effected by what had been said and done by the parties, plaintiff might recover the purchase price agreed upon, $1,900, less whatever sum the

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jury might find defendants had lost by reason of plaintiffs' failure to furnish the transfers of title as to the stallions Picador and Lord of the Vail, Second; that, if they should find such sale "contingent upon Mr. Holden's accepting or rejecting the papers, then, inasmuch as Mr. Holden rejected them as they stood, there would be no sale." The jury in answer to the special question, "Was there a completed sale of the horses in question to the defendants?" answered the same "No," and returned a verdict in favor of the plaintiffs in the sum of $2,206.05. This verdict was rendered on September 18, 1916, and on the same day plaintiffs filed a motion to amend the præcipe and verdict as follows: "On September 18, 1916, at the opening of court, counsel for plaintiffs presented a motion in writing, asking the court to amend the præcipe by striking out the words 'action of assumpsit,' and inserting in place thereof the words 'action of trespass in the case;' also to amend the journal entry of the verdict of the jury so far as necessary to make it in form a verdict in trespass on the case instead of a verdict in assumpsit."

On November 8th the motion to amend was denied, the court saying: "I do not deem the form of action of any consequence in the determination of the reserved question. It would not be reasonable to hold that the technicalities of a mere form of action would validate acts or confer rights which, under the same facts, would be illegal or barred under another form of action; the essential difference between the actions being found in a fiction of law. The transaction itself, and not the words used to designate it or to describe the form of action based upon it, governs the right of the plaintiffs to recover."

With reference to the reserved question, the court held that, in as much as under the verdict of the jury no completed contract was made, the plaintiffs were not precluded by the statute from bringing suit to recover the value of the property which defendants had unlawfully converted, and thereupon entered judgment in accordance with the verdict of the jury. This judgment is now reviewed in this court under thirty-six assignments of error.

Messrs. **John A. McMahon** and **Herbert L. Parsille**, for appellants:

The sale of the horses was complete.

6 Am. & Eng. Enc. Law, 465; Potter v. Lee, 94 Mich. 140, 53 N. W. 1047; Warder v. Hoover, 51 Iowa, 491, 1 N. W. 795; 35 Cyc. 254, 322.

It is the duty of the courts to see that the defendant is not prejudiced by one form of action being chosen rather than another.

Chandler v. Childs, 42 Mich. 129, 3 N. W. 297.

Partnerships who have failed to file a certificate under Act No. 164, of the Public Acts of 1913, have no right to transact business or to recover for partnership transactions.

Cashin v. Pliter, 168 Mich. 386, 134 N. W. 482, Ann. Cas. 1913C, 697; Re Reidy, 164 Mich. 167, 129 N. W. 196; Sloman v. Bender, 189 Mich. 264, 155 N. W. 581; Bottomley v. Brown, 188 Mich. 134, 154 N. W. 37; Benedict v. Bachelder, 24 Mich. 425, 4 Am. Rep. 130, 37 Cyc. 567; Haughton Elevator & Mach. Co. v. Detroit Candy Co. 156 Mich. 25, 120 N. W. 18; Imperial Curtain Co. v. Jacobs, 163 Mich. 72, 127 N. W. 772.

Messrs. **Davidson & Hudson**, for appellees:

Plaintiffs are entitled to recover, notwithstanding their failure to file a certificate of partnership, the action being based on a conversion of the property by defendants, not on a purchase price claim.

Missaukee Farm & Invest. Co. v. Ferris, 193 Mich. 286, 159 N. W. 490; Cashin v. Pliter, 168 Mich. 386, 134 N. W. 482, Ann. Cas. 1913C, 697; Urwan v. Northwestern Nat. L. Ins. Co. 125 Wis. 349, 103 N. W. 1102.

Brooke, J., delivered the opinion of the court:

It is the contention of appellants that, under the uniform law relative to the sale of goods (Comp. Laws 1915, chap. 228), there was in the case at bar a completed sale, and the court was in error in submitting that question to the jury.

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Under the testimony above quoted, we are of opinion that the court properly submitted this question. It is, we think, apparent that the minds of the parties never fully met as to what should be required of the plaintiff with reference to the papers showing breeding and transfers of title of the two stallions named. If this question was properly submitted and properly decided by the jury, there remains but one matter for determination, and that is whether the plaintiffs are debarred from prosecuting their action because of the provisions of Act of 164, Public Acts of 1913. We do not overlook the contention of the appellants with reference to the alleged errors of the court in his instructions to the jury upon the question of rescission. Under the finding of the jury that no completed sale had been made it follows that there was no contract to rescind, and that when the demand was made for the return of the horses to the plaintiffs defendants were holding them, not under any title acquired by the antecedent negotiations of a sale, but simply pending those negotiations.

Trial—jury—completion of contract.

Under the liberal provisions of our statute which permits amendments even in this court, in the interest of justice, we have no doubt that the court below was not in error in regarding the action as one in tort rather than in assumpsit.

Pleading—form of action—amendment.

Coming, then, to the provisions of the statute, can it be said that the members of a copartnership who have failed to comply with the law in filing a certificate in writing with the county clerk, containing the required information as to the details of the copartnership, are prevented from using the courts of the state for the purpose of redressing a wrong? We think not. It would, we think, hardly be claimed that, had defendants stolen the thirteen horses from a barn of the plaintiffs, the plaintiffs even though they had not filed the certificate required by law, could not have maintained an action in replevin or for a wrongful conversion of the animals. We are not unmindful of the fact that we have held (Maurer v. Greening Nursery Co. — Mich. —, 165 N. W. 861) that the members of a copartnership who have not complied with the act cannot prosecute an action under a contract. We do not think, however, that the effect of this statute should be extended, it being in plain derogation of common-law rights.

Name—fictitious—failure to file certificate—right to maintain action.

Judgment is affirmed.

ANNOTATION.

Noncompliance with statute requiring filing of certificate of partnership as affecting right to maintain action arising out of tort.

Although the statute involved in the reported case (DENTON v. BOOTH, ante, 114) does not expressly prohibit the making of a contract during the period of default in complying with the statute, it has been held in Maurer v. Greening Nursery Co. (1917) — Mich. —, 165 N. W. 861, affirmed on rehearing in (1918) — Mich. —, 168 N. W. 448, to prevent suit on such a contract. It is held, however, in the reported case, that the statute does not prevent an action for conversion.

Statutes prohibiting partnerships failing to file the required certificate from suing "for the collection of their debts," or "on any contract made or transaction had in the partnership name," have in some jurisdictions been held inapplicable to actions for torts. Ralph v. Lockwood (1882) 61 Cal. 155; Melcher v. Beeler (1910) 48 Colo. 233, 139 Am. St. Rep. 273, 110 Pac. 181; Pedroni v. Eppstein (1902) 17 Colo. App. 424, 68 Pac. 794; Anonymous (1887) 7 Ohio N. P. 568, 5 Ohio S. & C. P. Dec. 578.

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In Colorado, the statute provides that persons not filing the statutory affidavit shall not be permitted to prosecute suits for the collection of their debts. This has been held inapplicable to actions for tort. Melcher v. Beeler (1910) 48 Colo. 233, 139 Am. St. Rep. 273, 110 Pac. 181 (action for libel); Pedroni v. Eppstein (1902) 17 Colo. App. 424, 68 Pac. 794 (action for removing and appropriating buildings, and for converting live stock).

Under statutes requiring the filing of a certificate, and providing that persons doing business as partners contrary to their provisions shall not maintain an action on account of any contract made or transaction had in the partnership name, it has been held by the supreme court of California, and an Ohio court of common pleas, that noncompliance with the statute does not defeat an action of tort. Ralph v. Lockwood (1882) 61 Cal. 155 (action for conversion of property by constable, under attachment against third person); Anonymous (1887) 7 Ohio, N. P. 568, 5 Ohio S. & C. P. Dec. 578 (action "for damages, and not one arising from a contract between the parties").

The supreme court of Oklahoma has reached a contrary conclusion, under a statute very similar to those of California and Ohio. Farquharson v. Wadkins (1915) — Okla. —, 153 Pac. 1160. In that case the partners were conducting a moving picture business, and sued the mayor and chief of police of the city for damages for preventing the exhibition of a particular picture. The court said: "They instituted the suit to recover damages for an injury claimed to have been sustained by them as partners under the fictitious name of the 'Elite Theater.' These parties did not institute the action to recover damages sustained by them as individuals, on account of the wrongful acts of the defendants complained of, but they seek to recover damages for injuries resulting to the fictitious partnership, the 'Elite Theater.' It is contended on behalf of the defendants in error that this statute only covers actions growing out of contracts, and was intended only for the protection of creditors dealing with fictitious partnerships, but this contention is not sustained by the decisions of this court, and a different interpretation has been given this statute by such decisions." The court cites Baker v. L. C. Van Ness & Co. (1909) 25 Okla. 34, 105 Pac. 660 (action of replevin), and Smith v. Woods (1912) 33 Okla. 233, 124 Pac. 1088 (action to foreclose mechanics' lien). See also Patterson v. Byers (1907) 17 Okla. 633, 89 Pac. 1114, 10 Ann. Cas. 810 (action of replevin), and St. Louis & S. F. R. Co. v. Swearingen (1912) 31 Okla. 785, 123 Pac. 1122 (action for damages to shipment of live stock), in which cases it may have been assumed that the statute applied, though, in one case, it was held that the partnership name was not within the statute, and, in the other, that the statute had been sufficiently complied with.

In the cases cited from Ohio and California, the court does not discuss the question at length, but merely announces its holding that the statute is inapplicable. In Pedroni v. Eppstein (Colo.) supra (which did not involve a partnership, but an individual doing business as "trustee," to whom the statute also applied), the Colorado court of appeals said that the statute was highly penal, and should be strictly construed; and in Wallbrecht v. Blush (1908) 43 Colo. 329, 95 Pac. 927, where the statute was held inapplicable to an action of unlawful detainer, the court said that the statute was a penal statute, and would not be construed as embracing any penalty except that provided by its terms, and that an action to recover possession of real property could not be considered, by any reasonable construction, as an action for the collection of a debt.

In Melcher v. Beeler (1910) 48 Colo. 233, 139 Am. St. Rep. 273, 110 Pac. 181, supra, the question arose in connection with the refusal of an instruction which, the court said, would have told the jury that the failure of plaintiffs to file the statutory affidavit prevented them from maintaining the action. The court said that the statute only applied to suits for the collection of debts due the firm, and

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that as the action was one for a tort it was not within the statute. The instruction was probably open to the construction placed upon it by the court, but defendants do not seem to have been contending that the failure to file the affidavit defeated the action. Their contention was that as the statutory affidavit was not filed, and as they did not know that there was any person interested in plaintiff's business except B., or that his wife was a member of the firm, there could be no recovery if the alleged libelous publication was true so far as B. was concerned, even though false as to the wife. The court, however, rejected this contention.

In Cincinnati Traction Co. v. Hulvershorn (1909) 31 Ohio C. C. 444, a partnership brought an action for damages sustained by a coal wagon struck by a street car. The court said: "Although the certificate of partnership was not filed with the clerk of the court until more than four years after the right of action accrued, yet the action was commenced before expiration of that period, and, under the proviso of § 3170–6, Rev. Stat. the plaintiff could lawfully maintain the action." The section referred to provided that if the partners should at any time comply with the statute, then they should have the right to commence an action, or, if such action had been commenced, to maintain it. The court's meaning is not very clear, and the case seems to have been sometimes regarded as holding that noncompliance with the statute does not defeat an action for tort. The court, however, probably meant that, the action having been commenced within the period of limitation, the subsequent filing of the certificate authorized the prosecution of the action, though the certificate was filed after the expiration of that period. Having reached this conclusion, the court may have thought it unnecessary to decide whether the statute applied to an action for tort; but it is possible that the court assumed that it did so apply. The same is true of Powelson v. Seattle (1915) 87 Wash. 617, 152 Pac. 329, where, in an action for damages to property caused by negligence of a city in constructing an inadequate drain in grading a street, an objection based on the statute was disposed of on the ground that the certificate had been filed prior to the commencement of the action, though subsequent to the injury.

Phillips v. Goldtree (1887) 74 Cal. 151, 13 Pac. 313, 15 Pac. 451, and Turnbull v. Michigan C. R. Co. (1914) 183 Mich. 213, 150 N. W. 132, are similar to the cases just referred to, in that it is not clear whether the court assumed that the statute applied, or merely thought it unnecessary to pass upon that question. They are different from those cases, however, in that it is not clear whether the court regarded the action as in tort. The Michigan case was an action against a carrier for the wrongful delivery of a shipment, without requiring the surrender of the bill of lading. In the California case, the complaint as stated in the opinion, alleged that defendants received money for the use of plaintiffs, which they promised to remit to plaintiffs, that plaintiffs demanded the money of defendants, and that defendants refused to deliver it. This was probably an action of assumpsit, though it is not impossible that it was trover. It should be noted that each of these cases was decided by a court which has expressly held, in another case, that the statute does not apply to actions for tort.

Though not strictly in point, see also Wood v. Erie R. Co. (1878) 72 N. Y. 196, 28 Am. Rep. 125, affirming (1877) 9 Hun, 648. The statute there involved prohibited the transaction of business in the name of a partner not interested in the firm, and apparently did not authorize the doing of business in such name on filing a certificate. A person carrying on business in the name of a dissolved firm brought an action for damages to a shipment made by him in the name of such firm. The court held that the statute did not defeat the action, but apparently placed its decision on the ground that the carrier was not of the class of persons for whose protection the statute was passed, and not

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on the ground that the statute did not apply to torts.

See also Hoyt v. Allen (1842) 2 Hill (N. Y.) 322, where, in an action against a carrier for the loss of goods, defendant pleaded that plaintiff was transacting business in a fictitious name, in violation of such New York statute, the case being disposed of on the ground that it was not sufficiently pleaded that the contract between the parties with respect to the particular goods in question was made by plaintiff while engaged in the transaction of business in such assumed name; also The Nonpariel (1906) 149 Fed. 521, holding that a libel in admiralty for damages to a canal boat and its cargo from a collision with an obstruction could be maintained, though the libellant was doing business under a tradename. The objection to the maintenance of the suit was probably based on the New York statute, though the court does not so state.

A. McT.

ELEANOR P. SHAW, Respt.,

v.

G. B. BEAUMONT COMPANY, Appt.

New Jersey Court of Errors and Appeals — October 11, 1917.

(88 N. J. Eq. 333, 102 Atl. 151.)

Building contract — cost plus — salaries — office expense.

1. Under the terms of an agreement, "to receive for its entire compensation for its services in so doing (i. e., building) a sum equal to 10 per cent of the entire cost of such building," a corporation is not entitled to receive for its services, in addition to the 10 per cent called for by the terms of the contract, a proportion of the salaries of its officers and office employees, while supervising the construction of the building; nor 10 per cent on the cost of financing the building when the disbursements in connection therewith have been allowed; nor for telephone calls, carfare, postage, stationery,—they are office charges of the defendant corporation; nor tools used in the construction of the building,—they are part of the equipment of a contractor.

[*See note on this question beginning on page* 126.]

Equity — complete justice.

2. It is not an inflexible rule that, when the court of chancery has once acquired jurisdiction for one purpose, it is bound to retain the case for complete relief; whether the court of chancery will do so, so as to include all the points in controversy between the parties, rests somewhat in the discretion of the chancellor. The rule applied in this case, where the court of chancery, under an agreement, having jurisdiction to make an accounting excluded therefrom items under two former agreements which were cognizable in a court of law, held, proper.

Mortgage — lease — compensation of mortgagee.

3. A mortgagee in possession is not entitled to compensation for services rendered for renting the premises,—in this case, an apartment house.

Headnotes by BLACK, J.

(Garrison and Trenchard, JJ., dissent.)

APPEAL by defendant from a decree of the Chancery Court in favor of complainant in an action for an accounting and reconveyance of lands held by defendant, and for a receiver to collect rents pending litigation. *Affirmed.*

The facts are stated in the opinion of the court.

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Messrs. Collins & Corbin, and Edward A. Markley, for appellant:

The scope of the accounting should not have been confined to the agreement of February 26, 1913, but should have included therein the transactions between the complainant and defendant prior thereto, which led up to, related to, and were closely connected with said agreement.

Couse v. Boyles, 4 N. J. Eq. 212, 38 Am. Dec. 514; Ames v. New Jersey Franklinite Co. 12 N. J. Eq. 66, 72 Am. Dec. 385, 10 Mor. Min. Rep. 434; Bullock v. Adams, 20 N. J. Eq. 367; Youmans v. Youmans, 26 N. J. Eq. 149; Trotter v. Heckscher, 42 N. J. Eq. 254, 7 Atl. 650; Melick v. Cross, 62 N. J. Eq. 546, 51 Atl. 16.

Defendant should not have been regarded as a mortgagee in possession to the extent of disallowing it any compensation for services rendered to complainant under authorization of June 24, 1913, after November 1, 1913.

2 Jones, Mortg. § 1132; Davis v. Dendy, 3 Madd. Ch. 170, 56 Eng. Reprint, 473, 18 Revised Rep. 209; Harper v. Ely, 70 Ill. 581; Green v. Lamb, 24 Hun, 87; Gibson v. Crehore, 5 Pick. 145; Tucker v. Buffum, 16 Pick. 46; Gerrish v. Black, 104 Mass. 400; Montague v. Boston & A. R. Co. 124 Mass. 242.

Mr. William A. Lewis also for appellant.

Messrs. Hartshorne, Insley, & Leake and **William E. Decker** for respondent.

Black, J., delivered the opinion of the court:

The fundamental question in this case is one of equitable jurisdiction. The litigation grows out of an agreement made between the parties to this suit, on the 26th day of February, 1913. The complainant, being seized of lands at the corner of Highland avenue and the boulevard in Jersey City, New Jersey, entered into an agreement on the above date, with the defendant, to erect an apartment house on a part thereof. Under the terms of the agreement the complainant conveyed the lands to the defendant, and also gave the defendant certain moneys, the lands to be reconveyed to her on completion of the building and payment thereof, the cost to be ascertained by an accounting to be made by the defendant. The defendant, having erected and completed the apartment house on part of the land, sold and mortgaged other parts in accordance with the terms of the agreement, retained title to the remainder, and collected rents from apartments when rented. The defendant having failed to render a just and true account, the complainant exhibited her bill of complaint in the court below, and prayed: (a) For an accounting; (b) a reconveyance of the lands held by the defendant; (c) a receiver to collect the rents pending the litigation. The case was brought to trial before Advisory Master Charles J. Roe, resulting in a decree for the complainant, and the sum of five thousand five hundred and forty dollars and thirty-five cents ($5,540.35) to be paid by the defendant to the complainant; hence, the defendant brings this appeal, alleging seven specifications as grounds of appeal.

The first and only one that requires any extended discussion relates to the ruling of the advisory master, which limited the scope of the accounting to the agreement of February 26, 1913. The appellant urges that the master should have included the transactions between the complainant and the defendant, under two prior written agreements, viz., August 27 and November 22, 1912. They referred, speaking generally, to the same subject, viz., that of building. They were both abandoned, no work being done under them, except the preparing of plans for a building under the agreement of August 27, 1912, and the payment of five hundred and forty dollars ($540) to the appellant. The accounting was a long and laborious one, involving something over $100,000. The record is also voluminous. The clause in the agreement of February 26, 1913, providing for the conveyance of the property and the holding of it by the defendant, until it should be paid, is the distinguishing feature between that agreement and the two preceding agreements referred to

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above. That clause is the sole ground for the special equity, which gives the court of chancery jurisdiction over this cause. The question then is, Did the master err in limiting the scope of the accounting as above indicated? One other fact is urged, as having some significance, which may be mentioned; that is, the parties stipulated before the master, authorizing him to consider all the matters in dispute and adjudicate thereon (and waiving a jury trial on any such matters, in the brief); but it may be said, in passing, that such a stipulation imposes no obligation on the court of chancery to decide those issues.

It may be conceded that a court of chancery having once acquired jurisdiction of a cause, will do all in its power to settle all the rights of all the parties, in the matter of any controversy; but this is not an inflexible rule which the court of chancery is bound to follow in every case that comes before it.

Equity—complete justice.

The rule to be applied was succinctly stated by Vice Chancellor Reed, in the case of Stout v. Phœnix Assur. Co. 65 N. J. Eq. 573, 56 Atl. 694, in these words: "A court of equity in this state can deal with legal questions, only so far as their decision is incidental or essential to the determination of some equitable question. Merely because a court of equity has acquired jurisdiction for one purpose, it is not empowered to retain the case for complete relief."

Chief Justice Beasley, speaking for this court said: "It is not true, by any means, that, when a court of conscience has acquired cognizance for one purpose, it thereby acquires cognizance over the entire controversy for all purposes." Lodor v. McGovern, 48 N. J. Eq. 279, 27 Am. St. Rep. 446, 22 Atl. 200.

The principle is further illustrated in our courts, in the cases of Little v. Cooper, 10 N. J. Eq. 273; Red Jacket Tribe v. Hoff, 33 N. J. Eq. 441. The subject is discussed, the principle illustrated and applied, in many cases, and by text-writers, such as 1 Story, Eq. Jur. ¶ 72; Pom. Eq. Jur. ¶ 181; 10 R. C. L. p. 374, ¶ 123.

The extending of the jurisdiction of chancery so as to include all the points in controversy rests somewhat in the discretion of the chancellor; especially so, where the rights involved grow out of other contracts. In this case the defendant has an adequate and complete remedy at law for all the items involved under the two former contracts, including damages for their alleged breach. The court of chancery cannot retain jurisdiction for the purpose of granting a purely legal remedy, or to try a claim for unliquidated damages. Trotter v. Heckscher, 40 N. J. Eq. 657, 4 Atl. 83; Phillips v. Pullen, 45 N. J. Eq. 157, 16 Atl. 915.

The bill of complaint in this suit was filed April 22, 1915. The present Chancery Act (Pamph. Laws 1915, p. 184, ¶ 8), by which a jury trial shall be deemed to be waived, unless demanded in the pleadings, does not apply to this case. Id. ¶ 12. We therefore think that the master was right in confining the scope of the accounting to the agreement of February 26, 1913.

It is next urged that the defendant should not have been regarded as a mortgagee in possession, to the extent of disallowing it any compensation for services rendered to complainant, for renting the apartments under the authorization contained in a letter, dated June 26, 1913, after November 1, 1913. It is sufficient to say on this point that the ruling of the master is amply sustained by the authorities. Clark v. Smith, 1 N. J. Eq. 137; Elmer v. Loper, 25 N. J. Eq. 482; Venderhaise v. Hugues, 13 N. J. Eq. 410; Moore v. Cable, 1 Johns. Ch. 388; 2 Jones, Mortg. ¶ 1114.

Mortgage—lease—compensation of mortgagee.

The third point is without legal merit; it requires no discussion.

The next three points involve a

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construction of the clause in the contract, which provides that the defendant is "to receive for its entire compensation for its services in so doing [i. e., building] a sum equal to 10 per cent of the entire cost of such building, and to complete the same by October 1, 1913;" that the entire cost of the building, including the 10 per cent compensation, shall not exceed forty-two thousand dollars ($42,000). The master allowed the defendant the sum of three thousand four hundred and seventy dollars and fifty cents ($3,470.50) 10 per cent on the cost of the building, for its services in constructing the building, under this clause in the contract.

The appellant now claims that, in addition thereto, the master should have allowed a proportion of the salaries paid by the defendant to its officers and office employees, to its president, Mr. Beaumont, at the rate of nineteen dollars and twenty cents ($19.20) per day, to its secretary Mr. Rowan, at the rate of thirty-five dollars ($35) per week; to its messenger, or office boy, Mr. Stanley, at the rate of eighteen dollars ($18) per week, while supervising or superintending the construction of the building. Also it is contended by the appellant that the master should have allowed 10 per cent for services performed, on the cost of financing the apartment house, amounting to nine hundred ($900). But disbursements in connection with the mortgage loans and sales of land were allowed by the master; also the appellant claims items for telephone calls, carfare, postage, and stationery; tools, such as ladders, mortar tubs, etc., used in the constructing of the building. Without stating in detail the entire contract under which the appellant claims such items, it is sufficient to say that we think the master properly construed the contract, and made a correct application of its terms to the items in controversy in this case, by excluding all these various items above indicated as not being included within the provisions of the contract.

The reasoning of the master is quite satisfactory in the memorandum filed by him in the court below, excluding these various items. The contract provides for no independent supervision. The defendant cannot charge the complainant with a proportion of the salaries that it pays its officers for supervising or superintending the building. The defendant is the contracting party; it had a right to employ whomsoever it chose to superintend the building on its part, the work of the laborers employed by it. So, with the other items enumerated above, such as telephone calls, not allowed by the master, they were office charges of the defendant corporation; they were not costs and expenses of the building. So, the tools used in the construction of the building, they were a part of the equipment of the contractor; a contractor, when he agrees to build, must, in the absence of a contrary agreement, furnish all the tools and necessary appliances for the work contracted to be done.

Building contract—cost plus—salaries—office expenses.

Objection is also made to an allowance of a counsel fee of fifteen hundred dollars ($1,500) to the complainant. Pamph. Laws 1910, p. 427, permits the allowance of a counsel fee by the chancellor of such amount as shall seem to him reasonable and proper. After examining the record in this case, which is voluminous, involving a large sum of money, we cannot say that a counsel fee of such an amount was either improper or unreasonable.

The decree of the Court of Chancery is affirmed, with costs.

Garrison and **Trenchard**, JJ., dissent.

Bergen, J., concurring with modifications:

The complainant, by a letter dated June 24, 1913, addressed to the defendant, authorized it "to run all apartments, making such arrange-

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ments as in your judgment may seem advisable. Also such other arrangements as may be necessary in connection with the furnishing and running of apartments, such cost as may be incurred thereby to be added to the contract allowance."

This separate agreement manifestly authorized the defendants to find tenants and to furnish the apartments, the cost of which was made subject to the 10 per cent allowance. The word "cost" must refer to the furnishings and expenses of running the apartments. The master allowed the cost of painting, janitor's wages, coal and gas, nine refrigerators, and window shades, but eliminated all cost which arose subsequent to the 1st day of November, 1913, when he said the building was completed, and that thereafter the defendant was not entitled to 10 per cent on any furnishings or expenditures, upon the ground that, the building being completed, the defendant was a mortgagee in possession. If it be granted that the defendant was a mortgagee in possession, it was nevertheless entitled to continue its account until the property was turned over, and could not be deprived of the benefit of the written contract that it was to be paid 10 per cent upon the cost of the furnishings. It is impossible to tell from this account what proportion of the furnishings were allowed; none appear in this account except the refrigerators at $197; and the window shades at $178, whereas the total cost of the furnishings was $1,746.08. These furnishings were not a part of the original contract, and it would make no difference whether they were furnished after the completion of the building, or before; they were to be paid for with the addition of 10 per cent on their cost; and I do not see upon what theory we can take a part of such furnishings and include them in this account, and exclude the balance, to be a subject of future litigation.

I think that either the subject-matter of this latter contract should be wholly eliminated, with the statement that it is not to be included in the decree, or the whole amount should be included, and therefore the decree should be modified to this extent. I vote to affirm with this modification.

ANNOTATION.

Construction of "cost plus" contracts.

While no cases have yet been reported involving the construction of the so-called "cost plus" contracts which have been entered into on behalf of the government, in connection with the prosecution of the war, a few cases have arisen out of private contracts, providing for compensation on the basis of a percentage of the cost of the work done, and involving their construction as to what elements, or items, may be taken into consideration in determining the cost of the work, upon which the percentage compensation of the contractors is to be figured.

In accord with the reported case (SHAW v. G. B. BEAUMONT CO. ante, 122), as to the right to charge for the general expenses of the contracting firm is Isaacs v. Reeve (1899) — N. J. Eq. —, 44 Atl. 1, holding that the contractor should not be allowed to charge a sum for the mere supervisory attendance of one of the contractors, who did not do any actual work, in addition to the 10 per cent, as that was what the 10 per cent was for.

And in Savannah, A. & N. R. Co. v. Oliver (1909) 98 C. C. A. 174, 174 Fed. 140, where a contractor was to receive the actual cost of the work and labor performed, and materials and supplies furnished, either by himself or sub-

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contractors, and, in addition, 7½ per cent thereof as general contractor's profit, it was held that the general contractor was not entitled to charge for depreciation of the equipment used.

But to the contrary is Hoggson Bros. v. Spiekerman (1916) 175 App. Div. 144, 161 N. Y. Supp. 930, in which it is held that a building contract, providing for a percentage to the contractors upon the cost to them of the completion of the work, includes a proportion of the overhead charges of the contracting firm; that is, part of the general cost to the firm of doing business.

Where the principal contractor sublets part of the work, the owner should not be required to pay double commissions, or profits, but the principal contractor should be permitted to charge only his percentage upon the actual material and labor furnished by the subcontractors, and not upon the profit of the subcontractors. Grafton Hotel Co. v. Walsh (1915) 142 C. C. A. 461, 228 Fed. 5; Bushnell v. Brand (1916) 199 Ill. App. 542.

To the contrary, however, is Hamilton v. Coogan (1894) 7 Misc. 677, 28 N. Y. Supp. 21, affirmed without opinion (1896) 148 N. Y. 753, 43 N. E. 987, where the contract called for the payment of the cost of labor and material used in the building, and 10 per cent added thereto as profit it being held that 10 per cent could be charged upon the entire amount paid to subcontractors, even where they did the work on a cost plus basis.

In Isaacs v. Reeve (N. J.) supra, involving the charges to be made against the original contractor of a building, who abandoned the work before it was finished, for work done by subsequent contractors upon a cost plus 10 per cent basis in completing the building, it was held that he could not be charged with the cost of plumbing and painting, which were finished by subcontractors under the original contract, nor with the 10 per cent for the second contractors upon those amounts. Nor could he be charged with the cost of extra work not called for by the original contract, and commissions thereon.

Where changes and additions are made by direction of the owner during the progress of the work, which increase the cost of the building over the original estimate, the contractors are entitled to charge their percentage on the total cost. Schafer v. Lee (1917) — Okla. —, 166 Pac. 94.

In Westendorf v. Dininny (1905) 103 App. Div. 593, 92 N. Y. Supp. 858, where a contractor was to be reimbursed for expenditures upon a building, and paid a percentage thereon, it was held that items for carfare and board of men who were brought from New York city to work upon the building should not be allowed, as the owner did not know of the custom to pay such expenses, nor was he chargeable with notice of such custom.

In Westinghouse, C. K. & Co. v. Long Island R. Co. (1914) 160 App. Div. 200, 145 N. Y. Supp. 201, affirmed without opinion (1915) 216 N. Y. 697, 110 N. E. 1051, it was held that the amount to be paid to contractors engaged to electrify certain lines of defendant's railroad, for which they were to be paid the actual cost, with 10 per cent added, the term actual cost being defined by the contract to include miscellaneous charges, such as fire and casualty insurance and cost of accidents, it was held that the contractors were entitled to be reimbursed for a sum paid upon a judgment for personal injuries by an employee, which exceeded the amount of casualty insurance carried. It appears that the contractors did not claim their percentage upon this disbursement; but it is pointed out by presiding Justice Ingraham, in a dissenting opinion, that if it was proper to allow this charge it would necessarily follow that the contractors would also be entitled to charge their commissions upon the amount.

In Payne v. Cunningham (1917) 175 Cal. 166, 165 Pac. 531, it was held that —a provision in a contract for the superintendence of the alteration and

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construction of buildings that, should the superintendent fail to keep within the maximum cost fixed in the contract, "no charge shall be made for such superintendence for such excess," was construed to entitle the superintendent to commissions upon the maximum fixed in the contract, but not upon the cost of construction exceeding that amount, the owner having contended that the superintendent was not entitled to any commission, because he exceeded the maximum cost.

Where part of the work was not properly done, the contractor is not entitled to charge for the cost of doing the work over; but the proper basis for his charge is what the work would have cost if it had been done properly in the first place. Hoggson Bros. v. Spiekerman (1916) 175 App. Div. 144, 161 N. Y. Supp. 930.

In Priest v. Bircher (1877) 3 Mo. App. 565 (abstract), it was held that, where the superintendent of construction was to receive a percentage on any amount paid out for materials used or work performed in erecting a building, he was not entitled to a commission upon materials owned by the builder before the contract was made.

In Westendorf v. Dininny (1905) 103 App. Div. 593, 92 N. Y. Supp. 858, it was held that, where the contractor arbitrarily and unnecessarily raised the wage of a carpenter from $2.75 to $3 per day, he should not be allowed to charge for the increase, as he was bound to make the best terms he could for the builders. R. L. S.

JOYCE-PRUIT COMPANY
v.
NELSON BROTHERS
and
DEXTER STATE BANK, Garnishee, Appt.

PECOS VALLEY LUMBER COMPANY
v.
SAME.

(Two cases.)

New Mexico Supreme Court — September 19, 1918.

(— N. M. —, 175 Pac. 868.)

Set-off by agent.

An agent who collects money belonging to his principal has no right to set off against it an antecedent debt or claim owing to him by the principal, without first showing that the principal has agreed that he might so apply it.

[*See note on this question beginning on page* 132.]

Headnote by ROBERTS, J.

APPEAL by defendant garnishee from judgments of the District Court for Chaves County in favor of plaintiffs in proceedings to collect claims against Nelson Brothers in which funds in possession of the Dexter State Bank, and alleged to belong to defendants, were garnished. *Affirmed.*

The facts are stated in the opinion of the court.

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Mr. H. C. Maynard, for appellant:

Under the contract between the defendants Nelson Brothers and the appellant bank, there was simply a relation of debtor and creditor created.

Davis v. Lenawee County Sav. Bank, 53 Mich. 163, 18 N. W. 629; Butcher v. Butcher, 134 Mo. App. 61, 114 S. W. 564; Killen v. Barnes, 106 Wis. 546, 82 N. W. 536.

The bank had a right to purchase claims, and had a good right to offset them.

Nix v. Ellis, 118 Ga. 345, 98 Am. St. Rep. 111, 45 S. E. 404; Bramblett v. Slemp, 32 Ky. L. Rep. 1329, 108 S. W. 339; 34 Cyc. 751.

A garnishee can be held in garnishment proceedings by plaintiff in garnishment only to the extent of the judgment debtor's claim against garnishee.

Bank of State v. Bredlow, 31 Mo. 523.

Messrs. Hiram M. Dow and Tomlinson Fort, for appellees:

Where an agent collects the funds of his principal, he has no right to buy up or arrange for the payment of outstanding claims due by his principal to third persons, and to pay such claims without permission of his principal, and contrary to his directions.

Smuller v. Union Canal Co. 37 Pa. 68; Middletown & H. Turnp. Road v. Watson, 1 Rawle, 330; Tagg v. Bowman, 108 Pa. 273, 56 Am. Rep. 204.

Roberts, J., delivered the opinion of the court:

The same identical questions are involved in each of the above cases, and upon stipulation of counsel they are submitted upon the same transcript and briefs. The facts out of which the litigation arose may be briefly stated, as follows:

Nelson Brothers were partners, engaged in farming and stock raising. They were indebted to the Dexter State Bank in the sum of $492.50. They advertised a sale of their personal property, naming on the printed advertisements the Dexter State Bank as clerk of the sale and certain parties as auctioneers. After posting notices of the sale Nelson Brothers executed to the bank a bill of sale, covering all the property advertised for sale, for the purpose of securing the indebtedness which they owed the bank. The arrangement between the bank and Nelson Brothers, as we understand the evidence, was that the bank was to act as clerk of the sale; that it was to discount the notes taken at the sale, and to pay the expenses of the sale, and turn over to Nelson Brothers the net proceeds of the sale, less the discounts, expenses, and its commission. The bank was to deduct from the proceeds the amount of the indebtedness owing the bank by Nelson Brothers. The bank, after the sale, had on hand approximately $1,309.50 net, belonging to Nelson Brothers. They gave the bank a check covering the amount owing it. This amount the bank placed to their credit, and honored the check.

Either immediately prior to the sale, or after the sale, the bank purchased certain claims against Nelson Brothers. At the sale, so the representative of the bank testified, certain parties purchased property belonging to Nelson Brothers, and set off the purchase price with claims which they held against Nelson Brothers. The bank also paid out certain moneys on mortgages and judgments against Nelson Brothers. It asked that it be allowed an offset on the claims which it had purchased and held against Nelson Brothers, and the moneys paid out on such judgments, mortgages, etc. The trial court held that the bank was not entitled to the offsets and credits claimed, and gave judgment for the appellees. To review such judgments the appeals are prosecuted.

There is no contention as to the money paid the bank on the note owing by Nelson Brothers, secured by the bill of sale. This was paid, as stated, by Nelson Brothers' check. The question is as to the right of the bank to an offset on the claims purchased by it, and its claimed credits for the moneys paid out on the mortgage, judgments, etc. Appellant contends that, under the agreement between the bank and Nelson Brothers, there was created

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simply the relation of debtor and creditor; hence, the bank had a right to purchase claims against Nelson Brothers, and set off such claims against the demand of Nelson Brothers. If appellant is correct in this contention, undoubtedly the bank would have the rights claimed for it. But here the bank was the agent of Nelson Brothers, and by virtue of such agency collected the money in question. An agent who collects money belonging to his principal has no right to set off against it an antecedent debt or claim owing to him by the principal, without first showing that the principal has agreed that he might so apply it. Mechem Agency 2d ed. § 1349. In the case of Tagg v. Bowman, 99 Pa. 376, the court said: "An agent cannot avail himself of an advantage given by his agency, to apply it to his own benefit, to the injury of his principal."

Set-off—by agent.

In the case of Tagg v. Bowman, 108 Pa. 273, 56 Am. Rep. 204, the court said: "The receipt of money by one person from another, to be applied to a specific purpose, implies an agreement on the part of the former not to apply it to any other use, and of course not to his own by pleading a set-off. Smuller v. Union Canal Co. 37 Pa. 68; Bank of United States v. Macalester, 9 Pa. 475; Ardesco Oil Co. v. North American Oil & Min. Co. 66 Pa. 375, 380, 8 Mor. Min. Rep. 589. In Simpson v. Pinkerton, 10 W. N. C. 423, we held that an attorney at law or in fact, employed to collect a claim, when he has received the money, has no right to set off an antecedent debt or claim of his own against his constituent, without first showing that the latter agreed he might retain his demand out of the money. It was also ruled, in Middletown & H. Turnp. Road v. Watson, 1 Rawle, 330, that an agent of the company, who had received money to its use, could not, in a suit against him, set off debts of the company which he had paid without showing he had authority to pay them. It is there said: 'As long as the agent acts within the scope of his authority, and no longer, he is protected. It was the duty of Watson to collect and pay over the funds as they came into his hands. It was for the company to direct the application of the money, when in the treasury or under their control, to the discharge of their debts, the repair of the road, or whatever purposes they might suppose most beneficial to the corporation. This they have been prevented from doing by an assumption of power by their agent and a misapplication of the funds of the company. If such a breach of trust should be permitted, it would, in practice, lead to great abuses, by introducing a scene of speculation and fraud the most disastrous, and of the most secret and dangerous nature."

The trial court evidently refused to allow the bank credit for the money paid out by it on the judgment and mortgage, on the theory that it had no right to make the payments without specific authority of its principal, and further because the bank failed to show that these liens were legal and valid. It made no attempt to show this, going no further than to show that it had made the payments on a mortgage and a judgment. Nor did it attempt to show that the offsets which it had allowed purchasers of property at the sale were valid and legal debts owing by Nelson Brothers.

Finding no error in the proceedings, the judgments in each of the causes will be affirmed; and it is so ordered.

Hanna, Ch., J., and **Parker**, J., concur.

A petition for rehearing having been filed, **Roberts**, J., on November 21, 1918, handed down the following additional opinion:

Counsel for appellant has filed a motion for rehearing, supported by an acrimonious brief, in which he asserts that the doctrine of law announced by the court is preposterous, and that the court failed to

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read the record. The burden of his complaint now seems to be that the court committed a grievous error in not giving the bank credit for $107.16, which it alleged that it had paid to Martin and Sweeney, alleged to have held a chattel mortgage on four head of horses. He now asserts that the evidence shows that Nelson Brothers authorized this payment and further that the mortgage was valid and binding.

First, as to the accusation made by counsel that the court failed to read the record: The record was read with great care by the writer of the former opinion. In fact it was necessary to read the record in full in order to arrive at any intelligent understanding as to the facts in the case. Appellant's assignments of error were as follows:

"(1) The court erred in rendering judgment against the appellant upon its answer filed herein.

"(2) The court erred in rendering judgment against the appellant in favor of said appellees.

"(3) The court erred in rendering judgment against the garnishee herein, for the reason that said judgment is not supported by the evidence.

"(4) That said judgment rendered herein is contrary to law and not supported by the evidence."

Under the rule announced by this court in the case of Farmers' Development Co. v. Rayado Land & Irrig. Co. 18 N. M. 1, 133 Pac. 104, the court might well have declined to go into the merits of the case; but, as appellee had raised no question as to the sufficiency of the assignments of error, the court kindly refrained from noticing the deficiency of its own motion, and read the record in connection with appellant's brief, in order to enable it to determine the merits of the controversy.

It is well to state that, in the argument advanced by appellant in support of his claim that the cause should be reversed, the only language that might be construed as advancing the proposition which he now urges in his motion for rehearing is the following: "Our contention is we did not owe the judgment debtor, except a small amount, which has been taken care of in the judgment, and that we should be allowed to set off the amounts as set out in this brief and shown by the evidence."

In his statement of the facts in the case the only reference to the matter, other than the itemized list of the claims, is as follows: "The testimony is undisputed that the $107 paid to Martin and Sweeney was by virtue of an existing chattel mortgage and at the express wish of Nelson Brothers, given prior to said sale."

Appellant sets out in his brief on the motion for rehearing excerpts from the testimony, which he claims show that Nelson Brothers authorized the bank to pay the $107.16 on the mortgage. The cashier of the bank was on the stand, and he was asked: "Upon whose orders did you pay this $107.16?" His answer was: "That is hard to state; partly on Nelson's, and partly on my own." The witness further testified that the mortgage was a valid and subsisting lien upon the horses, but did not produce the mortgage, nor did he testify as to the amount called for by the same. The same witness later, however, testified that Nelson Brothers had asked them to place the proceeds of the sale to their credit, less the amount owing the bank under the bill of sale, and that Nelson Brothers themselves be permitted to check out the money and pay the various claims, and that Nelson Brothers never did consent for the cashier of the bank to pay the claims out of the moneys derived from the proceeds of the sale.

The trial court, in view of the equivocal statement that Nelson Brothers had "partly" authorized them to apply the money on the mortgage, and the unequivocal statement to the effect that they had refused to authorize them to pay out any of the money, evidently elected to believe the latter, and this court

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is not prepared to say that the trial court was in error in so doing.

Counsel for appellant says that the judgment referred to in the former opinion was a judgment directed against the bank in garnishment, and was not questioned either by the parties or the court below, and that the bank was given credit for this amount. If this is true, appellant has no ground for complaint, because we simply affirmed the judgment of the trial court. From appellant's brief we took it that he was complaining of a failure to allow credit for money paid on a judgment. If we were in error in assuming that the appellant was not given credit for money paid on the judgment, such error was occasioned, not by a failure to read the record, but by a lack of comprehension of the brief of appellant. After carefully going over the record again, and rereading appellant's original brief, we see no reason to depart from the former opinion, further than to say that the judgment referred to was paid by the bank, and that the bank received credit for the same in the trial of the case below.

For these reasons, the motion for rehearing will be denied; and it is so ordered.

Hanna, Ch. J., and **Parker**, J., concur.

ANNOTATION.

Right of agent to offset his own claim against collection made for principal.

I. When agent given authority to apply money in certain way, 132.
II. Independent debt due from principal to agent, 132.
III. Independent debt due subagent from agent, 133.
IV. Claims growing out of same transaction, 133.
V. Deduction for services and expenses in connection with the subject-matter, 134.

Scope.

Cases involving the relation of attorney and client, and those involving the right, as between correspondent banks, to offset a balance due from one to the other against the proceeds of paper transmitted for collection, are not included in the present note, as they involve considerations peculiar to those relationships.

I. When agent given authority to apply money in certain way.

Where an agent is given authority to apply money collected for his principal in a certain way, by accepting the trust, he waives any general right he may have to set off a claim of his own. Tagg v. Bowman (1885) 108 Pa. 273, 56 Am. Rep. 204; Smuller v. Union Canal Co. (1860) 37 Pa. 68; Shearman v. Morrison (1892) 149 Pa. 386, 24 Atl. 313.

Thus, where three tenants in common agreed that one of them should collect all of the rents from the property and apply half of it to a mortgage and the other half to be divided among the tenants in common, the whole of the sum so collected was impressed with the trust, and the collecting tenant could not set off a claim of his own against his cotenants. Shearman v. Morrison (Pa.) supra.

And where an agent was authorized to collect rents and apply them first, upon certain debts due to third persons and any balance upon the agent's own mortgage, the money collected by him from time to time was impressed with a trust in favor of the principal which required its application to the specified objects in their order, and the agent was not entitled to set off his own claim in an action for money which had been collected by him and not applied according to directions. Tagg v. Bowman (Pa.) supra.

And a collector of tolls for a canal company, who had instructions to apply the funds collected and received in a particular way, had no authority to appropriate part of such funds to the payment of a debt owed to himself by the company. Smuller v. Union Canal Co. (1860) 37 Pa. 68.

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II. Independent debt due from principal to agent.

An agent who collects money for his principal may not, in an action for the money by the principal, set off against the claim an independent debt against the principal, in the absence of an agreement permitting him to do so. Palmer v. Haynes (1831) 2 La. 370; New Orleans v. Finnerty (1875) 27 La. Ann. 681, 21 Am. Rep. 569; Young v. Jackson (1885) 37 La. Ann. 810; Morse v. Woods (1880) 5 N. H. 297; JOYCE-PRUIT CO. v. NELSON BROS. (reported herewith) ante, 128; Frick v. Freudenthal (1904) 45 Misc. 348, 90 N. Y. Supp. 344; Simpson v. Pinkerton (1881) 10 W. N. C. (Pa.) 423.

Thus, in Palmer v. Haynes (La.) supra, it was held that, where a broker received a note to be discounted, he became the agent of the owner, and his refusing to deliver the proceeds and offering in discharge other obligations of the owner which had been assigned to him, was unjustifiable, immoral and illegal.

A bank to whom a note is sent for collection has no right to set off against the proceeds of such note a debt due to it by a partnership of which the payee is a member. Commercial State Bank v. Rowland (1891) 31 Neb. 483, 48 N. W. 149.

In Young v. Jackson (1885) 37 La. Ann. 810, it was held that an agent is not entitled to retain and offset against money collected by him any sum that does not represent disbursements, expenses, and costs, a stipulated commission, or a liquidated debt.

However, in Noble v. Leary (1871) 37 Ind. 186, it was held that an agent in an action for money collected, might set off a note against the principal to a third person, which had been purchased by the agent, the court saying that it saw nothing in the general relation of agency to prevent such set-off, the acquisition of the note in question being in no way connected with the agency.

And in Ferriber v. Latting (1854) 9 La. Ann. 169, an agent for the collection of a note was, in an action by the principal for the money collected, allowed compensation of his account against the principal for board, money lent, and goods sold.

III. Independent debt due subagent from agent.

Where an agent has authority to employ a subagent to receive money for the principal, the principal may treat the subagent as his agent, and, when the subagent has received the money, may recover it in an action for money had and received; and if the subagent has made no advances and given no new credit to the agent on account of the remittance of the bill, the subagent cannot protect himself against such an action by passing the amount of the bill to the general credit of the agent, although the agent may be his debtor. Wilson v. Smith (1845) 3 How. (U. S.) 763, 11 L. ed. 820.

So, where a broker received a note for collection and transmitted it to another broker, the latter, upon collecting the proceeds of the note, could not retain them to liquidate a balance due him from the first broker. Arnold v. Clark (1848) 1 Sandf. (N. Y.) 491.

Where a subagent collects money for an agent with directions to pay it to a third party who is, in fact, an undisclosed principal of the first agent, the subagent has not, in a suit by the undisclosed principal against him, any right to set-off against the amount due a debt due to the subagent from the agent. Frazier v. Poindexter (1906) 78 Ark. 241, 115 Am. St. Rep. 33, 95 S. W. 464, 8 Ann. Cas. 552.

And where a bill of exchange was indorsed generally by the indorsee and sent by him to his correspondent for collection, the correspondent did not have authority to apply the proceeds to a debt which the indorsee owed to the correspondent, where the prior indorsement was such as to show that the indorsee held the bill for collection only. Blairne v. Bourne (1875) 11 R. I. 119, 23 Am. Rep. 429.

IV. Claims growing out of same transaction.

An agent may, however, set off against money collected a claim against the principal growing out of the same transaction.

Thus, in an action by an insurance

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company against its agent for moneys collected upon insurance policies and not transmitted, it was held that a sum of money paid by the agent to the company in consideration of an agreement by the company to enlarge the line of insurance which could be written, which agreement was not carried out by the company, could be set off. Spears v. Netherland F. Ins. Co. (1903) 31 Tex. Civ. App. 567, 72 S. W. 1018.

In Evans v. Lyon (1907) 33 Pa. Super. Ct. 255, an action against an agent for the sale of goods on commission, for a balance due for goods sold, it was held that the agent was entitled to set off against the balance certain moneys which he had expended, after a wrongful termination of the contract before the time fixed by its terms, in an endeavor to carry out the contract.

And in Johnson v. Hoosier Drill Co. (1881) 99 Pa. 216, it was held that an agent for the sale of implements was entitled to set off, against a demand for the proceeds of implements sold and delivered by him, a claim for damages against the manufacturer for failing to deliver other implements which the agent sold.

V. Deduction for services and expenses in connection with the subject-matter.

In a suit by a principal against an agent for money collected, the agent is entitled to a deduction for his services or expenses in connection with the subject-matter. English v. Devarro (1841) 5 Blackf. (Ind.) 588; Goodin v. Hayes (1905) 28 Ky. L. Rep. 112, 88 S. W. 1101; Evans v. Trenton (1853) 24 N. J. L. 764; Hutchinson v. VanVoorhis (1896) 54 N. J. Eq. 439, 35 Atl. 371; Gopen v. Crawford (1875) 53 How. Pr. (N. Y.) 278; Shearman v. Morrison (1892) 149 Pa. 386, 24 Atl. 313; Shaw v. Faires (1914) — Tex. Civ. App. —, 165 S. W. 501; Warner v. Cuckow (1895) 90 Wis. 291, 63 N. W. 238; Dale v. Sollet (1767) 4 Burr. 2,133, 98 Eng. Reprint, 112; Hamilton v. Street (1851) 8 U. C. Q. B. 124.

Thus, in an action against an agent for the wrongful conversion of money collected by him, he may set off the sum due him for commissions in making sales, under a Code provision for a counterclaim which "arises out of the transaction set forth in the complaint as the foundation of the plaintiff's claim," or is "connected with the subject of the action." Benton v. Moore (1904) 42 Misc. 660, 87 N. Y. Supp. 717.

And in Hamilton v. Street (U. C.) supra, it was held that an agent could deduct, in the first instance, disbursements, expenses, etc., made in the course of the agency, but that a debt arising out of an independent transaction must be pleaded as a set-off.

But an agent has no right to determine his own right to compensation, and the amount thereof, and to pay himself with the money of the principal in his hands, and with the same money pay a personal debt to another; and where the person who receives the money is cognizant of the transaction, he will not be allowed to profit by it. Girardey v. Girardey (1917) 99 Kan. 679, 163 Pac. 165.

And in New Orleans v. Finnerty (1875) 27 La. Ann. 681, 21 Am. Rep. 569, it was held that one appointed wharfinger could not offset an amount due him for salary and expenses of his office against a claim against him by the city for money collected, the court saying: "There is no such thing as compensating a debt due by an agent for moneys collected by him in the performance of his duties, by a debt due by the principal to the agent. No officer of a government, state or municipal, is empowered to pay himself his salary, or plead in compensation a demand made against him for moneys collected by him in his official capacity by an amount due him on account of his salary. His duty is to discharge the obligations of his office according to the terms of his acceptance thereof, and to get his pay as other officers get theirs. In other words, he cannot pay himself."

R. L. S.

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UNION NATIONAL BANK, Plff. in Err.,
v.
W. A. MAYFIELD et al.

Oklahoma Supreme Court — September 3, 1918.

(— Okla. —, 174 Pac. 1034.)

Bills and notes — increased interest — negotiability.

1. A promissory note for the payment of a sum certain, on a date named, and otherwise negotiable, is not rendered non-negotiable by a stipulation therein to the effect that, if the note be not paid on or before maturity, it shall bear interest from date at an increased and fixed rate.

[*See note on this question beginning on page* 139.]

Same — duration of negotiability.

2. An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise.

Headnotes by SHARP, Ch. J.

ERROR to the District Court for Woods County to review a judgment in favor of defendants in an action brought to recover the amount alleged to be due on a promissory note. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. **H. A. Noah** and **Ellis, Cook, & Barnett** for plaintiff in error:

The instrument in question was not rendered non-negotiable because of the guaranty clause on the reverse side.

McNary v. Farmers' Nat. Bank, 33 Okla. 1, 41 L.R.A.(N.S.) 1009, 124 Pac. 286, Ann. Cas. 1914B, 248; Ireland v. Floyd, 42 Okla. 609, L.R.A.1915C, 661, 142 Pac. 401; Mangold & G. Bank v. Utterback, 54 Okla. 655, L.R.A.1917B, 364, 160 Pac. 713; Central Trust Co. v. First Nat. Bank, 101 U. S. 68, 25 L. ed. 876; Dunham v. Peterson, 5 N. D. 414, 36 L.R.A. 232, 57 Am. St. Rep. 556, 67 N. W. 293.

Messrs. **Mauntel & Barry** and **A. G. Sutton**, for defendants in error.

A memorandum on the margin, in the corner, or beneath the signature of the payee, is by law presumed to be made when the contract or note was written and signed by the parties; and it will be read into the note and given the same effect as though it were written in full in the body of the instrument.

Van Zandt v. Hopkins, 151 Ill. 248, 37 N. E. 845; Shaw v. First M. E. Soc. 8 Met. 223; Grimson v. Russell, 14 Neb. 521, 45 Am. Rep. 126, 16 N. W. 819; Jones v. Fales, 4 Mass. 245; Barnard v. Cushing, 4 Met. 230, 23 Am. Dec. 362; Missouri P. R. Co. v. Levy, 17 Mo. App. 501; Black v. Epstein, 93 Mo. App. 459, 67 S. W. 736; Specht v. Beindorf, 56 Neb. 553, 42 L.R.A. 429, 76 N. W. 1059; Gerrish v. Glines, 56 N. H. 9; National Bank v. Feeney, 12 S. D. 156, 46 L.R.A. 732, 76 Am. St. Rep. 594, 80 N. W. 186; Dark v. Middlebrook, — Tex. Civ. App. —, 45 S. W. 963; Fletcher v. Blodgett, 16 Vt. 26, 42 Am. Dec. 487; Kilkelly v. Martin, 34 Wis. 526; Ireland v. Floyd, 42 Okla. 609, L.R.A.1915C, 661, 142 Pac. 401; Central Trust Co. v. First Nat. Bank, 101 U. S. 70, 25 L. ed. 877.

The note on its face shows that it is a non-negotiable instrument.

Randolph v. Hudson, 12 Okla. 516, 74 Pac. 946; Hegeler v. Comstock, 1 S. D. 138, 8 L.R.A. 393, 45 N. W. 331; Farmers' Loan & Trust Co. v. McCoy & Spivey Bros. 32 Okla. 277, 40 L.R.A. (N.S.) 177, 102 Pac. 125; Bracken v. Fidelity Trust Co. 42 Okla. 118, L.R.A. 1915B, 1216, 141 Pac. 6; Cotton v. John Deere Plow Co. 14 Okla. 605, 78 Pac. 321; Dickerson v. Higgins, 15 Okla. 588, 82 Pac. 649; Clevenger v. Lewis, 20 Okla. 837, 16 L.R.A.(N.S.) 410, 95 Pac. 230, 16 Ann. Cas. 56; Clowers v. Snowden, 21 Okla. 476, 96 Pac. 596;

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Stutman County v. Wallace, 142 U. S. 312, 35 L. ed. 1025, 12 Sup. Ct. Rep. 227.

Sharp, Ch. J., delivered the opinion of the court:

At Capron, Oklahoma, on June 4, 1914, defendants W. A. Mayfield and C. B. Mayfield executed their promissory note to the George O. Richardson Machinery Company, of St. Joseph, Missouri, in the sum of $835, payable at the Capron State Bank of Capron, Oklahoma; the provision with respect to the payment of interest being as follows: "With interest at the rate of 9 per cent per annum, payable annually, from date, until paid: Provided, however, if note is paid on or before maturity, interest shall be only 7 per cent."

On the back of the note is contained the following printed provision: "For value received, I hereby guarantee the payment of the within note, and any renewal of the same, and hereby waive protest, demand, and notice of demand, and nonpayment, and suit against the maker, and consent that the payment of this note may be extended from time to time without affecting any liability thereon."

Immediately following is a printed date line in blank. After the date line is another blank line, intended for the signature of the person signing the foregoing guaranty and waiver, below which are seven blank lines, intended for use in the indorsements of partial payments. Two of the blank lines are filled out, the first showing a credit on June 4, 1914, of $140; the second, a credit on June 13, 1914, of $14.20. Below the blank credit lines is the following indorsement: "Pay to the order of the Russell & Company. George O. Richardson Machinery Company. John H. Myers, Treasurer."

Immediately following the indorsement of the Machinery Company is the additional indorsement: "The Russell & Company, by Geo. H. McCall, Treasurer."

Action was brought against the makers on December 14, 1914, by the plaintiff bank, the owner and holder thereof by purchase from the last indorser, the Russell & Company.

The case turns upon the negotiability of the note. The trial court was of the opinion that the note was non-negotiable, and permitted the defendants to interpose their defense of a breach of warranty and fraud practised upon them by the agent of the machinery company, and thus to defeat a recovery on the note in the hands of the indorsee. It is urged by the defendant in error that the note is non-negotiable, because (1) of the provisions respecting the payment of interest; and (2) on account of the printed matter on the back of the note, which they claim formed a part of the indorsement, thereby destroying the negotiability of the note.

Do the words "with interest at the rate of 9 per cent per annum, payable annually, from date, until paid: Provided, however, if note is paid on or before maturity, interest shall be only 7 per cent," affect the negotiable character of the note? Counsel cite in support of their contention the following cases: Randolph v. Hudson, 12 Okla. 516, 74 Pac. 946; Cotton v. John Deere Plow Co. 14 Okla. 605, 78 Pac. 321; Dickerson v. Higgins, 15 Okla. 588, 82 Pac. 649; Clevenger v. Lewis, 20 Okla. 837, 16 L.R.A.(N.S.) 410, 96 Pac. 230, 16 Ann. Cas. 56; Clowers v. Snowden, 21 Okla. 476, 96 Pac. 596; Farmers' Loan & T. Co. v. McCoy & S. Bros. 32 Okla. 277, 40 L.R.A.(N.S.) 177, 122 Pac. 125; Bracken v. Fidelity Trust Co. 42 Okla. 118, L.R.A.1915B, 1216, 141 Pac. 6; Stutsman County v. Wallace, 142 U. S. 312, 35 L. ed. 1025, 12 Sup. Ct. Rep. 227. The Cotton Case simply held that the provision for payment of attorneys' fees in a promissory note, as the law then stood, destroyed the negotiable character of the note. In the Dickerson Case it is not clear on what grounds the note was declared non-negotia-

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ble, though as in the Cotton Case (cited as an authority), it contained a provision for the payment of attorneys' fees. The Clevenger Case also contained a provision for the payment of an attorney's fee and was held to be non-negotiable. The Clowers Case was also held not to be negotiable because of a provision for the payment of an attorney's fee. In the Farmers' Loan & Trust Co. Case the note was held to be non-negotiable because of a stipulation providing that, if paid within fifteen days from date, a discount of 5 per cent would be allowed. In the Bracken Case the note provided for "interest at 6 per cent per annum before maturity, and thereafter with interest at 10 per cent per annum until paid, interest payable with note," and was held to be non-negotiable. The rule announced in the Bracken Case was disapproved by the subsequent opinion in Security Trust & Sav. Bank v. Gleichmann, 50 Okla. 441, L.R.A. 1915F, 1203, 150 Pac. 908, and we think correctly so. The case of Hegeler v. Comstock, 1 S. D. 138, 8 L.R.A. 393, 45 N. W. 331, followed by the territorial supreme court in Randolph v. Hudson, 12 Okla. 516, 74 Pac. 946, was disapproved in Citizens' Sav. Bank v. Landis, 37 Okla. 530, 132 Pac. 1101, as well as by the opinion in the Gleichmann Case, and cannot therefore be considered as an authority. The notes involved in the several cases cited and arising in this court were all made prior to June, 1909, during which month the present Negotiable Instrument Statute was adopted. Chapter 24, p. 387, Sess. Laws 1909. A negotiable promissory note is defined by § 4234, Rev. Laws, as follows: A negotiable promissory note within the meaning of this chapter is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand or at a fixed or determinable future time, a sum certain in money to order or to bearer."

While by § 4051 an instrument, to be negotiable, must conform to the following requirements: "First. It must be in writing and signed by the maker or drawer; second, must contain an unconditional promise or order to pay a sum certain in money; third, must be payable on demand, or at a fixed or determinable future time; fourth, must be payable to order or to bearer; and fifth, where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty."

The sum payable is a sum certain, within the meaning of the law, although it is to be paid: First, with interest; second, by stated instalments; third, by stated instalments, with the provision that upon default in the payment of any instalment, or of interest, the whole shall become due; fourth, with exchange, whether at a fixed rate or at the current rate; fifth, with costs of collection or an attorney's fee, in case payment shall not be made at maturity. Rev. Laws, § 4052. Section 4055 provides that an instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which, first, authorizes the sale of collateral securities in case the instrument be not paid at maturity; second, authorizes a confession of judgment if the instrument be not paid at maturity; third, waives the benefit of any law intended for the advantage or protection of the obligor; fourth, gives the holder an election to require something to be done in lieu of payment of money. It is also provided that nothing contained in § 4055 shall validate any provision or stipulation otherwise illegal.

An examination of these several provisions leads us to conclude that there is nothing contained therein, or in the present Negotiable Instrument Statute, which in the instant

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case tends to make the amount payable uncertain within the meaning of the statute. The provision with respect to interest means nothing more nor less than that interest was payable from date until maturity at 7 per cent per annum, but, if not paid when due, it should bear interest at the rate of 9 per cent per annum from date. In Citizens' Sav. Bank v. Landis, supra, it was held that an instrument which, in its terms and form, was a negotiable promissory note, did not lose that character because it also provided that an additional rate of interest should be paid after maturity. This rule finds support in many of the authorities, as may be found from a reading of the cases cited in 8 C. J. § 253, where it is said that under the Negotiable Instruments Law not only may a provision be made for reserving interest after maturity, but for an increased rate of interest. The note could have been discharged on or before maturity by the payment of interest from date at the rate of 7 per cent per annum; if not paid then it could have been paid at any time thereafter upon the payment of interest at 9 per cent per annum, payable annually. As stated by that eminent jurist, Justice Brewer, in Parker v. Plymell, 23 Kan. 402, in a case involving a somewhat similar provision: "Clearly these words do not destroy the negotiability of the paper. They do not leave uncertain either the fact, the time, or the amount of payment. Indeed, up to and including the maturity of the notes, they are entirely without force. They become operative only after the notes are dishonored and have ceased to be negotiable, and then there is no uncertainty in the manner or extent of their operation. They create, as it were, a penalty for nonpayment at maturity, and a penalty the amount of which is definite, certain, and fixed."

Bills and notes —increased interest— negotiability.

The contention that the unsigned printed matter on the back of the note destroyed its negotiability is untenable. We agree with counsel as to the rule applicable to the construction of a note, where a construction is necessary. In doing so, however, it does not follow that the note, because of such printed matter and the indorsements thereon, is rendered non-negotiable. The instrument upon its face constituted a negotiable note, and it is only by reason of that which subsequently transpired that it is claimed its negotiability is destroyed. If negotiable when made, its negotiability remained unaffected, either by the form of the indorsement or the printed guaranty, waiver, and consent clause on its back, as it is provided in § 4097, Rev. Laws, that "an instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise."

Same—duration of negotiability.

A restrictive indorsement is one that (1) prohibits the further negotiation of the instrument; (2) constitutes the indorsee the agent of the indorser; (3) vests the title in the indorsee in trust for or to the use of some other person. Rev. Laws, § 4086. There is no claim that the note was paid, or the obligation of the makers otherwise discharged; neither was it restrictively indorsed. The indorsement of the payee was a special indorsement. Rev. Laws, § 4084. It seems clear, therefore, that, whatever other effect might be given the instrument by the subsequent indorsement below the printed provisions, its negotiability would not be affected, so that, were we to hold that the signature of the payee in making the indorsement constituted a signing of the preceding printed clause, it would not affect the negotiability of the note, the character of which was fixed at the time of its execution.

Because of the error of the court

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in holding the note to be a non-negotiable instrument, and the consequence attaching thereto, the judgment is reversed, and the cause remanded for a new trial.

All the Justices concur.

ANNOTATION.

Bills and notes: negotiability as affected by provision in relation to interest or discount.

I. In general, 139.
II. Provision for interest, or for a higher rate, from maturity, if the note is not paid when due, 140.
III. Provision for interest, or for a higher rate, from date, if not paid at maturity, 141.
IV. Provision for interest on interest, 144.
V. Provision as to discount, 145.

I. In general.

The provisions relating to interest in bills and notes that have been considered on the question of the negotiability of such instruments have been varied. It is apparent that the effect of such a provision depends upon the form and intent thereof.

A stipulation for the payment of interest at stated periods before the maturity of the note does not impair the negotiability. Commercial Nat. Bank v. Consumers' Brewing Co. (1900) 16 App. D. C. 186.

A blank left in a promissory note for the rate of interest does not render the instrument non-negotiable; the legal rate applies in such a case. Franklin Nat. Bank v. Roberts Bros. Co. (1915) 168 N. C. 473, 84 S. E. 706. But a provision that the rate of interest shall be the "same as savings banks pay" renders the note uncertain as to amount, and therefore non-negotiable. Whitwill v. Winslow (1883) 134 Mass. 343.

It is held in Acme Coal Co. v. Northrup Nat. Bank (1915) 23 Wyo. 66, L.R.A.1915D, 1084, 146 Pac. 593, that uncertainty as to the rate of interest in a note so as to render it non-negotiable is not created by drawing with a pen a ring around the figures representing such rate as inserted by a typewriter in a printed note blank, and placing a figure above them with a pen, where the statute provides that where there is a conflict between the written and printed provisions of a contract, the written one must prevail, since the typewritten figures must be regarded as printed.

A provision in a certificate of deposit issued by a bank payable on demand, that it shall bear interest if the money for which it is given remains in the bank a stated length of time, does not render the certificate uncertain as to amount, so as to destroy its negotiability. Hatch v. First Nat. Bank (1900) 94 Me. 348, 80 Am. St. Rep. 401, 47 Atl. 908; Cate v. Patterson (1872) 25 Mich. 191. Nor does a provision: "With interest at 6 per cent if left six months; no interest after six months," in such a certificate, render it uncertain and thus destroy its negotiability. Kirkwood v. First Nat. Bank (1894) 40 Neb. 484, 24 L.R.A. 444, 42 Am. St. Rep. 683, 58 N. W. 1016.

Nor does a provision that it shall bear interest if left six months but that interest shall cease one year from date, unless renewed, render it uncertain and therefore non-negotiable. White v. Wadhams (1918) — Mich. —, 170 N. W. 60.

The fact that a note shows on its face that the contract is usurious has been held not to render it non-negotiable. Goodwin v. Buhler (1894) 57 Mo. App. 63.

It was apparently the contention in Merchants' Nat. Bank v. Bentel (1911) 15 Cal. App. 170, 113 Pac. 708, that a demand note bearing interest was not a negotiable instrument; but just what the basis of this contention was does not appear. The court states that the laws of the state make the apparent maturity of a demand note bearing interest one year after its date; and this being true, the instrument is negotiable.

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II. Provision for interest, or for a higher rate, from maturity, if the note is not paid when due.

The rule supported by the majority of cases is that a provision that if not paid when due a note shall thereafter bear interest, or shall bear a higher rate of interest, does not render it non-negotiable. DeHass v. Roberts (1895) 30 L.R.A. 189, 17 C. C. A. 79, 28 U. S. App. 559, 70 Fed. 227; Houghton v. Francis (1862) 29 Ill. 244; Dorsey v. Wolff (1892) 142 Ill. 589, 18 L.R.A. 428, 34 Am. St. Rep. 99, 32 N. E. 495; Millikan v. Security Trust Co. (1918) — Ind. —, 118 N. E. 568; Towne v. Rice (1877) 122 Mass. 67; Hollinshead v. John Stuart & Co. (Hollinshead v. Globe Invest. Co.) (1898) 8 N. D. 35, 42 L.R.A. 659, 77 N. W. 89; Citizens' Sav. Bank v. Landis (1913) 37 Okla. 530, 132 Pac. 1101; Security Trust & Sav. Bank v. Gleichmann (1915) 50 Okla. 441, L.R.A.1915F, 1203, 150 Pac. 908 (expressly overruling Bracken v. Fidelity Trust Co. (1914) 42 Okla. 118, L.R.A.1915B, 1216, 141 Pac. 6); UNION NAT. BANK v. MAYFIELD (reported herewith), ante, 135; Merrill v. Hurley (1895) 6 S. D. 592, 55 Am. St. Rep. 859, 62 N. W. 958.

Contra: Cornish v. Woolverton (1905) 32 Mont. 456, 108 Am. St. Rep. 598, 81 Pac. 4.

It is the rule supported by the majority of cases that a provision that, if not paid when due, the note shall thereafter bear interest, does not render it non-negotiable. Houghton v. Francis (1862) 29 Ill. 244; Dorsey v. Wolf (1892) 142 Ill. 589, 18 L.R.A. 428, 34 Am. St. Rep. 99, 32 N. E. 495; Millikan v. Security Trust Co. (1918) — Ind. —, 118 N. E. 568; Towne v. Rice (1877) 122 Mass. 67.

The same rule is applied where a note bearing interest is to bear a higher rate from maturity if not paid; such a provision in a note does not, according to the weight of authority, render it non-negotiable. Hollinshead v. John Stuart & Co. (Hollinshead v. Globe Invest. Co.) (1898) 8 N. D. 35, 42 L.R.A. 659, 77 N. W. 89 (provision in the note accelerating maturity in case of default in the payment of interest; whether the higher rate of interest ran from the maturity as thus accelerated the court does not state, but apparently it did); Merrill v. Hurley (1895) 6 S. D. 592, 55 Am. St. Rep. 859, 62 N. W. 958 (provision, "with interest thereon at the rate of 7 per centum per annum, payable semiannually, according to the tenor of 10 interest coupons hereto attached. . . . If any part of the principal is not paid at maturity, it shall bear interest at the rate of 12 per cent per annum, payable annually"); De Hass v. Roberts (1895) 30 L.R.A. 189, 17 C. C. A. 79, 28 U. S. App. 559, 70 Fed. 227, affirming (1894) 59 Fed. 853, on this point (provision that the note and interest coupons "are to draw 12 per cent interest per annum after maturity").

The decisions of the supreme court of Oklahoma are not harmonious on the effect of such a provision as to interest. It has been held that the provision does not render the instrument non-negotiable. Citizens' Sav. Bank v. Landis (1913) 37 Okla. 530, 132 Pac. 1101 (provision, "with interest at 6 per cent per annum, before maturity, and thereafter at 10 per cent per annum, until paid.") But a contrary decision appears in Bracken v. Fidelity Trust Co. (1914) 42 Okla. 118, L.R.A.1915B, 1216, 141 Pac. 6 (provision, "with interest at 6 per cent per annum before maturity, and thereafter with interest at 10 per cent per annum until paid; interest payable with note"). The Bracken Case is expressly overruled in Security Trust & Sav. Bank v. Gleichmann (1915) 50 Okla. 441, L.R.A.1915F, 1203, 150 Pac. 908, and the latter case is approved in the reported case (UNION NAT. BANK v. MAYFIELD, ante, 135). The Oklahoma Negotiable Instruments Law was adopted in June, 1909. The court in Citizens' Sav. Bank v. Landis seems to have decided that case under that statute, although the note involved matured prior to the adoption thereof. In Bracken v. Fidelity Trust Co. the note involved was made prior to the adoption of the Negotiable Instruments Law, and the court seems to decide the case under the statute as it existed prior to the adoption of that law.

The note involved in Towne v. Rice (1877) 122 Mass. 67, did not expressly

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bear interest before maturity, but according to its terms was to bear interest after maturity if not paid. The court, however, speaks of the interest provided for after maturity as an additional rate, and holds the note negotiable notwithstanding this provision.

A contrary view has, however, been taken and a provision in a note that "this note and these [interest] coupons are to draw interest at the rate of 12 per cent per annum after maturity, and are secured by a mortgage of even date herewith," has been held to render the note uncertain and therefore non-negotiable. Cornish v. Woolverton (1905) 32 Mont. 456, 108 Am. St. Rep. 598, 81 Pac. 4. The court states that "it is not certain that the condition referred to will be fulfilled, and it is a contract other than one authorized by the statute. The note is therefore non-negotiable." The provisions of the governing statute were that "a negotiable instrument is a written promise or request for the payment of a certain sum of money to order or bearer, in conformity to the provisions of this article;" also that "a negotiable instrument must be made payable in money only, and without any condition not certain of fulfilment;" and that "a negotiable instrument must not contain any other contract than such as is specified in this article." This statute referred to was apparently not the Negotiable Instruments Law. At any rate in First Nat. Bank v. Barrett (1916) 52 Mont. 359, 157 Pac. 951, a case decided under the Negotiable Instruments Act of this state, but not in point in the present discussion, the decision in Cornish v. Woolverton is stated to have been rendered under a different statute from that involved in the Barrett Case.

There are a few cases involving notes containing such a provision as to interest together with other provisions, in which it is impossible to determine what weight, if any, was given to the provision relating to increased interest after maturity. A note promising to pay "with 7 per cent interest from date, and 8 per cent after due," with a promise also to pay attorneys' fees, was held non-negotiable in Second Nat. Bank v. Wheeler (1889) 75 Mich. 546, 42 N. W. 963, but this holding is not based at least not wholly, upon the provision as to the increased rate of interest after maturity. In Dickerson v. Higgins (1905) 15 Okla. 588, 82 Pac. 649, the note contained a provision that "if any part of the principal or interest of this note is not paid when due, it shall bear interest thereafter at the rate of 12 per centum per annum, payable semi-annually," in connection with a provision accelerating maturity in case of default in the payment of interest, and a provision for attorneys' fees; and there was the further provision that the note should be construed by the laws of the territory of Oklahoma, and that the principal and interest were payable at the office of the payee in Pennsylvania. The court merely states that these provisions in the note clearly render the note non-negotiable. It does not appear from the report of this case what rate of interest the note bore in the absence of a default. A bill of exchange was involved in Farmers' Nat. Bank v. Sutton Mfg. Co. (1892) 17 L.R.A. 595, 3 C. C. A. 1, 16 U. S. App. 312, 52 Fed. 191, which called for "interest at the rate of 8 per cent per annum after maturity, and attorneys' fees." The instrument was held negotiable, but the court's attention was directed chiefly to the provision as to attorneys' fees. It was, however, stated that the stipulation as to interest expressly applied only in case the bill was not paid at maturity.

A note "with 8 per cent interest after maturity and until paid" was held to be a promissory note, negotiable by the law merchant, and also under § 5501, Rev. Stat. 1881, in Bunting v. Mick (1892) 5 Ind. App. 289, 31 N. E. 378, 1055, but there is no discussion of the provision relating to interest.

III. Provision for interest, or for a higher rate, from date, if not paid at maturity.

The provisions considered in this subdivision are of two kinds: There is (1) the provision which is literally described in the subdivision heading; that is, that the note shall bear a

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higher rate of interest from its date if not paid at maturity; and (2) a provision which is in effect the same as the foregoing,—at least, is so regarded by a majority of the cases passing on the present question,—that the note shall bear a lower rate from its date if it is paid at maturity. The latter is sometimes spoken of as a discount.

See Lamb v. Story (1881) 45 Mich. 488, 8 N. W. 87, s. c. on second appeal (1884) 52 Mich. 525, 18 N. W. 248, infra.

According to the weight of authority, neither a provision that a note bearing no interest if paid at maturity shall bear interest from date if it is not so paid, nor a provision that it is to bear a higher rate from date if not paid at maturity, or a lower rate than that therein specified if paid at maturity, renders it non-negotiable. Parker v. Plymell (1880) 23 Kan. 402; Clark v. Skeen (1900) 61 Kan. 526, 49 L.R.A. 190, 78 Am. St. Rep. 337, 60 Pac. 327; Crump v. Berdan (1893) 97 Mich. 293, 37 Am. St. Rep. 345, 56 N. W. 559; Smith v. Crane (1885) 33 Minn. 144, 53 Am. Rep. 20, 22 N. W. 633; Hope v. Barker (1892) 112 Mo. 338, 34 Am. St. Rep. 387, 20 S. W. 567; Christian County Bank v. Goode (1891) 44 Mo. App. 129; Citizens' Bank v. Booze (1898) 75 Mo. App. 189; Kendall v. Selby (1902) 66 Neb. 60, 103 Am. St. Rep. 697, 92 N. W. 178; Security Trust & Sav. Bank v. Gleichmann (1915) 50 Okla. 444, L.R.A.1915F, 1203, 150 Pac. 909; overruling Randolph v. Hudson (1903) 12 Okla. 516, 74 Pac. 946; UNION NAT. BANK v. MAYFIELD (reported herewith) ante, 135.

Contra: Hegeler v. Comstock (1890) 1 S. D. 138, 8 L.R.A. 393, 45 N. W. 331.

According to the majority view a provision that a note bearing no interest if paid at maturity shall bear interest from date if it is not so paid does not destroy the negotiability thereof. Parker v. Plymell (1880) 23 Kan. 402; Hope v. Barker (1892) 112 Mo. 338, 34 Am. St. Rep. 387, 20 S. W. 567 (promise to pay "without interest thereon if paid at maturity. If not paid at maturity to bear 10 per cent interest from date"); Citizens' Bank v. Booze (1898) 75 Mo. App. 189 ("without interest if paid when due . . . in case default is made in payment, it shall draw 10 per cent interest from date"). This rule was adhered to in Security Trust & Sav. Bank v. Gleichmann (1915) 50 Okla. 444, L.R.A. 1915F, 1203, 150 Pac. 909, where a note payable "on or before the 1st day of November, 1905," contained the provision, "with interest at 8 per cent, payable annually from November 1, 1905, until paid. Interest from date if not paid when due." The note involved in this case matured prior to the adoption of the Negotiable Instruments Law, but the rule of the case was adhered to in the reported case (UNION NAT. BANK V. MAYFIELD, ante, 135), decided under that law. In Parker v. Plymell (Kan.) supra, it is stated: "Clearly, these words do not destroy the negotiability of the paper. They do not leave uncertain either the fact, the time or the amount of payment. Indeed, up to and including the maturity of the notes, they are entirely without force. They become operative only after the notes are dishonored and had ceased to be negotiable, and then there is no uncertainty in the manner or extent of their operation."

A bill is not rendered non-negotiable by a provision that if not paid when due, it shall bear interest from date. Christian County Bank v. Goode (1891) 44 Mo. App. 129. Certainty as to amount is stated to apply to the principal rather than to additions of interest.

A contrary view was taken by the supreme court of Oklahoma in an early case, and a provision that the note should bear interest from date in case it was not paid at maturity was held to render the instrument non-negotiable under a statutory provision that "a negotiable instrument must be made payable in money, only, and without any condition not certain of fulfilment." Randolph v. Hudson (1903) 12 Okla. 516, 74 Pac. 946. This decision is expressly overruled in Security Trust & Sav. Bank v. Gleichmann (Okla.) supra. The Gleichmann Case is approved in UNION NAT. BANK V. MAYFIELD.

The majority rule as stated above

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is applied by a majority of courts where a note is to bear a higher rate if not paid when due; the fact that the note contains a provision that it is to draw a higher rate of interest from date if not paid at maturity is held not to render it non-negotiable. Crump v. Berdan (1893) 97 Mich. 293, 37 Am. St. Rep. 345, 56 N. W. 559 (note bore interest at 7 per cent, and contained the further stipulation: "If not paid when due, I agree to pay 10 per cent interest from date until paid"). Nor does the fact that it is to draw a higher rate from date in case it remains unpaid a specified time after maturity render the instrument non-negotiable. Clark v. Skeen (1900) 61 Kan. 526, 49 L.R.A. 190, 78 Am. St. Rep. 337, 60 Pac. 327 (note bore interest at 6 per cent and was to bear 12 per cent if it remained unpaid 10 days after due). Such a provision does not render the instrument uncertain as to amount, so as to destroy its negotiability. Crump v. Berdan (Mich.) supra.

A provision that the note shall bear a lower rate if paid when due does not render it non-negotiable. The latest decision of the supreme court of Oklahoma which was made under the Negotiable Instruments Law is in accord with this theory. UNION NAT. BANK V. MAYFIELD (reported herewith) ante, 135. This decision reverses the commissioner's opinion in what is apparently the same case (Union Nat. Bank v. Mayfield (1917) — Okla. —, 169 Pac. 626). The court expressly states that the agreement for the higher rate of interest, with the proviso that if the note was paid on or before maturity the interest should be at the lower rate, means nothing more or less than that interest was payable from date until maturity at the lower rate, but if not paid at maturity it should bear the higher rate from date.

Some cases, however, in holding negotiable an instrument containing a provision for a lower rate if the note is paid when due do so on the theory that such a provision is a penalty and not enforceable according to its literal terms. Therefore the note bears interest at the lower rate before and after maturity, is certain as to amount, and negotiable. Smith v. Crane (1885) 33 Minn. 144, 53 Am. Rep. 20, 22 N. W. 633 (note contained a promise to pay "with interest at 10 per cent per annum from date until paid; 7, if paid when due"). The same view has been taken as to a provision for a higher rate from date, upon default either in the payment of interest instalments or in the payment of the note at maturity; such a condition is held to be a penalty, and unenforceable, and not in any way to affect the negotiability of the note. Kendall v. Selby (1902) 66 Neb. 60, 103 Am. St. Rep. 697, 92 N. W. 178.

It has been held, however, contrary to the foregoing, that such a provision renders the instrument non-negotiable. Thus, a note providing for "interest from date until paid at the rate of 10 per cent per annum, 8 per cent if paid when due," has been held non-negotiable. Hegeler v. Comstock (1890) 1 S. D. 138, 8 L.R.A. 393, 45 N. W. 331. The statutory provision governing this decision defined a negotiable instrument to be "a written promise or request for the payment of a certain sum of money to order, or bearer, in conformity to the provisions of this article." It was further provided that "a negotiable instrument must be made payable in money only, and without any conditions not certain of fulfilment." And another provision prescribed that "a negotiable instrument must not contain any other contract than such as is specified in this article." Such a provision is held to render the instrument uncertain as to amount. Hegeler v. Comstock (S. D.) supra.

A provision that a note bearing a specified rate of interest shall bear a less rate if paid at maturity is treated the same as though it had borne the lesser rate, with a provision that it was to bear the higher if not paid when due. Hegeler v. Comstock (S. D.) supra. See UNION NAT. BANK V. MAYFIELD.

These different theories arise from a difference of opinion as to when the certainty as to amount must be determinable. As expressed in Merrill v. Hurley (1895) 6 S. D. 592, 62 N. W. 958, 55 Am. St. Rep. 859, according to the one theory the amount due on a

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note is certain when there is no date at which the exact amount then due cannot be ascertained by inspection and computation. According to the other authorities such a degree of certainty is required that the exact amount to become due and payable at any future time must be clearly ascertainable at the date of the note, uninfluenced by any condition not certain of fulfilment.

In holding non-negotiable a note containing the usual promise to pay, "with interest at 7 per cent per annum, if paid when due; if not so paid, then the interest shall be 10 per cent per annum from date," and containing also an agreement to pay exchange and all expenses, including attorney's fee incurred in collecting, the court in Cayuga County Nat. Bank v. Purdy (1885) 56 Mich. 6, 22 N. W. 93, states that "in what we have said we are not to be understood as expressing any opinion on the legal validity of the special clauses or stipulations added to this note, or any of them. It is enough for the purposes of the question now decided that the parties have superadded to their notes certain special stipulations which they must be understood to have relied upon as having validity; and if that was their understanding, they could not have meant that the contract should have been a promissory note. We dispose of the case upon this manifest intent of the parties." But see Crump v. Berdau (1893) 97 Mich. 293, 37 Am. St. Rep. 345, 56 N. W. 559, supra.

IV. Provision for interest on interest.

An agreement in a note to pay interest on interest at a fixed rate does not render the instrument non-negotiable, nor render uncertain the amount to be paid thereon. Gilmore v. Hirst (1896) 56 Kan. 626, 44 Pac. 603. The note involved in this case drew interest at 8 per cent per annum until paid, and it was provided therein that the interest when due was to become principal and draw 8 per cent interest. A similar decision appears in Cherry v. Sprague (1905) 187 Mass. 113, 67 L.R.A. 33, 105 Am. St. Rep. 381, 72 N. E. 456, where a provision that "unpaid interest shall bear interest at 12 per cent" was held not to render the note non-negotiable. In Brown v. Vossen (1905) 112 Mo. App. 676, 87 S. W. 577, a note was held negotiable which provided that if the "interest be not paid semiannually, to become as principal and bear the same rate of interest." The court states that there is nothing indefinite, contingent, or uncertain in the terms of such a note.

In De Hass v. Roberts (1894) 59 Fed. 853, affirmed in (1895) 30 L.R.A. 189, 17 C. C. A. 79, 28 U. S. App. 559, 70 Fed. 227, a note containing a provision that "this note and these coupons [interest coupons] are to draw 12 per cent interest per annum after maturity, and are secured by a first mortgage on real estate; and if any of the interest coupons shall not be paid when due, the whole of the principal shall mature and be due at said time without demand, and said principal debt and said unpaid coupons shall represent and stand for the amount due, and the unpaid coupon first matured shall become a part of the principal, and the whole of the said principal and the first unpaid coupon shall bear 12 per cent per annum interest thereon from the maturity of said coupon until paid," was held a negotiable instrument.

In some cases such a provision is considered in connection with others. A note containing a promise to pay "with interest at 12 per cent per annum from date until maturity, and 12 per cent per annum interest on the whole amount due upon said note at the maturity thereof until the same is paid;" and the further agreement "that there shall be a reduction of 5 per cent per annum for payment on or before maturity," in connection with other provisions relating to the payment of attorneys' fees, and the ownership of property for the purchase price of which the note was given, was held non-negotiable in Edwards v. Ramsel (1882) 30 Minn. 91, 14 N. W. 272. The note here was considered as a whole by the court, and no particular provision thereof is discussed. It seems, however, from a reference to Third Nat. Bank v. Armstrong (1879) 25 Minn. 530, that the decision is based more upon the pro-

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visions relating to the ownership of the property. The note involved in Barker v. Sartori (1911) 66 Wash. 260, 119 Pac. 611, contained the following provision as to interest: "With interest at the rate of 9 per cent per annum from date until paid. Interest to be paid semiannually, and if not so paid, to bear interest after delinquency until paid at the rate of 9 per cent per annum." In holding this instrument negotiable the court states that it is apparent the note is a negotiable instrument within the rule prescribed by statute that a negotiable instrument must contain an unconditional promise or order to pay a sum certain in money, since the note was in writing, signed by the maker, and contained an unconditional promise to pay a sum certain in money. The court adds that "the fact that the interest was payable in instalments does not render the note uncertain, for the statute expressly provides that payments may be made by instalment. This applies as well to interest as to the principal. The argument made by counsel that an instalment may not be paid when due, therefore the instrument would not show upon its face what amount would be due at maturity, would apply equally to the principal, where payable by instalments." There is no reference by the court to the fact that the interest itself bore interest.

See Cronish v. Woolverton (1905) 32 Mont. 456, 108 Am. St. Rep. 598, 81 Pac. 4, supra.

The wording of the provision as to interest on interest may be uncertain, in which event the negotiability of the note is destroyed. For example, in Davis v. Brady (1903) 17 S. D. 511, 97 N. W. 719, a note read: "With interest from date until fully paid at the rate of 10 per cent per annum, payable annually on principal and all overdue unpaid interest. If the said interest is not paid when due, it becomes a part of the principal and draws interest at 12 per cent per annum until paid." In holding this provision uncertain the court states that "it cannot be determined with any degree of accuracy whether overdue interest draws 10 per cent per annum, payable annually, or 12 per cent per year until paid. It is also a doubtful question whether the amount for which the note was given and the unpaid interest draws interest annually at 10 per cent per annum, or whether the principal, augmented by the first and all subsequent instalments of overdue and unpaid interest, draws interest at 12 per cent until the entire amount is paid. According to the decisions of this court, such uncertainty destroys the negotiability of the instrument."

V. Provision as to discount.

It is the theory of some cases that a provision for discount in case a note is paid before maturity renders it non-negotiable. A note bearing 3 per cent per month, which, according to its terms, might be paid "at any time before maturity," in which event "interest at the rate of 18 per cent per annum shall be deducted till due," has been held to be uncertain and contingent, both as to time of payment and the amount to be paid, and therefore non-negotiable. Way v. Smith (1873) 111 Mass. 523. A note payable on or before two years from date, with interest, is rendered non-negotiable by a provision that, if paid within one year, no interest is to be paid. Lamb v. Story (1881) 45 Mich. 488, 8 N. W. 87, s. c. on second appeal (1884) 52 Mich. 525, 18 N. W. 248. A stipulation for a discount of 12 per cent if a note is paid before maturity has been held to render it non-negotiable because of the uncertainty as to the amount to be paid. National Bank v. Feeney (1897) 9 S. D. 550, 46 L.R.A. 732, 70 N. W. 874, opinion on second rehearing in (1899) 12 S. D. 156, 46 L.R.A. 736, 76 Am. St. Rep. 594, 80 N. W. 186.

A provision in a note payable in instalments, three, six, nine, and twelve months from date, that "a discount of 5 per cent will be allowed if paid within fifteen days from date," renders the note non-negotiable. Farmers' Loan & T. Co. v. McCoy & S. Bros. (1912) 32 Okla. 277, 40 L.R.A. (N.S.) 177, 122 Pac. 125. A similar decision was rendered under the Negotiable Instruments Act, with reference to a note payable in instalments, two,

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four, six, eight, ten, and twelve months from date, but containing a provision that "a discount of 6 per cent will be allowed if paid in full within fifteen days from date." First Nat. Bank v. Watson (1916) — Okla. —, 155 Pac. 1152. A note substantially similar was held non-negotiable under the Tennessee Negotiable Instruments Law in Farmers Loan & T. Co. v. Devear (1911) 2 Tenn. C. C. A. 366. The note in the Devear Case was payable in instalments, two, four, six, eight, ten, and twelve months from date, and contained the provision that "a discount of 5 per cent will be allowed if paid within fifteen days from date."

In Fralick v. Norton (1851) 2 Mich. 130, 55 Am. Dec. 56, the note was dated January 11, 1841, and read as follows: "Two years from date, for value received, we or either of us promise to pay . . . $60 with use. Said [payee] agrees that if $50 be paid on the first day of January, 1843, it shall cancel this note." This was held to render the instrument uncertain as to amount and to destroy its character as a promissory note.

On the contrary, other cases hold that a provision for a discount if paid before maturity does not destroy the negotiability. Thus, a provision in a promissory note payable in six instalments maturing at different times within thirteen months that "a discount of 6 per cent will be allowed if paid in full within fifteen days from date" is held not to render the note non-negotiable under the Negotiable Instruments Law. Farmers' Loan & T. Co. v. Planck (1915) 98 Neb. 225, L.R.A.1915E, 564, 152 N. W. 390, Ann. Cas. 1918B, 598. A provision in a note payable in instalments three, five, seven, and eight months from date, that "a discount of 6 per cent will be given if the full amount of this instalment is paid at maturity of the first instalment," does not render the instrument non-negotiable. Harrison v. Hunter (1914) — Tex. Civ. App. —, 168 S. W. 1036. A note containing the same provision as to discount, and payable in instalments the same as that involved in Farmers' Loan & T. Co. v. Devear (Tenn.) supra, was before the court in First Nat. Bank v. Rooney (1913) — Sask. —, 11 D. L. R. 358, 24 West. L. R. 163, and was there held to be negotiable. The court states that "the provision for a reduction of the sum certain if paid within fifteen days does not render that sum uncertain."

A provision for a discount if a note is paid on or before the date of maturity has been held not to render the note non-negotiable. Loring v. Anderson (1905) 95 Minn. 101, 103 N. W. 722. The note provided "a discount of 6 per cent to be allowed if paid on or before" the date of maturity. Such a provision is held not to render the instrument uncertain as to amount. The court states that "if the note was not paid when due, there could be no uncertainty as to the amount recoverable on it. For such amount would depend not upon any contingency or question of facts, for the law would determine the amount due on the note from its terms. . . . On the other hand, while there is a contingency before the maturity of the note as to whether the maker will pay it at maturity or before, there is no contingency or uncertainty as to the amount to be paid in full discharge of the note at maturity or at any time before, if the maker elects to pay before. The amount is $250, with interest, less a discount of 6 per cent, —a matter capable of being made certain by computation. The result of such computation would give the exact amount due on the note at its maturity, and the exact amount which the maker was required to pay in full discharge of the note at any time before [the maturity], or at any time on that day."

See Edwards v. Ramsey (1882) 30 Minn. 91, 14 N. W. 272.

A provision for a discount if paid at maturity has been held not to destroy the negotiability of the note. Thus, a provision in a note that "if this note is paid in full when due, a discount of $39.78 is to be made from the amount then due," does not render the instrument non-negotiable. Mans-

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field Sav. Bank v. Miller (1887) 2 Ohio C. C. 96, 1 Ohio C. D. 383.

And see the provisions discussed above for a lower rate of interest in case the instrument is paid at maturity. W. A. E.

ILLINOIS CENTRAL RAILROAD COMPANY, Plff. in Certiorari,

v.

BETTIE HUDSON.

Tennessee Supreme Court — April Term, 1916.

(136 Tenn. 1, 188 S. W. 589.)

Statute — construction — Stop Statute.

1. A statute imposing a penalty upon a railroad engineer for failure to stop his train before crossing the tracks of another corporation will be given such interpretation as to promote the legislative policy, and not given a strict construction as a penal statute.

[*See note on this question beginning on page* 156.]

Railroad — stopping train — statutory construction.

2. Whether or not a corporation carrying on the business of a street car company was authorized to do so is immaterial upon the question whether or not a railroad company was bound by statute to stop its trains before crossing the street car tracks.

Railroad — Stop Statute — application.

3. A statute making it a misdemeanor for the engineer of any railroad company to cross the tracks of any other railroad with an engine or train, without first coming to a full stop, does not apply to a crossing of street railway tracks, where the statutes of the state have always made a distinction between the two classes of roads.

Street railways — effect of running to suburb.

4. A street railway line does not cease to be such, so as to come within the operation of a Stop Statute, by reason of the fact that it is an extension from the city where the corporation is organized to operate, to a suburb, if the city cars are merely run to the suburb under conditions practically the same as those obtaining in the city streets.

(Hughes, Special Judge, dissents in part.)

CERTIORARI to the Court of Civil Appeals to review a judgment reversing a judgment of the Circuit Court for Shelby County in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Charles N. Burch, H. D. Minor, and Sivley & Evans, for plaintiff in certiorari:

The statutes of Tennessee, regulating the crossing of railroads, have no application to a street car crossing such as is involved in this case.

Lokey v. Memphis Street Railway (1909; Tenn. C. C. A.); East End Street R. Co. v. Doyle, 88 Tenn. 750, 9 L.R.A. 100, 17 Am. St. Rep. 933, 13 S. W. 936; Katzenberger v. Lawo, 90 Tenn. 235, 13 L.R.A. 185, 25 Am. St. Rep. 681, 16 S. W. 611; Chattanooga Rapid Transit Co. v. Walton, 105 Tenn. 422, 158 S. W. 737; Iron Mountain R. Co. v. Bingham, 87 Tenn. 522, 4 L.R.A. 622, 11 S. W. 705; Smith v. East End Street R. Co. 87 Tenn. 633, 11 S. W. 709; Cumberland Teleg. & Teleph. Co. v. United Electric R. Co. 93 Tenn. 504, 27 L.R.A. 236, 29 S. W. 104; Byrne v. Kansas City, Ft. S. & M. R. Co. 24 L.R.A. 693, 9 C. C. A. 666, 22 U. S. App. 220, 61 Fed. 610; Omaha & C. B. Street R. Co. v. Interstate Commerce Commission, 230 U. S. 324, 57 L. ed. 1501, 46 L.R.A.(N.S.) 385, 33 Sup. Ct.

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Rep. 890; Williams v. City Electric Street R. Co. 41 Fed. 556; Manhattan Trust Co. v. Sioux City Cable R. Co. 68 Fed. 82; Massachusetts Loan & T. Co. v. Hamilton, 32 C. C. A. 46, 59 U. S. App. 403, 88 Fed. 588; United States v. Baltimore & O. S. W. R. Co. 236 U. S. 14, 57 L. ed. 104, 33 Sup. Ct. Rep. 5; 3 Elliott, Railroads, § 1131; Vail v. Broadway R. Co. 147 N. Y. 377, 30 L.R.A. 626, 42 N. E. 4, 9 Am. Neg. Cas. 644; Front Street Cable R. Co. v. Johnson, 2 Wash. 112, 11 L.R.A. 693, 25 Pac. 1084; State v. West Duluth Electric Co. 76 Minn. 96, 57 L.R.A. 63, 78 N. W. 1032; Ferguson v. Sherman, 116 Cal. 169, 37 L.R.A. 622, 47 Pac. 1023; Thompson-Houston Electric Co. v. Simon, 20 Or. 60, 10 L.R.A. 251, 23 Am. St. Rep. 86, 25 Pac. 147; Gyger v. Philadelphia City Pass. R. Co. (Montgomery v. Philadelphia City Pass. R. Co.) 136 Pa. 96, 9 L.R.A. 369, 20 Atl. 399; Funk v. St. Paul City R. Co. 61 Minn. 435, 29 L.R.A. 208, 52 Am. St. Rep. 608, 63 N. W. 1099, 16 Am. Neg. Cas. 326; Louisville & P. R. Co. v. Louisville City R. Co. 2 Duv. 175; Massillon Bridge Co. v. Cambria Iron Co. 59 Ohio St. 179, 52 N. E. 194; Lincoln Street R. Co. v. McClellan, 54 Neb. 672, 69 Am. St. Rep. 736, 74 N. W. 1074; Cedar Rapids & M. C. R. Co. v. Cedar Rapids, 106 Iowa, 476, 76 N. W. 728; Lincoln Traction Co. v. Webb, 73 Neb. 136, 119 Am. St. Rep. 879, 102 N. W. 258, 17 Am. Neg. Rep. 617; Daily v. Milwaukee Electric R. & Light Co. 119 Wis. 398, 100 Am. St. Rep. 893, 96 N. W. 832, 15 Am. Neg. Rep. 227; Omaha Street R. Co. v. Boeson, 74 Neb. 765, 4 L.R.A.(N.S.) 122, 105 N. W. 303, 19 Am. Neg. Rep. 358; Kansas City, O. B. & Electric R. Co. v. Railroad Comrs. 73 Kan. 168, 84 Pac. 755; State v. Cain, 69 Kan. 186, 76 Pac. 443; Re New York Dist. R. Co. 107 N. Y. 42, 14 N. E. 187; Railroad Comrs. v. Market Street R. Co. 132 Cal. 677, 64 Pac. 1065; Sams v. St. Louis & M. River R. Co. 174 Mo. 53, 61 L.R.A. 475, 73 S. W. 686; Riley v. Galveston City R. Co. 13 Tex. Civ. App. 247, 35 S. W. 826; State ex rel. Tyrrell v. Lincoln Traction Co. 90 Neb. 535, 134 N. W. 278; Sears v. Marshalltown Street R. Co. 65 Iowa, 742, 23 N. W. 150; Frieday v. Sioux City Rapid Transit Co. 92 Iowa, 191, 26 L.R.A. 246, 60 N. W. 656; Georgia R. & Electric Co. v. Joiner, 120 Ga. 905, 48 S. E. 336.

The use of electricity as a motive power does not change a street railway into a commercial railway.

Cumberland Teleg. & Teleph. Co. v. United Electric R. Co. 93 Tenn. 504, 27 L.R.A. 236, 29 S. W. 104.

A street railway could not be converted into an interurban railroad, with all the duties and obligations owing to and from it as a steam railroad, by operating its cars for a portion of its route over a right of way which was acquired by a company organized under a steam railroad charter.

Sams v. St. Louis & M. River R. Co. 174 Mo. 53, 61 L.R.A. 475, 73 S. W. 686.

Messrs. **Bell, Terry, & Bell** for defendant in certiorari.

Holmes, Special Judge, delivered the opinion of the court:

Bettie Hudson was the plaintiff below, and brought her suit at law against the Memphis Street Railway Company and the Illinois Central Railroad Company for personal injuries alleged to have been sustained by reason of a collision between a freight train and a street car, upon which she was a passenger, the place of the alleged injury being a mile or more east of the corporate limits of the city of Memphis, at the crossing of the Illinois Central Railroad and the Raleigh Springs line of the street car track of the Memphis Street Railway Company, in the suburban town of Binghampton. The plaintiff charges that the street railway company was negligent, in that it caused its street car upon which the plaintiff was a passenger to be driven across the track of the railroad company in front of an approaching train, which ran into and collided with it, and thereby injured the plaintiff. She charges that the defendant Illinois Central Railroad Company was negligent, in that it did not bring its train of cars to a stop before crossing the street railway, and also charges a violation by the Illinois Central Railroad Company of certain statutory precautions, and also charges common-law negligence. To this declaration there were pleas of not guilty, and other

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pleas which raised questions not now in issue.

In the trial court, after all of the evidence was in, the court sustained a motion by the Illinois Central Railroad Company for a peremptory instruction, whereupon the plaintiff took a nonsuit as to the Memphis Street Railway Company and prosecuted her appeal to the court of civil appeals. The court of civil appeals reversed the trial court, holding that the peremptory instruction ought not to have been given, because it was the duty of the railroad company to stop its engine and train of cars before crossing the track of the Memphis Street Railway Company, under and by virtue of the provisions of chapter 46 of the Act of 1871, which is commonly spoken of as the "Stop Statute," the provisions of which are as follows:

An Act for the Protection of Persons and Property upon Railroads.

Section 1. Be it enacted by the general assembly of the state of Tennessee, that it shall be a misdemeanor for the engineer or other employee of any railroad company to cross the track of any other railroad in this state with an engine or train without first coming to a full stop.

Section 2. Be it further enacted, that a violation of the first section of this act shall subject the offender to indictment or presentment in any court having jurisdiction thereof, and upon conviction he shall be fined not less (than) fifty (50) dollars, nor more than one hundred (100) dollars, and imprisoned in the county jail not less than one month nor more than six months, or both at the discretion of the jury trying the same.

The case is brought before us by the Illinois Central Railroad Company on petition for certiorari. We will deal in this opinion only with the application of the Stop Statute.

The record shows that the Memphis Street Railway Company owns and operates the Raleigh Springs line as an integral part of its street railway system in the city of Memphis and suburbs; that it is using upon this particular line the same kind of cars and equipment which are used by it on other lines over the streets of Memphis; and that the street cars operated by it over this line go to and from the heart of the city of Memphis, are operated by electric motors, and are commonly known as "trolley cars." The cars on the Raleigh line ran over the streets of Memphis just as other street cars did, were operated on the same rails, and by the same wires, and by the same power, and by like crews as other street railway lines. So far as we are able to discover, the only difference between a Raleigh Springs car and other street cars operated exclusively within the city limits was merely the marking on the front to show destination. The Raleigh Springs car did not stop at uptown points in the city of Memphis to let off passengers on its outgoing trips; but it did stop at any and all street corners to let off passengers on its incoming trips. On its outgoing trips, after reaching Evergreen avenue, in the eastern part of the city, it stopped at any street crossing to let off or take on passengers. The street car company did no freight traffic on the Raleigh line, but ran only street cars over this line, and it seems clear from the record that it was doing a street car business on this line at least as far out as the Binghampton crossing.

Just before nightfall, in September, 1914, one of the Raleigh Springs cars, with a trailer attached, and loaded with passengers, approached the Binghampton crossing of the Illinois Central Railroad Company's belt line. The belt line has two tracks, running north and south at this place, the west track being for trains going south and the east track being for trains going north. The belt line skirts the city of Memphis, and is used largely for the handling of heavy freight trains by the railroad company. On the evening of this accident, the motorman with

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his street car, going east, reached the Binghampton crossing, stopped his car, as was his custom. There was a long freight train passing south over the west track of the belt line. The conductor on the street car, as was his custom, alighted from the street car and waited for the freight train going south to pass over the crossing, and as soon as it had done so, he stepped upon the track, his purpose being to ascertain if the way was clear and the crossing safe, and then flagged to the motorman on the street car to proceed upon and across the railroad tracks. Just at this time there was a long freight train approaching from the south, going north on the east track of the belt line. The north-going train was not observed by the street car conductor, and, before the motorman could get across the east track with his street car, the engine of the freight train struck the trailer, injuring and killing many people. The plaintiff was a passenger on the street car. The train going south left a cloud of smoke and dust in its trail. The record shows that the tracks at that place were straight, and the headlight on the engine of the freight train was lit. We are unable to say why the street car conductor did not see the freight train approaching from the south. The dust and smoke of the freight train going south may have somewhat obstructed his view. The train going south was operated on a regular schedule, and frequently met this same street car late in the afternoon. The train going north was not operated on a regular schedule, and the street car was not in the habit of meeting the north-bound train at this point. It may be that the street car conductor was relying, at this particular time, upon finding the situation at this crossing as he usually found it, and therefore did not take the pains and trouble to look carefully to see whether or not a train was coming from the south.

There have been other cases before this court growing out of this collision, and the facts in each of these cases are substantially the same, and for a more detailed statement of the facts we make reference to the opinion of this court in the case of Memphis Street R. Co. v. Cavell, 135 Tenn. 462, 187 S. W. 179, Ann. Cas. 1918C, 42. We deem it unnecessary to go further into the bloody details of the collision.

It is insisted that the court can be aided in the determination of the question now before us by resorting to the original charter granted to the Memphis & Raleigh Springs Railroad Company, on August 9, 1894, which company originally owned the Raleigh line. In 1894, the Citizens' Street Railway Company (then operating the street railway system of Memphis) leased the property and operating franchises of the Memphis & Raleigh Springs Railroad Company. The Memphis Street Railway Company, successor to the Citizens' Street Railway Company, purchased said lease in 1897. In 1899, the Memphis & Raleigh Springs Railroad Company confirmed said lease and conveyed by deed to the Memphis Street Railway Company, conveying to it the very line upon which the Memphis Street Railway Company had obtained a charter for the purpose of operating a street railway. We find little help in arriving at the application and meaning of the Stop Statute, by resorting to the charter provisions of the street railway company and the Memphis & Raleigh Springs Railroad Company. At most, it cannot be contended that the operation and method of operation by another corporation would be binding upon the Memphis Street Railway Company as to what shall be and is operated by it upon said line. If it is beyond the corporate power of the street car company to operate the Raleigh line, as operated by it, then we cannot see how that would lessen the statutory duty, if such duty existed, of another and different corporation. It is said by the

Railroad—stopping train—statutory construction.

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Missouri court in the case of Sams v. St. Louis & M. River R. Co. 174 Mo. 53, 61 L.R.A. 475, 73 S. W. 686: "The business in which the corporation was engaged may have been such as its charter did not authorize. Still, when the attempt is made to bring the act within the scope of the statute, the question is not what was the company authorized to do, but what in fact was it doing?"

The Memphis Street Railway Company, at the time and place of this collision, was carrying on the business of a street car company.

It is insisted by counsel for the railroad company that the Stop Statute is penal in its nature, and should have a strict construction, but we are not willing to rest upon the mere use of words which might have one meaning in 1871 and another and different meaning at this time. We think statutes of this kind are remedial as well as penal, and it would seem to be the proper course to search out and follow the true intent of the legislature, and to adopt that sense of the words used which will promote the legislative policy, being careful that the statute should not be enlarged by implication. Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412.

Statute—construction—Stop Statute.

We think, by referring to other Tennessee statutes, in pari materia, it will be found that the legislature did not have in mind the application of the Stop Statute to street railways. The General Incorporation Law of 1875 (Laws 1875, chap. 142), treats street railways as one class and commercial railroads as another class, and a different form of charter was prescribed for each. Chapter 114 of the Acts of 1877 amends the Act of 1871 by restricting its operation so that it does not apply to the longer road, when two roads which cross each other are under the same management. Manifestly, the legislature did not then have in mind street railroads. Chapter 100 of the Acts of 1899 amends the Stop Statute (this at a time when electric street cars were in use) by providing that the Act of 1871 does not apply, "where such other railroad is disconnected by interlocking switches placed on both railroads."

Railroad—Stop Statute—application.

It is contended that the situation at the Binghampton crossing is within the mischief of the statute. We think the statute was intended to prevent trains not easily and quickly stopped from colliding with each other at crossings. Electric street cars, which stop quickly and are easily and quickly started, could not have been intended by the legislature to have been put on a parity with a mogul engine, or a long and heavy-loaded freight or express or passenger train of cars. There exists a danger to persons and property upon railroads by reason of one railroad crossing another, each having rapidly moving trains, both having weight and great momentum, each approaching a place of contact in such a manner as not to be able to stop when a collision becomes imminent. It is the danger to persons and property occasioned by the inability of the engineer or other employee to stop his engine or train by reason of its weight, momentum, and character of traffic handled, when the two engines or trains are rapidly moving towards a common meeting place, at such a rate of speed that neither is able to stop when coming close enough to the crossing to see the other. Hence, the necessity of the statute, which provided a remedy for this mischief, without regard to whether the engineer upon each train was prudently operating his train or not.

The real purpose and spirit of the statute is not so much to punish an offending engineer as it was to prevent engineers and trainmen, when using their eyes and ears and all of the safety appliances available, from running their trains or engines together at a crossing. It was not the purpose of the statute to guard against the negligence of a street

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car conductor who flagged his motorman to come on the track of a railroad in front of a fast-moving freight train.

Suppose the crossing in the instant case had been that of two street railways, would the motorman on the other street car, if he had failed to stop his car before crossing the Raleigh line, have been guilty of a violation of the statute? He might be guilty of negligence, but not a violation of the statute. Of course, the statute must be reciprocal. It cannot apply to the one line without applying to the other.

Is it not fair to assume that the legislature knew of the danger which would exist at crossings like the Binghampton crossing, and therefore knew that the street car company would provide suitable rules and regulations for crossings, and would do just what the street car company has done at this particular crossing, that is, give the right of way to the railroad? The legislature knew of the impracticability of the application of the statute where parallel lines of a street railroad are crossed by a commercial railroad, and that there might be within or near the city limits of any large city two or three parallel street car lines, upon which a long train of eighty or ninety cars (such as the train of the railroad was in the instant case) at one time might be crossing the tracks of the street railway. If the legislature intended the statute to apply to street railways, then, before the days of the subway, it would have been practically impossible to operate a train in or near the city limits of any large city.

We have made a thorough and exhaustive examination of the authorities. This is the first time our statute has been before a court of appellate jurisdiction, except in the case of Byrne v. Kansas City, Ft. S. & M. R. Co. 24 L.R.A. 693, 9 C. C. A. 666, 22 U. S. App. 220, 61 Fed. 605. Judge Taft delivered the opinion of the court, and, among other things, he said: "The court below was of the opinion that § 1304 [Stop Statute] did require the engine to stop before crossing a street railway. We are unable to concur in this view. The evidence is that this was a street railway, from which we infer, in the absence of evidence to the contrary, that it was a horse railway."

It seems to be well settled in this state that a street railroad is but an improved use of the street, and that it is not an additional burden upon the ultimate fee. Smith v. East End Street R. Co. 87 Tenn. 626, 11 S. W. 709; Cumberland Teleg. & Teleph. Co. v. United Electric R. Co. 93 Tenn. 492, 27 L.R.A. 236, 29 S. W. 104. However, a dummy line is an additional burden upon the ultimate fee in the road or street, for which the owner of that fee is entitled to compensation, as for the taking of his property for a public use. East End Street R. Co. v. Doyle, 88 Tenn. 747, 9 L.R.A. 100, 17 Am. St. Rep. 933, 13 S. W. 936. A dummy line drawn by a steam engine for transportation of passengers, whether operated within or without the limits of a municipality, is a railroad within the meaning of the statutes which provide certain precautions for the prevention of accidents on railroads. Katzenberger v. Lawo, 90 Tenn. 235, 13 L.R.A. 185, 25 Am. St. Rep. 681, 16 S. W. 611.

In the Doyle Case, supra, the court expressly distinguishes between a dummy railroad operated by steam and an ordinary street car, the motive power of which is horses, and classifies the dummy railroad with commercial railways. See also Elliott, Railroads, § 1131.

It was said by the Minnesota supreme court in Funk v. St. Paul City R. Co. 61 Minn. 435, 29 L.R.A. 208, 52 Am. St. Rep. 608, 63 N. W. 1099, 16 Am. Neg. Cas. 326, that a statute making a railroad liable for injury by reason of the negligence of a fellow servant would not apply to a street railway. The court said: "It is a matter of common knowledge that street cars operated by cable or electricity are more readily

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managed than those operated by steam, where long passenger and freight trains, with their weight and momentum, are not so easily controlled. A street car is generally run separately, rarely with more than two or three coupled together, and there is but little danger of collision. They do not run so rapidly, their movements are easily and quickly checked, and the roadbeds are constructed upon level or graded streets, without deep cuts, and generally lighted."

See also Freiday v. Sioux City Rapid Transit Co. 92 Iowa, 191, 26 L.R.A. 246, 60 N. W. 656; Stanley v. Davenport, 54 Iowa, 463, 37 Am. Rep. 216, 2 N. W. 1064, 6 N. W. 706.

In Massachusetts Loan & T. Co. v. Hamilton, 32 C. C. A. 46, 59 U. S. App. 403, 88 Fed. 588, the court held to the same effect, and, among other things, said: "These authorities show the necessity that exists for the courts, in all cases, to look carefully to the statute itself, in connection with the history of the times and the contemporaneous legislation, in order to discover in what sense the word 'railroad' is used."

In Vail v. Broadway R. Co. 147 N. Y. 377, 30 L.R.A. 626, 42 N. E. 4, 9 Am. Neg. Cas. 644, the words "on any railroad," as used in a statute relieving railroad companies for liability to a passenger injured while riding on the platform of a car, had no application to street railways.

It is held that an electric street railway company is not a "railroad" corporation, within the meaning of the exemption of the stockholders of the railroad corporation from individual liability equal to the amount of their stock. Ferguson v. Sherman, 116 Cal. 169, 37 L.R.A. 622, 47 Pac. 1023.

It was held that a statute which authorizes "any railway" to appropriate land for a right of way did not include street railroad companies, whether propelled by horse power or electricity, such railroads not being engaged in the business of carrying passengers and freight, and not operating trunk lines. Thomson-Houston Electric Co. v. Simon, 20 Or. 60, 10 L.R.A. 251, 23 Am. St. Rep. 86, 25 Pac. 147.

It is suggested that the authorities are in hopeless conflict, but this conflict is more apparant than real. The real difference in the authorities does not lie so much in the question of principle announced, as it does in the difference in the various statutes and legislative policies. The word "railroad" may mean one thing in a statute of one class, and the same word have quite another and different meaning when used in another statute, intended to accomplish a different purpose. If the various decisions are carefully read with this thought in mind, it will be seen that the authorities are not in such hopeless conflict.

Upon an examination of cases relied upon by counsel for the street railway company, and also by counsel for the plaintiff, it will be found that those cases may be differentiated from the case at bar upon one of several grounds; either upon a difference in the verbiage of the statute, or upon the character of operation and traffic, or upon a different legislative policy or purpose. We will illustrate this difference by referring first to the case of Spokane & I. E. R. Co. v. Campbell, 133 C. C. A. 370, 217 Fed. 518. The court in this case held that the electric railway was subject to the Safety Appliance Act of Congress. It will be noted that the act of Congress is much broader than the statute before us. It speaks of "all trains, locomotives, tenders, cars, and similar vehicles" used on any railroad engaged in interstate commerce. This case also illustrates the different "legislative purpose" above referred to, as the court in this case said that the broad purpose of the legislature applies as completely to one kind of railroad as to the other. The electric railroad was being operated between two states, and therefore came within the provisions of the Safety Appliance Act. In the

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case of Diebold v. Kentucky Traction Co. 117 Ky. 146, 63 L.R.A. 637, 111 Am. St. Rep. 230, 77 S. W. 674, 4 Ann. Cas. 445, there was an electric railway chartered for the purpose of carrying passengers and freight between two cities in different states. Roy v. East St. Louis & Suburban R. Co. 119 Ill. App. 313; Hannah v. Metropolitan Street R. Co. 81 Mo. App. 78; Elizabethtown, L. & B. S. R. Co. v. Ashland & C. Street R. Co. 96 Ky. 347, 26 S. W. 181.

All these cases may be distinguished from the case at bar upon some one of the above-mentioned grounds. In the Missouri case above referred to, the road ran between Kansas City, Missouri, and Independence, Missouri, and was evidently not a street railroad. And the court held that the Fencing Statute of Missouri applied to this company, a very different sort of statute from the one under consideration. However, the case of Sams v. St. Louis & M. River R. Co. 174 Mo. 53, 61 L.R.A. 475, 73 S. W. 686, is the announcement of the court of last resort in Missouri.

Further illustrating and reconciling the apparent conflict in the authorities, we refer to Birmingham Mineral R. Co. v. Jacobs, 92 Ala. 187, 12 L.R.A. 830, 9 So. 320. The Stop Statute of Alabama was before the court. This was a case of two roads, each operated by steam, crossing each other. The court held that the dummy railroad was not a street railway within the meaning of the Constitution and statutes of that state, but that it was a railroad. The road traversed wide scopes of country, with regular stations, used heavy dummy engines, etc. Also in the case of Louisville & N. R. Co. v. Anchors, 114 Ala. 492, 62 Am. St. Rep. 116, 22 So. 279, 3 Am. Neg. Rep. 125, the Oxford Lake Line was engaged in the business of transporting freight and passengers between Anniston, Oxford, and intermediate points.

Savannah, T. & I. of H. R. Co. v. Williams, 117 Ga. 414, 61 L.R.A. 249, 43 S. E. 751, is a case cited as an authority; but in that state, by statute as well as by judicial decision, the word "railroad" includes street railroads, unless a contrary intention appears. As was said: "The Constitution, statutes, and decisions of this state recognize that the word 'railroad' is generic, and includes street railroads, narrow gauge roads, horse car companies, dummy lines, and street railroads operated by electricity."

But even in the state of Georgia, we find a later announcement on the Stop Statute in the case of Georgia R. & Electric Co. v. Joiner, 120 Ga. 905, 48 S. E. 336, which is cited and relied upon by counsel for the defendant.

Upon a consideration of all the authorities which we have found, and to which we have been cited, we are irresistibly driven to the conclusion that the Stop Statute has no application to a crossing between a commercial steam railroad and a street car line.

But it is insisted that if the statute does not apply to street railroads, it does apply to the Raleigh line of the Memphis Street Railway Company, which line, it is insisted, is an interurban railroad. We cannot assent to this view. As before stated, the Memphis Street Railway Company operates the Raleigh line as an integral part of its street railway system in the city of Memphis and suburbs. It is chartered to do the business of a street railroad over its Raleigh line, and, so far as we are able to discover from the record, it is operating only a street car line to and through Binghampton, which is a thickly populated suburb of the city of Memphis. It is operating on the Raleigh line, as far as Binghampton, the same cars, by the same power, on the same kind of rails, with the same speed and momentum, as it operates over this same line and other lines within the city limits of Memphis. The street cars acquire no greater mo-

Street railways—effect of running to suburb.

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mentum, are no heavier, are just as easily handled at Binghampton as at any other point well within the city limits of Memphis. Not only so, but the mere passing of an imaginary line (city limits) does not change the character of operation, because in the suburbs the community may be as thickly populated, or more so, than at other points well within the city limits. The street railway company is not engaged in the business of operating an interurban railroad between Binghampton and Memphis; and, while we now express no opinion as to the application of the statute to interurban railroads, we do hold that the statute has no application to the Binghampton crossing.

It is insisted that the matter in this state is put at rest by the case of Hogan v. Nashville Interurban R. Co. 131 Tenn. 244, L.R.A.1915E, 788, 174 S. W. 1118, Ann. Cas. 1916C, 1162. That was the case of an interurban railway, and the case has no application to the case at bar, for we cannot hold that the Act of 1907, chapter 433, enlarges the application of the Stop Statute so as to make it apply to a crossing between a railroad and a street car line in the surburbs of a city.

It must, therefore, follow that the learned court of civil appeals was in error in holding that the Stop Statute had any application in this case. However, that court was right in reversing the trial court on the motion for a peremptory instruction. The peremptory instruction ought not to have been given, because the plaintiff was also relying upon the proof as making out a case of common-law negligence, as alleged in her declaration. That question is fully covered by this court in the case of Roper v. Memphis Street R. Co. 136 Tenn. 23, 188 S. W. 588, in the opinion rendered by the court this day. For the views of the court in this case upon the alleged common-law negligence, and alleged failure of the railroad company to use the statutory precautions, we refer to the opinion in the Roper Case.

It follows that the judgment of the Court of Civil Appeals, reversing and remanding this cause, is affirmed, and the case shall be proceeded with in accordance with the views expressed in the Roper Case.

Hughes, Special Judge, concurring in part:

I agree to the judgment of affirmance, but do not concur in so much of the opinion of the majority as deals with the Stop Statute. In my opinion, the Raleigh line is an interurban railway. Inside the city it may be a street railway, but not so after it leaves the city. I think the Stop Statute applies to interurban railways.

The court does not hold that under the Act of 1871 an interurban railway is not a railroad within the meaning of the act. In the view of the majority, that question is not before the court. But the court does decide that the Raleigh line was a street railway at the time and place where the collision occurred. There lies the precise point of difference between us. If the opinion of the court goes further, it does so unnecessarily.

In view of the development of electric interurban transportation, present and prospective, we must come ultimately, I think, to treat such lines as street railways within the cities through which they run, if they render street car service therein. They may be street railways after they cross the imaginary line which constitutes the city limits. But after they leave what is the city in fact, and cease to render such service as street cars render, they are railroads, within the meaning of this act, as fully as if the cars were driven by steam. That these lines carry people instead of freight is a reason for applying the act to them, and not a reason against it.

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ANNOTATION.

Validity and construction of railroad Stop Statute.

I. Validity, 156.
II. Construction:
a. In general, 156.
b. Trains or tracks within statute, 157.
c. Effect of violation of statute, 159.

I. Validity.

The validity of statutes requiring that every railroad train shall be brought to a full stop before crossing the track of another railroad seems to have been uncontested in the cases involving such an act. The little authority there is on the subject is collateral, and has arisen in connection with municipal legislation. In Baltimore & O. R. Co. v. District of Columbia (1897) 10 App. D. C. 111, it was held that a regulation of the district commissioners requiring railroad trains to stop before passing over a street railway crossing was not unreasonable, and was not invalid because in the case of a long train a compliance would involve a violation of another regulation forbidding the obstruction of the crossings. On the question of reasonableness the court said: "To compel the appellants to stop their trains at the crossings, as required by the regulation in question, will cause them inconvenience, and no doubt, work irksome delays in the passage of their trains through the city of Washington; but these requirements do not appear to be so oppressive, necessarily, as to require them to be declared unreasonable when considered in connection with the paramount duty with which the commissioners are charged in respect of the protection of the lives and property of the people who are also entitled to the use of the streets, subject only to similar restrictions."

In Baltimore & O. R. Co. v. District of Columbia (D. C.) supra, it was held that a regulation requiring the stopping of trains at street railway crossings was a legitimate exercise of the police power, conferred by the delegation of the power to make regulations for the protection of the "lives, limbs, health, comfort, and quiet" of citizens.

But in Central R. Co. v. Elizabeth (1904) 70 N. J. L. 578, 57 Atl. 404, it was held that a power delegated to a municipality to "regulate the speed and running of locomotive engines and railroad cars through said city" did not authorize a requirement that trains should be brought to a stop before crossing a street.

II. Construction.

a. In general.

A statute requiring trains to be stopped before reaching a railroad crossing is to be rigidly enforced. See Birmingham Mineral R. Co. v. Jacobs (1890) 92 Ala. 187, 12 L.R.A. 830, 9 So. 320, wherein it was said: "The statute in question is a very wise and humane exercise of the state's police power. It is of very easy observance, and if faithfully and thoughtfully conformed to, no such thing as a collision of trains at a railroad crossing could occur."

Such a statute is mandatory, and the inconvenience or delay resulting from its enforcement is no excuse for a violation. El Paso & S. W. R. Co. v. Murtle (1908) 49 Tex. Civ. App. 273, 108 S. W. 998. It takes from the persons operating trains all discretion with respect to stopping at a railroad crossing. "It is not a question of whether a prudent man would have obeyed the statute or not, but the law is that every person operating a train, arriving at such a crossing, must bring it to a stop whether there be a visible necessity for so doing or not." San Antonio & A. P. R. Co. v. Bowles (1895) 88 Tex. 634, 32 S. W. 880.

The fact that to stop a train at the prescribed distance from a crossing would cause the rear of the train to overlap the track of a third railroad company does not excuse a failure to stop. Birmingham Mineral R. Co. v. Jacobs (1890) 92 Ala. 187, 12 L.R.A. 830, 9 So. 320. See also Baltimore

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& O. R. Co. v. District of Columbia (D. C.) supra, wherein it was held to be no objection to a requirement that trains should stop at a street car crossing that a street might thereby be temporarily obstructed, in violation of another regulation.

A statute requiring every train to be stopped before crossing another railroad track, "and within 400 feet thereof," does not require a stop 400 feet from the crossing, but is satisfied by a stop at any point within 400 feet of it. Lockwood v. Chicago & N. W. R. Co. (1882) 55 Wis. 50, 12 N. W. 401.

The Alabama statute requires not only a stop, but that the engineer, before starting, must "know the way to be clear." See Birmingham Mineral R. Co. v. Jacobs (1890) 92 Ala. 187, 12 L.R.A. 830, 9 So. 320. That provision does not require him to anticipate negligence on the part of the employees of the other railroad, or any other unusual occurrence. Southern R. Co. v. Bonner (1904) 141 Ala. 517, 37 So. 702. In that case it appeared that an engineer stopped before reaching a crossing, and then, seeing no train approaching, he proceeded slowly across the crossing, blowing the whistle and ringing the bell. While the train was on the crossing, it was struck by a train of the other company, which was running rapidly and did not stop at the crossing. It was held that the engineer of the first-mentioned train was not guilty of negligence so as to preclude a recovery for his death.

b. Trains or tracks within statute.

The statutes requiring the stopping of trains at crossings are usually made applicable to a "railroad" company crossing the tracks of another like company. It has been held that a "dummy" railroad is a railroad within such statute. Byrne v. Kansas City, Ft. S. & M. R. Co. (1894) 24 L.R.A. 693, 9 C. C. A. 666, 22 U. S. App. 220, 61 Fed. 605; Birmingham Mineral R. Co. v. Jacobs (1890) 92 Ala. 187, 12 L.R.A. 830, 9 So. 320. And see the reported case (ILLINOIS C. R. Co. v. HUDSON, ante, 147).

In Mound City Transfer R. Co. v. Wabash R. Co. (1910) 154 Mo. App. 156, 133 S. W. 611, it was held that an "industrial line" using electric motive power in a "dummy" engine, and furnishing switching and terminal facilities at a certain plant, was not a street railway within an ordinance requiring street cars to be brought to a stop before crossing a railroad track, the court saying by way of dictum: "It would seem to come more properly under the provisions of § 3099, which requires all trains to come to a full stop not less than 10 nor more than 60 rods before reaching any railroad junction, etc."

An interurban electric line transporting freight and passengers is a railroad within the meaning of the statute. Louisville & N. R. Co. v. Anchors (1896) 114 Ala. 492, 62 Am. St. Rep. 116, 22 So. 279, 3 Am. Neg. Rep. 125, wherein it was said: "The question now is whether a railroad upon which electricity is used as the moving power is a railroad within the provisions of the statute. The statute itself makes no distinction, and in considering the purposes intended in the adoption of these regulations, we are unable to see any good reason why persons traveling upon electric cars are not entitled to the same protection as those traveling upon cars propelled by steam. Public necessities even within city limits demand increased facilities for travel over the horse car, and many decisions of courts, applicable to street railways operated by horses, could not be applied without manifest injustice to trains operated by steam or electricity. The speed, economy, and convenience afforded by electricity commend its use even for commercial purposes as well as travel, as superior in some respects to any other motive power thus far applied. A railroad, within the provisions of the statute, does not cease to be such railroad because it may discontinue the use of steam, and substitute that of electricity. The change in the motive power may relieve it from some provisions of the statute, but those which are needful for the protection of life and property continue in force." See to the same effect, Roy v. East

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St. Louis & Suburban R. Co. (1905) 119 Ill. App. 313.

In Billingsley v. Nashville, C. & St. L. R. Co. (1912) 177 Ala. 342, 58 So. 433, a statute of the character under consideration was apparently deemed to be applicable to an electric street railway, as to which no details appear in the opinion.

In Byrne v. Kansas City, Ft. S. & M. R. Co. (1894) 24 L.R.A. 693, 9 C. C. A. 666, 22 U. S. App. 220, 61 Fed. 605, it was held that the Tennessee statute does not require a railroad train to be stopped at a crossing over a horse car line. In the reported case (ILLINOIS C. R. Co. v. HUDSON) the same act is held not to require a stop at the track of an electric street railway. That decision was followed in Roper v. Memphis Street R. Co. (1916) 136 Tenn. 23, 188 S. W. 588, decided on the same day. Collaterally related to this discussion is the case of Georgia R. & Electric Co. v. Joiner (1904) 120 Ga. 905, 48 S. E. 336, wherein it was held that a statute requiring "all engine drivers and conductors" to stop at a railroad crossing does not require a street car to be stopped at a crossing over a steam railroad.

In denying the applicability of a stop statute to track intersections in switch yards, the court in St. Louis Nat. Stock Yards v. Godfrey (1902) 198 Ill. 288, 65 N. E. 100, affirming (1902) 101 Ill. App. 40, said: "We are of the opinion that the statute does not apply to switch yards like the one in question, consisting of an intricate system running in various directions, some crossing each other, all used for switching purposes, and belonging to the same railroad or company."

In Chicago G. W. R. Co. v. Minneapolis, St. P. & S. Ste. M. R. Co. (1910) 100 C. C. A. 41, 176 Fed. 237, 20 Ann. Cas. 1200, it appeared that a union depot company maintained a depot yard, the tracks of the several railroads using the depot being connected by switches with the depot trackage. An incoming train of one company collided with an outbound train of another company near one of the switch points in the depot yard. It was held that a Minnesota statute requiring railroad trains to come to a full stop before reaching "any railroad junction or crossing at grade" was not applicable. The court said: "This statute was inapplicable to the case here presented and imposed no duty to the Great Western Company or to the operators of its stock train upon the 'Soo' Company, or upon the crew upon its passenger train. The connection of the double track of the Great Northern Company with the north end of its single track was no 'junction' within the meaning of this law. The junction to which this statute refers and to which it is limited is a junction of two or more railroads owned by different proprietors, or a junction of two or more main lines, or of a main line and a branch line of the same company with each other. The legislature never intended to apply it to, and it has no application to, every connection upon a continuous line of railroad in a single direction of its single tracks with its double tracks; or of those tracks with its side tracks, when all are directed by the same management and controlled by the same operator. United States v. Oregon & C. R. Co. (1896) 164 U. S. 526, 540, 41 L. ed. 541, 545, 17 Sup. Ct. Rep. 165."

But in El Paso & S. W. R. Co. v. Murtle (1908) 49 Tex. Civ. App. 273, 108 S. W. 998, it appeared that a train in charge of a yardmaster was being backed by a switch engine from one yard to another over a transfer track which crossed the line of another company. A train of the latter company, not being stopped at the crossing, came into collision with the cars so being switched. It was held that the crossing was one at which the statute required a stop.

Where one railroad company leases the roads of two others, the trains operated on the leased roads are within a statute requiring a stop "whenever railroads cross each other." Chesapeake & O. R. Co. v. Anchor (1896) 99 Ky. 175, 35 S. W. 266, wherein the court said: "It is contended there was no violation of the statute because the Chesapeake & Ohio Railway Co., as lessee of both roads, operated all the trains which were run

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over them. As a matter of fact no trains are operated by the Elizabethtown, Lexington, & Big Sandy Railroad Company or the Ohio & Big Sandy Railroad Company over their respective tracks. They are exclusively used by the Chesapeake & Ohio Railway Company. The statute was intended in so far as possible, to prevent collisions at points where railroads cross each other. It is a fact that the railroads cross each other in Cattlettsburg. Trains are operated by defendant over each of the railroad tracks and pass over the crossing in question. While we recognize the danger of the collision is greatly lessened by the defendant operating the trains which pass over the crossing, yet this does not alter the fact that trains which pass over the Ohio & Big Sandy Railroad Company track and those which pass over the Elizabethtown, Lexington, & Big Sandy Railroad Company track pass over the crossing, and a collision is possible unless safety is secured by the observance of the provision of the statute."

c. Effect of violation of statute.

The failure of a railroad company to stop before reaching a crossing, as required by a statute, is usually held to constitute negligence per se, rendering it liable for any injury proximately resulting. Richmond & D. R. Co. v. Freeman (1892) 97 Ala. 289, 11 So. 800 (injury to brakeman on other train); Grand Rapids & I. R. Co. v. Ellison (1889) 117 Ind. 234, 20 N. E. 135, 11 Am. Neg. Cas. 445 (injury to passenger on offending train); El Paso & S. W. R. Co. v. Murtle (1908) 49 Tex. Civ. App. 273, 108 S. W. 998 (injury to brakeman on other train); Ft. Worth & D. C. R. Co. v. Mackney (1892) 83 Tex. 410, 18 S. W. 949 (injury to fireman on other train); San Antonio & A. P. R. Co. v. Bowles (1895) 88 Tex. 634, 32 S. W. 880 (injury to brakeman on offending train).

In Stearns v. Chicago, R. I. & P. R. Co. (1914) 166 Iowa, 566, 148 N. W. 128, it was said that a failure to stop, as required by statute, was sufficient to take the case to the jury on the question of negligence.

A violation of such a statute is negligence not only as to persons on trains traversing the crossing, but as to any person who is rightfully at or near the crossing. Southern R. Co. v. Williams (1904) 143 Ala. 212, 38 So. 1013. In that case it appeared that the plaintiff's intestate was walking along a path parallel with and close to a railroad track. As he approached a crossing a collision occurred between two trains by reason of the failure of the operators of one of them to stop before reaching the crossing. One of the trains was overturned and the plaintiff's intestate was killed. It was held that the failure to obey the statute was negligence, giving rise to a right of action for the death of the intestate. The court said: "It may be that the protection of trains at the crossings of two railroads, and passengers, employees, and other persons rightfully on the trains, was the primary purpose and the inspiring cause for the enactment of the statute, but its terms and language are too broad and comprehensive not to embrace any person who may rightfully be within the zone of that danger which the statute intended to be prevented or avoided by a compliance with its requirements."

In Illinois C. R. Co. v. Camp (1917) — Ala. —, 75 So. 290, a failure to observe the requirements of a stop statute was held to be negligence as to the driver of an automobile truck who attempted to drive over a railroad track at the place where it intersected another track, and was struck by a train which did not stop before reaching the crossing.

A railroad company whose employee fails to stop a train before crossing the track of another railroad, as required by a statute, is liable for an injury caused by a collision at the crossing, though a defective brake on the train of the other company contributes to the collision. Louisville & N. R. & Lighting Co. v. Hynes (1910) 47 Ind. App. 507, 91 N. E. 962.

The failure of an engineer to obey the statute and stop before reaching a railroad crossing has been held to be such contributory negligence as to

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bar a recovery for his death in the resultant collision, where the delay attendant on stopping would have prevented a collision, though no view of the other track could have been obtained by stopping. Lonergan v. Erie R. Co. (1903) 173 N. Y. 616, 66 N. E. 1112, affirming (1901) 67 App. Div. 297, 73 N. Y. Supp. 392, which reversed a verdict for the plaintiff on other grounds, but held that there was no contributory negligence.

In Great Western R. Co. v. Brown (1879) 3 Can. S. C. 159, it appeared that an engineer approached at a high rate of speed, a crossing at which he was required by statute to stop, and did not apply the brakes until the train was close to the crossing. Attempting to stop within too short a space, an airbrake tube burst and the timely stopping of the train was thereby rendered impossible. A collision at the crossing resulted and the engineer was killed. It was held that his negligence precluded a recovery for his death.

It has been held that where a statute imposes a penalty on a railroad for a failure to stop a train at a crossing, it is liable for the penalty in case a train is not stopped, though it has made and promulgated a proper rule on the subject, which is disobeyed by its employees in this instance. Indianapolis & St. L. R. Co. v. People (1879) 91 Ill. 452.

But in State v. Chicago, M. & St. P. R. Co. (1903) 122 Iowa, 22, 101 Am. St. Rep. 254, 96 N. W. 904, it was held that the company was not liable to a penalty where, because of a defective brake, the engineer was unable to stop at a crossing. The penal clause of the statute under consideration was as follows: "Any engineer violating the provisions of this section shall forfeit $100 for each offense, to be recovered in an action in the name of the state for the benefit of the school fund, and the corporation on whose road the offense is committed shall forfeit the sum of $200 for each offense, to be recovered in like manner." With respect to the statute the court said: "But one offense is denounced by it, and that is the omission of the engineer to stop the train as required. The first sentence commands what shall be done—defines a duty; the first clause of the second sentence imposes a penalty on any engineer for 'each offense' of omitting such duty; the second clause of the second sentence adds a penalty against the corporation 'on whose road such offense is committed.' To what do these last words refer? Manifestly, to the offense of which the engineer is guilty. No other is mentioned in the section. The statute cannot be fairly read otherwise. The thought seems to have been that, as the engineer controls the train, the fault in failing to stop as required is primarily his, and secondarily that of the company for which he acts. There is no ground for holding that the company may be liable independent of any fault of the engineer. The forfeiture of the corporation is made to depend upon his guilt of the offense defined, and upon that only."

It has been held that it is competent for a public service commission to make an order requiring a railroad to comply with a stop statute at a particular crossing at which the statute has been disobeyed habitually. Railroad & Warehouse Commission v. Great Northern R. Co. (1914) 124 Minn. 533, 144 N. W. 771. W. A. S.

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MARY J. HOLLOWAY
v.
PEOPLE'S WATER COMPANY, Appt.

(Two Cases.)

Kansas Supreme Court — May 12, 1917.

(100 Kan. 414, 167 Pac. 265.)

Definition — restitution — purging contempt.

1. "Restitution," as used in § 260 of the Civil Code (Gen. Stat. 1915, § 7158), when applied to the situation here presented, means to restore, reimburse, or make good.

[*See note on this question beginning on page* 169.]

Appeal — immaterial error.

2. The admission in evidence of a certain deposition and letter, if error, was immaterial.

Judgment — reserved power to change.

3. That portion of the decree of May 13, 1912, retaining the cause "for further orders should the same be deemed necessary in the future, to in justice and equity conserve and protect the rights of respective parties hereto," left the court with jurisdiction to modify or change such decree at a subsequent term and before final dismissal of the suit.

Evidence — sufficiency.

4. The evidence supports the findings and decrees and orders of the trial court.

Contempt — fine — destination.

5. Under § 6 of article 6 of the Constitution (Gen. Stat. 1915, § 208) the fine for contempt in violating an injunction goes to the support of common schools, although the proceeding to punish for such contempt was in this case civil rather than criminal.

Injunction — violation — punishment.

6. For violation of the injunction it was proper to fine the defendants and also to require them to pay the plaintiff the sum named to compensate her for her expenses incurred in the prosecution of her action.

Appeal — error in nomenclature.

7. While it was incorrect and therefore erroneous to call such payment a fine, to reverse for this misuse of the word "fine" would be an excess of nicety, and hence the judgment as correctly construed is affirmed.

Headnotes by WEST, J.

APPEAL by defendant from decrees of the District Court for Woodson County in favor of plaintiff in consolidated actions brought to enjoin defendant from permitting water to escape from its pipes and tank in such a manner as to fall on plaintiff's property, and charging it with indirect contempt in permitting the overflow. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Giles H. Lamb and W. E. Hogueland, for appellant:

The motion to vacate and modify was improper, no evidence should have been received thereon, and, when received, it should have been disposed of on demurrer.

Fisher v. Montgomery, 87 Kan. 687, 125 Pac. 61; Vail v. School Dist. 86 Kan. 808, 122 Pac. 885; Lewis v. Woodrum, 76 Kan. 384, 92 Pac. 306; 23 Cyc. 861, 862; Martindale v. Battey, 73 Kan. 92, 84 Pac. 527.

The lower court had no power to annul, vacate, set aside, and hold for naught the judgment of May 13, 1912, that judgment having been rendered with all the solemnity usually surrounding the rendition of judgments.

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Kan. 765, 90 Pac. 284; citing State ex rel. Minard v. Sowders, 42 Kan. 312, 22 Pac. 425; Johnson v. Jones, 58 Kan. 745, 51 Pac. 224; Com. v. Weymouth, 2 Allen, 147, 79 Am. Dec. 776; Crothers v. Ross, 15 Ala. 800; Lattimer v. Ryan, 20 Cal. 628; Fix v. Quinn, 75 Ill. 232; McManama v. Garnett, 3 Met. (Ky.) 517; Pormann v. Frede, 72 Wis. 226, 39 N. W. 385; Fisher v. Montgomery, 87 Kan. 687, 125 Pac. 61.

Where there is no allegation of insolvency and no showing is made that defendant is not amply able to respond in damages, no injunction will lie.

Miller v. Burket, 132 Ind. 469, 32 N. E. 309.

Statements in a motion for new trial that the decision of the court is not sustained by efficient evidence and is contrary to law are sufficient to present the case for review.

Pratt v. Kelley, 24 Kan. 111; Gruble v. Ryus, 23 Kan. 195; Gilmore v. Bank of Garnett, 10 Kan. App. 496.

Courts are not disposed to interfere by injunction to prevent the erection or maintenance of property built or operated to promote public convenience.

Harrison v. Brooks, 20 Ga. 544; Barnes v. Calhoun, 37 N. C. (2 Ired. Eq.) 199; Atchison, T. & S. F. R. Co. v. Armstrong, 71 Kan. 366, 1 L.R.A. (N.S.) 113, 114 Am. St. Rep. 474, 80 Pac. 978; Carroll v. Wisconsin C. R. Co. 40 Minn. 168, 41 N. W. 661; Parrot v. Cincinnati, H. & D. R. Co. 10 Ohio St. 624; Phillips v. Lawrence Vitrified Brick & Tile Co. 72 Kan. 643, 2 L.R.A. (N.S.) 92, 82 Pac. 787; Daniels v. Keokuk Waterworks, 61 Iowa, 549, 16 N. W. 705; McCaffrey's Appeal, 105 Pa. 257; Sanderson v. Pennsylvania Coal Co. 86 Pa. 401, 27 Am. Rep. 711, 11 Mor. Min. Rep. 60; Rhodes v. Dunbar, 57 Pa. 274, 98 Am. Dec. 221; Daughtry v. Warren, 85 N. C. 136; Goodall v. Crofton, 33 Ohio St. 271, 31 Am. Rep. 535; Gilbert v. Showerman, 23 Mich. 448; Louisville Coffin Co. v. Warren, 78 Ky. 400; Green v. Lake, 54 Miss. 540, 28 Am. Rep. 378.

Contempt proceedings are criminal in their nature.

6 R. C. L. p. 530, § 43, note 9; State v. Dent, 29 Kan. 416; Hayes v. Fischer, 102 U. S. 121, 26 L. ed. 95.

Messrs. G. R. Stephenson and Frank G. Drenning, for appellee:

Injunction is a proper remedy to prevent the discharge of water upon the premises of another when said water is accumulated by artificial means.

40 Cyc. 656, ¶ 2; Parker v. Larsen, 86 Cal. 237, 21 Am. St. Rep. 30, 24 Pac. 989; Davis v. Niagara Falls Tower Co. 171 N. Y. 336, 57 L.R.A. 545, 89 Am. St. Rep. 817, 64 N. E. 4; Huber v. Stark, 124 Wis. 367, 109 Am. St. Rep. 937, 102 N. W. 12, 4 Ann. Cas. 340; Jutte v. Hughes, 67 N. Y. 272; Louisville & N. R. Co. v. Franklin, 170 Ky. 645, 186 S. W. 643; Bailey v. Chicago, St. P. M. & O. R. Co. 25 S. D. 200, 126 N. W. 268; McCabe v. New York C. & H. R. R. Co. 139 App. Div. 698, 124 N. Y. Supp. 652; Cronin v. Payne, 157 Mich. 104, 121 N. W. 290; Johnson v. Ruth, 144 Iowa, 693, 123 N. W. 326; Keifer v. Shambaugh, 99 Neb. 717, 157 N. W. 634; Northern P. R. Co. v. Cunningham, 103 Fed. 709; Sylvester v. Jerome, 19 Colo. 128, 34 Pac. 760.

The law does not authorize the water company to create and continue a private nuisance.

State v. Concordia, 78 Kan. 255, 20 L.R.A.(N.S.) 1050, 96 Pac. 487; Atchison, T. & S. F. R. Co. v. Armstrong, 71 Kan. 366, 1 L.R.A.(N.S.) 113, 114 Am. St. Rep. 474, 80 Pac. 978.

Flooding premises by overflows from a water tank is a private nuisance.

29 Cyc. 1178; Farnham, Waters, §§ 431, 982; Norman v. Ince, 8 Okla. 412, 58 Pac. 632, 6 Am. Neg. Rep. 681; Defiance Water Co. v. Olinger, 54 Ohio St. 538, 32 L.R.A. 736, 44 N. E. 238; Reinhart v. Sutton, 58 Kan. 726, 51 Pac. 221; Hazeltine v. Edgmand, 35 Kan. 213, 57 Am. Rep. 157, 10 Pac. 544; Baltimore Breweries' Co. v. Ramstead, 78 Md. 501, 27 L.R.A. 294, 28 Atl. 273; Aldworth v. Lynn, 153 Mass. 53, 10 L.R.A. 210, 25 Am. St. Rep. 608, 26 N. E. 229; Davis v. Niagara Falls Tower Co. 171 N. Y. 339, 57 L.R.A. 545, 89 Am. St. Rep. 817, 64 N. E. 4.

Intent and negligence in creating and continuing a nuisance are immaterial.

29 Cyc. 1154B, 1155C; Brady v. Detroit Steel & Spring Co. 102 Mich. 277, 26 L.R.A. 175, 60 N. W. 687; High, Inj. § 746; Reinhart v. Sutton, 58 Kan. 726, 51 Pac. 221.

Neither is lack of intent or malice or negligence any defense for the violation of an injunction.

Thompson v. Pennsylvania R. Co. 48 N. J. Eq. 105, 21 Atl. 182; 3 Enc. Ev. 462, ¶ 3; Thistlethwaite v. State, 149 Ind. 319, 49 N. E. 156; High, Inj. 1416, 1417.

Punishment for violation of an injunction is a civil, and not a criminal,

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action, and part of the fine may be paid complainant.

Merchants' Stock & Grain Co. v. Board of Trade, 109 C. C. A. 230, 187 Fed. 398; Kreplik v. Couch Patents Co. 111 C. C. A. 381, 190 Fed. 569; Morehouse v. Giant Powder Co. 124 C. C. A. 158, 206 Fed. 27; Re Independent Pub. Co. 228 Fed. 790; Gompers v. Buck's Stove & Range Co. 221 U. S. 441, 445, 55 L. ed. 805, 807, 34 L.R.A. (N.S.) 874, 31 Sup. Ct. Rep. 492; Re Christensen Engineering Co. 194 U. S. 458, 48 L. ed. 1072, 24 Sup. Ct. Rep. 729; Bessette v. W. B. Conkey Co. 194 U. S. 324, 48 L. ed. 997, 24 Sup. Ct. Rep. 665; Costilla Land & Invest. Co. v. Allen, 15 N. M. 528, 110 Pac. 847; Re McCormick, 132 App. Div. 921, 117 N. Y. Supp. 70; Gorham v. New Haven, 82 Conn. 153, 72 Atl. 1012; O'Brien v. People, 216 Ill. 354, 108 Am. St. Rep. 219, 75 N. E. 108, 3 Ann. Cas. 966; People v. Diedrich, 141 Ill. 665, 30 N. E. 1038; Re Nevitt, 54 C. C. A. 622, 117 Fed. 448.

West, J., delivered the opinion of the court:

The plaintiff, who resides and owns property in block 17 in the city of Yates Center, sued the water company to enjoin it and its officers, agents, and employees from permitting water to escape from its pipes and tank in such a manner as to fall upon her property, alleging that on numerous occasions her premises had been flooded by the overflow of the steel tank of the defendant, situated in block 17. The court found that the company had repeatedly caused its tank to overflow the plaintiff's premises to her inconvenience and damage, sometimes by the unavoidable clogging of valves or other natural causes, and at numerous times from lack of care on the part of its employees, and ordered that the company, its officers and anyone acting for or in its behalf, be enjoined to exercise due care in the furnishing and adjustment of the machinery and appliances at and about the water plant and tank to prevent the overflow of the latter so as to overflow or otherwise injure the property of the plaintiff; that if by injury or accident to the machinery, or by failure of the appliances at the power house to register the altitude of water in the tank, the company and its employees should have no actual knowledge or notice of such overflow, then upon notice given it the defendant was required to take proper steps to place such machinery and appliances in order, and stop and prevent such overflow. It was further ordered that they be restrained and enjoined from wantonly, maliciously, recklessly or carelessly causing or permitting such overflow. The last paragraph of the decree was in these words:

"It is further considered, ordered, adjudged, and decreed that this cause be retained by the court for further orders should same be deemed necessary in the future, to in justice and equity properly conserve and protect the rights of respective parties hereto."

After the close of the term the plaintiff filed a motion to vacate and modify the decree and to render another in lieu thereof, setting up that since May 13, 1912, the defendant had caused, suffered, and permitted its tank to overflow large quantities of water upon her land twelve different times. This motion was supported by the affidavits of two witnesses, who testified to numerous overflows since the date of the decree. The defendant sought to show that instructions had been given to its employees to use more than ordinary precaution to prevent overflow and that the best known appliances were used. The decision on the motion was rendered July 14, 1913, enjoining the company, its officers or agents, or anyone acting on its behalf, from so operating its machinery, appliances, and water tank as to cause an overflow upon the plaintiff's premises, and modifying the decree of injunction rendered May 13, 1912, so as to conform to the later decree. From this an appeal was taken, the record reciting the filing of a motion for a new trial and its denial. It is contended that no record of such motion can be found, but owing to the recital in

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the abstract and the statements of counsel upon the argument, and later by affidavits, it must be deemed that such motion was filed and overruled. March 21, 1914, the plaintiff filed accusations against the president and general manager, charging them with indirect contempt by repeatedly permitting the tank to overflow on the premises of the plaintiff on some seventeen different dates, and charging that each of these officers wholly neglected to give proper supervision to the pumping and storing of water in the tank by neglecting to put in an electric altitude gauge, and wholly failed to make any provision whatever to prevent overflow, and failed to have an employee on duty at all times when pumping water into the tank to receive telephone calls when the tank overflowed, and failed to prevent such overflows after being notified on two days mentioned and on other days referred to. Respondents moved to strike from the accusations certain portions thereof, which motion was overruled; whereupon they moved to quash the accusations, which motion was likewise overruled; also a demurrer, after which they filed their verified answer denying any violation of the court's injunction or any wish or desire to violate it, and asserting their will and wish to "sustain the general scheme of good government, including respect and submission to all orders and judgments of all courts of acknowleged and accredited jurisdiction until such orders or judgments were and are properly modified, set aside, or reversed, according to the regular order and proceeding of law, and in particular, the orders and judgments of this court as the court of general jurisdiction within and for the judicial district wherein defendant company is located and operating, and that all orders and judgments of this court have been complied with to the full and utmost extent."

Further, that they were, with the exercise of all human care, unable to comply with the decree, and if there had been a seeming violation it was because it was not within their power to prevent such apparent noncompliance. Then followed a statement as to the franchise and function of the defendant, its duties and requirements, and an assertion that the tank was equipped with the most practically scientific and perfect device for automatically cutting off the service that could be procured or placed thereon. They also alleged that the company had appealed from the decree on which the accusations were based, and charged that the latter were made from "spite, viciousness, and antagonism as to defendant company and the public in general." The accusations were heard by the court and the testimony of five witnesses for the plaintiff was produced. Various overflows were described, some of which extended to the premises of the plaintiff, who testified that the tank overflowed March 3, 7, 8, and 10, 1914, and October 10, 1913.

"It ran over in great quantities, it was so wet all over my yard that the children got their feet wet, water was sprinkling all over my yard. My yard was all covered with water on the 7th. It ran over again on the 8th and twice on Sunday. That was in March, 1914. It delayed me making garden. It made it so wet I had to put on my rubbers to get out."

A demurrer to the evidence was overruled, and respondents testified as to the efforts they had made to prevent overflow. The president stated that he had studied practically all the schemes to keep tanks from overflowing, and had tried very hard to keep this tank from overflowing and had not knowingly or intentionally permitted it to overflow. The general manager testified that he had received no complaint from the plaintiff of any overflow, that he had the valve replaced on occasion of leakage at one time, and had instructed the pumpers that the tank must not overflow, that it was necessary to keep it prac-

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tically full to give pressure for fire protection, and he knew of no mechanical device that would absolutely prevent overflow. In rebuttal a deposition was offered and objected to. The ruling on the objection was reserved and the deposition was read. This described a certain valve the witness claimed would prevent overflow "as near as anything automatic can do so." The plaintiff then offered in evidence a letter from the company making or selling this valve, which letter was addressed to the plaintiff's attorney and set forth the merits of the device, which letter was objected to but read, the ruling on its admission being reserved. The president testified that he had never heard of but one valve of the kind described in use in this country and that one did not work correctly. The abstract recites that no evidence of negligence, wantonness, wilfulness, or intention was offered by the plaintiff. The court found the company and the respondent's president and general manager guilty of indirect contempt as charged.

"It is therefore considered, ordered, and adjudged that the defendants pay a fine of One Hundred Dollars ($100) and it is further considered, ordered, and adjudged that of such fine $75 thereof be paid to Mary J. Holloway, plaintiff, to compensate her for expenses incurred in the prosecution of her action."

From this order the respondents appeal, and the two appeals, the two causes having been consolidated, were presented and are considered together.

Twenty specifications of error are urged covering the various rulings in all the hearings referred to, including considerable complaint about the insufficiency of the accusations filed in the contempt matter. The main contentions however, center around the notion that the first injunction was a finality and the attempt of the court to hold the case open for future orders was a nullity; the alleged error in opening up and modifying this decree at a subsequent term, the insufficiency of the evidence to warrant the judgment rendered in the contempt proceeding, and the alleged invalidity of that portion of the judgment requiring three fourths of the fine to be paid to the plaintiff.

Serious complaint is made of admission in evidence in the injunction matter of a deposition and letter. It is necessary only to say that in such a trial before the court without a jury an examination of their contents shows that they could not have had any prejudicial effect, and if any error was committed (Gen. Stat. 1915, § 3107) it was immaterial.

Appeal—immaterial error.

Stress is laid on the public-service nature, functions, and requirements of the defendant water company and on the doctrine that its duties to the inhabitants of Yates Center are paramount to the rights of adjacent property owners who may in a slight degree be damaged or inconvenienced by leakage or overflows. On the other hand, attention is called to numerous decisions that the duties of a water company do not authorize or justify the creation of a private nuisance. With both these doctrines we are in full accord, and the appeal will be considered in the light of both theories, which are not only well established but harmonious.

No attempt will be made to settle the dictionary question as to whether the decree of May 13, 1912, was final or interlocutory. Definitions do not always define. The journal entry bears abundant evidence on its face of judicial intention to put the parties in proper relation to each other, or at least require them to act in such relation, retaining full jurisdiction to make other or different orders as future exigencies might arise. Judge Story in his work on Equity Jurisprudence, vol. 1, 13th ed. p. 21, said:

Judgment—reserved power to change.

"But courts of equity are not so restrained. Although they have

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prescribed forms of proceeding, the latter are flexible, and may be suited to the different postures of cases. They may adjust their decrees so as to meet most, if not all, of these exigencies; and they may vary, qualify, restrain, and model the remedy so as to suit it to mutual and adverse claims, controlling equities, and the real and substantial rights of all the parties. . . . So that one of the most striking and distinctive features of courts of equity is that they can adapt their decrees to all the varieties of circumstances which may arise, and adjust them to all the peculiar rights of all the parties in interest."

"Sometimes the character of the decree as final or interlocutory may be affected by what the decree itself declares in this regard, as indicating the purpose of the court with respect to further proceedings; but if the decree is in its effect necessarily interlocutory, it cannot be made final by any phraseology or style tending to so characterize it." 16 Cyc. 472.

"The injunction should be broad enough to cover the whole case, but it may be granted as to part of the bill and refused as to the rest. It may, in a proper case, provide for a modification of the injunction when changed conditions require it." 22 Cyc. 966.

The court is one of general jurisdiction and had unquestioned jurisdiction of the parties and the subject-matter, and as in any other case questions of continuance or dismissal were matters very largely of discretion, and it would go counter to its plain intention and equally plain prerogative to hold that the order made concerning the management of this plant by the defendant caused the jurisdiction of the court to end with the ending of the term.

Reading the record in cold blood, uncolored by the manifest feeling of impatience with the plaintiff and with the result of the hearings possessed by the defendants, we have no difficulty in holding that the evidence warranted the court in decreeing the defendants to be in contempt. Nothing has been suggested and nothing occurs from examination and reflection constituting a sufficient excuse for the repeated interference with the plaintiff's premises by the overflow of the defendants' tank. Finding that she had been so many times before, during and after judgment, confronted with a condition amounting to the maintenance of a nuisance, it was in accordance with her rights and no impairment of defendants' rights that adjudication of contempt was made.

Evidence—sufficiency.

We cannot agree with the defendants that the proceeding was criminal in its nature, in the sense of a prosecution for crime, for, while the status provides that "the trial shall proceed upon testimony produced as in criminal cases, and the accused shall be entitled to be confronted with the witnesses against him" (Gen. Stat. 1915, § 3107), the proceeding in this case was not for the purpose of enforcing the criminal statutes, but for the vindication of the plaintiff's rights to be let alone and live untroubled by repeated overflows of her property caused by the acts or carelessness of the defendants. The ægis of § 6 of article 6 of the Constitution is raised and thus quoted in defendants' brief: "That all fines shall go to the school of the county in which the money is paid or fine collected, for the support of the common schools."

The correct reading is: "And the proceeds of fines for any breach of the penal laws shall be exclusively applied in the several counties in which the money is paid or fines collected, to the support of common schools." Gen. Stat. 1915, § 208.

Violation of a temporary injunction was by the circuit court of appeals of the eighth circuit held to be civil, and not criminal contempt, in Merchants' Stock & Grain Co. v. Board of Trade, 109 C. C. A. 230, 187 Fed. 398, citing numerous authorities. To a similar effect is Kreplik v. Couch Patents Co. 111

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C. C. A. 381, 190 Fed. 565; Morehouse v. Giant Powder Co. 124 C. C. A. 158, 206 Fed. 24; and Bessette v. W. B. Conkey Co. 194 U. S. 324, 48 L. ed. 997, 24 Sup. Ct. Rep. 665. See also Gompers v. Buck's Stove & Range Co. 221 U. S. 418, 55 L. ed. 797, 34 L.R.A.(N.S.) 874, 31 Sup. Ct. Rep. 492; and O'Brien v. People, 216 Ill. 354, 108 Am. St. Rep. 219, 75 N. E. 108, 3 Ann. Cas. 966. In the Merchants' Stock & Grain Co. v. Board of Trade Case it was said in the opinion: "The truth is that substantial benefit to a private party preponderating over that to the government is the distinguishing characteristic of a civil contempt, and that benefit is often as great and it arises as frequently from judgments for contempts for disobedience of a prohibitory as of a mandatory order or judgment." (p. 400.)

In the Bessette Case the Supreme Court quoted from Judge Sanborn's opinion in Re Nevitt, 54 C. C. A. 622, 117 Fed. 448, with approval:

"Proceedings for contempts are of two classes; those prosecuted to preserve the power and vindicate the dignity of the courts and to punish for disobedience of their orders, and those instituted to preserve and enforce the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them to be entitled. The former are criminal and punitive in their nature, and the government, the courts, and the people are interested in their prosecution. The latter are civil, remedial, and coercive in their nature, and the parties chiefly in interest, in their conduct and prosecution, are the individuals whose private rights and remedies they were instituted to protect or enforce." 194 U. S. 328, 48 L. ed. 1002, 24 Sup. Ct. Rep. 665.

"It may not be always easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both. A significant and generally determinative feature is that the act is by one party to a suit in disobedience of a special order made in behalf of the other." p. 329.

Very recently (Barton v. Barton, 99 Kan. 727, 163 Pac. 179), we had occasion to consider a cognate question,—contempt for violating an order made in a divorce case for expenses and support of a minor child. It was there said the primary object of the proceeding was to protect private rights, and only incidentally to vindicate the authority of the law: "While the punishment of such contempt takes on a criminal phase, it is really remedial in character and is sometimes designated as a civil contempt." p. 728.

So it can hardly be said that the fine in question was by the constitutional provision referred to required to be paid to the county for the support of common schools. But in 1868 the legislature enacted § 8257 of the General Statutes of 1915, requiring that "all fines and penalties imposed and all forfeitures incurred in any county shall be paid into the treasury thereof, to be applied to the support of the common schools."

Regardless of the Constitution, this would require any fine imposed to be thus applied; but at the same time the legislature enacted § 7158, a slight verbal change being made in 1909, providing that for violation of an injunction the guilty party may be required "to pay a fine not exceeding $200, to make immediate restitution to the party injured, and give further security to obey the injunction; or, in default thereof, he may be committed to close custody until he shall fully comply with such requirements, or be otherwise legally discharged."

Under this he may be fined, the proceeds going to the county school fund. He may be required also to give bond to obey the injunction even when restitution is not required, as in State ex rel. Jackson v. Lindsay, 85 Kan. 192,

Contempt—fine—destination.

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116 Pac. 209. Quite naturally it is complained that in this instance the court undertook to impose a fine and divert three fourths of it to the benefit of the plaintiff. This contention is apparently borne out by the language of the journal entry. There are precedents for this sort of a judgment. In Merchants' Stock & Grain Co. v. Board of Trade, 109 C. C. A. 230, 187 Fed. 398, the defendants were adjudged to pay a fine, three fourths to the complainant and one fourth to the government. It was there said that the main effect as well as the object of judgment for contempt was "to coerce the defendants to obey the injunction and to cease their continuing appropriation of the complainant's property, and the punitive element in it is subordinate, incidental, and, so far as the discussion and determination of this question is concerned, negligible." p. 402.

In Kreplik v. Couch Patents Co. 111 C. C. A. 381, 190 Fed. 565, the first circuit court of appeals said: "The court holds that the proper remedial relief for a disobedience of an injunction in the equity cause before it would have been to have imposed a fine for the use of the complainant, measured in some degree by the pecuniary injury caused by the act of disobedience." p. 569.

In Morehouse v. Giant Powder Co. 124 C. C. A. 158, 206 Fed. 24, these rulings were referred to with apparent approval. Also in the case of Re Independent Pub. Co. 228 Fed. 787. In the Gompers Case, 221 U. S. 418, 55 L. ed. 797, 34 L.R.A. (N.S.) 492, 31 Sup. Ct. Rep. 492, the Supreme Court said: "But as the act of disobedience consisted not in refusing to do what had been ordered, but in doing what had been prohibited by the injunction, there could be no coercive imprisonment, and therefore the only relief, if any, which 'the nature of petitioner's case' admitted, was the imposition of a fine, payable to the Buck's Stove & Range Company." p. 449.

In Stollenwerk v. Klevenow, 151 Wis. 355, 139 N. W. 203, attorneys' fees were paid to the plaintiff as a part of the punishment for contempt. "The employment of attorneys meant assuming an obligation that they be paid for their services. Such employment resulted in loss and damage to the plaintiffs to the extent of the amount they were legally obliged to pay for such services. Such loss was occasioned solely by the contumacious conduct of certain of the defendants. Actual loss and damage was produced and resulted to the plaintiffs by reason of the misconduct of which they complained, . . . and therefore the court was right in awarding indemnity to the plaintiffs." p. 364.

High on Injunctions, vol. 2, 4th ed. § 1457, says: "And it is a proper punishment to require a party who has violated an injunction to pay the actual damages which have been sustained by the plaintiff by reason of such violation, with the costs of the proceedings for contempt. But where there had been a clear and wilful violation of the injunction, it was held proper to punish by a fine of the amount of the taxed costs and solicitor's and counsel fees incurred by defendant's resistance to the proceedings for attachment and in the proceedings for the taking of testimony as to violation, the defendant to stand committed until payment of such fine. . . . In the Federal courts, however, the rule is well established that, in imposing a fine for the violation of an injunction, the court may direct the payment of the money or of a portion thereof to the aggrieved party as compensation for the time and expense involved in procuring the punishment for contempt."

What does the statute mean by providing that the guilty party may be required to make immediate restitution to the party injured? According to Webster's International Dictionary, 1911 ed., "restitution" means: "Act of restoring; restoration of anything to its rightful owner; act of making good, or of giving

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an equivalent for any loss, damage, or injury; indemnification."

At common law the word was used to denote the return or restoration of a specific thing or condition, and the writ of restitution lay to restore after reversal of a judgment what the party had lost. Black gives the definition: "In equity. Restitution is the restoration of both parties to their original condition (when practicable) upon the rescission of a contract for fraud or similar cause."

The first meaning given by the Oxford English dictionary is: "The action of restoring or giving back something to its proper owner, or of making reparation to one for loss or injury previously inflicted."

This section of the Code is taken from the Ohio Code, and we have been unable to find any definition of the word by the courts of that state. Our statute (Gen. Stat. 1915, § 10,973, subd. 2) requires words to be construed according to the context and the approved usage of the language, but technical words which have acquired a peculiar and appropriate meaning in law are to be construed according thereto. The language used is generic in character and does not attempt to specify any subject, kind, or instance of restitution, and it is difficult if not impossible to give it any significance if it be restricted to the technical common-law use of the term. If given the ordinary lay meaning, however, the expression would mean that the defendant should make the plaintiff whole for the loss he had occasioned by his violation of the injunction. This seems less strained and unnatural than to attribute to the legislature the technical meaning which leaves the expression as applied to many cases without any practical meaning at all. It may well be said, therefore, and we hold that in an instance like this, in addition to the fine, the violator of the injunction may be required to reimburse the plaintiff for the loss sustained by the violation; or at least for her costs in bringing him before the court to answer therefor. It is true that, strictly speaking, this restitution or reimbursement is no part of a fine, but something in addition thereto, and the language used in the journal entry calling it all a fine is incorrect, $25 of it only being fine and the rest reimbursement; the one going to the county for the use of the schools, the other to the plaintiff; but it would be an excess of nicety to order a reversal on account of this incorrect but unimportant use of the word.

Definition—restitution—purging contempt.

Injunction—violation—punishment.

Appeal—error in nomenclature.

Construing it as we have done, and holding that the judgment was in reality that the defendants pay a fine of $25 and reimburse the plaintiff to the extent of $75, such judgment is affirmed.

ANNOTATION,

Restitution as purging contempt in violating injunction.

A search has failed to discover any other decision construing the word "restitution" as used in a statute providing that restitution may be made a condition upon which a party may purge himself of contempt in violating an injunction.

It is not uncommon for the court to require the contemner to undo what he has done, so far as it is physically possible.

Thus, in Murphey v. Harker (1902) 115 Ga. 77, 41 S. E. 585, in which the defendant had continued the building operations after notice of the issuance of an order restraining him from so doing, it was held that the judge had authority to require him to restore the status as it was at the time he first received notice of the fact that the injunction was granted.

And in Murdock's Case (1825) 2

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Bland, Ch. (Md.) 461, 20 Am. Dec. 381, the contemners were ordered to remove a fence erected by them in violation of an injunction.

In State ex rel. Hoefs v. District Ct. (1911) 113 Minn. 304, 129 N. W. 583, it was held to be within the power of the court to require the defendant, to purge himself of contempt in violating an injunction restraining him from constructing a ditch and thereby lowering the waters of a meandered lake, to fill up the ditch and restore the lake, the court saying: "Without this power the authority of the court in such cases to compel respect to its judgments would be impotent and without force or effect."

So, where one commits a contempt of court by removing fixtures from a mill of which he is in possession while under an injunction forbidding such removal, he may be compelled to restore the fixtures. Ashby v. Ashby (1901) 62 N. J. Eq. 618, 50 Atl. 473.

In Elizabethtown, L. & B. Street R. Co. v. Ashland & C. R. Co. (1893) 94 Ky. 478, 22 S. W. 855, a railroad company which had constructed its road against the tracks of another, in violation of an injunction, was required, in order to purge the contempt, to remove the obnoxious track.

In Daniel v. Ferguson [1891] 2 Ch. (Eng.) 27, 39 Week. Rep. 599, where the defendant in an action to restrain him from building so as to darken the plaintiff's light, upon receiving notice of motion for injunction, endeavored to anticipate the action of the court by putting on extra men and by working night and day, it was held that what he had erected ought to be at once pulled down without regard to the ultimate result of the action.

In Byne v. Byne (1875) 54 Ga. 257, it was held that when, on an application for an injunction, a temporary restraining order is granted and the defendant violates such restraining order by taking possession of land in defiance thereof, it is competent for the chancellor at the hearing, though he may refuse the injunction, to direct the sheriff to restore the parties to their status at the time the bill was filed.

In some jurisdictions the statutes provide for the imposition of a fine, in cases in which the contempt proceeding is civil and remedial, for the purpose of indemnifying the party injured by the act constituting the contempt. See Shore v. People (1889) 26 Colo. 516, 59 Pac. 49; Levy v. New Orleans Waterworks Co. (1886) 38 La. Ann. 29; State ex rel. Hoefs v. District Ct. (1911) 113 Minn. 304, 129 N. W. 583; Lansing v. Easton (1839) 7 Paige (N. Y.) 364; Macy v. Jordan (1845) 2 Denio (N. Y.) 570; Erie R. Co. v. Ramsey (1870) 3 Lans. (N. Y.) 178, affirmed in (1871) 45 N. Y. 637; Harteau v. Deer Park Blue Stone Co. (1874) 1 Hun (N. Y.) 493, 3 Thomp. & C. 763; People ex rel. Woolf v. Jacobs (1875) 5 Hun (N. Y.) 428; People v. Van Buren (1892) 44 N. Y. S. R. 820, 18 N. Y. Supp. 734; Power v. Athens (1879) 19 Hun (N. Y.) 165; Sheffield v. Cooper (1879) 21 App. Div. 518, 48 N. Y. Supp. 639; Re Empire State Surety Co. (1914) 164 App. Div. 586, 150 N. Y. Supp. 398; Robins v. Frazier (1871) 5 Heisk. (Tenn.) 100; Emerson v. Huss (1906) 127 Wis. 215, 106 N. W. 518; Stollenwerk v. Klevenow (1912) 151 Wis. 355, 139 N. W. 203.

Although a court may, in vindication of its injunctional order, punish a party for a wilful violation thereof, notwithstanding such order was improperly granted, it may not order the contemner to pay any sums as an indemnity to the opposite party. Kaehler v. Dobberpuhl (1883) 56 Wis. 497, 14 N. W. 631; Kaehler v. Halpin (1883) 59 Wis. 40, 17 N. W. 868.

Under a Tennessee statute which provides that "if the contempt consists in the performance of a forbidden act, the person may be imprisoned until the act is rectified by placing matters and persons in statu quo, or by the payment of damages," it has been held that the measure of damages is not "the actual pecuniary loss directly sustained," but that the circumstances of aggravation or mitigation attending the disobedience of the order may be taken into consideration. Robins v. Frazier (1871) 5 Heisk. (Tenn.) 100.

It has been held that under a statute

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providing that "if an actual loss or injury has been produced to any party by the misconduct alleged the court shall order a sufficient sum to be paid by the defendant to such party to indemnify him and to satisfy his costs and expenses instead of imposing a fine upon such defendant," actual loss and damage are produced and result to the plaintiffs within the meaning of such statute by reason of the misconduct of the defendant where they have been obliged to employ attorneys for the purpose of bringing to the attention of the court the fact that its order was being set at defiance. Stollenwerk v. Klevenow (1912) 151 Wis. 355, 139 N. W. 203.

But in New York it has been held that under a statute providing that a fine shall be imposed upon the contemner sufficient to indemnify the injured party for the loss and injury produced by the misconduct, and to satisfy his costs and expenses, there is no authority for adding a counsel fee to the costs and expenses. People ex rel. Woolf v. Jacobs (1875) 5 Hun (N. Y.) 428; Power v. Athens (1879) 19 Hun (N. Y.) 165.

As to whether the court, in the absence of a statutory provision authorizing the imposition of a fine for the purpose, may properly require payment of the damages sustained by the injured party, there is a difference of opinion.

In Delaware, L. & W. R. Co. v. Frank (1816) 145 C. C. A. 182, 230 Fed. 988, it was held that the defendant might properly be fined a sum which would fully compensate the complainant for the pecuniary loss occasioned by his disobedience of the injunction order, and that such fine may also act as a deterrent is no objection to its imposition.

See also, as supporting this view, Matthews v. Spangenberg (1883) 15 Fed. 813; American Graphophone Co. v. Walcutt (1898) 86 Fed. 468; Ashby v. Ashby (1901) 62 N. J. Eq. 618, 50 Atl. 473.

In Teager v. Lindsley (1886) 69 Iowa, 725, 27 N. W. 739, and Griggs v. Doctor (1895) 89 Wis. 161, 30 L.R.A. 360, 46 Am. St. Rep. 824, 61 N. W. 761, it was held that the court had power to render judgment in a contempt proceeding against the offending defendant for the amount of the exempt wages garnished by him in violation of an injunction order.

And in Thomson v. Palmer (1848) 3 Rich. Eq. (S. C.) 139, it was held that one who, in violation of an injunction, has prosecuted a suit at law against an executor, may be required to pay the executor's costs therein.

But in Dowagiac Mfg. Co. v. Minnesota Moline Plow Co. (1903) 124 Fed. 736, affirmed in (1904) 64 C. C. A. 122, 129 Fed. 1005, a proceeding to punish a violation of an injunction in a patent infringement case, the court said: "I do not understand that the office of a proceeding for contempt ordinarily or in a case of this kind is to compensate the party complaining for any injury that he has sustained by reason of acts of the defendant which constitute the contempt. If he has a legal right to recover on account of these acts it must be in some other procedure. I do not think the object of contempt proceedings is to obtain damages from one party for the use of the other. Parties cannot recover damages they have sustained in this summary manner ordinarily, they must be recovered in an ordinary proceeding."

See also, as holding that, in the absence of statutory authority, a fine cannot be appropriated to the benefit of the party injured, Barnes v. Chicago Typographical Union (1908) 232 Ill. 402, 14 L.R.A.(N.S.) 1150, 122 Am. St. Rep. 129, 83 N. E. 932, reversing on this point (1907) 134 Ill. App. 11.

Of course, until the complainants' rights have been determined they are not entitled to have punishment imposed for their benefit as compensation for any damages they may have sustained because of the defendant's acts. New Jersey Patent Co. v. Martin (1909) 166 Fed. 1010.

Although there is this difference of opinion as to the propriety of awarding damages in the contempt proceeding, it seems to be generally conceded that it is proper to require payment to the complainant of his costs and ex-

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penses in bringing the violation of the injunction order to the attention of the court.

In Cary Mfg. Co. v. Acme Flexible Clasp Co. (1901) 48 C. C. A. 118, 108 Fed. 873, it is said that "the power of the circuit court to direct the payment of a part or all of the fine to the complainant in an application for contempt as a compensation for his time and outlay in prosecuting the application has been often recognized in the circuit courts . . . and in practice is a power which ought to be exercised when the expenses and trouble to which the complainant has been subjected justify its exercise." Citing Re Mullee (1869) 7 Blatchf. 23, Fed. Cas. No. 9,911; McCauley v. White Sewing Mach. Co. (1881) 9 Fed. 698; Re Tift (1881) 11 Fed. 463; Re North Bloomfield Gravel Min. Co. (1886) 11 Sawy. 590, 27 Fed. 785; Wells, F. & Co. v. Oregon R. & Nav. Co. 9 Sawy. 601, 19 Fed. 20.

So, where a proceeding for contempt was instituted by the creditors of a bankrupt for the violation of an injunction by which the estate was depleted, and by reason of which proceeding restitution was effected, it is within the power of the court to direct a fine imposed for the contempt to be paid to such creditors as partial reimbursement for their costs and attorneys' fees expended. Morehouse v. Giant Powder Co. (1913) 124 C. C. A. 158, 206 Fed. 24.

Complainant may be reimbursed for his trouble and expense in watching the defendant to ascertain if he was violating the injunction, in securing evidence of the fact, and in presenting it to the court. Delaware, L. & W. R. Co. v. Frank (1916) 145 C. C. A. 182, 230 Fed. 988.

But the court will not require the complainant to be fully reimbursed for the expenses of bringing the violation of the injunction order to the attention of the court where the record is so unnecessarily voluminous and the expense is so large that a fine or penalty commensurate therewith would be inordinate. Board of Trade v. Tucker (1913) 221 Fed. 300.

And in Board of Trade v. Tucker (1915) 137 C. C. A. 255, 221 Fed. 305, it was held that although, in punishing the violation of an injunction as a civil contempt, the court may reimburse the complainant for the necessary expense of enforcing the injunction, extravagance in disbursements should not be allowed. E. S. O.

MRS. MOLLIE PIERSON, Appt.,
v.
UNION BANK & TRUST COMPANY.

Kentucky Court of Appeals — October 25, 1918.

(181 Ky. 749, 205 S. W. 906.)

Banks — verbal direction to pay check — effect of Negotiable Instruments Act.

1. A verbal direction by a depositor to a bank to pay the deposit on checks drawn by a third person is not invalidated by the provision of the Negotiable Instruments Act that the signature of any party may be made by an agent duly authorized in writing.

[*See note on this question beginning on page* 175.]

Same — depositor's consent to check by another.

2. A verbal direction by one depositing money in a bank to honor checks signed by another is binding on the depositor, and compliance with such direction relieves the bank from further liability to the depositor.

Estoppel — to claim bank deposit.

3. A depositor who induces a bank

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to pay out his funds on checks signed by another is estopped to assert claims to the fund against the bank.

Banks — joint deposit — check of one.

4. A bank which receives for deposit a check to two jointly, with the understanding that the deposit, although standing in the name of one only, shall be paid upon the check of either, satisfies its obligation when it honors a check drawn by one of the depositors.

APPEAL by plaintiff from a judgment of the Circuit Court for Henderson County in her favor in part only, in an action brought to recover the balance of a fund alleged to have been deposited by her in the defendant bank. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **Woodward & Dixon** and **Moorman & Woodward**, for appellant:

A bank paying checks drawn by an agent who is without written authority cannot charge the same to the depositor's account.

Finley v. Smith, 165 Ky. 445, L.R.A. 1915F, 777, 177 S. W. 262; Boswell v. Citizen's Sav. Bank, 123 Ky. 485, 96 S. W. 797; First Nat. Bank v. Hargis Commercial Bank & T. Co. 170 Ky. 690, 186 S. W. 471; First State Bank v. Williams, 164 Ky. 144, 175 S. W. 10; Elsey v. People's Bank, 168 Ky. 701, 182 S. W. 873; Commercial Bank v. Arden, 177 Ky. 520, L.R.A.1918B, 320, 197 S. W. 951.

Banks are creatures of the statute, and their powers are strictly limited and confined by the terms of the statute.

Commercial Bkg. & T. Co. v. Citizens Trust & Guaranty Co. 153 Ky. 571, 45 L.R.A.(N.S.) 950, 156 S. W. 160, Ann. Cas. 1915C, 166.

Messrs. Dorsey & Dorsey for appellee.

Sampson, J., delivered the opinion of the court:

Mollie Pierson and her son, Roy Pierson, went to the appellee bank for the purpose of and did open a checking account with it in the name of Mollie Pierson, by depositing a check made to Mollie Pierson and Roy Pierson jointly for the sum of $703. The Piersons instructed the bank to pay out the money on the check of Mollie Pierson or upon her check by her son, Roy Pierson. Some time thereafter Roy Pierson deposited another $100 to the credit of Mollie Pierson, but this money appears to have belonged wholly to Mrs. Pierson. In the meantime he was issuing checks against the account, signed "Mollie Pierson by Roy Pierson," and these checks were paid. Mrs. Mollie Pierson also issued three small checks, amounting to $16.90 against the account, which were paid. The fund was exhausted, and shortly thereafter Roy Pierson died. Mrs. Mollie Pierson then brought this action against the bank, alleging that she had deposited in the bank the sum of $803 which was her individual funds, and that she had only checked out $16.90, and that the bank wrongfully refused to honor her check for the balance of the $803 which she averred was due her. The bank answered, setting up the fact that it had been instructed by Mrs. Mollie Pierson, in the presence of her son Roy, to honor checks issued by Roy Pierson, signed Mollie Pierson by Roy Pierson, and that it had done so, and that the entire fund had been paid out on such checks, except the $16.90 paid on the checks of Mrs. Pierson. By reply Mrs. Pierson denied that either of the deposits had been made by Roy Pierson, and also denied that when the account was opened by the deposit of the money in the bank she requested the bank to honor or pay any check that either she or her said son might draw against the funds in the bank, either in her name or in the name of her son. She further alleged that she had at no time given written or verbal authority to the bank, or to its agents, to honor checks drawn by her son, Roy Pierson, on the deposit; but she admitted she had drawn the three small checks amounting to $16.90.

A trial was had before a jury, to which the question of fact as to

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whether Mrs. Pierson had authorized the agents of the bank to pay the money out upon checks signed, "Mollie Pierson, by Roy Pierson," was submitted, and the jury found that Mrs. Pierson had authorized the bank verbally to honor checks so signed. Upon motion and grounds for a new trial filed by Mrs. Pierson, the verdict and judgment were set aside and Mrs. Pierson granted a new trial. Upon a second trial before a special judge to whom both the law and facts were submitted, without the intervention of a jury, a like conclusion upon the facts was reached and a judgment entered awarding Mrs. Pierson $83.10, being the balance of the $100, the second deposit made to her account at the bank at the time when no instructions were given by Mrs. Pierson to the officers of the bank to honor any check save her own. The bank was allowed credit for the $703, which it had paid out on the checks signed Mollie Pierson by Roy Pierson. In other words, the court on the last trial held that, as Mrs. Pierson did not give the officers of the bank any instructions as to the payment of the money at the time of the second deposit, $100, the bank had no authority to pay out this money except on her check; and, as she had issued only three small checks amounting to $16.90, there remained of the $100 the sum of $83.10.

As a jury upon the first trial, and the court upon the second trial, found that the deposit of $703 was made by Mrs. Pierson and her son Roy, both being present, to the credit of Mrs. Pierson, with instructions to the officers of the bank to pay the money out on checks signed Mollie Pierson by Roy Pierson, we have only the legal question to consider: May one, when making a deposit in bank, verbally direct the bank to pay out the funds on checks signed by another, and thus relieve the bank, when payment is so made, of responsibility? In other words, if such a direction is given by the depositor to the bank at the time the deposit is made and accepted, and the bank, in pursuance of such instruction, pays out the money upon the check of the person designated, or upon the particular signature agreed upon, will the bank be protected? That is the question presented here. The bank, in receiving the deposit, agreed, on the request of the depositors, to pay out the money on checks signed, "Mollie Pierson, by Roy Pierson." All this entered into the contract by which the deposit was received by the bank, and the bank was bound to comply therewith, and it was fully within its rights when it paid checks so signed. There is no difference in principle between the state of case where A hands money to B, and directs B to pass it to C. The giving of the money to C fully discharges the obligation of the second person, who holds the money as trustee or agent for the first person. If Mrs. Pierson, immediately, upon depositing the money at the bank and before the account was entered upon the books, had said to the cashier, "Give the money to my son Roy," and the cashier had thereupon paid it out to him, and Roy had appropriated it to his own use and benefit, would it be contended that Mrs. Pierson could thereafter sue the bank and recover the money which she had thus directed to be given to her son?

Banks—depositor's consent to check by another.

There is yet another reason why the bank is not liable to Mrs. Pierson. The transaction was between Mrs. Pierson, the bank, and her son, and she directed the bank to honor checks upon the funds signed, "Mollie Pierson, by Roy Pierson," and the bank complied with this request and paid out the money. Upon her representation the bank parted with the money. It is not therefore liable to her again for the amount, because she, by inducing the bank to pay out the money to her son or on his check, is es-

Estoppel—to claim bank deposit.

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topped to now assert claim to the fund.

Mrs. Pierson insists that under § 19 of the Negotiable Instruments Act, which is § 3720b, Kentucky Statutes, which reads, "The signature of a party may be made by an agent duly authorized in writing," the bank had no legal authority to pay the money out upon checks by Roy Pierson, because Roy Pierson had no written authority from Mrs. Pierson to act as her agent in signing her name to checks; that the only authority which the bank had, or that Roy Pierson had, for signing and issuing of the checks or making payment of the money, was verbal. It has been held in the case of Finley v. Smith, 165 Ky. 445, L.R.A.1915F, 777, 177 S. W. 262, and in the case of Inter-Southern L. Ins. Co. v. First Nat. Bank, 178 Ky. 95, 198 S. W. 563, that a signature placed upon a negotiable instrument by an agent is without binding force upon the principal unless the agent be duly authorized in writing. The statute is so plain upon this point that it would be difficult to otherwise construe it. But in the case at bar we do not think the facts come within the rule. Mrs. Pierson instituted this action against the bank, not to enforce or defeat a liability which grew out of the attachment of her signature to a negotiable instrument by her agent, but to recover money from her debtor, the bank, which she had directed the bank to pay in a certain way. We may rely upon the facts as found by the jury and by the court to preclude her. All the authorities agree in holding that a bank is not the agent of a depositor, but that the depositor and bank stand in the relation of creditor and debtor. This being so, the rules of the common law apply in this case, and subsection 19 of § 3720b, Kentucky Statutes, relied on by Mrs. Pierson, has no application.

Banks—verbal direction to pay check—effect of Negotiable Instruments Act.

Aside from all this, the deposit of $703 with which the account was opened was the joint property of Mrs. Pierson and her son Roy, and this was manifested by the fact that the check was made to them jointly. The bank, in possession of these facts, and at the request of the two, placed the money to the credit of Mrs. Pierson alone, with the agreement and understanding that the fund was subject to check by Roy Pierson. In receiving and accepting the deposit, it was agreed between all the parties, including the bank, that the same should be paid out upon checks signed, "Mollie Pierson, by Roy Pierson," or upon checks signed, "Mollie Pierson." This was a special agreement or contract between the depositors on the one side and the bank upon the other, which is inseparable from the deposit contract. The deposit was accepted and received by the bank and was offered by Mrs. Pierson and her son with the specific understanding and agreement that it should be paid out in the manner aforesaid, and the bank, having complied with its part of the agreement and parted with its money, cannot now be compelled to again pay the amount at the suit of Mrs. Pierson.

Same—joint deposit—check by one.

No error appearing to the prejudice of the appellant, the judgment is affirmed.

ANNOTATION.

Effect of verbal order with respect to payment of check or transfer of bank deposit.

By virtue of the implied contract arising from the usage of the banking business a bank is entitled to demand some written evidence of an order of a depositor to pay out or transfer his deposit, and is not bound to act on an oral order. McEwen v. Davis (1872) 39 Ind. 109; First Nat. Bank v.

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Stapp (1905) 165 Ind. 162, 112 Am. St. Rep. 214, 74 N. E. 987, 6 Ann. Cas. 632.

However, in Altman v. Phillips County Bank (1912) 86 Kan. 930, 122 Pac. 874, wherein it was held that a demand by the depositor was not prerequisite to an action by the depositor where it appeared that a demand would have been futile, the court said obiter: "It is true that the usual method of demanding money so deposited is by the presentation of a check of the depositor, but it may be demanded without a check or written order."

But a bank may, if it so desires, waive its right to a written order, and is authorized to pay out a fund on deposit or transfer the deposit to the name of another on the oral order of the depositor. Rice v. Bank of Camas Prairie (1896) 5 Idaho, 39, 47 Pac. 856; Neff v. Greene County Nat. Bank (1886) 89 Mo. 581, 1 S. W. 747; Whitsett v. People's Nat. Bank (1909) 138 Mo. App. 81, 119 S. W. 999; Ellis v. First Nat. Bank (1901) 22 R. I. 565, 48 Atl. 936. See also First Nat. Bank v. Hall (1898) 119 Ala. 64, 24 So. 526.

See also dictum in McEwen v. Davis (1872) 39 Ind. 109; First Nat. Bank v. Stapp (1905) 165 Ind. 162, 112 Am. St. Rep. 214, 74 N. E. 987, 6 Ann. Cas. 631. And see the reported case PIERSON V. UNION BANK & T. Co. ante, 172.

In Whitsett v. People's Nat. Bank (1909) 138 Mo. App. 81, 119 S. W. 999, the action was to recover the amount of a check which the plaintiff had sent by an agent to the defendant bank and which the latter had placed to his credit. It appeared that subsequent to this deposit the plaintiff drew another check on another bank for the exact amount called for by the previous check, payable to one Ferguson. Ferguson presented the second check for payment at the defendant bank, which at first refused payment thereon because it was drawn on another bank; but on Ferguson's representation that he was authorized, verbally, to inform the defendant that the plaintiff wished to transfer or have the amount to his credit in the defendant's possession paid to him (Ferguson), and that the naming of another bank as drawee was a mistake, the cashier of the defendant's bank changed the name of the drawee and paid the money to the payee. It further appeared that the plaintiff had ratified the transaction. It was therefore held that the plaintiff could not recover the sum paid by the defendant to Ferguson, as a written order from the plaintiff was not necessary before the defendant could act as it did. The court said: "Though usually banks do not pay out the money of depositors except on the depositor's checks, a check is nothing more than a written order, and there is no reason in law for saying that a bank may not lawfully pay out or transfer money on a depositor's account by oral order."

In Rice v. Bank of Camas Prairie (1896) 5 Idaho, 39, 47 Pac. 856, the action was to recover a sum of money previously deposited by the plaintiff and another, as partners, with the defendant bank. It appeared that after the deposit was made one of the partners, on his oral request, obtained payment from the bank of the sum deposited. It was held that an instruction which stated to the jury that the defendant had no right to pay out the deposit unless it had received a written order from the partnership firm was erroneous. The court said: "However careless and uncommon may be the payment of money by a bank to a depositor without any written order or receipt, if such payment of the money of the firm was actually so made by the bank to a person authorized to draw such money, it would be a good payment, and the bank would not be further liable."

In Ellis v. First Nat. Bank (1901) 22 R. I. 565, 48 Atl. 936, it appeared that the plaintiffs had accepted a certain assignment, which included a bank account of the assignor. The plaintiffs went to the bank and informed its cashier that they had accepted the assignment, and that one Ellis was authorized to draw checks on the bank deposit. The cashier agreed, orally, to honor the checks drawn by Ellis. It was said that the

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verbal agreement was a sufficient authorization for the transfer of the assigned account to the assignees and for the payment out of said account of checks drawn by Ellis. The court said: "There is no question that the account was not transferred from the name of the American Worsted Company to the names of the assignees by check, though the finding of the trial justice establishes the fact that the cashier did agree to transfer the account, which finding of fact was correct, we think, from the weight of the evidence; and, as said by the supreme court of Indiana in McEwen et al. v. Davis, 39 Ind. 109, 112: 'The banks may pay the money upon an oral order, or transfer it from one account to another, and such oral order will be a sufficient authority and justification for so doing.'"

In Watts v. Christie (1849) 11 Beav. 546, 50 Eng. Reprint, 928, the court, by way of dictum, said: "In the ordinary relation between banker and customer, the customer is a mere common creditor of the banker. A debt is owing to the customer, which he may at any time call on the banker to pay, and which it is the duty of the banker to pay upon his order or check. The customer may order it to be paid himself or anybody else, or he may order it to be carried over or transferred from his own account to the account of any other person, as he pleases. He may do so by a written instrument; and I know nothing to prevent his doing so by a verbal direction, except this: that the bank may require some written evidence of this order to transfer; and I believe there is no necessity for giving a written instrument, except for the purpose of evidence."

In First Nat. Bank v. Hall (1898) 119 Ala. 64, 24 So. 526, the following facts appeared: The defendants, two members of a partnership, had executed a promissory note to the plaintiff, a bank. They had made several deposits with the bank before the note matured. On the day payment on the note became due one of the defendants went to the bank and offered a check in payment of the note. The plaintiff's cashier informed him that the check was not necessary, as the note had already been charged to the defendants' account and marked paid. It further appeared that when the deposits were made the defendants informed the plaintiff, orally, that the note was to be paid out of the funds deposited. It was held that no further authority was necessary before the bank could act as it did. The court said: "A verbal instruction by a depositor to a cashier to apply his money on deposit in a certain way is sufficient authority. A check might furnish more complete and satisfactory evidence of the authority, but a check is not necessary to confer the authority."

In Neff v. Green County Nat. Bank (1886) 89 Mo. 581, 1 S. W. 747, it appeared that the plaintiff had deposited a sum of money with the defendant bank. On the same day that he made the deposit he orally requested the cashier of the defendant bank to transfer the sum to the name of one Spillman, which the cashier did. It was held, in an action by the plaintiff to recover the amount of the deposit, that his oral order to change the account was sufficient and therefore valid and binding. C. M.

THOMAS B. MOORMAN, Appt.,

v.

BOARD OF SUPERVISORS OF CAMPBELL COUNTY et al.

Virginia Supreme Court of Appeals—June 14, 1917.

(121 Va. 112, 92 S. E. 833.)

Execution — return after day — effect.

1. A return of an execution within a reasonable time after the return day is sufficient to bring the judgment within the operation of the statute

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limiting actions upon judgments upon which executions have been issued and returned, where the statute subjects the officer failing to make a return to a fine for every month that the failure continues.

[*See note on this question beginning on page* 181.]

Mandamus — return of process.

2. Mandamus lies to compel return of process.

Equity — absence of execution — effect.

3. A court of equity administering a decedent's estate may apply personal property in satisfaction of outstanding judgments against a distributee, where all interested parties are before the court, although no valid execution has been issued against such property, under the rule that when such court acquires jurisdiction it will retain it and do complete justice between the parties.

Marshaling — liens on real and personal estate — absence of execution.

4. Where a court of equity administering a decedent's estate has before it the interest of a distributee, consisting of both real and personal property, and where an attorney's lien for services has attached to both kinds of property, and a judgment lien exists only against the real estate, the court may, under the doctrine of marshaling, apply the personal estate towards satisfaction of the judgment.

APPEAL by defendant from decrees of the Circuit Court for Campbell County in favor of complainants in a suit, consolidated with a suit to set aside the will of defendant's deceased brother, to subject the interest of defendant in the estate of said brother to the lien of a judgment. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **Caskie & Caskie** and **Wilson & Manson**, for appellant:

When the return day had passed, the sheriff was without authority to extend the life of the writ or the lien of the judgment.

Preston v. Kindrick, 94 Va. 760, 64 Am. St. Rep. 777, 27 S. E. 588; Ramsburg v. Kline, 96 Va. 465, 31 S. E. 608; Graves v. Spry, 4 Penn. (Del.) 396, 55 Atl. 334; Burk, Pl. & Pr. p. 64.

Messrs. **Frank Nelson** and **Alexander H. Light**, for appellees:

Unless the statutory law on the subject would make it the imperative duty of the officer to actually enter his return on this process on the first day of the rules, it would be natural for him to return it on either of the three rule days, as he can do in returning process generally.

Grandstaff v. Ridgely, 30 Gratt. 1; Botts v. Pollard, 11 Leigh, 433.

The return, "No effects," shows that the execution "has not been satisfied."

Slingluff v. Collins, 109 Va. 717, 64 S. E. 1055, 17 Ann. Cas. 456; Hamilton v. McConkey, 83 Va. 533, 2 S. E. 724; 2 Barton, Law Pr. 791; Rowe v. Hardy, 97 Va. 674, 75 Am. St. Rep. 811, 34 S. E. 625; Burk, Pl. & Pr. 659.

Prentis, J., delivered the opinion of the court:

The question in this case arises out of this state of facts: Winnington L. Moorman died leaving a considerable estate of which the appellant, Thomas B. Moorman, his brother, inherited one sixth. Winnington L. Moorman had made a will, but in a suit instituted for that purpose the will was set aside as to its most important provisions. The board of supervisors of Campbell county then instituted its suit for the purpose of subjecting the interest of the appellant in the estate of Winnington L. Moorman to the lien of a judgment recovered many years theretofore. The two suits were thereafter heard together, and, in addition to the judgment reported in favor of the board of supervisors of Campbell county, the commissioner reported another judgment against the appellant, in favor of the county school board of Campbell county. The estate consisted of real and personal property, and is being distributed

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under the direction of the court in these suits.

1. The first assignment of error is that the judgments are barred by the Statute of Limitations, under § 3577 of the Code. It is contended that no valid returns were made upon the first executions issued, which were returnable to the rules on the first Monday in June, 1898, and that therefore the ten year limitation applies.

These returns both read thus: "No effects, June 8, 1898. R. L. Perrow, Sheriff." The allegation is that as the first Monday in June, 1898, was June 6th, and the returns are dated June 8, 1898, therefore the sheriff was without authority and these returns are invalid.

In Hamilton v. McConkey, 83 Va. 533, 2 S. E. 724, the return was, "Not levied by reason of the stay law," and the court determined that to be a sufficient return under the statute, as it then read, to make the limitation twenty years, saying, among other things, that "the question is not whether the return is true or false, sufficient or insufficient."

In Rowe v. Hardy, 97 Va. 675, 75 Am. St. Rep. 811, 34 S. E. 625, the subject is fully and clearly discussed by Riely, J. The return there was in this language: "Return this execution by order of the attorney for the plaintiff, J. C. Rowe, D. for J. L. Waterman, S. G. C." The execution was returnable to February rules 1870, and it was not lodged in the clerk's office until March 19, 1870. This was determined to be a sufficient return to make the limitation twenty years. Since the dates of those returns, the statute, by the Code of 1887, has been amended, and the last clause of § 3577 now reads: "Any return by an officer on an execution showing that the same has not been satisfied shall be sufficient return within the meaning of this section."

In Slingluff v. Collins, 109 Va. 717, 64 S. E. 1055, 17 Ann. Cas. 456, the return was, "No effects known to me this 8th day of November, 1889," but was not signed, and the sheriff was permitted to amend his return in 1908 by having the deputy who made the return upon the original execution sign it.

The clear and necessary implication of § 901 of the Code is that a valid return may be made after the day to which the execution is returnable, because it subjects an officer failing to make returns to a fine "for each month subsequent to the judgment that the failure may continue, until it appear that the return cannot be made, or, if it be the case of an execution or warrant of distress, until it appear that the amount thereof is paid to the party entitled." This statute would fail to accomplish its manifest purpose if such belated return by an officer, which may be thus enforced, is an invalid return. Indeed, if any public official fails to perform a duty upon the date upon which the law requires it to be performed, then he should certainly discharge that duty as soon thereafter as possible, and private rights should not be imperiled by the failure of an official to do his duty upon a specified date. The return of process by an officer is a ministerial act, and mandamus will lie to compel its performance. When performed, it has every legal effect which it would have had if performed on the date required by law, unless some intervening superior right shall have accrued, or there be some express provision of law to the contrary. An execution may not be levied after the date upon which it is returnable, and the imperative duty to return does not arise until it is no longer possible to levy it. The life of the execution ends upon the date to which it is returnable, and the duty to return it then arises. That duty should be promptly performed.

Execution—return after day—effect.

Mandamus—return of process.

Dr. Lile, in an illuminating note on Rowe v. Hardy, in 5 Va. L. Reg. 672, says this: "Another point of equal importance, likewise settled most satisfactorily in the opinion, is that the return of an execution is valid though made after the return day.

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How long afterwards would doubtless depend upon the peculiar circumstances of the case and especially upon the existence or nonexistence of intervening equities of third persons acquired in reliance upon the absence of a return. If justice required it, and there were no rights of innocent third persons affected, doubtless there is no specific limit to the time within which a valid return of an execution may be made, even though the sheriff's term of office may have expired in the meanwhile."

In this case the executions were returned two days after the return day, and this was clearly within a reasonable time; therefore the returns were made in the lawful performance of a delayed duty. Manifestly such action was valid, and the returns sufficient to extend the limitation upon the judgments to twenty years from the return day of the executions.

The trial court rightly decided that the judgments here attacked were valid and subsisting liens, and that the right to issue executions thereon had not expired.

2. Another question arises out of the fact that a second execution had been issued on one of these judgments, the purpose apparently being thereby to acquire a lien upon the share of appellant in the personal estate of Winnington L. Moorman. This execution was adjudged to be invalid, upon the motion of appellant, and the appellee has apparently acquiesced in that decree. The court, however, directed that the entire interest of the appellant in the personal as well as in the real estate should be applied towards the satisfaction of the judgments. It is argued by the appellant that this was error, because, there being no valid execution outstanding, there was no specific lien upon appellant's interest in the personal estate. This is true, but nevertheless, this action may be justified upon two grounds:

(a) Upon the well-settled equitable doctrine, which is thus succinctly expressed in Laurel Creek Coal & Coke Co. v. Browning, 99 Va. 529, 39 S. E. 158: "When a court of equity acquires jurisdiction of a cause for any purpose, it will retain it and do complete justice between the parties, enforcing, if necessary, legal rights, and applying legal remedies to accomplish that end."

While it is hardly necessary to cite authority in support of this rule, we note that it has been applied in Virginia in Moores v. White, 3 Gratt. 143; Miller v. Wills, 95 Va. 337, 28 S. E. 337; Woolfolk v. Graves, 113 Va. 190, 69 S. E. 1039, 73 S. E. 721.

This rule should be applied here. The estate of Winnington L. Moorman was being fully administered. All of the parties interested in the funds were before the court, and there were no other claimants thereof nor any intervening liens or equities in favor of any other persons. The continuing right to issue executions upon the judgments was clear, and the court properly directed the application of the proceeds of the personal property belonging to appellant to the satisfaction of his debt to the appellees.

Equity—absence of execution—effect.

(b) The decree can also be sustained by the application of that favorite of equity, the doctrine of marshaling of assets and securities. In the course of the litigation, the attorneys who had represented the appellant as one of the heirs at law, and had succeeded in setting aside the will of Winnington L. Moorman and thus establishing his rights, were adjudged, under their contract, to be entitled to one third of his interest in the decedent's estate, real and personal. Inasmuch as the lien of the attorneys for their fees was upon both the real and personal property, and the lien of the judgment only upon the real property, the court, if necessary, would have marshaled the assets and applied the fund arising from the personal estate, first, towards the

Marshaling—liens on real and personal estate—absence of execution.

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satisfaction of the lien of the attorneys for their fees, so as to exonerate the real estate therefrom and to leave as large a fund as possible for the satisfaction of the judgments. This established doctrine has been frequently enforced in Virginia, and the cases are collected in 9 Enc. Dig. Va. & W. Va. Rep. p. 595.

The decree will be affirmed.

ANNOTATION.

Execution: effect of return made after return day.

This note does not cover cases like Clingman v. Barrett (1845) 2 Humph. (Tenn.) 20, involving the liability of an officer for failure to make the return; nor does it include the effect of acts or proceedings under the execution subsequent to the return day thereof.

As to the effect of a judicial sale made after the return day of the writ, see note to Ireland v. Linn County Bank, post, 184.

The question of collateral attack on judicial and execution sales is treated in note to Keystone Collieries v. Mudge, 1 A.L.R. 1428.

The Virginia cases, Hamilton v. McConkey (1887) 83 Va. 533, 2 S. E. 724; Rowe v. Hardy (1899) 97 Va. 675, 75 Am. St. Rep. 811, 34 S. E. 625; and Slingluff v. Collins (1909) 109 Va. 717, 64 S. E. 1055, 17 Ann. Cas. 456, cited as supporting the reported case (MOORMAN V. CAMPBELL COUNTY, ante, 177) in holding that the return of an execution after the return day is valid under the statutes therein mentioned, are sufficiently set out in the opinion in the Moorman Case.

It is generally held that the time in which an officer makes return to an execution does not affect the title of a purchaser at the sale. Cloud v. El Dorado County (1859) 12 Cal. 128, 73 Am. Dec. 526; Low v. Adams (1856) 6 Cal. 277; Rich v. Henry (1885) 4 Mackey (D. C.) 155; Aubert v. Buhler (1825) 3 Mart. N. S. (La.) 489; Briant v. Hebert (1878) 30 La. Ann. 1127; True v. Emery (1877) 67 Me. 28; Caldwell v. Blake (1879) 69 Me. 458; Ingersoll v. Sawyer (1824) 2 Pick. (Mass.) 276; Prescott v. Pettee (1826) 3 Pick. (Mass.) 331; Emerson v. Towle (1828) 5 Me. 197; Welsh v. Joy (1833) 13 Pick. (Mass.) 477; Sanford v. Durfee (1837) 19 Pick. (Mass.) 485; Firth v. Haskell (1889) 148 Mass. 501, 20 N. E. 164; Odiorne v. Mason (1837) 9 N. H. 24 (since Statute of 1816, providing that "whenever any execution shall be served and satisfied in whole or in part by being levied on real estate it shall not be necessary to record the same or the return thereon in the clerk's office from which it issued); Smull v. Mickley (1828) 1 Rawle (Pa.) 95.

So the following cases particularly set out, some of which have heretofore been cited, support the general proposition above stated:

Thus it is held in Wheaton v. Sexton (1819) 4 Wheat. (U. S.) 506, 4 L. ed. 626, that a sale under a fi. fa. duly issued is legal as respects the purchaser, provided the writ is levied upon the property before the return day, although the sale is made after the return day, and the writ is never actually returned.

The objection interposed in Cloud v. El Dorado County (1859) 12 Cal. 128, 73 Am. Dec. 526, was that the sheriff made no return under an execution after the levy. The court observed that it often has been held that this is not indispensable. While it is undoubtedly the duty of the sheriff to make this return, and while it is important as evidence of a permanent and authentic character that he should do so, the title of the purchaser does not depend upon his performance of this duty. The purchaser has no control over the conduct of the officer in this respect; nor is it just or reasonable that he should be responsible for the remissness or negligence of the sheriff in the discharge of such an office. The purchaser rests for title upon the judgment, execution, levy, sale, and deed; and he need show no more to entitle him to whatever

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rights the defendant in execution had in the property sold.

The decision in Hogue v. Corbit (1895) 156 Ill. 540, 47 Am. St. Rep. 232, 40 N. E. 219, held that the fact that a sheriff did not return a writ of attachment until after the return day did not prove fatal to the levy and attachment, the court stating the rule that where there is no peculiar statute to the contrary, the failure of the officer to make return on or before the return day will not affect the lien of the plaintiff under the attachment.

It was held in Aubert v. Buhler (1825) 3 Mart. N. S. (La.) 489, that notwithstanding the act providing that the sheriff shall make return on or before the return day, a failure to return a writ of execution until after the return day did not affect the purchaser at the sheriff's sale. "Whether," says the Supreme Court of the United States in a case very similar to this, "the marshal makes a correct return, or any return at all to the writ, is immaterial to the purchaser." Wheaton v. Sexton (U. S.) supra.

Where the law prescribes no definite period for the return of a writ of seizure and sale, it was held in Taylor v. Graham (1866) 18 La. Ann. 656, 89 Am. Dec. 699, that the tardy action of the sheriff in the execution of the writ did not render the sale made under it a nullity. See also to the same effect, Re Hall (1869) 21 La. Ann. 693, and Brooks v. Magee (1910) 126 La. 388, 52 So. 551.

It is held in Briant v. Hebert (1878) 30 La. Ann. 1127, that when the sheriff, after the return day, makes a return of a writ of fieri facias, under which he has seized certain property, and retains a copy of the writ, written by himself, it is not necessary that he should append to the copy his certificate of its correctness, in order to enable him to make a valid sale of the seized property; under such circumstances, the return of the writ after its return day will not affect the validity of the sale. The object of compelling the sheriff to make return of the writ of fieri facias within a specified time, observes the court, was to prevent the future recurrence of the grave abuse of which sheriffs had sometimes been guilty, and to put it in the power of the plaintiff in execution to control the sheriff's official conduct thereon. A sheriff might and sometimes did fail to proceed under the writ, and as he had it in his own custody the plaintiff would be ignorant of what his actions had been. The statute, therefore, provided that he should return the writ within a given time, by which means the party interested in its enforcement learned what official action had been taken under it, and if he did not return it, he became liable to the party entitled to the benefit of it for the full amount specified therein. Rev. Stat. § 3408.

It is stated in Prescott v. Pettee (1826) 3 Pick. (Mass.) 331, that without doubt one who wishes to maintain a title upon a levy in court must show that the execution had been returned. That an interval, however, had passed after the return day, when it had not been returned, if all the other proceedings are perfect, cannot destroy a title even as to a purchaser in the intermediate time, since by going to the registry of deeds he may ascertain how the title stands.

A return may be made a long time after the levy, and it will relate back to the time named in the writ. Firth v. Haskell (1899) 148 Mass. 501, 20 N. E. 164; Prescott v. Pettee (Mass.) supra; Welsh v. Joy (1833) 13 Pick. (Mass.) 477; Walsh v. Anderson (1883) 135 Mass. 65.

In Sanford v. Durfee (1837) 19 Pick. (Mass.) 485, assumpsit for money had and received, brought by the purchaser of personal property sold on execution, against one who claims the same property by virtue of an assignment from the debtor, the sale was held to be valid although no return was made on the execution, and it was not returned to the clerk's office at the return term, nor until after the commencement of this action.

In Firth v. Haskell (1889) 148 Mass. 501, 20 N. E. 164, the officer who made the sale died without fully performing his official duty. He prepared a certificate of his doings, but he left it unsigned, and failed to return the execu-

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tion to the court. The officer who returned it was one "who might by law have served the execution, if originally delivered to him." It was held that the validity of the levy and the sale was unaffected by the delay in making the return, and that the officer completing it was duly authorized to do so under statute. The court observed that the return of an execution is not necessary to protect the purchaser's right; his title rests upon a judgment and execution authorizing the sale, and cannot be affected by mere irregularities of the officer.

It was held in Smull v. Mickley (1828) 1 Rawle (Pa.) 95, that the validity of a purchaser's title was not affected by the fact that the venditioni exponas was not returned until after the acknowledgment of the sheriff's deed, and until long after the sheriff's term of office had expired.

The Vermont case, however, Hall v. Hall (1831) 5 Vt. 304, seems to be opposed to the general rule. It was held in that case that a creditor acquired no title to real estate by the levy of an execution where the officer failed to make and subscribe his return until after the return day of the writ, the whole of the proceedings being void.

The following cases presenting different questions also discuss the effect of a return of a writ of execution after the return day:

Thus, in West v. Nixon (1858) 3 Grant, Cas. (Pa.) 236, involving the right to revive a judgment, it was stated that the sheriff's return upon a scire facias after the return day was good and could be made as well after as before the return day. "In practice this often occurs, and is sometimes allowed to be made after a lapse of several years, to avoid apparent irregularities."

It was held in Wallis v. Bourg (1861) 16 La. Ann. 176, that a sheriff must make a return of the writ on the return day, but he may retain a copy in order to carry out his execution. (Act of 1855, No. 199.) This was the second injunction sued out against the seizing creditors; and the plaintiff contended that, at the dissolution of the first injunction, the return day having expired, the sheriff should have proceeded as if no seizure had been made. The statute, observed the court, regulates this matter otherwise. It authorizes the officer to proceed "in the same manner as though the original writ was in his hands. Sess. Acts 1855, p. 253, § 2."

In Bullitt v. Winstons (1810) 1 Munf. (Va.) 269, involving the question what acts amount to a legal levying of a writ of fieri facias, it is held that a sheriff may be permitted, by order of court, to make a return upon an execution according to the truth of the case, at any time after the return day.

Competency and conclusiveness of return after return day.

In Rich v. Henry (1885) 4 Mackey (D. C.) 155, an action by the voluntary assignee of a debtor for the benefit of creditors, against the marshal who had taken possession of goods under certain writs of execution, plaintiff took exception to the offer in evidence of the execution under which the marshal justified the taking of the goods, and set up title upon the ground that it had not been returned prior to the return date. It is a general principle of law familiar to the practice of this district and to the practice of England through an unbroken succession of decisions, observed the court, that a writ of execution—final process as distinguishable from mesne process—does not require a return to give it vitality. It may be relied upon as an element of evidence at any time in title to land or title to personal property, independent of the fact of its having been returned prior to the return day. Indeed, it is a looseness of practice not to be commended, but still it is a practice justified, that a writ of that sort does not lose any of its efficacy by not having been returned. So far do the courts go with reference to the process of final execution, that even after the return day has passed, and long after the particular sheriff has gone out of his office, still, having life while in office, it is his duty, and the right of nobody else, to perfect that execution which he has levied; and if the succeeding sher-

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iff undertakes under a writ of venditioni exponas or otherwise, to execute that incomplete process, it is null and void, because the former sheriff is the only man who can execute the process. That being so, the fact remains that the return may be made at any time, and when made it is of equal effect and of equal verity as if it had been made prior to the return day. The object of having a return day is that the sheriff in default may be held responsible to the parties if he is guilty of any laches; and that they may have a day in court to vindicate themselves with respect to any right they may have respecting the process of execution. That disposes of the question chiefly relied upon as to the title of the defendant,—that the process was not returned by the return day, and therefore could not have been returned properly.

In Weidman v. Weitzel (1825) 13 Serg. & R. (Pa.) 96, however, a sheriff's return to a fi. fa. of "debt and costs paid," made two years out of time, and not less than a year after action founded on promise by defendant to pay if plaintiff would forbear to proceed with the execution, was held not conclusive upon the plaintiff.

So, in Williams v. Carr (1829) 1 Rawle (Pa.) 420, a suit to determine amount due upon a judgment, it was held that where a sheriff retained a fieri facias in his hands for six years and then returned it nulla bona, such return would not preclude the admission of evidence to contradict it.

J. D. C.

J. C. IRELAND
v.
LINN COUNTY BANK et al.

Kansas Supreme Court — November 9, 1918.

(103 Kan. 618, 176 Pac. 103.)

Execution — sale after return day.

1. A sheriff who has, under an execution, levied on personal property, which property remains in his hands unsold for want of bidders, for want of time to advertise and sell, or for any other reasonable cause, may sell that property after the return day of the execution.

[*See note on this question beginning on page* 189.]

Evidence — judgment against sheriff.

2. Where a sheriff has been indemnified against all costs and damages that he may sustain by reason of levying an execution on certain personal property, and judgment is rendered against him for liabilities growing out of the levy, that judgment, in an action brought by the sheriff against his indemnitors, is only prima facie evidence that the sheriff has been damaged in the amount named therein, where the sheriff did not notify them of the action against him, nor ask them to assist in the defense thereof.

Execution — duty to instruct.

3. It is the duty of an execution creditor, who has indemnified the sheriff, to give the sheriff instructions as to how he shall proceed when he asks for such instructions; and, when the execution creditor fails or refuses to give such instructions, the sheriff, acting in good faith, may proceed according to his best judgment, and the indemnitor will be liable to the sheriff for the damage afterward sustained by him.

Same — attorney's fees.

4. A sheriff who has been indemnified is entitled to recover reasonable and necessary attorney's fees for the services of an attorney in protecting the sheriff's interests in personal property held under the execution, and in resisting actions against him growing out of levying the execution. He is also entitled to recover his mileage fees for the distances necessarily traveled by

Headnotes by MARSHALL, J.

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him in performing his duty under the execution, to recover the fees paid by him for publication of notice of sale of the property under the execution, and to recover the expenses incurred by him in caring for the property.

Appeal — questions disposed of.

5. The questions presented by the defendants on their cross appeal have been disposed of in the determination of the questions presented by the plaintiffs.

CROSS APPEALS from a judgment of the District Court for Linn County in favor of plaintiff in an action on a bond given to indemnify him against harm for levying an execution on the property of an execution debtor; plaintiff appealing from the amount of the judgment recovered by him and the denial of his motion for new trial; and defendants appealing from so much as refused to set aside the judgment in plaintiff's favor and grant them a new trial. *Reversed.*

The facts are stated in the opinion of the court.

Mr. **John O. Morse**, for plaintiff:

Plaintiff was entitled to recover the damage he sustained in caring for and feeding the stock after July 22, 1911, and defendants are liable under their indemnity bond for all of such damage sustained by him up to the time the stock was released.

17 Cyc. 1369; Ansonia Brass & Copper Co. v. Conner, 103 N. Y. 502, 9 N. E. 238; Ritchie v. Higginbotham, 26 Kan. 645; 35 Cyc. 1776.

Mr. **W. P. Dillard**, for defendants:

The judge has no power to order execution returned before the day named in the writ, and such order is void for want of jurisdiction.

Irons v. McQuewan, 27 Pa. 196, 67 Am. Dec. 456.

Where a sheriff has levied upon and advertised for sale property under a general execution, and the return day will expire before the sale day, he should obtain an alias execution.

First Nat. Bank v. Farmers' Nat. Bank, 61 Kan. 620, 60 Pac. 324.

No valid act can be done by an officer under an execution after the return day thereof, except to return the writ.

Shultz v. Smith, 17 Kan. 307.

Mr. **James D. Snoddy** also for defendants.

Marshall, J., delivered the opinion of the court:

The plaintiff commenced this action to recover on an indemnity bond given by the defendants to the plaintiff, while he was sheriff, to indemnify him against loss on account of levying an execution on the personal property of T. N. Marshall, the execution debtor. The plaintiff prayed for judgment in the sum of $629.65 and interest. Judgment was rendered in his favor for $170.85. Each side appeals.

On May 23, 1911, defendant the Linn County Bank caused an execution to issue on a judgment rendered by the district court of Linn county in favor of the bank and against T. N. Marshall. The execution was held by the bank until July 20, 1911, when it was delivered to H. D. Callison, under sheriff at La Cygne, the place of residence of T. N. Marshall. An indemnity bond of $5,000 was demanded by the sheriff and was given by the bank. The bond was signed by each of the defendants. The execution was levied on certain personal property, and that property was advertised for sale on July 3, 1911. On June 24, 1911, T. N. Marshall filed his petition in bankruptcy, and on June 30th the referee in bankruptcy ordered that the execution be stayed and that the bank be restrained from proceeding further thereunder. The property was not sold on July 3d, although the bank then demanded of the plaintiff that he hold the property and sell it at once. The plaintiff refused to sell at that time. Part of the property levied on was at Marshall's farm, and was not taken away, and part of the property was in the Frisco stockyard at La Cygne. On July 3d the plaintiff turned over to Marshall all the property levied on, to be held subject to the orders of the plaintiff as sheriff. July 22, 1911, was the return day of the execution. On July

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24th the plaintiff, without notice to the bank, obtained an order from the judge of the district court at chambers, giving the plaintiff until August 15, 1911, in which to return the execution. On July 24th the plaintiff readvertised the property for sale on August 14th. On July 29th the referee in bankruptcy ordered the trustee to relinquish certain of the property levied on by the plaintiff. After that property had been released, the plaintiff's attorney asked the bank's attorney what the bank wanted done with the property. The bank's attorney declined to give any directions and replied in effect that the plaintiff and his attorney had got into the muddle, and that they could get out of it the best way they could. On August 12, 1911, T. N. Marshall presented to the judge of the district court at chambers an affidavit, showing that Marshall had, on June 24th, been duly adjudged a bankrupt, and the judge ordered that the levy of the execution on the property be set aside and the property be discharged. The property was then released.

Marshall presented to the plaintiff a claim for feed used and services rendered in caring for the property. The plaintiff refused to pay the claim, and Marshall brought an action to recover thereon. The plaintiff did not notify any of the defendants that the action had been commenced, and did not request them to defend or assist in the defense therein. A judgment was rendered against the plaintiff for $478.21 and costs. The plaintiff afterward paid that judgment.

The present action is to recover the amount paid on that judgment, to recover attorney's fees in that action, to recover attorney's fees in the bankruptcy proceeding, to recover mileage of the plaintiff on the execution, to recover the cost of the last notice of sale, and to recover $50 for feed used prior to July 3d. The bank paid for all the feed used and for the care of the property to July 3d, except the $50 and three other items, amounting to $19.48. The court rendered judgment in favor of the plaintiff for feed and pasture for nineteen days, and for the items that made up the $19.48. The nineteen days must have been from July 3d, the day first advertised for the sale, to July 22d, the return day of the execution. The court evidently refused to render judgment for any feed furnished, or services rendered, after July 22d. The court also refused to allow anything for attorney's fees, for the plaintiff's mileage, for the publication notice, or for the $50 paid for feed furnished prior to July 3d.

1. The first proposition argued by the plaintiff is that the judgment in favor of Marshall was at least prima facie evidence that the plaintiff had sustained damages in the amount named in the judgment. That proposition is correct. Topeka v. Ritchie, 102 Kan. 384, 170 Pac. 1003; Train v. Gold, 5 Pick. 380; Lee v. Wisner, 38 Mich. 82; Stewart v. Thomas, 45 Mo. 42; French v. Parish, 14 N. H. 496; Bridgeport F. & M. Ins. Co. v. Wilson, 34 N. Y. 275; Lincoln v. Blanchard, 17 Vt. 464; 14 R. C. L. 62; note in 22 Am. St. Rep. 207.

Evidence—judgment against sheriff.

The judgment would have been conclusive evidence, if the plaintiff had notified the defendants of the action or had requested them to defend therein. 14 R. C. L. 61; 22 Cyc. 106; note in 22 Am. St. Rep. 205; 3 Enc. Ev. 277.

2. The serious problem is the court's refusal to enter judgment for any item of feed or service that arose after July 22d. The plaintiff as well as the bank was compelled by the referee's order to stop proceedings under the execution, and neither could proceed until after the referee directed the trustee to release the property. The plaintiff could then proceed only against the property that had been released. When he, through his attorney, asked for instructions as to how to

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proceed, the bank, through its attorney, refused to give any instruction, and told the plaintiff to get out of the difficulty as best he could. The bank should have then given instructions. When it refused, it was bound by what the plaintiff afterward did, so long as he acted in good faith, and it and its sureties must bear the consequences. If the bank did not want to be bound by the acts of the plaintiff, it should have told him what it wanted done.

Execution—duty to instruct.

3. The defendants argue that the plaintiff could not sell the property after the return day, and should have returned the execution on that day. They also argue that the judge at chambers had no power to extend the time for returning the execution. These arguments compel a determination of the power of the sheriff to sell, after the return day of the execution, the property levied on previous to that day.

Section 448 of the Code of Civil Procedure (Gen. Stat. 1915, § 7352) provides that a sheriff may, for his own protection, take security from the execution debtor for the return to the sheriff of personal property that remains in his hands unsold for want of bidders, for want of time to advertise and sell, or for any other reasonable cause. Section 450 of the Code (Gen. Stat. 1915, § 7354) provides that, when a writ shall issue directing the sale of property previously taken in execution, the clerk shall add a command directing the officers to levy upon lands and tenements, under certain conditions. Section 457 (§ 7361) provides for the issue of other executions when real property has been levied on and not sold. Under these statutes this court has said: "A sheriff cannot legally sell real estate on execution after the return day of the execution, and more than sixty days after its date and after it was issued." Shultz v. Smith, 17 Kan. 306.

This rule has been recognized in Ritchie v. Higginbotham, 26 Kan. 645; Rain v. Young, 61 Kan. 428, 78 Am. St. Rep. 325, 59 Pac. 1068; First Nat. Bank v. Farmers' Nat. Bank, 61 Kan. 620, 60 Pac. 324; Norton v. Reardon, 67 Kan. 302, 100 Am. St. Rep. 459, 72 Pac. 861.

These decisions also recognize a writ directing the sale of property previously levied on, and that writ and its effect are discussed at length in Ritchie v. Higginbotham. The court there said: "The object of this writ, so far as it regards personal property, is to force the sheriff to sell when he has returned a levy unsold for want of buyers, and to bring him into contempt for not selling it."

If the sheriff can be forced to sell under such a writ, he certainly has the power to sell without it. In 10 R. C. L. 1295, this language is used: "As to the right to sell after the return day, there is some conflict. On the one hand, it is held that such a sale is void, and that the sheriff and the attorney who directed the sale are liable as trespassers. On the other hand, many courts have recognized the authority of the sheriff to sell the property after the return day, particularly when the levy is made before the return day. Other courts allow a sale of personalty, but not of realty, after the return day. This distinction is based on the theory that a levy on land, unlike a levy on personalty, vests no right or title in the sheriff, so that he acts under a naked power."

The weight of authority seems to be that the sheriff has power to sell personal property after the return day of his writ, where that property has been levied on before that return day. An exhaustive note on the subject is found in 76 Am. Dec. 83–89. See also note in 28 Am. St. Rep. 120; 1 Freeman, Executions, 3d ed. § 106; 16 Standard Proc. 179; 17 Cyc. 1242; Dennis v. Chapman, 19 Ala. 29, 54 Am. Dec. 186; Cox v. Currier, 62 Iowa, 551, 17 N. W. 767; Savings Inst. v. Chinn, 7 Bush, 539; Sheldon

Same—sale after return day.

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v. New Orleans Canal & Bkg. Co. 11 Rob. (La.) 181; Labiche v. Lewis, 12 Rob. (La.) 8; Barnard v. Stevens, 2 Aik. (Vt.) 429, 16 Am. Dec. 733.

Under these and other authorities that might be cited, it must be held that the sheriff had the power, after the return day of the execution, to sell the property levied on.

4. There remain the questions of attorney's fees in resisting the action of Marshall against the plaintiff, of attorney's fees in looking after the rights of the plaintiff to the property that was involved in the bankruptcy proceeding, of the mileage of the plaintiff, of the fee for publishing the last sale notice, and of the $50 paid for feed prior to July 3.

On the question of attorney's fees, in 14 R. C. L. 59, it is said: "When actions are brought to recover indemnity, either where the right to indemnity is implied by law or arises under a contract, reasonable counsel fees which have been incurred in resisting the claim indemnified against may be recovered as a part of the damages and expenses."

22 Cyc. 89 and 35 Cyc. 1771 make similar statements. Each of those statements is supported by numerous authorities. These statements are unqualified, and, so far as the language given in each of them is concerned, the liability of the indemnitor does not depend upon notice having been given to him by the indemnitee; but in a number of the cases cited the indemnitor had notice, though in a number of the cases there is nothing to indicate that the indemnitor had any notice. It therefore may be argued that, because the defendants were not notified by the plaintiff concerning the action commenced by Marshall, the defendants are not liable for attorney's fees. The argument is not good. The plaintiff had the right to defend in the action against him. That right could not be taken from him by the defendants. They could join or assist in the defense, but they could not exclude the sheriff from participating therein. In the following cases the indemnitors participated in the action with the indemnitees, yet the indemnitors were held liable for attorney's fees: Stewart v. Lapsley, 7 La. Ann. 641; Davis v. Smith, 79 Me. 351, 10 Atl. 55; Chesapeake & O. Canal Co. v. Allegany County, 57 Md. 201, 40 Am. Rep. 430; Clarke v. Moies, 11 Gray, 133.

While the solution of the problem presented is not without difficulty, yet the weight of authority, the better reasoning, and the conclusion of the court is that an indemnitee can recover his reasonable and necessary attorney's fees. The conclusion reached is supported to some extent by First Nat. Bank v. Williams, 62 Kan. 431, 63 Pac. 744; Bourke v. Spaight, 80 Kan. 387, 102 Pac. 253; Topeka v. Brooks, 99 Kan. 643, 164 Pac. 285.

Same—attorney's fees.

It may have been necessary for the plaintiff to employ an attorney in the bankruptcy proceeding. If it was necessary, he can recover the reasonable attorney's fee paid or promised; but, if it was not necessary, he cannot recover.

The fee for the public notice should be recovered by the plaintiff, as well as the mileage for the distances necessarily traveled by him in performing his duty under the execution.

The $50 paid for feed furnished prior to July 3, 1911, should be recovered, if it is found that the amount was so paid.

5. On their cross appeal the defendants contend that no judgment whatever should have been rendered against them. What has been said concerning the question presented by the plaintiff disposes of this contention of the defendants.

Appeal—questions disposed of.

The judgment is reversed, and a new trial is granted.

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ANNOTATION.

Judicial sale made after return day of writ, under a levy made before return day.

I. Generally, 189.
II. Personal property, 189.
III. Real property:
a. Majority rule, 190.
b. Minority rule, 193.

I. Generally.

The question as to grounds of collateral attack on judicial and execution sales is treated in note to Keystone Collieries v. Mudge, 1 A.L.R. 1428.

As to effect upon sale of failure to return the writ until after return day, see note to Moorman v. Campbell County, ante, 177.

It is generally held, in harmony with the reported case (IRELAND v. LINN COUNTY BANK, ante, 184), that, in the absence of a statute to the contrary, an officer, by reason of the title and possession acquired by a previous levy, may sell personal property after the return day of a writ of execution without the issuance of new process; and in some jurisdictions the same rule is adhered to in the case of real property. In other jurisdictions, however, it is held that in the case of real property an officer acquires by a levy neither title nor right of possession, as in the case of personal property, and that realty may not be sold after the return day of a writ of execution without new process, such as a venditioni exponas.

It may be observed from the cases in this note, generally, that where an officer has authority to sell after the return day of a fieri facias, but neglects to do so, a venditioni exponas may be procured to compel him to act; in such case the writ confers upon the officer no authority not previously possessed by him. Where, however, the officer's authority to sell ceases on the return day, and new process is necessary to make a sale thereafter, a venditioni exponas serves the purpose of an execution, and authorizes him to sell.

II. Personal property.

The following cases support the rule that personal property may be sold after the return day without new process, where it has been levied upon before that day: Evans v. Governor (1851) 18 Ala. 659, 54 Am. Dec. 172; Dennis v. Chapman (1851) 19 Ala. 29, 54 Am. Dec. 186; Logsdon v. Spivey (1870) 54 Ill. 104; Willoughby v. Dewey (1872) 63 Ill. 246; Wright v. Howell (1872) 35 Iowa, 288; Cox v. Currier (1883) 62 Iowa, 551, 17 N. W. 767; Rogers v. Darnaby (1843) 4 B. Mon. (Ky.) 241; Rudd v. Johnson (1824) 5 Litt. (Ky.) 19; Colyer v. Higgins (1863) 1 Duv. (Ky.) 7, 85 Am. Dec. 601; Aubert v. Buhler (1825) 3 Mart. N. S. (La.) 489; Rothschild v. Ramsay (1831) 2 La. 277; Gaither v. Martin (1852) 3 Md. 154; Sanford v. Durfee (1837) 19 Pick. (Mass.) 485; Blair v. Compton (1876) 33 Mich. 433; Pettingill v. Moss (1859) 3 Minn. 222, Gil. 151, 74 Am. Dec. 747; Barrett v. McKenzie (1877) 24 Minn. 20; Hombs v. Corbin (1886) 20 Mo. App. 497; Lanier v. Stone (1821) 8 N. C. (1 Hawks) 329; Spang v. Com. (1849) 12 Pa. 360; Evans v. Barnes (1852) 2 Swan (Tenn.) 293; Barnard v. Stevens (1828) 2 Aik. (Vt.) 429, 16 Am. Dec. 738.

The court in Logsdon v. Spivey (1870) 54 Ill. 104, observed that when a sheriff has levied an execution on personal property, and for any reason fails to sell during the lifetime of the writ, the plaintiff in execution may sue out a venditioni exponas, to compel him to sell the property; but only compels him to do what the law required him to do without a writ.

The importance of the distinction between a case where the writ was levied after the return day, and a case where it was levied before the return day but the sale thereunder was made after the return day, is illustrated by Rudd v. Johnson (1824) 5 Litt. (Ky.) 19, supra, where the court, while holding that a sheriff cannot legally receive money on an execution after the return day, unless he has levied on the

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property before, observed incidentally that where the sheriff, before the return day, takes property, he may no doubt sell it afterwards, upon the ground that the authority to take and sell property is entire, and he who begins its execution may finish it.

Where property levied on was sold after the return day of the execution, by consent of the defendant, without a venditioni exponas, the legality of the sale was not questioned in Pickard v. Peters (1842) 3 Ala. 493; the court holding that, there being two executions against the same defendant in favor of different plaintiffs, both of which were levied on a slave, the money realized from a sale after the return day, by agreement between the defendant in the execution and the officer, without a bond of indemnity, neither levy having been discharged, should have been applied to the senior instead of the junior execution.

It is held in Sheldon v. New Orleans Canal & Bkg. Co. (1845) 11 Rob. (La.) 181, that the mere seizure under a fi. fa. of a judgment in favor of a debtor does not devest the property of the latter, and transfer it to the seizing creditor. It gives him, at most, a right to proceed and sell the judgment, and to be paid by preference out of the proceeds. A fi. fa. is the warrant of the sheriff, authorizing him to seize property and keep it, and to sell it to satisfy the judgment under which it was issued. When a seizure has been made, the sheriff is not bound to return the writ, though it has subsequently expired. He may retain it and sell the property seized. If he returns the writ he will be without authority to hold or dispose of the property; and any privilege resulting from the seizure will cease to exist.

III. Real property.

a. Majority rule.

In some jurisdictions no distinction is made between real and personal property, and it is held that, where there has been a previous levy, realty as well as personalty may be sold after the return day without the issuance of new process.

United States.—Wheaton v. Sexton (1819) 4 Wheat. 503, 4 L. ed. 626; Remington v. Linthicum (1840) 14 Pet. 84, 10 L. ed. 364; Mason v. Bennett (1892) 52 Fed. 343; United States v. Hogg (1902) 50 C. C. A. 608, 112 Fed. 909, affirming (1901) 111 Fed. 292.

California.—Smith v. Morse (1852) 2 Cal. 525; Welch v. Sullivan (1857) 8 Cal. 165; Southern California Lumber Co. v. Ocean Beach Hotel Co. (1892) 94 Cal. 217, 28 Am. St. Rep. 115, 29 Pac. 627.

Idaho.—Ollis v. Kirkpatrick (1891) 3 Idaho, 247, 28 Pac. 435.

Illinois.—Phillips v. Dana (1842) 4 Ill. 551; Reddick v. Cloud (1845) 7 Ill. 670; Bryant v. Dana (1846) 8 Ill. 343; Bellingall v. Duncan (1846) 8 Ill. 477.

Indiana.—Tillotson v. Doe (1841) 5 Blackf. 590; Ewing v. Hatfield (1861) 17 Ind. 513; Lowry v. Reed (1883) 89 Ind. 442; Rose v. Ingram (1884) 98 Ind. 276.

Iowa.—Stein v. Chambless (1865) 18 Iowa, 474, 87 Am. Dec. 411; Childs v. McChesney (1866) 20 Iowa, 431, 89 Am. Dec. 545; Butterfield v. Walsh (1866) 21 Iowa, 97, 89 Am. Dec. 557; Thorington v. Allen (1866) 21 Iowa, 291; Moomey v. Maas (1867) 22 Iowa, 380, 92 Am. Dec. 395.

Kentucky.—Allen v. Trimble (1815) 4 Bibb, 24, 7 Am. Dec. 726; Cox v. Joiner (1815) 4 Bibb, 94; Savings Inst. v. Chinn (1870) 7 Bush, 539; Neilson v. Churchill (1837) 5 Dana, 333.

Louisiana.—Rowly v. Kemp (1847) 2 La. Ann. 360; Dorsey v. Carrollton Bank (1850) 5 La. Ann. 237; Fink v. Lallande (1840) 16 La. 547; Black v. Catlett (1842) 1 Rob. 540; Labiche v. Lewis (1845) 12 Rob. 8.

Maryland.—Moreland v. Bowling (1846) 3 Gill, 500.

Massachusetts.—Heywood v. Hildreth (1812) 9 Mass. 393.

Minnesota.—Knox v. Randall (1878) 24 Minn. 479; Spencer v. Haug (1891) 45 Minn. 231, 47 N. W. 794; Bradley v. Sandilands (1896) 66 Minn. 40, 61 Am. St. Rep. 386, 68 N. W. 321.

Nebraska. — Johnson v. Bemis (1878) 7 Neb. 226; Wyant v. Tuthill (1885) 17 Neb. 495, 23 N. W. 342.

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New York.—Wood v. Colvin (1843) 5 Hill, 228; Jackson ex dem. Cooper v. Browner (1831) 7 Wend. 388.

Pennsylvania.—Blythe v. Richards (1823) 10 Serg. & R. 261, 13 Am. Dec. 672; Toonur v. Purkey (1817) 1 Mill, Const. 323, 12 Am. Dec. 634.

South Carolina.—Gassaway v. Hall (1837) 3 Hill, L. 289.

Washington. — Hensen v. Peter (1917) 95 Wash. 628, L.R.A.1918F, 682, 164 Pac. 512.

England.—Jeanes v. Wilkins (1748) 1 Ves. Sr. 195, 27 Eng. Reprint, 978.

It should be observed that the fact that a writ of venditioni exponas may in fact have been issued does not militate against the authority of a case in support of the rule above cited, where it appears that such writ was not the source of the officer's authority, but a mere means of compelling him to exercise his authority. In Southern California Lumber Co. v. Ocean Beach Hotel Co. (1892) 94 Cal. 217, 28 Am. St. Rep. 115, 29 Pac. 627, supra, the court said that a writ of venditioni exponas is sometimes issued, but its issuance is not necessary to justify a sale, as the writ itself is only a direction to perform a duty which already exists, and the sheriff acquires no additional authority from its issuance; and quoted from Freeman on Executions, 2d ed. § 58, as follows: "By a levy, a lien is created whose duration is not limited to the return day of the writ, and from this it must necessarily follow that the officer has authority, notwithstanding the passing of such return day, to make his levy productive by a sale of the realty levied upon; and this authority is not dependent on the issuing of a venditioni exponas, for this writ does nothing more than to compel performance of a pre-existing duty."

In Bellingall v. Duncan (1846) 8 Ill. 477, supra, the court observed that a sheriff did not derive his authority from the writ of venditioni exponas.

In the early case of Wheaton v. Sexton (1819) 4 Wheat. (U. S.) 503, 4 L. ed. 626, supra, the court expressed its surprise that any doubt could be entertained that a sale of real property might be made after the return, if the levy was made before the day.

In United States v. Hogg (1902) 50 C. C. A. 608, 112 Fed. 909, affirming (1901) 111 Fed. 292, supra, Lurton, Ch. J., writing the opinion, it was held that a statute of Kentucky, providing that an officer may at any time after return day, while the original execution is in his hands, sell any property taken in virtue thereof, "providing the levy was made before the return day," was merely declaratory of the common law, and did not interfere with the rule at common law that an execution was leviable as well on the return day as upon any prior day of its life, nor prevent a sale after the return day, under a levy made on the return day.

In Remington v. Linthicum (1840) 14 Pet. (U. S.) 84, 10 L. ed. 364, supra, the court said that as a special return on a fi. fa. is one of the modes of proving a sale and securing the title of the purchaser, the marshal must be authorized to make an indorsement, after a regular return term, in cases when the sale was made afterwards.

In Moreland v. Bowling (1846) 3 Gill (Md.) 500, supra, the court said the sheriff may retain a fi. fa. in his hands after a levy and an ineffectual effort to sell, not only until the return day has passed, but until several terms have passed, and may then sell; it is at the option of the plaintiff to rule the return of the fi. fa. and issue a venditioni exponas, or allow the sheriff to continue to act under the fi. fa.

In Hensen v. Peter (1917) 95 Wash. 628, L.R.A.1918F, 682, 164 Pac. 512, supra, the court said: "It is well settled that, in the absence of a statute to the contrary, an officer who has entered upon the service of an execution by levying the same upon the property of the debtor before the return day may, after the return day and after the actual return, continue to hold the property and prosecute such further proceedings as may be necessary to convert the property, whether real or personal, into money, for the purpose of satisfying the judgment. This is especially so where the sheriff has been interrupted by an injunction, issued at the instance of the judgment debtor."

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In Kentucky, it is held on common-law principles that, where a sheriff has levied on property before the return day of the execution, he may proceed to sell afterwards, as well lands as personal property, even without a venditioni exponas, on the ground that such writ gives no new authority to the officer, but is merely intended to compel him to do that which he was before authorized to do. The doctrine in that state is, that, such being the power of the sheriff under a writ of fieri facias at common law, and not having been repealed by the statute concerning execution, the power still exists. The statute having made lands subject to like process of execution as personal property, it is held that it may be dealt with in like manner. Irvin v. Picket (1814) 3 Bibb (Ky.) 343.

The Missouri Act of 1863 provided "that executions now issued, or that hereafter may be issued, from any court of record, and levied upon real estate, if from any cause the real estate shall not be sold at the next term of the court from which said execution has issued or may hereafter be issued, said execution and the lien of said levy shall remain and continue in full force until a term of court is held in the county where said property can or may be sold." See Stewart v. Severance (1869) 43 Mo. 332, 97 Am. Dec. 392. The position of the Missouri courts under the above statute, with reference to sales after the return day, was stated in Webster v. Woolbridge (1847) 3 Dill. 74, Fed. Cas. No. 17,340, thus: "In Missouri, the executions are returnable in term, and the law has always required execution sales to be made during a term of the circuit court. . . . Without a statute an execution is functus officio after the return day. . . . But by statute, . . . where a levy has been duly made, the power to sell exists after the return day; for the express provision is that if there is a levy when the writ is in force, and the sale is not made at the next term, the execution, and lien created thereby, shall remain and continue in force until the end of the second term, and until a term of court is held at which the real estate may be sold according to law. This obviates the necessity of a new writ, and authorizes a sale upon the writ under which the levy was made, at the second term of the proper court, or, if need be, at a still later term. But when a term arrives at which the land levied on may be legally sold, and it is not, then a sale made afterwards by virtue of the original execution might be and probably would be void." See also the following Missouri cases, decided under that statute; Bank of Missouri v. Bray (1866) 37 Mo. 194 (sale properly set aside in this case, levy and sale having been made after return day); Stewart v. Severance (1869) 43 Mo. 331, 97 Am. Dec. 392 (sale was valid where it was adjourned by consent of plaintiff beyond term fixed); Kane v. McCown (1874) 55 Mo. 181 (sale upheld); Buchanan v. Tracy (1870) 45 Mo. 437 (whether an officer sells before or after the return, whether he makes a correct return, or any return at all, to the writ, is immaterial to the purchaser, provided the writ is duly issued and the levy made before the return); Karnes v. Alexander (1887) 92 Mo. 660, 4 S. W. 518 (where the general execution has been levied by the sheriff on the property of the defendant anterior to the return day, the property so levied upon may be sold at any time after the return day, provided it is sold during the term); Huff v. Morton (1887) 94 Mo. 405, 7 S. W. 283 (sale upheld).

And see also to the same effect Huff v. Morton (Mo.) supra, where the court observes that the writ of venditioni exponas is not a writ of authorization. It may be called a branch of the writ of fieri facias, commanding the officer to execute that writ. It gives the officer no authority not previously possessed by him. Notwithstanding the return of that writ, he could sell the property levied upon as well without as with a venditioni exponas.

In Stein v. Chambless (1865) 18 Iowa, 474, 87 Am. Dec. 411, the court, in answer to the contention that the sale was invalid because made under

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an alias execution, instead of under a venditioni exponas, observed that "regularly, under the directions of the statute, the sale should have been made under this last writ, instead of an alias execution; but, because it was not, it does not follow that the sale was void and ineffectual to pass the title to the purchaser, for the reason that the power of the sheriff to sell under the first execution was not and had not been exhausted at the time of the sale; and for this very sufficient reason perhaps was, that the officer made his return to the effect that he had sold the property under both executions aforesaid. At all events it has long and often been settled by the courts that, if the officer levies before the expiration of the execution, he may complete the sale as well after as before the return day of the writ. Phillips v. Dana (1842) 4 Ill. 558; Wood v. Colvin (1843) 5 Hill (N. Y.) 231."

It is held in Cochrane v. Bank of United States (1845) 11 Rob. (La.) 64, that where the seizure has been made before the return day, he may do all that the law requires of him after that time; where after a seizure under a fi. fa. the sheriff, on being enjoined from further proceedings, returns the writ into court and, under an alias fi. fa., proceeds to sell the property originally seized, without making any new seizure, the sale will be annulled. See also to the same effect, Jacobshagen v. Moylan (1874) 26 La. Ann. 735.

b. Minority rule.

Some authorities, however, make a distinction between real and personal property, and hold in the case of realty that after the return day of an execution, although there has been a previous levy, there is no authority for a sale without new process.

Thus, the rule that real property may not be sold after the return day of an execution or fieri facias without new process, although there has been a previous levy, is applied in the following cases: Morgan v. Doe (1849) 15 Ala. 190; Smith v. Mundy (1850) 18 Ala. 182, 52 Am. Dec. 221; Sheppard v. Rhea (1873) 49 Ala. 125; Hawes v. Rucker (1891) 94 Ala. 166, 10 So. 85; Shultz v. Smith (1876) 17 Kan. 306; First Nat. Bank v. Farmers' Nat. Bank (1900) 61 Kan. 620, 60 Pac. 324. See also, as recognizing the rule, the other Kansas cases: Ritchie v. Higginbotham (1881) 26 Kan. 645; Rain v. Young (1900) 61 Kan. 428, 78 Am. St. Rep. 325, 59 Pac. 1068; First Nat. Bank v. Farmers' Nat. Bank (1900) 61 Kan. 620, 60 Pac. 324; Norton v. Reardon (1903) 67 Kan. 302, 100 Am. St. Rep. 459, 72 Pac. 861; Lehr v. Doe (1844) 3 Smedes & M. (Miss.) 468; Kane v. Preston (1852) 24 Miss. 133; Williamson v. Williamson (1876) 52 Miss. 725; Lackey v. Lubke (1865) 36 Mo. 115; Den ex dem. Seawell v. Bank of Cape Fear (1831) 14 N. C. (3 Dev. L.) 284, 22 Am. Dec. 722; Tarkinton v. Alexander (1836) 19 N. C. (2 Dev. & B. L.) 87; Smith v. Spencer (1842) 25 N. C. (3 Ired. L.) 263 (but see Doe ex dem. Mordecai v. Speight (1832) 14 N. C. (3 Dev. L.) 428, 24 Am. Dec. 266, infra); Barden v. M'Kinne (1826) 11 N. C. (4 Hawks) 281, 15 Am. Dec. 519; Rogers v. Cawood (1851) 1 Swan (Tenn.) 142, 55 Am. Dec. 729; Randolph v. Metcalf (1869) 6 Coldw. (Tenn.) 411; Overton v. Perkins (1837) 10 Yerg. (Tenn.) 328; Lester's Case (1843) 4 Humph. (Tenn.) 383; Haney v. Millikin (1884) 2 Tex. App. Civ. Cas. (Willson) 170; Terry v. Cutler (1893) 4 Tex. Civ. App. 570, 23 S. W. 539; Towns v. Harris (1855) 13 Tex. 507.

In Young v. Smith (1859) 23 Tex. 598, 76 Am. Dec. 81, it was held that a venditioni exponas confers upon the sheriff authority to sell land after the return day, such writ being a lawful process of execution in such cases; see, to the same effect: Lockridge v. Baldwin (1857) 20 Tex. 303, 70 Am. Dec. 385; Hester v. Duprey (1877) 46 Tex. 627; Towns v. Harris (1855) 13 Tex. 507; Mitchell v. Ireland (1881) 54 Tex. 301; Cain v. Woodward (1889) 74 Tex. 549, 12 S. W. 319.

It is held in Cash v. Tozer (1841) 1 Watts & S. (Pa.) 519, that, under an act directing the sale of realty before the return day of a fieri facias, a sale made after the return day, although continued by adjournment from day

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to day, is void, and vests no title in the purchaser.

So, it was held in Dale v. Medcalf (1848) 9 Pa. 108, that a sheriff's sale on a fieri facias after the return day of the writ was void and passed no title to the purchaser, holding unconstitutional the first section of the later Act of 1845, wherein an attempt was made to validate and confirm sales which had been made prior to the passage of the act, and which were void under the ruling of the supreme court in Cash v. Tozer (Pa.) supra.

But in Rhodes v. Barnett (1900) 196 Pa. 429, 46 Atl. 438, a sheriff's sale of realty, adjourned until the Friday after the return day at the instance of and for the benefit of defendants, was held valid. The court, while admitting that the first section of the Act of 1845 was unconstitutional, in accordance with Cash v. Tozer, held constitutional the second section of the Act of 1845, providing that all sales of real estate of sheriffs and coroners shall be made on or before the return day of the writs respectively, or within six days thereafter.

In Doe ex dem. Mordecai v. Speight (1832) 14 N. C. (3 Dev. L.) 428, 24 Am. Dec. 266, it was held that a sale of land under a fi. fa. is good, though made on the day after the process is returnable, before it be returned, and during the term of the court to which it is returnable. The court cited and relied on Laniel v. Stone (1821) 8 N. C. (1 Hawks) 329. That case, however, merely held that a sale of *chattels* after the return day was valid, and expressly refrained from passing upon the question as to realty, since it was not necessary to a decision. The Mordecai Case, though perhaps distinguishable on its facts, seems opposed to the other North Carolina cases above cited, which expressly draw a distinction, in this regard, between a sale of chattels and a sale of real property.

In holding that, while goods may be sold by the sheriff under a previous levy without a venditioni exponas, a sale of land without such authority is inoperative, the court in Doe ex dem. Seawell v. Bank of Cape Fear (1831) 14 N. C. (3 Dev. L.) 279, 22 Am. Dec. 722, observes that, as a venditioni exponas can give no power to sell, it is argued that, ex necessitate, the power given by the fi. fa. must remain. The argument would prove much, were it true. For, although it is admitted that a venditioni exponas confers no power to sell in the case of a chattel levied on under a fi. fa., because the power existed before and therefore could not be conferred again, yet, where the power did not exist before, that reason fails. And if not conferred by the venditioni exponas it does not exist. The reason ex necessitate is, therefore, turned against the defendant. In these cases, we have considered and must consider that a venditioni exponas or order of sale, by whatever name it be called, changes its character from that which it bears where there has been a levy on goods. There it confers no power to sell, because the power existed before. But in the case of a levy on lands it confers the power of sale for the very contrary reason. Where goods are levied on under an attachment, and they are afterwards ordered to be sold, or where lands are levied on by a constable and returned to court and ordered to be sold, the order of sale, whether it be called simply by that name or dignified with the name of venditioni exponas, is the writ which gives the sheriff power to sell.

In observing the distinction between realty and personalty, the court, in Overton v. Perkins (1837) 10 Yerg. (Tenn.) 328, states that goods are movable, and capable of being taken by the sheriff into possession. They are liable to be wasted in the hands of the debtor, and hence the policy of the law in requiring the sheriff to take them into his possession. As possession of goods indicates ownership, and is in fact part of the title to them, it follows that the sheriff would acquire by his levy and possession a special property in them. Having thus deprived the general owner, the debtor, of the possession of his goods, the execution is satisfied by the levy, if the goods are of value equal to its amount. With all these legal consequences re-

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sulting from the levy on goods, it is perfectly consistent that the sheriff should have the power to sell them after the return of the execution. Although the return day of the execution has passed, yet he may make the sale; not because he has made the levy only, but also because he has a special property. The special property he has in the goods must be the principal reason why he can exercise this power. For he may sell, although he has ceased to be sheriff. The power to do so does not exist by reason of his official character, for he has ceased to be an officer; not because of any legal process, for he has none, and that which he had is functus officio. To what principle, then, arising out of his connection with the subject, can this extraordinary power be traced, if it be not mainly to the one before stated, his special property in the goods? It is true, it is not by virtue of this special property alone that he sells, for if that were so he would, as contended by the defendant's counsel, convey only his special property to the purchaser. The law has placed the property in his possession by means of the levy; and that act, having been done by him while he had the lawful authority to perform it, places him in such a situation in relation to the property that a right of disposition is conferred upon him. This principle, growing so naturally out of the situation in which the property is placed in the hands of an ex-sheriff, is liable to no injurious consequences. The property is in his hands; he knows he has it, and he knows he is liable to the creditor for the amount of the execution he had levied on it, and to the debtor for the value of the property over and above the sum for which it was seized. It is his interest to sell, and discharge himself of his trust at once; and it is the interest of both debtor and creditor that he should sell, which either one or the other will not fail to cause him to do, if he delays, by quickening process. Land, however, is not capable of being wasted, and therefore there is no necessity for the sheriff to take possession. He acquires no special property in the land levied on, and can maintain no action in relation to it; nor does a levy on land satisfy the execution. Upon what principle, then, can he sell the land after the return of the fi. fa.? Suppose he goes out of office, and years, as in this case, elapse before the sale is sought to be made; is he to keep in his memory that he once had an execution in his hands, and that he levied it on a particular tract of land? How is he to know that the judgment has not been satisfied, that an alias execution has not been levied on other property and satisfied by his successor? Although an execution may be levied on land, if, before the sale, it shall come to the knowledge of the sheriff that there is personal property on which he can levy, he is bound to abandon the land and seize the personal estate. The levy is not, therefore, a satisfaction of the execution. It does not effect a disseisin of the debtor, nor vest in the sheriff any right. It has no other operation than to fix upon that particular tract as the subject from which the sum claimed in the execution is to be raised. In view of these considerations, we cannot give our assent to the proposition that a levy, on land, one of the slightest and the most undefined acts a ministerial officer can perform, shall have the treméndous effect of devesting the freehold rights of a man in possession, and of investing the sheriff with the power of selling it after the execution has spent its force. See also, to the same effect, Morgan v. Doe (1849) 15 Ala. 190; Den ex dem. Seawell v. Bank of Cape Fear (1831) 14 N. C. (3 Dev. L.) 279, 22 Am. Dec. 722; McCrory v. Chaffin (1851) 1 Swan (Tenn.) 309; Haney v. Millikin (1884) 2 Tex. App. Civ. Cas. (Willson) 170; Young v. Smith (1859) 23 Tex. 598, 76 Am. Dec. 81; Cain v. Woodward (1889) 74 Tex. 549, 12 S. W. 319.

The reason of the distinction, observes the court in Young v. Smith (1859) 23 Tex. 598, 76 Am. Dec. 81, is that the seizure of personal property vests a special property in the sheriff, who may take possession for the purpose of the execution, and complete the sale, after the return day, by virtue of the authority previously given,

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whereas a levy on land gives no right of property or possession. It gives no authority to the officer to take possession and turn the defendant out, but only a right to enter for the purposes of the sale. It confers authority to pass the title merely, not to change the possession; and there must be in existence some lawful authority for the conversion and sale of the property. The execution could confer none after the return day; and hence the necessity of a venditioni exponas for that purpose.

In Haney v. Millikin (1884) 2 Tex. App. Civ. Cas. (Willson) 170, the property in controversy was a house which was built by one party upon land belonging to another. The house was sold under an execution, as the property of the person who built it, and was purchased by appellant. The sale was made after the return day of the execution. It was held that if the house was real property the sale was void and passed no title to appellant. If it was personal property, the sale was valid and passed title.

Where the day fixed in an advertisement for the sale of land under a venditioni exponas was subsequent to the return day of the writ, it was held in Luther v. McMichael (1845) 6 Humph. (Tenn.) 298, that the officer could sell under the alias writ sued out, without again advertising the sale. J. D. C.

LILA M. ENFIELD et al., Appts.,
v.
M. C. STEWART.

New Mexico Supreme Court — August 10, 1918.

(— N. M. —, 174 Pac. 428.)

Replevin — discontinuance — avoidance of recovery.

1. The plaintiff in a replevin suit cannot, by a discontinuance of the action or by suffering a nonsuit, prevent a judgment being rendered against him for damages or for a return of the property.

[*See note on this question beginning on page* 200.]

Same— special owner.

2. Where defendant has only a special interest and the plaintiff is a stranger to the title, then the entire value, according to the ancient doctrine of common law, may be recovered by the special owner, who is answerable over to the general owner for whatever interest remains after the special claim is satisfied.

Chattel mortgage — effect on title.

3. A chattel mortgage, as between the mortgagor and mortgagee, does not convey the legal title to the mortgagee, but is a mere lien.

Headnotes by HANNA, Ch. J.

APPEAL by plaintiffs from a judgment of the District Court for Eddy County granting defendant's motion for judgment and overruling a motion to set it aside, in an action brought to recover possession of an automobile. *Affirmed.*

Statement by **Hanna**, Ch. J.:

The appellant, plaintiff below, brought this action in replevin on the 16th day of June, 1914, in the district court of Eddy county, New Mexico, to recover possession of one Overland automobile, model 71F, No. 593, against defendant M. C. Stewart, sheriff of Eddy county, New Mexico. She recovered possession of the automobile, giving a bond in the sum of $2,000, and al-

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leging the value of the car to be $1,000. She claimed the automobile by virtue of a chattel mortgage, dated January 8, 1914, and made by C. Gertrude Enfield and John B. Enfield, and alleged in her complaint that the said automobile had been levied on by the defendant under an execution issued out of the district court in the case of State National Bank v. John B. Enfield. She further alleged that the mortgage had never been satisfied, and was yet in full force and effect, and that by reason thereof she was entitled to the possession, and set up the further fact that she had been damaged, by reason of her suit, $100 attorney's fees.

The defendant on the 15th day of September, 1914, filed a demurrer, raising but the one question, that attorneys' fees were not recoverable in suits of this character, which demurrer was never disposed of. On the 6th day of September, 1916, the plaintiff's attorney made a motion in open court to dismiss the case, and an order was duly entered dismissing the same. On the 29th day of May, 1917, attorney for defendant filed a motion to reinstate the case on the ground that it had been improperly dismissed, which motion was served upon the attorneys of record for the plaintiff, Osborn & Robinson, who waived the five days' notice of taking up the motion, and also waived "our further appearance as counsel in said cause." On the same day an order was entered, granting the motion to reinstate, and, without filing an answer in the case, the defendant immediately moved for judgment in the sum of $1,000, on the ground that the automobile in question had been removed from the jurisdiction of the court, and that defendant therefore elected to accept a money judgment in lieu of the property replevied in the case. A motion for judgment was granted, and judgment entered on the 29th day of May, 1917.

On August 6, 1917, plaintiff appeared by new counsel, J. B. Atkeson, and moved to set aside the judgment on the following grounds: First, that the entry of judgment was without due process of law; second, that the decree against the sureties was erroneous because the case was dismissed on September 6, 1916, without notice to the sureties, and was subsequently reinstated and put to judgment; third, that the decree was erroneous because at the time it was rendered there was undisposed of a demurrer pending against ¶ 11 of the complaint, and that the defendant had never filed an answer in said cause to the merits of the case, wherefore there was no issue joined; fourth, that at the time the final decree was rendered the attorneys for plaintiff had withdrawn from the case, and neither the plaintiff nor sureties had the notice thereof required by law; fifth, that the decree was erroneous because it recites that attorneys for plaintiff appeared in open court, in face of the fact that it appears that these attorneys had withdrawn from the case; sixth, that the decree was erroneous because it was based upon defendant's motion for judgment on the pleadings, when the defendant had a demurrer pending in said cause and had no answer filed thereto. Other grounds not necessary to be referred to are set out.

The motion to set aside the judgment was overruled. A subsequent motion to set aside the judgment was interposed and overruled, which we do not deem necessary to more particularly refer to.

From the final judgment or decree and subsequent orders overruling the motion to set aside the judgment this appeal was taken.

Mr. J. B. Atkeson for appellants.
Mr. G. W. McCrary for appellee.

Hanna, Ch. J., delivered the opinion of the court:

A motion by appellee to dismiss the appeal and affirm the judgment has been filed in this court, but is not supported by brief. We therefore prefer to consider the case on its merits, and will take up the as-

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signments of error in the order discussed in appellant's brief.

The first and most important assignment of error is that the court erred in rendering judgment for the reason that the defendant had not filed an answer or raised an issue in the case, nor in any manner made claim to the property in controversy, or for the possession thereof, nor in any way claimed said property or damages. A general proposition that a judgment rendered without an issue is a nullity, and the defendant, not having filed an answer in the case, raised no issue, is cited in support of this assignment of error, appellant relying on 11 Enc. Pl. & Pr. 864, and numerous other authorities in support of her contention. It is argued that, the defendant not having filed an answer in the case claiming the automobile or possession thereof, the court could not decree that the defendant have judgment for $1,000, not knowing whether it was the automobile or possession thereof to which the defendant was entitled, if anything. By appellee, it is contended that the attempted dismissal of the action by counsel for plaintiff the plaintiff abandoned her action, and that her failure to prosecute the same with effect and without delay was equivalent to pleading to the complaint, and that no answer was necessary to be filed by defendant to entitle him to the judgment rendered. Appellee cites in support of his contention the case of Brannin v. Bremen, 2 N. M. 40, in which case the territorial supreme court held: "The plaintiff in a replevin suit cannot, by a discontinuance of the action or by suffering a nonsuit, prevent a judgment being rendered against him for damages or for a return of the property. Therefore, where a plaintiff in replevin moved to dismiss the suit at his own costs, and the court ordered the case to be dismissed except to assess the value of the property and the damages and to render judgment for the defendant, it was held that such a 'dismissal' amounted merely to an abandonment of the case by the plaintiff with the consent of the court, and that it did not affect the defendant's right to a verdict and judgment in his favor, nor deprive the court of jurisdiction of the suit."

It was apparently urged in the case referred to that, under the authority of Elsberg v. Maurin, 9 N. M. 645, 43 Pac. 690, which was an early case decided at the January term, 1867, of the territorial supreme court, because the defendant did not plead as the statute says he may do, therefore no judgment could be rendered against the plaintiff. That case did hold that where the defendant files no plea there is no issue, and a trial cannot be had, although plaintiff fails to appear. The case of Brannin v. Bremen, supra, apparently overruled the case of Elsberg v. Maurin, and followed the rule laid down by the supreme court of Missouri in the case of Fallon v. Manning, 35 Mo. 274, that "the defendant's right to a judgment for affirmative relief in no wise depends upon the shape of his answer, but alone (where the plaintiff has possession of the property) upon the plaintiff's failure to prosecute his action with effect."

The supreme court of Missouri in the case referred to said: "If a plaintiff, having got possession of property by means of his suit, should, before answer filed, voluntarily dismiss his suit, can there be any doubt that the defendant would in such case be entitled to have an assessment and judgment for the property taken, or its value?"

By appellant it is argued that by § 4349, Code 1915, which was adopted after the Brannin v. Bremen Case, supra, and after the case of Elsberg v. Maurin, supra, the defendant is required to plead to the complaint in replevin actions, as required by §§ 4106 and 4110 of the Code. In this contention, however, we cannot agree with appellant. It is our opinion that the defendant by his demurrer had pleaded so far as

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he was required to plead, and even though it was his duty to call up the demurrer for final disposition before further steps could be taken in the case, nevertheless the plaintiff cannot, by an abandonment of the action, as is indicated by the attempted dismissal in the trial court of the suit, bar the defendant's rights to a judgment for affirmative relief; and to require an answer after an abandonment of the action would be to call for a useless or idle thing on the part of the defendant. The judgment in the case was evidently rendered under § 4350, Code 1915, providing that, where the plaintiff fails to prosecute his suit with effect and without delay, judgment shall be given for the defendant, and shall be entered against the plaintiff and his securities for the value of the property taken, and double damages for the use of the same from the time of delivery, and it shall be in the option of the defendant to take back such property or the assessed value thereof. In Lamy v. Remuson, 2 N. M. 245, it was held that where plaintiff, by dismissal, abandons his suit in replevin, the court may assess the damages and the value of the property without a jury.

Replevin—discontinuance—avoidance of recovery.

Considerable is said in appellant's brief concerning the alleged withdrawal from the case of the counsel for plaintiff. Just what occurred in this transaction is not made clear by the record, although one of the counsel for plaintiff was put upon the stand and questioned as to what he intended by his so-called "waiver" of further appearance in the case. It is argued that under § 360, Code 1915, it was the duty of the defendant to notify plaintiff of this withdrawal. The trial court evidently found in this connection that there had not been a withdrawal of the appearance of counsel within the purview of § 360 of the Code, and we see no reason to depart from the conclusion arrived at by the trial court.

In our view of the matter there is but one question in the case; that raised by appellant's point that a judgment rendered without issue is a nullity, and that the defendant, not having filed an answer in the case, raised no issue. In this connection it must be borne in mind that by the complaint filed in the case the value of the automobile in question was set up as $1,000; that the defendant elected in his motion for judgment to demand a money judgment in lieu of the return of the property replevied. It was contended that the motion for judgment did not authorize a judgment without a statement and proof of facts authorizing the judgment. In this contention appellants overlook that by their complaint they admitted that the defendant had levied upon the car in question, and was about to sell the car to satisfy the judgment under which the levy had been made. Plaintiff had recovered the possession of the car from the defendant, the sheriff, who had possession of it under the execution referred to, and plaintiff was under the duty and necessity of prosecuting her case with effect and without delay. This she failed to do, and attempted through counsel to dismiss the case after a long interval of time.

The only question that might be urged in this connection is that the interest of the defendant, the sheriff, in question, was a special interest, and was not proven. This question has been disposed of in the case of Dilworth v. McKelvy, 30 Mo. 149, which is cited in the case of Fallon v. Manning, supra. The supreme court of Missouri in the Dilworth Case said: "Where the defendant has only a special interest, and the plaintiff is a stranger, then the entire value, according to the ancient doctrine of the common law, may be recovered by the special owner, who is answerable over to the general owner for whatever interest remains after the special claim is satisfied."

Same—special owner.

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We think this is a correct statement of the law, and adopt it as controlling in this case.

Our conclusion in this respect is undoubtedly correct, unless it can be urged that the plaintiff in the trial court was not a stranger to the title in that she was a mortgagee. In this connection we believe it is pertinent to say that the action is a possessory one, and plaintiff's right to maintain the same would undoubtedly depend on her right to possession, which she did not assert, in the absence of a showing of a breach of the conditions of the mortgage entitling her to enter into possession. The record in this case does not disclose that she has asserted any such right, and we think for the purposes of this case, so far as the record discloses, she is a stranger to the title, in the sense in which it is used in the Missouri case. We are not unmindful either of the fact that a chattel mortgage has been generally held to be a transfer of title of personal property as security for the payment of money, or performance of some other act or condition. 6 Cyc. 985. The right of possession as between the parties, in the case of chattel mortgages, is fully discussed in Jones, on Chattel Mortgages, 5th ed. §§ 426 et seq. As pointed out by that author, New Mexico has provided by statute that "in the absence of stipulation to the contrary a mortgagor of real or personal property shall have the right of possession thereof."

Judge Pope, in a concurring opinion in the case of Stearns-Roger Mfg. Co. v. Aztec Gold Min. & Mill. Co. 14 N. M. 300, 93 Pac. 706, construing the statute referred to, which appears as § 571, Code 1915, pointed out that a mortgage passes no legal estate, but is a mere lien. This rule has been followed in New Mexico as to real-estate mortgages. It is a construction of the statute referred to covering both real and personal property mortgages, and we see no reason why the rule should not be extended to chattel mortgages. We therefore conclude that a chattel mortgage as between the mortgagor and mortgagee does not convey the legal title to the mortgagee, but is a mere lien.

Chattel mortgage—effect on title.

We deem it unnecessary to further consider the assignments of error, and for the reasons stated the judgment of the trial court is affirmed, and it is so ordered.

Parker and Roberts, JJ., concur.

ANNOTATION.

Voluntary dismissal of replevin action by plaintiff as affecting defendant's right to judgment for the return or value of the property.

I. Scope, 200.
II. Rule that judgment for the return of the property or its value may be rendered, 200.
III. Rule that no judgment can be rendered after dismissal, 206.
IV. Statutes prescribing form of judgment, 207.

I. Scope.

This note has been confined in general to cases involving a voluntary dismissal by the plaintiff, and does not include a discussion of cases in which the court has rendered a judgment of dismissal or nonsuit at the instance of defendant. Some cases of the latter kind have, however, been included for illustrative purposes. The note does not cover the question whether, after the term in which the judgment in replevin was rendered, the court can render judgment for a return of the property or its value.

II. Rule that judgment for the return of the property or its value may be rendered.

A majority of cases take the view that, upon the dismissal of an action in replevin by the plaintiff, who has obtained possession of the property, a judgment may be rendered in favor

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of the defendant for a return of the property, or its value. Kneebone v. Kneebone (1890) 83 Cal. 645, 23 Pac. 1031; Marshall v. Livingston (1886) 77 Ga. 21 (defendant had pleaded); Smith v. Adams (1888) 79 Ga. 802, 5 S. E. 242 (upon refusal of plaintiff to prosecute the suit, defendant moved for judgment in his favor); Thomas v. Price (1891) 88 Ga. 533, 15 S. E. 11 (nonsuit upon defendant's motion); Patty v. Piedmont Fertilizer Co. (1916) 146 Ga. 149, 90 S. E. 966; Trammell v. Georgia Engineering & Constr. Co. (1910) 8 Ga. App. 501, 69 S. E. 921; Corbett v. Pond (1897) 10 App. D. C. 17; Hall v. Smith (1859) 10 Iowa, 45; Kerley v. Hume (1826) 3 T. B. Mon. (Ky.) 181; Rogers v. Bradford (1871) 8 Bush. (Ky.) 163; Hays v. Coffee (1890) 12 Ky. L. Rep. 293; Dahler v. Steele (1870) 1 Mont. 206; ENFIELD v. STEWART (reported herewith) ante, 196; Barrett v. Forrester (1800) 1 Johns. Cas. (N. Y.) 247; Pannell v. Hampton (1849) 32 N. C. (10 Ired. L.) 463; Manix v. Howard (1880) 82 N. C. 125; Dawson v. Thigpen (1905) 137 N. C. 462, 49 S. E. 959; Wellman v. Wellman (1897) 11 Ohio Dec. Reprint, 815; Broom v. Fox (1800) 2 Yeates (Pa.) 530; Pee Dee River Lumber Co. v. Fountain (1911) 90 S. C. 122, 72 S. E. 885; Liebmann v. McGraw (1892) 3 Wash. 520, 28 Pac. 1107; Timp v. Dockham (1873) 32 Wis. 146; Jumeau v. Brooks (1901) 48 C. C. A. 397, 109 Fed. 353; Salkold v. Skelton (1619) Cro. Jac. 519, 79 Eng. Reprint, 443. In Corbett v. Pond (1897) 10 App. D. C. 17, a foreign executor brought an action in replevin, and gave bond as usual; the defendant pleaded the usual plea of "Not guilty," and there was a joinder of issue by the plaintiff upon this plea. Before the issue thus made up was tried, the plaintiff died, and his death was suggested upon the record; but no action was taken for three years, when the attorney who had filed the suit for the plaintiff came into court without notice to the defendant or his attorney, and moved that the suit should stand abated, as the same had not been revived, and thereupon an order was entered to the effect that the suit should stand abated and the defendant should go without day; four years afterwards the defendant moved for a jury of inquest to assess the damages sustained, and for a judgment in his favor that the goods taken from his possession under the writ be returned to him with damages, or, upon failure of such return, that he recover against the surety damages sustained, to be assessed by the jury of inquest. It was held that the defendant was entitled to this relief. Some stress was placed upon the fact that the suits were instituted by a foreign executor or administrator, but the decision was not based solely upon this fact. After a plaintiff in replevin has been nonsuited it has been held that the court may render a judgment for the return of the property in Pannell v. Hampton (1849) 32 N. C. (10 Ired. L.) 463. The right to render this judgment, however, seems not to have been disputed in this case, the question being whether the court could render a judgment for damages sustained by the defendant, by being deprived of the property. A judgment for the return of the property was sustained in Kneebone v. Kneebone (1890) 83 Cal. 645, 23 Pac. 1031, but the objection to the judgment in this case was that it should have been in the alternative for the return of the property or the value thereof. It is held in Salkold v. Skelton (Eng.) supra, that, if a defendant in replevin plead property in himself, he may have return without avowry. In the course of the opinion the court states that "if the plaintiff were nonsuited before the declaration the defendant should have return." The defendant is not driven to his action on the bond, where the plaintiff in replevin has dismissed his action after obtaining possession of the property. Marshall v. Livingston (1886) 77 Ga. 21.

The view stated in the foregoing paragraph is supported by practically all the cases cited in this subdivision, but there are various statements of the rule. Some courts, adhering to this theory, state that a replevin action in which the property in dispute has been delivered to the plaintiff cannot be dismissed or abandoned by the plaintiff without the consent of the defendant,

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except upon condition of returning the property or the value thereof to the defendant. In Liebman v. McGraw (1892) 3 Wash. 520, 28 Pac. 1107, the court states: "We do not think the court could properly dismiss the action without also, by its judgment, restoring the defendant to the possession of the property." It has been stated that plaintiff in a replevin action cannot, without the defendant's consent, dismiss the action so as to deprive the defendant of his right to have his damages assessed and return of the property awarded. Hall v. Smith (1859) 10 Iowa, 45. But see Crist v. Francis (1878) 50 Iowa, 257, infra. In Rogers v. Bradford (1871) 8 Bush (Ky.) 163, it was held that a plaintiff in replevin, who had obtained possession of the property on giving bond, could not complain of the overruling of his motion to dismiss the action, the court saying: "One of the conditions of his bond is that he would duly prosecute the suit, and another that he would perform the judgment of the court in the action by returning the property, if a return thereof should be adjudged, and by paying such sums of money as might be adjudged against him, not exceeding double the value of the property and the costs of the litigation. After the execution of this bond and the obtention of the horse he had no right to dismiss his suit, and thereby prevent a judgment. He might, if he chose, abandon the further prosecution of his suit; but the defendant's claim for the return of the property taken from him in advance of judgment by an order of the court, interlocutory in its character, was of the nature of an action against the plaintiff, and could not be defeated or prejudiced by his refusal or failure to comply with the conditions of his bond. The defendant was entitled, in the action in which he had been dispossessed of property to which he asserted claim, to have a judgment for its return, and for such damages as he had sustained by or through the process of the court in such action."

In Hays v. Coffee (1890) 12 Ky. L. Rep. 293, it is held that after the plaintiff in an action for the recovery of personal property has given bond and obtained possession of the property, he has no right to dismiss his action and thus prevent a judgment against himself for a return of the property.

But in Marksberry v. Bramlette (1886) 8 Ky. L. Rep. 536, it is held, according to a syllabus which is all that is reported, that a plaintiff who has obtained possession of personal property without executing a proper bond may dismiss his action, where the plaintiff has not executed a proper bond, for which reason the delivery to him of the property was irregular.

In Pee Dee River Lumber Co. v. Fountain (1911) 90 S. C. 122, 72 S. E. 885, where the plaintiff in a claim and delivery action sought to discontinue the same without returning the property, the court, in denying him this right, referred to a statute providing that, if property has been delivered to the plaintiff and the defendant claim a return thereof, judgment for the defendant may be had for a return of the property, or the value thereof in case a return cannot be had, and damages for taking and withholding the same and states that it is not sufficient to say that the plaintiff has given a bond; that if the property belonged to the defendant he is entitled to its return, or its value in case a return cannot be had, and he cannot be deprived of his right in this regard by a discontinuance.

Whether issues are joined or not in a replevin action, it is necessary for the prevention of fraud to provide, on the plaintiff's motion to dismiss the action, for a judgment of restitution of the property to the defendant, or for its value. Manix v. Howard (1880) 82 N. C. 125. The plaintiff in this case failed to file a complaint, and, after obtaining possession of the property, neglected to take further proceedings in the case. It is stated: "From the case of appeal signed by the counsel, and the record proper, it is to be taken that the plaintiff never filed any complaint at all, but was content, having had possession delivered to him, to let the matter hang. . . . Could the plaintiff elect to dismiss or discontinue the action, or neglect to proceed to issue,

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and by this means force the defendant to sue him in a separate action, or to submit to be kept out of the possession indefinitely? Or did the defendant, in such contingencies, have the right to be put back into the possession by orders in the cause? The proper proceeding to be had in the state of things which occurred in the court below is not specifically pointed out in the Code of Civil Procedure. . . . But, it seems to us, a judgment for the defendant for restitution of the property, if to be had, and, if not, for its value, was just in itself, and the only course that could be adopted to prevent the plaintiff from using the process of the law for his personal advantage merely, instead of as a means of a due and orderly assertion of his right by a trial thereon. It is settled that whenever a party is deprived of the possession of property by the process of the law, in proceedings adjudged void, an order for restitution will be made as a part of the judgment. . . . Upon the same reason, if a plaintiff in the action of a claim and delivery, in which action both parties are actors, procured property to be taken out of the hands of the defendant, and put into his possession, and then dismiss his action, it ought to be a part of the judgment to put the parties in statu quo. Such a course of proceeding seems to be necessary; otherwise the plaintiff, under color of legal process, will perpetrate a fraud on the law and be allowed to keep property, the title to which was prima facie in the defendant, from whom it was taken at the beginning of the suit." Manix v. Howard (N. C.) supra, is approved in an obiter statement in Dawson v. Thigpen (1905) 137 N. C. 462, 49 S. E. 959.

In Jumeau v. Brooks (1901) 48 C. C. A. 397, 109 Fed. 353, holding it not error for the trial court to refuse to allow the plaintiff to take a nonsuit, the court states that if the plaintiff had taken a nonsuit the statutes governing the case provided for a judgment just like the one rendered on the verdict; that is, for the property or its value.

In Barrett v. Forrester (1800) 1 Johns. Cas. (N. Y.) 247, an action of replevin in which the plaintiff, having neglected to bring his cause to trial, moved for judgment as in case of nonsuit, the court states that in an action of replevin both parties are considered equally actors, and either may carry down the cause to the trial, and that a judgment therefore, as in case of nonsuit, is never granted.

In Broom v. Fox (1800) 2 Yeates (Pa.) 530, it is stated that regularly there can be no discontinuance without leave of court, and this rule holds with peculiar force in replevin, as there both the parties are actors. The court, however, in this case, granted a discontinuance, as both parties sought it.

In Petty v. Piedmont Fertilizer Co. (1916) 146 Ga. 149, 90 S. E. 966, a defendant was held entitled to the restitution of his property, or to a judgment for the value of the property, upon the voluntary dismissal of his case by the plaintiff, for the reason that when the plaintiff dismissed his suit it was out of court and beyond the court's jurisdiction, and the court had no discretion to allow it to be reinstated over the objection of the defendant.

It is the theory of some cases that the judgment of dismissal is, in effect, a judgment of restitution. It has been stated that a judgment of dismissal of trover action gave the defendant the right to an immediate restitution of the property, and rendered it the duty of the plaintiff to make the restitution; that this is the legal effect of such a judgment. Freeman v. Norwell (1858) 25 Ga. 359. The court in Trammell v. Georgia Engineering & Constr. Co. (1910) 8 Ga. App. 501, 69 S. E. 921, states that the dismissal of the (replevin) suit amounted in law to a judgment of restitution, and ipso facto entitled the defendant to a writ of restitution or a verdict for the property and its reasonable hire.

It has been stated, in holding that a judgment for a return of the property is proper, that if the plaintiff fails to establish a right to the property, it should be returned to him from whom

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it was taken. Chadwick v. Miller (1858) 6 Iowa, 34. The dismissal of the action by the plaintiff has been treated as an abandonment of his claim to the property. Thus, it is stated in Marshall v. Bunker (1874) 40 Iowa, 121, that upon the dismissal of the action by the plaintiff in replevin he abandoned all claim to the possession of the property, and that upon such abandonment the defendants become entitled to the possession of the property, or to a judgment for the value of their interests therein.

The decision in the foregoing Iowa cases are not based on statute. In Crist v. Francis (1878) 50 Iowa, 257, however, the court was of the opinion that in the absence of a statute the defendants would have had no right to recover their interest in the property after the plaintiffs had dismissed the replevin action; but held that this right was conferred by statute providing that the judgment should determine which party was entitled to the possession of the property, should designate his right therein, and, if such party did not have the possession thereof, should also determine the value of his right and award damages for illegal detention. The court said: "We presume that, as the statute authorizes the defendant to recover the value of his right, the plaintiff cannot defeat him of his remedy in the action by dismissing the suit. The statute quoted would thereby be defeated. It provides that the judgment shall determine which party is entitled to the possession and shall determine the value of his right. To enforce this provision we must hold that the dismissal of the action cannot deprive the defendant of the remedy of judgment for the value of his right in the property. The cause, therefore, should not be finally disposed of upon the dismissal, but should be retained for the purpose of settling defendant's right. This was done in this case. We think the proceeding intended to determine the value of defendant's right, that is, to assess his damage, was correct."

In Chadwick v. Miller (Iowa) supra, the court said: "The only question for this court to answer is, whether the judgment below should award a return of the property; and the answer is, that the judgment is correct in this respect. At the common law, judgment for the defendant was for a return, and his damages and costs. . . . The nature of the case, also, dictates such a judgment. In replevin, the plaintiff takes the property from the possession of another, under a claim of right to either the possession or the property itself, that is, the title or ownership, or to both of these; and it follows, as of course, that if he fails to establish the right set up, the property should be returned to him from whom it was taken; and the condition of the bond to be given by the plaintiff, under § 1996, Code, contemplates a judgment of this kind."

A dismissal of a replevin action by the plaintiff is in effect a final judgment against him, and as between the parties it stands, so far as that action is concerned, as though all the issues offered in the complaint had been found for the defendant; and therefore the defendant is entitled to judgment for a return of the property, as he would be if the cause had been tried and all the issues found in his favor. Dahler v. Steele (1870) 1 Mont. 206. The court said: "It is the object of courts when a cause is dismissed, as far as they can, to put the defendant in the same condition he was before suit. Hence, his costs are awarded him. If he has been arrested, he is released. If an injunction has been awarded, it is dissolved, and he permitted to perform the acts from the doing of which he was restrained. . . . If an attachment has issued, the defendant is entitled to a return upon making a demand of the officer. . . . It would seem that, in an action to recover possession of personal property, something more than costs ought to be awarded. The plaintiff has obtained the possession of the defendant's property by means of a remedy which, by the dismissal of the original action, becomes extinct. He is a party to the action, and if the rule is to be followed that the defendant is, in such cases, to be put in as good

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a condition as he was before the suit, if within the power of the court, I cannot see why a return of the property should not be awarded. If the court can prevent it, a plaintiff ought not, in such a way, to be permitted to recover any advantage."

The court in one case, after stating that ordinarily, upon the dismissal of an action by the plaintiff, the defendant is entitled to costs, continues: "But in an action of replevin, such as the present, the judgment ought, we apprehend, to go further. The defendant in replevin, as well as the plaintiff, is actor, and, according to the well-settled principles of the common law, judgment should, in the general, upon the dismission of the action be given for a return of the property to the defendant. There may be, and probably are, exceptions to this general rule; as, for example, if, when the suit is dismissed, it should appear from the record that the defendant is not entitled to the possession of the property, it might perhaps be irregular for the court to render judgment for the property to be returned to him." Kerley v. Hume (1826) 3 T. B. Mon. (Ky.) 181, holding, in a replevin action against an officer who had taken property under an execution and the execution creditor, that upon a nolle prosequi against the officer the judgment should have been rendered in his favor for a return of the property, the court said that, although these facts appear from the record there is nothing in them which takes the case out of the general principle of the common law, laid down in the text above.

In Michigan, upon a discontinuance of a replevin action by the plaintiff, the defendant may waive a return of the property and have damages assessed for its detention. Thus, in Soper v. Hawkins (1885) 56 Mich. 527, 23 N. W. 206, where the plaintiff, against whom a judgment had been rendered in the lower court upon appeal, entered an order discontinuing his case on appeal on payment of costs to be taxed, and served due notice of the order on the defendant, and the defendant on receipt of the order gave notice to the plaintiff of his election to waive return of the property, and have damages for its detention, the court states that the defendant, upon such discontinuance, could probably make the election he did, to waive return of the property and have his damages and value of the property assessed. In Hoffman v. Gorman (1900) 123 Mich. 485, 82 N. W. 225, where the plaintiff in replevin, upon appeal, dismissed his action, it is stated that upon judgment of nonsuit or discontinuance defendant is entitled either to a return of the property or its value. This right is not confined to voluntary dismissal, but exists also where plaintiff has suffered a nonsuit, or has been otherwise defeated in the action. Pearsons v. Eaton (1869) 18 Mich. 79; Wheeler v. Wilkins (1869) 19 Mich. 78; Stall v. Diamond (1877) 37 Mich. 429; Johnson v. Dick (1888) 69 Mich. 108, 36 N. W. 738; Treadwell v. Paddock (1889) 75 Mich. 286, 42 N. W. 820. It is stated in People ex rel. Taylor v. Tripp (1867) 15 Mich. 518, that, where a plaintiff in replevin has judgment of discontinuance rendered against him by the justice, it is the duty of the justice to proceed and assess damages in favor of the defendant, when he waives a return.

But this right, it seems, must be exercised when suit is discontinued. It is not clear what the contention was in Stack v. Smith (1884) 54 Mich. 238, 19 N. W. 968. It is stated in the brief opinion reported of that case that, if the relator had appeared on the adjourned day of the suit and elected, when plaintiff discontinued the suit, to take judgment for the value of the property replevied from him, he would have been entitled to it, but he did not appear then, and could not appear thereafter and demand that judgment. It seems that in this jurisdiction, upon the discontinuance of a replevin action, the defendant may elect whether to claim or waive a return of the property.

In Fowler v. Hosmer (1895) 105 Mich. 90, 62 N. W. 1028, it was held a replevin action should not have been dismissed upon a stipulation between

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the plaintiff and one defendant, by which the property was to be surrendered to the latter, it appearing that another defendant had an adverse interest. That a settlement with one codefendant binds other codefendants is denied in this case, on a second appeal. Saunders v. Closs (1898) 117 Mich. 130, 75 N. W. 295.

How the value of the property may be determined has been involved in some cases. Thus, in Murphy v. Jenkins (1845) 1 Denio (N. Y.) 669, where, in a replevin action, the defendant noted the cause for trial, and the plaintiff was nonsuited for not appearing when it was called at the circuit, and the defendant, being entitled to a return, elected to take judgment for the value of the property replevied, it was held that such value might be assessed upon a writ of inquiry, there being no trial within the provisions of the statute at which it could be assessed. But where, on a trial, the plaintiff submits to a nonsuit, and the defendant, who is entitled to judgment de retorno elects to take judgment for the value of the property, he may have such value assessed by the jury impaneled in the cause, and need not issue a writ of inquiry for that purpose. Van Alstine v. Kittle (1835) 18 Wend. (N. Y.) 524. The method of determining the value of the property is, however, beyond the scope of the present discussion.

A defendant who has shown himself not entitled to possession of the property is not entitled to a judgment for its return. Thus, where an action in replevin is brought against a sheriff, who has seized goods by virtue of an execution, and the person from whom the goods have thus been seized, such person, who has admitted the right of the sheriff to possession of the goods, is not entitled to a judgment for the possession thereof upon the direction of a verdict of no cause of action. Sheehan v. Golden (1895) 85 Hun, 462, 33 N. Y. Supp. 109. A similar decision appears in Oppenheim v. Lewis (1897) 20 App. Div. 332, 46 N. Y. Supp. 765, affirmed without opinion in (1899) 159 N. Y. 530, 53 N. E. 1129.

In the reported case (ENFIELD v. STEWART, ante, 196), the right of the defendant to a judgment for the return of the property or its value was upheld, although the defendant had not filed an answer or raised an issue in the case. The question of pleading has not been considered in all cases. In some cases, while the defendant has not pleaded, it has been held that, where he asks for a judgment in his favor as soon as the plaintiff moves for a nonsuit, this is tantamount to denying the plaintiff's right to the property, and is, to all intents, setting up a claim to the property. Glenn v. Porter (1900) 68 Ark. 320, 57 S. W. 1109. In this state of the record a judgment for the return of the property or its value, made as a part of the judgment granting the plaintiff's motion for a nonsuit, is not void. Ibid.

Upon a default by the plaintiff in a replevin action it has been held that the defendant is entitled to a judgment of return of the property, without any pleading by him. Wellman v. Wellman (1897) 11 Ohio Dec. Reprint, 815. This, however, seems to have been by virtue of a statute.

It has been held, where the defendant has pleaded title in himself or a stranger, or traverses the title of plaintiff, that the defendant is entitled to a judgment for a return of the property or its value where the plaintiff refuses to prosecute the action and consents to a nonsuit. Timp v. Dockham (1873) 32 Wis. 146. While some emphasis was placed upon the fact that defendant had pleaded, it is not clear that the relief granted was conditioned on this.

The defendant's right to such a judgment has been sustained in this state, where the nonsuit was granted upon the motion of the defendant. Fugina v. Brownlie (1886) 65 Wis. 628, 27 N. W. 408.

III. Rule that no judgment can be rendered after dismissal.

In the absence of a statute expressly authorizing such a judgment, it is the theory of some cases that the court cannot render a judgment for a return of the property after a dismissal by the plaintiff of an action in replevin in which the plaintiff has

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procured the possession of the property. Hulman v. Benighof (1890) 125 Ind. 481, 25 N. E. 549 (action dismissed by trial court upon default of plaintiff, and judgment for return of property entered as part of the judgment of dismissal,—a judgment the supreme court held there was no power to render); Peffley v. Kenrick (1891) 4 Ind. App. 510, 31 N. E. 40; Lapp v. Ritter (1898) 88 Fed. 108 (decided under Indiana law; in this case the complaint had been put in issue by the filing of an answer).

In Crist v. Francis (1878) 50 Iowa, 257, the court stated that, in the absence of statute, the defendant in the replevin action would have been required to bring action on the replevin bond, or recover the property by an action for that purpose. But see Hall v. Smith (1859) 10 Iowa, 45, supra.

No such judgment can be rendered where the plaintiff has dismissed his action before a finding is announced by the court or a verdict returned by the jury. Wiseman v. Lynn (1872) 39 Ind. 250.

No such judgment can be rendered where, at the time of dismissal, the defendants have not been served and have entered no appearance. Thus, in Frost v. Harzfield (1886) 20 Ill. App. 660, it was held that, on dismissal by the plaintiff of a replevin action, in which the property had been taken on the replevin writ, the court had no authority to order a retorno habendo and enter judgment of damages for detention of the property in favor of defendants, on whom there had been no service, and in whose favor no appearance had been entered. But see American Preservers Co. v. Bishop, infra, IV.

When a cause has been dismissed with the permission of the court it is no longer pending; consequently, no judgment can be rendered therein, other than a judgment for costs. Wiseman v. Lynn (Ind.) supra. No statute was in force as at the time of the decision in Mikesill v. Chaney, infra, IV.

That no judgment for a return of the property or its value can be rendered has been held true, even if defendant has pleaded in the action. McIlvaine v. Holland (1849) 5 Harr. (Del.) 226. (Discontinuance after reversal upon appeal. It seems a statute prescribed this judgment).

The remedy of the defendant is an action on the replevin bond (McIlvane v. Holland (Del.) supra), or an independent action to recover the property.

In some cases the right of the defendant to a judgment for a return or its value is made to depend upon proof of his right thereto. In one case in which the court rendered a judgment for the defendant for a return of the property and costs, but refused to render judgment in the alternative for the value of the property if a return could not be had, the defendant appealed from the refusal to render judgment in the alternative for the value of the property. In discussing the question the court states that, upon a dismissal of the action, the defendant was entitled to judgment of dismissal with costs, that "this much followed as a necessary consequence of the respondent's inability and failure to proceed to the trial of the case. But his right to judgment for a return of the property, or for the value if a return could not be had, was not established by such failure on the part of the respondent. It was incumbent on him to establish such right affirmatively. In this respect he was the actor and, in as much as no proof was offered by either party, this question must be determined upon the pleadings alone." The court, having found that the defendant failed to show the ownership and right to possession in himself, concludes that he "was not entitled to the judgment for the value, which he demanded from the court below." Capital Lumbering Co. v. Hall (1882) 10 Or. 202.

IV. Statutes prescribing form of judgment.

The judgment that may be rendered upon the dismissal of a replevin action by the plaintiff, who has procured possession of the property, is regulated by statute in a number of states. Some statutes expressly provide that, upon dismissal or nonsuit, judgment

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shall be entered for defendant for the possession of the property, or the value thereof.

Under such a statute it has been held that a formal judgment that the defendant recover of and from the plaintiff the property taken under a writ of replevin should be entered before an order for a writ of retorno habendo is entered. American Preservers' Co. v. Bishop (1900) 184 Ill. 68, 56 N. E. 382. The failure to enter the formal judgment on the record, however, is not fatal to the validity of the proceeding, where, before appeal is taken, the record is amended so as to show a proper entry of judgment.

The issuance of a writ of retorno prior to the entry of an express judgment that the property be returned to the defendant, although not particularly formal, is good in substance under such a statute, especially where a statute relating to procedure provides that no judgment shall be reversed in the supreme court for mere error in form. American Preservers' Co. v. Bishop (1898) 83 Ill. App. 493, affirmed in (1900) 184 Ill. 68, 56 N. E. 382, upon the ground that judgment for a return of the property had in fact been rendered, where an amended record was filed showing this fact.

In Mikesill v. Chaney (1854) 6 Ind. 52, where the plaintiff at the close of his evidence suffered a nonsuit, it was held, under a statute providing that upon a nonsuit of the plaintiff the defendant is entitled to a return of the goods and shall have judgment and execution therefor, that a fair construction of the statute gave the defendant below the right to show the court that he was entitled to the goods, and that upon such showing the court ought to have entered judgment in his favor for the same; that the object of the statute was to give the defendant the right to have the merits of the cause disposed of while it was yet in court.

Where, upon the plaintiff being nonsuited, a jury is impaneled in pursuance of the statute to inquire into the right of property and right of possession of the defendant to the goods and chattels in controversy, the plaintiff is entitled to offer testimony to prove ownership of the property in himself. Harman v. Goodrich (1847) 1 G. Greene (Iowa) 13.

Under a statute providing that if the plaintiff, without replevin, fail to prosecute his suit with effect and without delay, the justice or jury shall assess the value of the property taken and damages for the use of the same, and in such case the judgment shall be against the plaintiff and his sureties, that he return the property taken or the value so assessed, and also pay double the damages assessed for the detention of the property, it has been stated that the law presumes the title to be in the defendant, who had possession before the suit, where the plaintiff fails to prosecute. Rickner v. Dixon (1850) 2 G. Greene (Iowa) 591.

Under a similar statute in Smith v. Winston (1847) 10 Mo. 299, the defendant was held entitled to a judgment for the return of the property or its value, where the plaintiff, upon his demurrer to a special plea of the defendant being overruled, took a nonsuit. This case is approved in Maids v. Watson (1850) 13 Mo. 544.

In Reed v. Wilson (1850) 13 Mo. 28, it is stated that, upon the plaintiff in replevin taking a nonsuit, the court should assess damages to the defendant.

The plaintiff in a replevin suit cannot, by a discontinuance of the action or by suffering a nonsuit, prevent a judgment being rendered against him for damages, or for the return of the property. Berghoff v. Heckwolf (1858) 26 Mo. 511 (dictum).

It has been held that the right of the defendant to a judgment for a return of the property or its value does not depend upon his answer, but upon the plaintiff's failure to prosecute his action. Fallon v. Manning (1864) 35 Mo. 271. In this case the plaintiff failed to appear when the case was called for trial, and the court proceeded to assess the value of the property and the damages sustained by the defendant, and gave judgment for the return of the property or for

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its assessed value. Subsequently, the plaintiff's counsel contended that the answer was insufficient to justify the court in rendering a judgment for the defendant for any sum whatever, much less for the whole value of the property taken.

In Ranney v. Thomas (1869) 45 Mo. 111, it was held that a plaintiff to whose petition a demurrer was sustained, and to whom leave was granted to file an amended petition, could not thereafter dismiss his suit without having a judgment rendered against him for the return of the property or its value.

After the dismissal of the suit, the plaintiff, who is a stranger to the title to the property taken, cannot litigate against the sheriff from whom the property was taken, and who held it on execution against third parties, the title of the execution debtor, and prevent the assessment of more than nominal damages, on the ground that the defendant had no title or interest. Nelson use of Haenschen v. Luchtemeyer (1871) 49 Mo. 56.

The application of this statute is not prevented by the fact that plaintiff and defendant in the replevin action are husband and wife. Beagles v. Beagles (1902) 95 Mo. App. 338, 68 S. W. 758.

In Brannin v. Bremen (1880) 2 N. M. 40, it is stated that the New Mexico statute is copied from the Missouri statute and, in accordance with the rule of the Missouri cases, the New Mexico court holds that the plaintiff in the replevin suit cannot, by a discontinuance of the action or by suffering a nonsuit, prevent a judgment being rendered against him for damages, or for a return of the property. In an early case in this jurisdiction it was held that, where the defendant has not pleaded in a replevin action, a trial cannot be had under the statute, but judgment should be entered in accordance with the provisions of the statute. Elsberg v. Maurin (1867) 9 N. M. 645, 43 Pac. 690. See the reported case (ENFIELD v. STEWART ante, 196), for comment on this case.

See Pee Dee River Lumber Co. v. Fountain (1911) 90 S. C. 122, 72 S. E. 885, supra.

Under the statute governing Rosenberg v. Flack (1890) 32 N. Y. S. R. 449, 10 N. Y. Supp. 759, where the defendant in an action of replevin recovered judgment by discontinuance, a part of that judgment was for the return of the goods and chattels replevied, unless he elected to waive such return and take judgment for the value of the property.

In Lamkin v. Rosenthal (1896) 5 App. Div. 532, 39 N. Y. Supp. 483, it is stated that the plaintiff in a replevin action cannot be allowed to use the action to take goods away from defendant's possession, and then, by discontinuing the action, deprive him of the means of establishing his title and of the judgment of the court restoring them to him; that the defendant has the right and must be allowed to take the verdict of a jury upon the question of his ownership of the goods. No statute is referred to in this connection.

See Jumeau v. Brooks (1901) 48 C. C. A. 397, 109 Fed. 353, supra.

Some statutes authorize the court, notwithstanding the dismissal, on application of the defendant, to inquire into the right of property and possession, and compel delivery thereof to the party entitled thereto, by attachment or otherwise. Such a statute governed the decision in McVey v. Burns (1875) 14 Kan. 291; Higbee v. McMillan (1877) 18 Kan. 133; Thomas v. First Nat. Bank (1912) 32 Okla. 115, 12 Pac. 272, Ann. Cas. 1914A, 376. The statute governing Malsby v. Gamble (1911) 61 Fla. 310, 54 So. 766, provided that when it shall appear upon the nonsuit of the plaintiff, or upon trial, or otherwise, that the defendant is entitled to the goods, and the goods have not been redelivered to the defendant, the judgment shall be entered up against the plaintiff for possession of the property, and against him and his sureties for the value thereof and costs.

A defendant who proceeds under such a statute, and is successful, may have an order for the return of the property or its value. Higbee v. Mc-

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Millan (1877) 18 Kan. 133; Thomas v. First Nat. Bank (1912) 32 Okla. 115, 121 Pac. 272, Ann. Cas. 1914A, 376; Roberts v. Wilkins (1913) 40 Okla. 138, 137 Pac. 111.

Under such a statute it is held, in Nebraska, that the plaintiff in a replevin action cannot dismiss and defeat the right of the defendant to this trial of the right of property and a judgment for its return or its value, in case it is adjudged to him. Ahlman v. Meyer (1886) 19 Neb. 63, 26 N. W. 584; Garber v. Palmer B. & Co. (1896) 47 Neb. 699, 66 N. W. 656; Vose v. Muller (1896) 48 Neb. 602, 67 N. W. 598; Saussay v. W. J. Lemp Brewing Co. (1897) 52 Neb. 627, 72 N. W. 1026; Houck v. Linn (1898) 56 Neb. 743, 77 N. W. 51; Reid, M. & Co. v. Panska (1898) 56 Neb. 195, 78 N. W. 534; Morrill v. McNeill (1901) 1 Neb. (Unof.) 651, 91 N. W. 601.

Under such a statute it has been held that a plaintiff in a replevin action cannot dismiss his suit without prejudice before its final submission to the jury, since such dismissal would be an idle ceremony, for the defendant would then have the right to proceed under the statute to have the right to the property tried. Aultman v. Reams (1880) 9 Neb. 487, 4 N. W. 81.

That, upon dismissal of an action in replevin, the defendant is entitled to have the right of property determined, is held in Moore v. Herron (1885) 17 Neb. 697, 24 N. W. 425.

A plaintiff, having obtained possession of property under a replevin action, cannot be permitted to escape liability by dismissing his action. Cook v. Vaughn (1901) 1 Neb. (Unof.) 244, 95 N. W. 333.

An early Tennessee statute provided that upon the failure of the plaintiff to prosecute his suit for any cause whatever, without first having returned the property replevied to the defendant and satisfied him for the detention, the court shall impanel a jury to ascertain the value of such property and damages for the seizure and detention thereof. When the jury has so found, the court shall give judgment that the plaintiff return the property to the defendant and pay the damages assessed, or, on his failure to return the property, that the defendant recover of the plaintiff its value and damages, and that execution issue accordingly. Nashville Ins. & T. Co. v. Alexander (1849) 10 Humph. (Tenn.) 378.

See Crist v. Francis (1878) 50 Iowa, 257, supra.

When a suit of replevin has been dismissed for lack of jurisdiction upon motion of the defendant, it has been held that the defendant is not entitled to have the right of property determined and a judgment for the return thereof or its value rendered in his favor. State ex rel. Savage v. Letton (1898) 56 Neb. 158, 78 N. W. 533; Reid, M. & Co. v. Panska (1898) 56 Neb. 195, 78 N. W. 534; Bolin v. Fines (1900) 60 Neb. 442, 83 N. W. 740. On the contrary, it has been held, upon a suit in replevin being dismissed upon defendant's motion, that the defendant is entitled to a judgment for the value of the replevied property, under a statutory provision that, if plaintiff fail to establish his right to the property, the defendant shall recover such damages as under the circumstances he shows himself entitled to. Funk v. Israel (1857) 5 Iowa, 438.

In some cases statutes that do not expressly regulate this matter have been looked to as indicating the policy of the law. In Glenn v. Porter (1900) 68 Ark. 320, 57 S. W. 1109, under a statute providing that the plaintiff may dismiss any action in vacation on the payment of costs, except an action to recover the possession of specific personal property when the property has been delivered to the plaintiff which is stated to show the policy of the law, it is held that a judgment rendered as a part of the order directing a nonsuit, that the property or its value be returned to the defendant, is not void.

In Sanderson v. Lace (1849) 2 Pinney (Wis.) 257, the defendant, upon a discontinuance by the plaintiff, waived a judgment for the return of the property and elected to take his judgment

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for its value under the statute. The provisions of the statute are not set out in the report of this case.

Upon a nonsuit granted at the motion of the plaintiff, the court in Bath v. Ingersoll (1876) 1 Wyo. 280, discharged the jury and impaneled a new jury for the purpose of inquiring into the defendant's damages, and this action of the trial court is stated by the supreme court to be sustained by the provisions of the Code.

Pabst Brewing Co. v. Butchart (1897) 68 Minn. 303, 71 N. W. 273; Clark v. Clinton (1883) 61 Miss. 337, and Bernheimer v. Martin (1889) 66 Miss. 486, 6 So. 326, sustaining a judgment for the return of the property or its value, were decided under statutes, the provisions of which are not set out. It is held in Bernheimer v. Martin (Miss.) supra, that, upon the dismissal of an action by the court upon motion of the defendant, the court should award a writ of inquiry and give judgment on the bond of the plaintiff, in favor of the defendant, for the property seized, or its value as assessed as provided in a section of the Code. W. A. E.

STATE EXCHANGE BANK OF ELK CITY, OKLAHOMA, Plff. in Err.,
v.
NATIONAL BANK OF COMMERCE OF ST. LOUIS, MISSOURI, et al.

Oklahoma Supreme Court—July 23, 1918.

(— Okla. —, 174 Pac. 796.)

Bills and notes — indorsement without recourse — effect.

1. One who indorses a promissory note without recourse is a qualified indorser and warrants to subsequent bona fide holders: First, that the instrument is genuine and what it purports to be; second, that he has a good title to it; third, that all prior parties had capacity to contract; fourth, that he has no knowledge of any fact which would impair its validity or render it valueless. He cannot, in an action in which he is made a party, brought by a subsequent bona fide holder of the instrument, impeach such warranty by objecting to a judgment against the maker and prior indorsers in favor of such holder.

[*See note on this question beginning on page* 216.]

Pleading — demurrer — misjoinder of parties.

2. A misjoinder of parties or excess of parties cannot be taken advantage of by demurrer, but can only be reached by motion filed before joining issues on the merits.

Same — misjoinder of causes of action.

3. A misjoinder of causes of action can only be reached by special demurrer setting forth distinctly the grounds of objection, and cannot be met by general demurrer or by objection to the introduction of evidence.

Parties — misjoinder — waiver.

4. If one who is made a party to a cause of action appears and answers a cross action against him without objection to being made a party or to misjoinder of causes of action, he will be deemed to have waived all objections, except that the facts alleged are not sufficient to state a cause of action against him.

Pleading — denial and demurrer — effect.

5. A pleading containing a general denial and also matter in the nature of a general demurrer will be treated as an answer and the demurrer will be considered as waived; and, if the pleading attacked by fair legal intendment states a cause of action, though defectively stated, an objection to the introduction of testimony will be overruled.

Headnotes by STEWART, C.

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ERROR to the District Court for Beckham County to review a judgment in favor of plaintiff and cross petitioners in an action on a promissory note. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. **Keaton, Wells, & Johnston, R. N. Linville,** and **Frank L. Williams,** for plaintiff in error:

There was error in admitting the issue of conversion raised by Mayer and Rosser against the State Exchange Bank, including error in admission of evidence.

Horne v. Oklahoma State Bank, 42 Okla. 37, 139 Pac. 992; Cooper v. German Nat. Bank, 9 Colo. App. 169, 47 Pac. 1041; Bankers' Nat. Bank v. Security Trust Co. 19 S. D. 418, 103 N. W. 654; Bolton v. Donavan, 9 N. D. 575, 84 N. W. 357; Goodrich v. Williamson, 10 Okla. 588, 63 Pac. 974; Clay County Land Co. v. Alcox, 88 Minn. 4, 92 N. W. 464; Merchants' Trust Co. v. Bentel, 10 Cal. App. 75, 101 Pac. 31; Curtis v. First Nat. Bank, — Tex. Civ. App. —, 138 S. W. 795; Johnson v. Johnson, 157 App. Div. 289, 142 N. Y. Supp. 416; Raleigh & G. R. Co. v. Western & A. R. Co. 6 Ga. App. 616, 65 S. E. 586; Keel v. Gribble-Carter Grain Co. — Tex. Civ. App. —, 143 S. W. 235.

Declaring as a matter of law that plaintiff, National Bank of Commerce, took the note bona fide and without notice of equities, was error.

Keisel v. Baldock, — Okla. —, L.R.A.1916D, 632, 154 Pac. 1194; Brinton v. Maxey, — Okla. —, 157 Pac. 1048; Hayes v. State Exch. Bank, — Okla. —, 153 Pac. 1112; Jenkins v. Planters' & M. Bank, 34 Okla. 607, 126 Pac. 757; Simmons Nat. Bank v. Dilley Foundry Co. 95 Ark. 368, 130 S. W. 162; Re Hopper-Morgan Co. 156 Fed. 525; Morrison v. Farmers & M. Bank, 9 Okla. 697, 60 Pac. 273; Abmeyer v. First Nat. Bank, 76 Kan. 877, 92 Pac. 1109; Sixth Nat. Bank v. Lorillard Brick Works Co. 29 Jones & S. 29, 18 N. Y. Supp. 861; Sutherland v. Mead, 80 App. Div. 103, 80 N. Y. Supp. 504; Union Nat. Bank v. Winsor, 101 Minn. 470, 118 Am. St. Rep. 641, 112 N. W. 999, 11 Ann. Cas. 204; Queen City Sav. Bank & T. Co. v. Reyburn, 163 Fed. 597; Bank of Big Cabin v. English, 27 Okla. 334, 111 Pac. 386; Ives v. Jacobs, 21 Abb. N. C. 151, 1 N. Y. Supp. 330; Nickerson v. Ruger, 76 N. Y. 279; Holeman v. Hobson, 8 Humph. 126; Youngberg v. Nelson, 51 Minn. 172, 38 Am. St. Rep. 497, 53 N. W. 629; Watson v. Cheshire, 18 Iowa, 202, 87 Am. Dec. 382.

Messrs. **Asp, Snyder, Owen, & Lybrand** and **Echols & Merrill,** for defendants in error:

It was proper to permit the issue between defendants Mayer and Rosser and the State Exchange Bank to be raised and tested in this suit.

31 Cyc. 223, 224; 5 Enc. Pl. & Pr. 674, 678; Kimball v. Connor, 3 Kan. 414; Allen v. Tritch, 5 Colo. 223; Hopkins v. Gilman, 47 Wis. 581, 3 N. W. 382.

Any objection which defendant State Exchange Bank might have made to the order of the court making it a party defendant and requiring it to answer the cross complaint of its co-defendants Mayer and Rosser was waived.

5 Enc. Pl. & Pr. 679; Boland v. Ross, 120 Mo. 208, 25 S. W. 524; Fitzgerald v. Cross, 30 Ohio St. 444; Weaver v. Kuchler, 17 Okla. 189, 87 Pac. 600; 6 Enc. Pl. & Pr. 379.

The peremptory instruction in plaintiff's favor was right.

Voss v. Chamberlain, 139 Iowa, 569, 19 L.R.A.(N.S.) 106, 130 Am. St. Rep. 331, 117 N. W. 269; Wood v. Brush, 72 Cal. 224, 13 Pac. 627; Hall v. Kimball, 77 Ill. 161; Fossitt v. Bell, 4 McLean, 427, Fed. Cas. No. 4,958; Crayton v. Clark, 11 Ala. 787; Weader v. First Nat. Bank, 126 Ind. 111, 25 N. E. 887; Johnson v. Amana Lodge, 92 Ind. 150; Backus v. Spaulding, 129 Mass. 234; Linn v. Rugg, 19 Minn. 181, Gil. 145; Northern Bank v. Kyle, 7 How. (Miss.) 360; Davis v. Neligh, 7 Neb. 84; Bliss v. Houghton, 13 N. H. 126; Furniss v. Gilchrist, 1 Sandf. 53; Sherwood v. Francis, 11 Vt. 204; Parker v. Kendall, 3 Vt. 540; Davis v. Miller, 14 Gratt. 1; Stewart v. Anderson, 6 Cranch, 203, 3 L. ed. 199; King v. Conn, 25 Ind. 425; Martin v. Trobridge, 1 Vt. 477.

The note herein sued upon was, as a matter of fact, negotiable.

Louisville Bkg. Co. v. Gray, 123 Ala. 251, 82 Am. St. Rep. 120, 26 So. 205; Forbes v. First Nat. Bank, 21 Okla. 210, 95 Pac. 785; Security Trust & Sav. Bank v. Gleichmann, 50 Okla. 441, L.R.A.1915F, 1203, 150 Pac. 908.

Stewart, C., filed the following opinion:

The plaintiff, National Bank of Commerce of St. Louis, brought its

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action as the alleged holder in due course of a negotiable promissory note signed by D. A. Mayer and indorsed by Calvin M. Rosser, payable to the order of State Exchange Bank of Elk City, the action being against Mayer and Rosser as defendants. Mayer and Rosser filed answer to the petition, and also filed cross petition against State Exchange Bank of Elk City, and asked that the State Exchange Bank of Elk City be made a party to the action. As grounds for defense and for cause of action against the State Exchange Bank of Elk City, said defendants admit the execution and indorsement of the note, and, in substance, urge that the note is non-negotiable, but, if not non-negotiable, the plaintiff is not a holder in due course; that at the time of the execution of said note and as a part of the same transaction certain collateral notes amounting to $28,500 were placed in the State Exchange Bank of Elk City as collateral security for the payment of the note in question, and other notes aggregating in all the sum of $26,500; that the State Exchange Bank has collected all of said collateral notes and converted and used the proceeds thereof, the total sum collected being more than sufficient to discharge and satisfy the note sued upon and all other indebtedness for which such collaterals stood security; that the State Exchange Bank fraudulently separated the note set out in plaintiff's petition from the collateral notes, and wrongfully and fraudulently disposed of said note and collected the collateral notes. Defendants pray the court that the State Exchange Bank be made a party defendant; that the plaintiff take nothing by its suit, but that, in case a judgment be rendered against the defendants, they have judgment against the State Exchange Bank in the same amount, together with costs and other proper relief. To which answer and cross petition the plaintiff filed general denial, and the State Exchange Bank appeared and filed what was styled answer to cross petition, containing a general denial, and also matters in the nature of a general demurrer, making no objection on the ground of misjoinder.

Charles E. Davis, William D. Leonard, and J. A. Moon were officers of the State Exchange Bank, Charles E. Davis being president, and being also associated with Mayer and Rosser as a member of the Wichita Falls & Northwestern Town-Site Company. The town-site company had acquired property and also incurred considerable indebtedness. The note sued upon, though signed only by Mayer and indorsed by Rosser, was the obligation of the town-site company; there were several other notes signed by individuals of the town-site company which were town-site obligations, and the town site had notes owing to it in the approximate sum of $28,500, being the notes used as collateral, as aforesaid. The lands of the town-site company were sold to Kemp & Kell, capitalists, of Wichita Falls, and as a part of the consideration Kemp & Kell guaranteed the payment of the notes owing to the town-site company, which guaranteed notes were placed as collateral to the note sued upon and other obligations of the town-site company evidenced by divers notes signed by individual members of such town-site company. Afterwards the State Exchange Bank, by its president, Charles E. Davis, indorsed the note in question without recourse, and the said Charles E. Davis, William D. Leonard, and J. A. Moon then indorsed the note as collateral to obligations individually owed by them to the plaintiff. The obligations for which said note was collateral maturing and being unpaid, the plaintiff caused the collateral held to be sold at public sale, and the plaintiff at such sale purchased the note, afterwards bringing action on the same against Mayer and Rosser. The evidence fully established the fact that the State Exchange Bank had realized on the collateral notes held by it

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more than a sufficient sum to pay the note in question and the other obligations for which such collaterals were held as security, but there is no evidence to show that the plaintiff was not a holder in due course. The court peremptorily instructed the jury to return a verdict for the plaintiff, and submitted the issues arising on the cross action by Mayer and Rosser against the State Exchange Bank to the jury under instructions as to the law. The jury returned a verdict as instructed against the defendants, Mayer and Rosser, and in favor of the plaintiff, and also a verdict in favor of Mayer and Rosser and against the State Exchange Bank of Elk City. Judgment was accordingly rendered by the court, from which the State Exchange Bank duly prosecuted error. The plaintiff in error, State Exchange Bank, summarizes the error complained of as follows: "(1) Error in admitting the issue of conversion of collateral raised by Mayer and Rosser against the State Exchange Bank, including error in admission of evidence; (2) error in declaring as a matter of law that the plaintiff, National Bank of Commerce, took the note bona fide and without notice of equities; (3) error relating to instructions."

Exhaustive briefs have been filed in this case. They but tend to becloud the issues properly before this court, which may be resolved into a few simple propositions easy of solution.

Under the first assignment above, the plaintiff in error discusses at length the question of misjoinder of parties and of causes of action, it being urged that the State Exchange Bank was not a proper party, and that plaintiff's cause of action and the issues between Mayer and Rosser on one hand and the State Exchange Bank on the other were not properly joined. Many authorities are cited, with which authorities we take no issue. However, we think that the course pursued by the State Exchange Bank in the trial court absolves us from the duty in this case of passing upon the questions of misjoinder and necessary parties. Section 4742, Revised Laws 1910, provides: "When the defects do not appear upon the face of the petition, the objection may be taken by answer; and if no objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, except only the objection to the jurisdiction of the court, and that the petition does not state facts sufficient to constitute a cause of action."

Subdivision 5 of § 4740, Revised Laws 1910, authorizes a demurrer to be filed when several causes of action are improperly joined, and § 4741 reads: "The demurrer shall specify distinctly the grounds of objection to the petition. Unless it do so, it shall be regarded as objecting only that the petition does not state facts sufficient to constitute a cause of action."

It is clear from the statutes cited that any defects as to misjoinder of causes of action apparent on the face of the pleadings must be pointed out by demurrer specifically and distinctly, or the same will be regarded as waived. If there is a misjoinder or excess of parties, a demurrer will not lie, but the objection must be made by motion, and, where there is a misjoinder of causes of action, a special, but not a general, demurrer will lie. Hurd v. Simpson, 47 Kan. 372, 27 Pac. 961; Choctaw, O. & G. R. Co. v. Burgess, 21 Okla. 653, 97 Pac. 271. In Choctaw, O. & G. R. Co. v. Burgess, supra, Chief Justice Williams says in the syllabus: "When a person is unnecessarily joined as a party plaintiff, it does not result in a defect of parties plaintiff, but in a misjoinder or excess of such parties, and cannot be taken advantage of by demurrer, but by motion, and, when such question is not raised in the court below, will not be entertained on appeal."

Pleading—demurrer—misjoinder of parties.

Same—misjoinder of causes of action.

In the case at bar, no objection

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was made by demurrer, motion, answer, or otherwise to the State Exchange Bank being made a party to the action, or to any misjoinder of causes of action. It is too late after the State Exchange Bank, without objection, has submitted to a trial in a court of competent jurisdiction on the merits, because of an adverse result, to attempt to raise any question of misjoinder. Such speculation and trifling with the courts cannot be indulged. If the judgment of the trial court had been favorable and had become final, it would not have been void and could have been pleaded as res judicata by the appellant, in case another action had been brought by Mayer and Rosser. Such being true, the judgment as rendered is binding on the appellant, unless reversed for errors duly preserved.

The appellant objected to the introduction of any evidence on the cross petition. The only question that could be presented by such an objection was the sufficiency of the cross petition, and such was the ground urged at the time the objection was made. We are of the opinion that the cross petition, though somewhat awkward, does state a cause of action against the State Exchange Bank. Under our procedure, an answer and demurrer cannot be combined. When a party files a pleading containing matter both in the nature of a general demurrer and of an answer, such pleading will be treated as an answer and the demurrer considered waived. In the absence of demurrer filed and urged, all legal intendments will be indulged in favor of the pleading attacked. There is no necessary averment in which the cross petition is wholly lacking.

Parties—misjoinder—waiver.

Pleading—denial and demurrer—effect.

The plaintiff in error is in no position to urge the second assignment made. No issues were made between the plaintiff and the State Exchange Bank. The defendants Mayer and Rosser are the only parties that could be heard to object to the court peremptorily instructing a verdict for the plaintiff. They bring no error to this court, and the judgment against them has become final. The State Exchange Bank cannot object to the judgment on the note in favor of the plaintiff for the further reason that it is an indorser of the note. It is true the indorsement was without recourse, and therefore qualified, but a qualified indorser is a warrantor to a certain extent and cannot impeach the warranty. Section 4115, Revised Laws 1910, defines the warranties implied by a qualified indorsement as follows: "Every person negotiating an instrument by delivery or by a qualified indorsement warrants: First. That the instrument is genuine and in all respects what it purports to be. Second. That he has a good title to it. Third. That all prior parties had capacity to contract. Fourth. That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless. But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee. The provisions of subdivision 3 of this section do not apply to person negotiating public or corporate securities, other than bills and notes."

Bills and notes—indorsement without recourse—effect.

From which section it follows that the State Exchange Bank, being a qualified indorser, and not merely a transferrer of the note by delivery, warranted to all subsequent holders that it had a good title and had no knowledge of any fact which would impair the validity of the note or render it valueless. Instead of objecting to the judgment in favor of the plaintiff, it was the duty of the bank to have insisted on the judgment being so rendered. It is true that the State Exchange Bank could have pleaded and shown, if the facts so warranted, that it had not indorsed the note, or that the obligation for which it was placed as col-

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lateral with the plaintiff was discharged, but such was not done, nor was there any other issue offered as between the plaintiff and the State Exchange Bank. To hold that the State Exchange Bank could be heard to object to the judgment on the note in favor of the plaintiff would be license for the rankest of bad faith in dealing with commercial paper. To permit the State Exchange Bank to prevent a judgment on the note for reasons resting solely on the alleged wrongful acts of such bank would countenance and authorize unmitigated perfidy.

The third assignment of error relates to the instructions given by the court and to requested instructions which were refused. The first instruction given by the court, of which complaint is made, is that the court instructed the jury to return a verdict for the plaintiff and against Mayer and Rosser for the amount due on the note. This contention is interwoven with the second assignment of error, and therefore has been disposed of. The objection made to the other instruction is that the jury was authorized by the court to consider a new and foreign issue, in that the State Exchange Bank is made a party and the issue between it and the other defendants tried. This objection likewise has been answered. Special instruction No. 1, requested by the State Exchange Bank and refused by the court, seeks to single out one of the witnesses and to charge upon his credibility. The court properly instructed in general upon the credit to be given the witnesses; the giving of the instruction requested would have been manifest error. Requested instruction No. 2, which was refused by the court, is to the effect that, if Mayer and Rosser engaged with the State Exchange Bank to procure funds in violation of law, they could not recover from the State Exchange Bank. There is no such issue in the pleadings; and, if there were, there is not sufficient evidence in the record to support the same. Defendants Mayer and Rosser requested certain special instructions as to the issues between such defendants and the plaintiff, National Bank of Commerce, which requested instructions were refused by the court, and which refusal the appellant, State Exchange Bank, seeks to show was prejudicial to its rights. The appellant is in no position to complain as to any instructions defining the issues between such defendants and the plaintiff. As before stated, there were no issues between the plaintiff and the appellant, State Exchange Bank. The special instructions presented by Mayer and Rosser were not requested by the appellant, and therefore no exceptions were preserved by the appellant to the denial of any such request; hence the State Exchange Bank cannot complain in this court of the refusal of the court to give the instructions.

After carefully considering all of the matters set forth in the respective briefs, and giving due weight to the argument and to each of the authorities cited, we have come to the conclusion that the trial court did not commit reversible error, and the judgment is therefore affirmed.

Per Curiam:

Adopted in whole.

ANNOTATION.

Undertaking of one who indorses a note without recourse.

I. Nature and effect of indorsement without recourse:
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II. Liability for fraud, 219.

III. Liability as vendor under implied warranties:
- a. In general, 220.
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I. Nature and effect of indorsement without recourse.

a. In general.

An indorsement of a promissory note without recourse transfers the indorser's title to and property in the note. Seeley v. Reed (1886) 28 Fed. 164; Hudson v. Shepard (1900) 90 Ill. App. 626; Brotherton v. Street (1890) 124 Ind. 599, 24 N. E. 1068; Watson v. Chesire (1865) 18 Iowa, 202, 87 Am. Dec. 382; Whittenhall v. Korber (1874) 12 Kan. 618; Challiss v. McCrum (1879) 22 Kan. 157, 31 Am. Rep. 181; Nelson v. Southworth (1914) 93 Kan. 532, 144 Pac. 835; Goolrick v. Wallace (1913) 154 Ky. 596, 49 L.R.A.(N.S.) 789, 157 S. W. 920; Burks v. Ritter (1888) 10 Ky. L. Rep. 232; Waite v. Foster (1851) 33 Me. 424; Richardson v. Lincoln (1842) 5 Met. (Mass.) 201; Schmidt v. Pegg (1912) 172 Mich. 159, 137 N. W. 524; Crosby v. Roub (1863) 16 Wis. 616, 84 Am. Dec. 720; Lyon v. Ewings (1863) 17 Wis. 61; Keyes v. Waters (1846) 18 Vt. 479.

An indorsement on a note to the payee that "I assign this note" to a specified person, "without recourse," was, in Brotherton v. Street (1890) 124 Ind. 599, 24 N. E. 1068, supra, held sufficient to pass title, although there was a plain misuse of the words.

In Bradley v. Cassells (1903) 117 Ga. 517, 43 S. E. 857, an indorsement without recourse of a purchase money note, in which title to the property for which it was given was reserved in the payee, was held not to carry with it the title to such property, to the indorsee.

One who transfers a note "without recourse" is not liable as an indorser. By such an indorsement he indicates that he is unwilling to make himself responsible for the payment of the instrument. Bankhead v. Owen (1817) 60 Ala. 457; Neely v. Black (1906) 80 Ark. 212, 96 S. W. 984; Thompson v. First State Bank (1897) 102 Ga. 696, 29 S. E. 610; Watson v. Chesire (1865) 18 Iowa, 202, 87 Am. Dec. 382; Wolcott v. Timberman (1870) 28 Iowa, 454; Challiss v. McCrum (1879) 22 Kan. 157, 31 Am. Rep. 181; Bank of Kansas City v. Mills (1880) 24 Kan. 604; Ware v. McCormack (1894) 96 Ky. 139, 28 S. W. 157, 959; Goolrick v. Wallace (1913) 154 Ky. 596, 49 L.R.A.(N.S.) 789, 157 S. W. 920; Waite v. Foster (1851) 33 Me. 424; Upham v. Prince (1815) 12 Mass. 14; Richardson v. Lincoln (1842) 5 Met. (Mass.) 201; Youngberg v. Nelson (1892) 51 Minn. 172, 38 Am. St. Rep. 497, 53 N. W. 629; Charnley v. Dulles (1845) 8 Watts & S. (Pa.) 353; Epler v. Funk (1848) 8 Pa. 468; Crosby v. Roub (1863) 16 Wis. 616, 84 Am. Dec. 720; Seeley v. Reed (1886) 28 Fed. 164; Welch v. Lindo (1812) 7 Cranch (U. S.) 159, 3 L. ed. 301.

In Calhoun v. Albin (1871) 48 Mo. 304, it is held that an indorser without recourse has no further concern with the note as an original party to it.

It is pointed out in an English case involving a check which was indorsed without recourse that an indorser may relieve himself from liability by adding after his name, the words "sans recourse." Wakefield v. Alexander (1901) 17 Times L. R. (Eng.) 217.

And in Goupy v. Harden (1816) 7 Taunt. 159, 129 Eng. Reprint, 64, 2 Marsh. 254, Holt, N. P. 342, 17 Revised Rep. 478, holding an agent who had indorsed foreign bills which he had purchased for his principal, to be liable on his indorsement, the court said: "If he desired to avoid liability he should have indorsed the bills without recourse."

Indorsement of a note without recourse, made by the secretary of a corporation, under its direction, shows that he intended to indorse the note, and not to guarantee its payment. McIntire v. Preston (1848) 10 Ill. 48, 48 Am. Dec. 321.

An indorsement "without recourse" of notes and a chattel mortgage given to secure their payment is held in Lissner v. Stewart (1912) — Tex. Civ. App. —, 147 S. W. 610, to pass the ownership of the notes and lien to the transferee without any liability or guaranty of the payment of the notes.

The words "without recourse" in a notarial act of assignment transferring notes secured by a mortgage

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amount to nothing more than a stipulation of nonwarranty. Templeman v. Hamilton (1885) 37 La. Ann. 754.

One of the joint makers of a note secured by a mortgage, to whom the note and mortgage have been assigned, and who transfers it without recourse on either of the makers of the note individually, as shown by an assignment of the mortgage securing the note, is not liable as an indorser or as maker, where the language of the assignment makes it clear that the parties had in mind that the assignee thereof look only to the land for the payment of the indebtedness, having assumed the payment of the note "as between the makers." Security State Bank v. Clarke (1916) 99 Kan. 18, L.R.A.1918E, 160, 160 Pac. 1149.

One who assigns accounts and a note, which assignment is expressed in a schedule of the property transferred, to be without recourse, is not liable on his indorsement, where the indorsement and execution of the assignment without recourse were concurrent acts, which, construed together, constitute but one contract, which, by its terms, cuts off any recourse on the assignor. Collier v. Mahan (1863) 21 Ind. 110.

Sureties on a note which is transferred without recourse, and who thereafter transfer it "without recourse on us in law or equity," are relieved from liability thereon to the indorsee. Britnell v. Smith (1914) 189 Ala. 440, 66 So. 569.

Erasure of the words "without recourse" on an assignment of a promissory note by consent of the parties because the assignee was unwilling to take it in that form and the assignor believed that it "made no difference" whether the words were erased or not is not a contract of guaranty, enforceable in an action by the assignee against the assignor. Lyons v. Divelbis (1853) 22 Pa. 185.

The holder of a note who knows that the indorsement of the payee, which reads "with recourse," was intended to be "without recourse," is not a bona fide holder of the note, and cannot enforce it against the indorser, although he purchased the note before maturity and paid value for it. Johnson v. Williard (1892) 83 Wis. 420, 53 N. W. 776.

A payee who is liable as indorser cannot evade liability as against subsequent indorsers by placing the words "without recourse" beneath his indorsement and agreeing with the holder to pay the note in case he is unable to collect it from the subsequent indorsers. Freile v. Rudiger (1918) — N. J. Eq. —, 104 Atl. 142.

b. Demand and notice.

An indorser without recourse, irrespective of the limitation in his indorsement, cannot be held liable where he has not been notified of the dishonor of the note by the maker. Rayne v. Ditto (1875) 27 La. Ann. 622; Duffy v. O'Conner (1874) 7 Baxt. (Tenn.) 498 (holding demand and notice are necessary to impose liability upon an indorser who assigns a note on condition that the maker and indorsers be exhausted before recourse is had to him).

c. Form and manner of indorsement.

A charge that the words "without recourse" must be written in such a manner that they can be read by a man "of ordinary ability and understanding," in order to exonerate the indorser, is erroneous. Hayden v. Strong (1881) 23 Hun (N. Y.) 527.

To avoid the necessity for construction and the probability of misconstruction, it would always be better for the one desiring to escape the liabilities of an indorser to add the words "without recourse." Spencer v. Halpern (1896) 62 Ark. 595, 36 L.R.A. 120, 37 S. W. 711.

To relieve one who puts his name on the back of a negotiable promissory note, from liability as an indorser, he must insert in the contract itself, words clearly expressing such an intent, such as the phrase "without recourse." Maine Trust & Bkg. Co. v. Butler (1891) 45 Minn. 506, 12 L.R.A. 370, 48 N. W. 333; Copeland v. Burke (1916) — Okla. —, L.R.A.1917A, 1165, 158 Pac. 1162.

A party to a note may limit or qualify his indorsement by use of the words "without recourse," and this

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may follow the name of the party as well as precede it. Fitchburg Bank v. Greenwood (1861) 2 Allen (Mass.) 434.

The words "without recourse," preceding the signature of an indorser are not available to subsequent indorsers. Doom v. Sherwin (1894) 20 Colo. 234, 38 Pac. 56.

The words "without recourse" following the name of one indorser and preceding that of another, may be shown to apply to the former, even against a bona fide holder. Corbett v. Fetzer (1896) 47 Neb. 269, 66 N. W. 417.

II. Liability for fraud.

On the assignment of a note "without recourse" there is no liability over for failure to collect the note unless there was fraud or misrepresentation in making the assignment. Prettyman v. Short (1852) 5 Harr. (Del.) 360.

One who transfers a note without recourse is liable to the vendee for fraudulent representations as to the solvency of the maker, in reliance on which the transfer was accepted. Harton v. Scales (1823) Minor (Ala.) 166; Dayton v. Tillotson (1874) 39 Iowa, 404 (holding an indorser without recourse liable for falsely pretending that the makers of the note were responsible and that it was collectable); Watson v. Chesire (1865) 18 Iowa, 202, 87 Am. Dec. 382 (holding indorser without recourse liable where he falsely represented the note to be all right).

False and fraudulent statements that notes transferred without recourse were "good," or "as good as gold," are not necessarily the statement of an opinion, but if made and intended to be accepted as a statement of fact, they are actionable. Doolen v. Hulsey (1917) — Tex. Civ. App. —, 192 S. W. 364.

But false representations made by the indorser of notes secured by a chattel mortgage, as to the financial responsibility of the makers of the notes, and as to insurance on the mortgaged property, are held not to render the indorser liable as a guarantor in a suit on the notes and to foreclose the mortgage lien, since the indorsement passed the ownership of the notes and lien without any liability or guaranty of the payment of the notes. Lissner v. Stewart (1912) — Tex. Civ. App. —, 147 S. W. 610.

One of two joint makers of a note, who, by a writing on the back of the instrument, states that he has paid it and transferred it to a specified person, and signs his name, with the words "without recourse" prefixed, is not liable thereon to the transferee in the absence of mistake and where no deceit or fraud was practised by him. Cross v. Hollister (1892) 47 Kan. 652, 28 Pac. 693.

That the payee named in a note indorsed by him without recourse was guilty of a fraud on the maker by the indorsement and transfer of the note, and would be responsible to him for the injury done him thereby, does not make the indorser liable to the indorsee where the latter's right to demand and receive payment of the note from the maker is not affected. Craft v. Fleming (1863) 46 Pa. 140.

One who assigns without recourse a note given him for the purchase price of land, and represents to the assignee that the note is a lien upon the land and that he will not execute a deed until all the purchase money, including the assigned note, has been paid, is liable to the assignee, where, at the request of the purchaser of the land, he fraudulently conveys the property to a third person without retaining a lien. Briney v. Hayden (1890) 12 Ky. L. Rep. 357.

One who delivers a note made by others in payment of his account, which note was accepted in the belief that he had signed or indorsed it so as to become liable on it, and who later, when asked to indorse it, added the words "without recourse" to his signature, is liable as an original promisor, and the words "without recourse" are mere surplusage. Childs v. Wyman (1857) 44 Me. 433, 69 Am. Dec. 111. The court said: "If the defendant intended by writing those words under his name, to avoid the liability incurred by his signature, that would not avail him. In a case where a note was written thus: 'Borrowed

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of J. S. £50, which I promise *not* to pay,' it was rightly held that 'the word *not* shall be rejected, for a man should never say, I am a cheat and have defrauded.' "

III. Liability as vendor under implied warranties.

a. In general.

An indorsement without recourse leaves the indorser liable as vendor. Challiss v. McCrum (1879) 22 Kan. 157, 31 Am. Rep. 181; Bevan v. Fitzsimmons (1890) 40 Ill. App. 109.

b. Warranty of title.

The transferrer of a negotiable promissory note without recourse engages that he has good title to it. Youngberg v. Nelson (1892) 51 Minn. 172, 38 Am. St. Rep. 497, 53 N. W. 629; Burks v. Ritter (1888) 10 Ky. L. Rep. 232.

An indorsement without recourse does not, under the express terms of the Iowa Code, obviate the liability involved in the warranty of title. State ex rel. Carroll v. Corning State Sav. Bank (1908) 139 Iowa, 338, 115 N. W. 937.

One who transfers a negotiable promissory note by qualified indorsement without recourse warrants, by the express terms of the Oklahoma statute, that he has a good title to the note. STATE EXCH. BANK v. NATIONAL BANK (reported herewith) ante, 211.

But it is held in Wolcott v. Timberman (1870) 28 Iowa, 454, that one who assigns to another without recourse all his interests in certain notes, claims, and shares of stock, in consideration that the assignee will pay a judgment on which both parties are liable, is not liable as vendor in case of the failure of the title to a note assigned, since the words "without recourse" were evidently intended to qualify the assignor's liability, and cannot operate unless they relieve him from liability as a vendor, for he is liable only as such.

c. Competency of parties.

There is an implied warranty in the case of an indorsement without recourse, unless it is otherwise agreed, that the parties to the instrument are sui juris and capable of contracting. Watson v. Chesire (1865) 18 Iowa, 202, 87 Am. Dec. 382.

d. Validity of obligation.

One who transfers a negotiable promissory note by qualified indorsement without recourse warrants, by the express terms of the Negotiable Instruments Law, that he has no knowledge of any fact which would impair the validity of the note or render it valueless. STATE EXCH. BANK v. NATIONAL BANK.

It will be noted that the warranty imposed upon a qualified indorser by the Negotiable Instruments Law, and set forth in the preceding paragraph, is much more restricted than that imposed on a general indorser, who, by the terms of the statute, warrants "that the instrument is at the time of his indorsement valid and subsisting." From this it would appear that the indorser of a note without recourse does not impliedly warrant that the instrument is an enforceable obligation.

There are, however, dicta in several cases which intimate that the transferrer of a negotiable promissory note without recourse engages that it is a valid obligation of those whose names are upon it. Youngberg v. Nelson (1892) 51 Minn. 172, 38 Am. St. Rep. 497, 53 N. W. 629; Seeley v. Reed (1886) 28 Fed. 164; McDonnell v. Burns (1897) 28 C. C. A. 174, 55 U. S. App. 233, 83 Fed. 866.

The words "without recourse" in an indorsement were held in Ober v. Goodridge (1896) 27 Gratt. (Va.) 878, to relieve the transferrer from liability because of the insufficiency of proof of the dishonor of the note to charge prior indorsers on the note, it appearing that the transfer was made pending an action by the transferrer against the maker and prior indorser, and that the evidence as to notice of dishonor was on file in that action and known to the transferee. The court said that it was plain that the transferrer, by the use of the words "without recourse," intended that they should include the risk in regard to the sufficiency of such proof.

An assignor without recourse impliedly warrants that he has done

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nothing and will do nothing to prevent the assignee from collecting the instrument assigned. Watson v. Chesire (1865) 18 Iowa, 202, 87 Am. Dec. 382.

The transfer of a note without recourse does not relieve the assignor from liability to the assignee if the note is invalid for the want of, or by reason of the illegality of, the consideration. Burks v. Ritter (1888) 10 Ky. L. Rep. 232.

One who transfers a note without recourse impliedly warrants that it is a valid note of hand, based upon a valid and lawful consideration, and is liable to the transferee when it was in fact void because given for intoxicating liquor sold in violation of law. Hannum v. Richardson (1875) 48 Vt. 508, 21 Am. Rep. 152. The court said: "In short, it was not a note; it was not what it imported to be or what it was sold and purchased for."

But in Rayne v. Ditto (1875) 27 La. Ann. 622, it is held that one who receives a negotiable note indorsed without recourse takes it at his own risk, and the indorser is not liable because the defense of Confederate money consideration was successfully pleaded by the maker.

e. Genuineness of the note.

On an indorsement without recourse the indorser is liable upon the implied warranty that the note is genuine (Abbott v. Mitchell (1841) 18 Me. 354; Frazer v. D'Invilliers (1841) 2 Pa. St. 200, 44 Am. Dec. 190; State ex rel. Carroll v. Corning State Sav. Bank (1908) 139 Iowa, 338, 115 N. W. 937; Hall v. Latimer (1908) 81 S. C. 90, 61 S. E. 1057); or that it is what it purports to be (Watson v. Chesire (1865) 18 Iowa, 202, 87 Am. Dec. 382; Youngberg v. Nelson (1892) 51 Minn. 172, 38 Am. St. Rep. 497, 53 N. W. 629). See also Hannum v. Richardson (1875) 48 Vt. 508, 21 Am. Rep. 152.

An indorser of a note "without recourse" guarantees the genuineness of the signatures on the paper. Watson v. Chesire (1865) 18 Iowa, 202, 87 Am. Dec. 382; Challiss v. McCrum (1879) 22 Kan. 157, 31 Am. Rep. 181; Burks v. Ritter (1888) 10 Ky. L. Rep. 232; McCormack v. Ware (1891) 13 Ky. L. Rep. 678; Ware v. McCormack (1894) 96 Ky. 139, 28 S. W. 157, 959; Palmer v. Courtney (1891) 32 Neb. 773, 49 N. W. 754; Dumont v. Williamson (1867) 18 Ohio St. 515, 98 Am. Dec. 186; Charnley v. Dulles (1845) 8 Watts & S. (Pa.) 353.

f. Solvency of parties.

There is no implied warranty of the solvency of the parties to a note transferred without recourse. Watson v. Chesire (1865) 18 Iowa, 202, 87 Am. Dec. 382; Challiss v. McCrum (1879) 22 Kan. 157, 31 Am. Rep. 181.

The mere offer, through brokers, of a note for sale without recourse to the seller, does not involve any representation as to the solvency of the parties to it, where the sale is made in good faith. Hecht v. Batcheller (1888) 147 Mass. 335, 9 Am. St. Rep. 708, 17 N. E. 651.

g. Amount due.

One who indorses a note without recourse impliedly warrants that it is a legal obligation to the full amount for which it purports to be. Challiss v. McCrum (1879) 22 Kan. 157, 31 Am. Rep. 181; M. Rumley Co. v. Dollarhide (1899) 86 Ill. App. 476; Drennan v. Bunn (1888) 124 Ill. 175, 7 Am. St. Rep. 754, 16 N. E. 100 (holding vendor without recourse liable for deficiency between amount apparently due on note and amount legally collectable on it); Cressey v. Kimmel (1898) 78 Ill. App. 27 (holding indorser without recourse liable for amount of reduction of note by reason of successful defense of usury); Blethen v. Lovering (1890) 58 Me. 437 (holding liability on implied warranty that amount specified in note is due, accrues at time of indorsement without recourse).

There is no implied warranty on the part of one who transfers a note without recourse, that the sum specified in the note is actually due thereon, where there is an agreement attached thereto which states that the real amount due upon the note is to be determined by a third person. Freeman v. Guyer (1852) 13 Ill. 652.

The mere sale of a note without recourse, through brokers, does not involve any representation as to its

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value, where the sale is made in good faith. Hecht v. Batcheller (1888) 147 Mass. 335, 9 Am. St. Rep. 708, 17 N. E. 651.

b. Payments.

One who transfers a negotiable instrument by indorsement without recourse impliedly warrants that the instrument has not been paid. Watson v. Chesire (1865) 18 Iowa, 202, 87 Am. Dec. 382.

An indorser without recourse impliedly warrants that no payments have been made except those that appear to have been indorsed thereon, and that such as so appear are genuine. Carroll v. Nodine (1902) 41 Or. 412, 93 Am. St. Rep. 743, 69 Pac. 51.

A. W. R.

EX PARTE JOHN T. DUNCAN.

Texas Court of Criminal Appeals — January 12, 1916.

(78 Tex. Crim. Rep. 447, 182 S. W. 313.)

Contempt — constructive language in brief — necessity of oath.

A petition charging contempt in the language of a brief filed during vacation must be sworn to, to give the court jurisdiction.

[*See note on this question beginning on page* 225.]

APPLICATION for a writ of habeas corpus to secure relator's discharge from custody to which he had been committed for alleged contempt of court. *Writ issued.*

The facts are stated in the opinion of the court.

Messrs. **Dickens & Dickens** and **A. Burleson** for relator.

Mr. **C. C. McDonald**, Assistant Attorney General, for the State.

Harper, J., delivered the opinion of the court:

Relator was adjuged guilty of contempt of court by Honorable Frank S. Roberts, judge of the district court of the twenty-second judicial district, and his punishment assessed at a fine of $50 and one day's imprisonment in the county jail.

Relator made application to this court for a writ of habeas corpus, but in as much as the petition showed that the alleged contempt was certain statements contained in a brief in a civil cause on appeal, we first declined to issue the writ until it was presented to our supreme court, deeming it probable that that court had jurisdiction under article 1529 of the Revised Civil Statutes, as the alleged contempt grew out of proceedings had in a civil case. However, upon consideration, one of the justices of the supreme court indorsed on the application that the supreme court declined to issue the writ for lack of jurisdiction, and as there could be no doubt that this court had jurisdiction, under the Constitution to issue the writ, after the supreme court had held it was without jurisdiction, we ordered the writ to issue, returnable on January 5, 1916. On that day the cause was heard, and it was made to appear that in the case of Isolda Zapp v. Y. F. Mossop, in the district court of Fayette county, the said Honorable Frank S. Roberts, as judge of that court, on the 18th day of December, 1914, entered a certain judgment in favor of plaintiff. Notice of appeal was given, but no appeal perfected. However, in September, 1915, the defendant Y. F. Mossop sued out a writ of error to the first court of civil appeals at Galveston, and filed a brief in said cause on September 23, 1915, and also filed a copy of the

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brief with the clerk of the district court, in Fayette county, as he was required by law to do. It is a portion of the language used in this brief by relator, as attorney for Mossop, that is held to improperly reflect on the trial court, and for the use of which language he was held to be in contempt of court.

It is agreed that the district court of Fayette county was not in session when the brief was filed, and that the language was not used in the presence and hearing of the court, but, if the language was improper, it constituted what in law is termed constructive contempt. Relator earnestly insists that the language used was in no wise intented to reflect on the trial judge, but was intended to be but an earnest plea for his client. As Honorable Frank S. Roberts has held said language to be contemptuous, we will not discuss that question, but only inquire into whether or not the necessary and proper steps were taken to confer jurisdiction on the judge of the twenty-second judicial district to adjudge relator guilty. If the proper steps were not taken to confer jurisdiction on that court, relator is entitled to be discharged.

After the brief had been filed, Mr. C. D. Krause, an attorney of the Fayette county bar, having his attention called to the brief (it also using language that he contended improperly reflected on him), addressed a petition to the judge, calling his attention to the language used in the brief. Upon the filing of this petition, Judge Roberts ordered process to issue summoning relator to appear before him and show cause why he should not be adjudged to be guilty of contempt for making use of such language. On the day named relator appeared, and filed an answer, first pleading that the court had no jurisdiction, in that the petition filed was not sworn to by Mr. Krause, nor any other person. We are of the opinion this plea should have been sustained, and this court so held in Ex parte Foster, 44 Tex. Crim. Rep. 425, 60 L.R.A. 631, 100 Am. St. Rep. 866, 71 S. W. 593, and Ex parte Landry, 65 Tex. Crim. Rep. 440, 144 S. W. 962. In this latter case Judge Davidson exhaustively reviewed the authorities and held: "If the acts or conduct occur in the presence or hearing of the court, it may deal summarily with the contemnor without a written statement charging the contempt; but where the contempt does not occur in its presence and hearing the better practice is to present the contempt by written charges, which should be sworn to unless presented in writing by the district attorney in his official capacity."

Contempt—constructive language in brief—necessity of oath.

State's counsel contends that we were wrong in so holding, in an able brief, and that those decisions should not be followed. In deference to the earnest insistence, we have again investigated this question, and we think the great weight of authority is with the holding of the court. In Rapalje on Contempt, § 93, it is said: "In the United States the almost universal practice in this matter is to present to the court an affidavit setting forth the facts and circumstances constituting the alleged contempt, sworn to by some person who witnessed or had knowledge of the offense. Unless such an affidavit be presented, process will not be granted. The issuing of process without the filing of the proper affidavit is erroneous, and the error is not cured by the subsequent filing thereof."

Of course, this rule only applies when the language used, or conduct complained of, was not in the presence and hearing of the court; for where the contemptuous acts or conduct are committed in the presence of the court, he may inflict summary and immediate punishment.

In State v. Blackwell, 10 S. C. 35, it was held: It is a fatal objection to a rule to show cause why

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a party should be attached for contempt for an offense not committed in the presence of the court that it was issued without an affidavit setting forth the facts. In Encyclopædia of Pleading & Practice, vol. 4, page 779, the rule is stated: "The almost universal method by which contempt proceedings are begun is by an affidavit, and an examination of the authorities will generally disclose that in all contempt proceedings, save for such as are committed in the court's immediate presence an affidavit is essential."

In the case of Wyatt v. People, 17 Colo. 261, 28 Pac. 964, the supreme court of Colorado says: "Constructive contempts—those not committed in the presence of the court—must, of course, in some regular and legitimate way be brought to the court's knowledge; until this is done the process of attachment will not issue. . . . And in Gandy v. State, 13 Neb. 445, 14 N. W. 143, it is said that such proceedings must be commenced by a sworn information. But the practice generally recognized throughout the United States, and according to Blackstone frequently followed in England, is for some proper official or interested party to set forth by affidavit the material facts relied on. A little contrariety of opinion exists as to whether the warrant of commitment or the order of court must recite the jurisdictional facts. But the overwhelming weight of authority in this country sustains the proposition that the affidavit upon which the proceeding for a constructive contempt is based must state facts which, if established, would constitute the offense, and that, if the allegations of the affidavit are not sufficient in this respect, the court is without jurisdiction to proceed."

The supreme court of California, in Batchelder v. Moore, 42 Cal. 412, says: "When the alleged contempt is not committed in the presence of the court, an affidavit of the facts constituting the contempt must be presented, in order to set the power of the court in motion."

In Whittem v. State, 36 Ind. 213, it is held: "The proceeding against a party for a constructive contempt must be commenced by either a rule to show cause, or by an attachment, and such rule should not be made or attachment issued, unless upon affidavit specifically making the charge."

In the case of State v. Henthorn, 46 Kan. 616, 26 Pac. 937, it is held: "A careful examination of the authorities satisfies us that in all cases of constructive contempt, whether the process . . . issues in the first instance, or a rule to show cause is served, a preliminary affidavit or information must be filed in the court before the process can issue."

In the case of Re Wood, 82 Mich. 82, 45 N. W. 1116, it is said: "Those [contempts] not committed in its immediate view and presence must be brought before the court by affidavit of the persons who witnessed them, or have knowledge of them; and a rule is made, based upon such affidavit, either that an attachment issue, or that the accused show cause at a certain time and place why he should not be punished for the alleged contempt"—citing 4 Bl. Com. 286; 2 Hawk. P. C. 222; 1 Tidd, Pr. 4th Am. ed. 88, 478, 479; Re Judson, 3 Blatchf. 148, Fed. Cas. No. 7,563; 6 Dane, Abr. p. 528, chap. 193, art. 27; Com. v. Dandridge, 2 Va. Cas. 408; State v. Matthews, 37 N. H. 450; Crow v. State, 24 Tex. 12.

In the case of State v. Kaiser, 20 Or. 50, 8 L.R.A. 584, 23 Pac. 964, it is held: "A court has no authority to proceed against a party for contempt on account of acts not committed in the immediate view and presence of the court, unless the facts constituting the contempt are shown by an affidavit presented to the court."

See also Re Nickell, 47 Kan. 734, 27 Am. St. Rep. 318, 28 Pac. 1076; Flannery v. People, 225 Ill. 69, 80 N. E. 60; Thomas v. People, 14 Colo. 256, 9 L.R.A. 569, 23 Pac. 326;

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Hurley v. Com. 188 Mass. 447, 74 N. E. 677, 3 Ann. Cas. 757; and cases cited in those authorities.

As no affidavit, nor petition sworn to, was filed in this case, the jurisdiction of the court was not properly invoked, and therefore the relator is entitled to be discharged; and it is so ordered. We do not deem it necessary to discuss the other questions presented.

Relator is discharged.

ANNOTATION.

Necessity of affidavit or sworn statement as foundation for constructive contempt.

I. Scope of note, 225.
II. Generally, 225.
III. Criminal contempt, 231.
IV. Proceeding instituted by prosecuting attorney, 235.
V. Waiver of verification, 236.

I. Scope of note.

This note is confined to a review of the cases discussing the necessity for the verification of the statement or charge presented to the court as a foundation for the issuance of a rule to show cause, attachment, or other writ in proceedings for constructive contempt. There are many cases which declare in general terms that, in cases of constructive contempt, a "preliminary affidavit, information, or complaint" must be presented or filed in order to bring the subject-matter to the attention of the court, and these cases are excluded unless the question of the necessity of verifying the preliminary statement is directly passed on.

II. Generally.

It is well settled that cases of contempt not committed in the immediate view or presence of the court must be brought to the attention of the court by a statement of the facts by persons who witnessed them or have knowledge of them (see 6 R. C. L. tit. Contempt, p. 531), and the rule seems to be uniformly recognized that this statement must be made under oath, either in the form of an affidavit or by some other sworn statement.

United States.—Sona v. Aluminum Castings Co. (1914) 131 C. C. A. 232, 214 Fed. 936.

Arkansas.—York v. State (1908) 89 Ark. 72, 115 S. W. 948.

California.—Re Northern (1912) 18 Cal. App. 52, 121 Pac. 1010; Ex parte Rickert (1899) 126 Cal. 244, 58 Pac. 549; Re McCarty (1908) 154 Cal. 534, 98 Pac. 540.

Colorado.—Kirby v. Chicago, R. I. & P. R. Co. (1911) 51 Colo. 82, 116 Pac. 150.

Illinois.—Perry v. Kausz (1912) 167 Ill. App. 250; People v. Gard (1912) 175 Ill. App. 486, affirmed in (1913) 259 Ill. 238, 102 N. E. 255, writ of error dismissed in (1914) 235 U. S. 691, 59 L. ed. 423, 35 Sup. Ct. Rep. 206.

Indiana.—Whittem v. State (1871) 36 Ind. 196; Saunderson v. State (1898) 151 Ind. 550, 52 N. E. 151; Snyder v. State (1898) 151 Ind. 553, 52 N. E. 152.

Kansas.—Re Nickell (1892) 47 Kan. 734, 27 Am. St. Rep. 315, 28 Pac. 1076; Re McKenna (1892) 47 Kan. 738, 28 Pac. 1078; Nichols v. Quinn (1915) 94 Kan. 742, 147 Pac. 1103.

Michigan.—Re Wood (1890) 82 Mich. 75, 45 N. W. 1113.

Montana.—State ex rel. Gemmell v. Clancy (1900) 24 Mont. 359, 61 Pac. 987; State ex rel. Flynn v. District Ct. (1905) 33 Mont. 115, 82 Pac. 450.

Nebraska.—Le Hane v. State (1896) 48 Neb. 105, 66 N. W. 1017.

Nevada.—Ex parte Hedden (1906) 29 Nev. 352, 90 Pac. 737, 13 Ann. Cas. 1173.

New York.—Rhinelander v. Dunham (1882) 2 N. Y. Civ. Proc. Rep. (Browne) 32; Ackroyd v. Ackroyd (1869) 3 Daly, 38; Ward v. Arenson (1863) 10 Bosw. 589; Bradbury v. Bliss (1897) 23 App. Div. 606, 48 N. Y. Supp. 912.

North Carolina.—In Re Deaton

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(1890) 105 N. C. 59, 11 S. E. 244; Re Odum (1903) 133 N. C. 250, 45 S. E. 569, 14 Am. Crim. Rep. 296.

Ohio.—State v. Thompson (1856) 2 Ohio Dec. Reprint, 30.

Oregon.—State v. Kaiser (1890) 20 Or. 50, 8 L.R.A. 584, 20 Pac. 964.

South Carolina.—State v. Blackwell (1878) 10 S. C. 35.

Texas.—Ex parte Foster (1903) 44 Tex. Crim. Rep. 423, 60 L.R.A. 631, 100 Am. St. Rep. 866, 71 S. W. 593; Ex parte Landry (1912) 65 Tex. Crim. Rep. 440, 144 S. W. 962. And see the reported case (EX PARTE DUNCAN, ante, 222).

Washington.—Re Coulter (1901) 25 Wash. 526, 65 Pac. 759.

Wyoming.—Wilson v. Territory (1874) 1 Wyo. 155.

Canada.—Re Toronto Junction (1908) 11 Ont. Week. Rep. 182.

In Sona v. Aluminum Castings Co. (1914) 131 C. C. A. 232, 214 Fed. 936, wherein the proceedings were based on the unsworn petition of a party to an injunction suit, alleging a violation of the injunction order, the court, holding the absence of a verification of the petition to be fatal, said: "Process of arrest for contempt, not committed in the court's presence, can properly issue only upon the filing of affidavit, stating positively the facts, and in such way as prima facie to show the commission of a contempt. This is the generally recognized rule."

One of the reasons advanced for the rule has been that the public is entitled to the protection afforded by the penalties imposed for false swearing. State v. Blackwell (1878) 10 S. C. 35, wherein it appeared that a person accused of selling intoxicating liquors without a license stated while on his trial that he had the day previous given two of the jurors whisky, whereupon the court of its own motion, and without affidavit, issued a rule to show cause why he should not be punished for contempt. Holding the proceeding to be void for want of an affidavit, the court said: "The rule to show cause appears to have been made without affidavits. This is a fatal objection. All parties charged, otherwise than by the oath of the grand jury, with offenses other than contempts committed in the presence of the court, are entitled to have the matters charged stated under oath, the penalties for false swearing being regarded as a safeguard to the liberties of the citizen."

In Whittem v. State (1871) 36 Ind. 196, wherein an attachment in contempt was issued on the verbal statement of an attorney in a suit for damages for seduction, based on the charge that he had caused the prosecuting witness to absent herself from court, it was held that the proceedings could not be instituted in such a manner, the court saying: "The court should never enter a rule to show cause or order an attachment until an affidavit of some responsible person was filed, specifying the acts committed by the person accused of the contempt."

Likewise, in the case of Re Nickell (1892) 47 Kan. 734, 27 Am. St. Rep. 315, 28 Pac. 1076, wherein proceedings for contempt in inducing witnesses to remain away from court were instituted by an unverified rule to show cause, it was held that the proceedings should have been dismissed, it not appearing that any preliminary verified complaint was filed. To the same effect, see Re McKenna (1892) 47 Kan. 738, 28 Pac. 1078, which arose out of the same state of facts.

Similarly, in Ex parte Landry (1912) 65 Tex. Crim. Rep. 440, 144 S. W. 962, wherein the contempt complained of consisted in interfering with a witness, it was held that the court could not of its own motion, and without affidavit, issue a rule to show cause why the accused should not be punished for contempt, based on a statement in its rule that the facts had been made known to the court.

In the case of Re Coulter (1901) 25 Wash. 526, 65 Pac. 759, the contempt complained of consisted in the refusal to obey an order to apply money to the satisfaction of a judgment, and that such refusal was brought to the attention of the court by the report of the sheriff, on which the court entered a rule to show cause.

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Holding that an affidavit was specifically required as a basis for proceedings in constructive contempt by statute (Bal. Code, § 5801), the court said: "It is clear that the contempt charged against the petitioner is not one committed in the immediate view and presence of the court, which can be punished summarily. It is equally clear that it is one which, by the terms of the statute, must be brought to the attention of the court by an affidavit stating the facts constituting the contempt before any proceedings can be taken therein. When, therefore, the lower court proceeded to punish the petitioner without following the prescribed procedure, it proceeded illegally, and without authority of law. It is no answer to say that the facts were brought before the court by the return of the officer. If the court may derive knowledge of the violation of its order from this source, it may from any other source, even the oral statement of a stranger to the proceedings. More than this, the statute is imperative. It has made an affidavit essential to set the powers of the court in motion, and, although the rights of the parties may be as well protected in a procedure had upon the return of the officer as in a procedure had upon an affidavit, yet the courts may not alter the statute."

In Ward v. Arenson (1863) 10 Bosw. (N. Y.) 589, wherein an attachment was issued against a party to an action for a refusal to appear in pursuance of an order and be examined touching the possession of property as a judgment debtor, it was held that as nothing appeared to show that the attachment was based on an affidavit, which was a necessary prerequisite, the attachment was properly dismissed.

Likewise, in Perry v. Kausz (1912) 167 Ill. App. 250, a proceeding in contempt, alleging refusal to appear and answer interrogatories concerning the property of a judgment debtor, instituted by a rule to show cause, it was held that an affidavit was a necessary prerequisite to an attachment or rule to show cause for constructive contempt.

In the case of Re Northern (1912) 18 Cal. App. 52, 121 Pac. 1010, construing the statute (Code Civ. Proc. § 1211) which provides that where a contempt is committed without the presence of the court, an affidavit shall be presented to the court or judge of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators or other judicial officer, it was held that the court had no jurisdiction of contempt proceedings for the refusal to pay alimony pursuant to an order in divorce proceedings, in the absence of an affidavit, as provided by the Code.

Similarly, in the case of Re McCarty (1908) 154 Cal. 534, 98 Pac. 540, it appeared that on an affidavit duly filed, alleging nonpayment of alimony, the court issued a rule to show cause, and on the hearing ordered the contemnor to pay $150 to his wife on or before a specified future date. At a hearing on the date specified, the court entered an order reciting the failure of the contemnor to pay in pursuance of the first order, adjudged him guilty of contempt, and committed him to the custody of the sheriff until he complied with the order. It was insisted that the affidavit on which the first order was based was sufficient to sustain the conviction. Holding that, as there was nothing in the record to show any continuance, and there being no affidavit filed on which to base the proceedings for contempt in violating the order for the payment of the $150, the conviction was a nullity, the court stated the rule governing such cases as follows: "The contempt of which the court undertook to adjudge the petitioner guilty was not a contempt committed in the presence of the court, for which it might deal with the petitioner summarily, as provided in § 1211 of the Code of Civil Procedure, but it was a constructive contempt,—one committed without the presence of the court,—and consisting of a failure to pay to the plaintiff herself, in a given time, the amount ordered to be paid. The order did not require payment in court, but payment outside of it. The court could have no knowledge of the disobedience of its order save

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upon an affidavit showing the fact of nonpayment. In such a case, where the contempt is a constructive one, in order to invest the court with jurisdiction to proceed to punish for it, it is essentially a prerequisite to the exercise of such jurisdiction that an affidavit setting forth the fact of noncompliance with the order should have been presented to the court. This is so clearly the law that § 1211 of the Code of Civil Procedure, Hutton v. Superior Ct. (1905) 147 Cal. 156, 81 Pac. 409, and Otis v. Superior Ct. (1905) 148 Cal. 129, 82 Pac. 853, need only be referred to as establishing it. When the court proceeded on September 18th to investigate the matter of contempt on the part of petitioner, in failing to comply with its order of September 8th, and adjudged him guilty of contempt therefor, no affidavit had been made showing noncompliance with that order, and necessarily no citation to show cause had been issued. Under these circumstances the court never acquired jurisdiction to proceed in the matter, and its order, for want of such jurisdiction, was void."

In Ex parte Hedden (1906) 29 Nev. 352, 90 Pac. 737, 13 Ann. Cas. 1173, a proceeding against a witness for contempt in refusing to produce before a grand jury the books of a corporation alleged to be in his possession, the court, on the unsworn report of the grand jury, summarily adjudged the witness to be guilty, and imposed a punishment. It was held that the contempt was constructive, and, therefore could only be punished in proceedings based on affidavit.

In Ex parte Rickert (1899) 126 Cal. 244, 58 Pac. 549, wherein it appeared that the president of a corporation was imprisoned on an order of court for contempt, consisting in instructing the secretary of the company to refuse to produce certain books which he had been ordered by the court to produce, it was held that the imprisonment was illegal because of the want of an affidavit setting out the facts, which was required by statute as a basis for contempt proceeding.

In State v. Thompson (1856) 2 Ohio Dec. Reprint, 30, wherein a liquor dealer, charged with a refusal to obey an order requiring him to close his saloon as a nuisance, was arrested and brought before court on an attachment issued on an unsworn allegation, it was held that the conviction could not be sustained, as an affidavit was a necessary basis for such an attachment.

In Ex parte Foster (1903) 44 Tex. Crim. Rep. 423, 60 L.R.A. 631, 100 Am. St. Rep. 866, 71 S. W. 593, it was held that a court could not, of its own motion and without affidavit, declare a person guilty of contempt for publishing evidence in a trial before the verdict was rendered, and against the order of the court.

In York v. State (1908) 89 Ark. 72, 76, 116 S. W. 948, which was a proceeding for contempt in having violated an injunction order, the court of its own motion, and without affidavit or its equivalent, issued a citation to the contemnors to appear and show cause why they should not be punished for contempt. It was held that an affidavit was essential as a basis for the rule, and therefore the proceedings were a nullity.

In State ex rel. Gemmell v. Clancy (1900) 24 Mont. 359, 61 Pac. 987, it appeared that, on a hearing of a motion to dissolve a temporary restraining order, the relator admitted having done certain acts in violation of the order, whereupon the court adjudged him guilty of contempt, and by way of punishment refused to hear him on his motion. Holding the lower court to have been without jurisdiction in so far as the contempt proceedings were concerned, the court said: "No affidavit containing the facts constituting the contempt had been presented. No notice had been given him; nor had he been served with an order to show cause why he should not be punished for contempt. On the contrary, it does appear that, on the hearing of said motion on the 3d day of March, relator was held guilty of contempt without notice, without an opportunity to be heard, without an opportunity to defend, and in the absence of an affidavit

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of the facts constituting the contempt necessary to set the power of the court in motion. It appears from the evidence of relator that any contempt which relator may have committed was 'constructive,' that is, one not committed in the immediate view and presence of the court, and therefore a contempt which did not permit a summary punishment. Section 2172 of the Code of Civil Procedure provides that when a contempt not in the presence of the court is committed an affidavit shall be presented of the facts constituting the contempt."

Similarly, where an order to turn over to a receiver property alleged to have been in the possession of the contemnor included also an order to show cause why he should not be punished for contempt, it was held that the order to show cause was improper, as there had been no affidavit filed on which it could be based. Bradbury v. Bliss (1897) 23 App. Div. 606, 48 N. Y. Supp. 912. In that case the rule was stated as follows: "The proceedings to punish for contempt must be taken as prescribed in the statute. They are stricti juris. . . . The statute requires that there should be served upon the accused before he shall be punished for contempt, either an order to show cause why such punishment should not be inflicted, or there should be issued a warrant of attachment to bring him before the court. Code Civ. Proc. § 2269. But whichever mode of procedure is adopted, it is necessary that certain facts shall be made to appear to the court. These facts are specified in § 2269 of the statute, and one of them is that the judge must be satisfied by affidavit of the commission of the offense. Until that has been done, no order to show cause can be issued. But the defense cannot be committed until the order directing the act to be done has been brought to the attention of the defendant, and the demand has been made upon him that it shall be done; and he is not guilty of a contempt of court until after that demand has been refused or neglected. No such proof was made before the judge when this order to show cause was granted, and it could not be made, because at that time no demand had been made for the performance of the order to deliver the property, and the defendant had not then refused to deliver it. The case, then, had not arisen in which the judge was authorized to make an order to show cause, and that order was irregular, and for that reason this motion should have been denied."

In State ex rel. Flynn v. District Ct. (1905) 33 Mont. 115, 82 Pac. 450, a water commissioner caused the arrest of one charged with unlawfully taking water, and carried him before a district judge, who, after a hearing, adjudged him guilty and sentenced him to pay a fine. This the court held was in violation of a statute (Code Civ. Proc. § 2172), which specifically provided that proceedings in constructive contempt should be based on affidavit.

Where the proper preliminary affidavit is filed, it is unnecessary to verify the formal petition or accusation. Nichols v. Quinn (1915) 94 Kan. 742, 147 Pac. 1103. In that case the proceeding was for contempt in refusing to produce property subject to execution, pursuant to an order of court, wherein it appeared that a preliminary affidavit was filed and later a written unverified accusation. It was insisted that the failure to verify the accusation vitiated the proceedings. Holding that the preliminary affidavit was sufficient, the court said: "There is no express provision of the statute that the accusation shall be verified. The only verification which the statute in terms requires is that of the preliminary affidavit for the issuance of the attachment authorizing the arrest. This provision was complied with. The statute requires 'a written accusation, setting forth succinctly and clearly the facts alleged to constitute such contempt,' and the accused is then required to answer. Gen. Stat. 1909, § 2486. . . . The cases cited by the defendant, State v. Henthorn (1891) 46 Kan. 613, 26 Pac. 937, and Re Smith (1893) 52 Kan. 13, 33 Pac. 957, are not in point, for the reason that in neither of them was there an affidavit or accusation of any

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kind filed. In the present case the preliminary affidavit authorized the issuance of an order for the arrest of the defendant, and when he was brought before the court and the accusation was filed, the court was authorized to hear and determine the accusation upon the testimony as produced."

In Kirby v. Chicago, R. I. & P. R. Co. (1911) 51 Colo. 82, 116 Pac. 150, wherein the accused was charged with contempt in having violated an injunction order, the affidavit on which the proceeding was based and an attachment issued was presented to the judge while outside his judicial district. It was insisted that this was not a sufficient compliance with the statute (Rev. Code, § 356) providing that "when the contempt is not committed in the immediate view and presence of the court or judge at chambers, an affidavit shall be presented to the court or judge of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators." The court, upholding this contention, ruled that as the affidavit was presented to the judge when outside his judicial district, it in effect amounted to no presentation, and therefore the proceeding must fail.

It has been held that contempt proceedings for the refusal of a witness to appear before and answer questions of a referee may not be based on the report of the referee alone, but must be supported by affidavit. Rinelander v. Dunham (1882) 2 N. Y. Civ. Proc. Rep. (Browne) 32; Ackroyd v. Ackroyd (1869) 3 Daly (N. Y.) 38. And in the case of Re Judson (1853) 3 Blatchf. 148, Fed. Cas. No. 7,563, it was held that a witness could not be punished for contempt in refusing to answer a question in proceedings before a commissioner, where the motion and papers accompanying it, certified to the court by the commissioner, contained no affidavit as to the materiality of the evidence sought.

In each of the following cases, although the point was not directly in issue, the decision being based on other grounds, the court recognized and stated the rule that an affidavit or other sworn statement is necessary as a foundation for contempt proceedings, where the contempt was committed without the presence of the court.

California.—Batchelder v. Moore, (1871) 42 Cal. 412.

Indiana.—Stewart v. State (1894) 140 Ind. 9, 39 N. E. 508; Rucker v. State (1908) 170 Ind. 635, 85 N. E. 356.

Iowa.—Jordan v. Circuit Ct. (1886) 69 Iowa, 177, 28 N. W. 548; Tuttle v. Hutchison (1916) 173 Iowa, 503, 151 N. W. 845.

Maryland.—Murdock's Case (1825) 2 Bland Ch. 461, 20 Am. Dec. 381.

Michigan.—Russell v. Wayne Circuit Judge (1904) 136 Mich. 624, 99 N. W. 864.

Montana.—Re Mettler (1915) 50 Mont. 299, 146 Pac. 747.

Nebraska.—Ludden v. State (1891) 31 Neb. 429, 48 N. W. 61; McAleese v. State (1894) 42 Neb. 886, 61 N. W. 88; Hawthorne v. State (1895) 45 Neb. 871, 64 N. W. 359; Zimmerman v. State (1895) 46 Neb. 13, 64 N. W. 375.

Nevada.—Phillips v. Welch (1877) 12 Nev. 158.

New Mexico.—Re Fullen (1912) 17 N. M. 394, 128 Pac. 64.

New York.—People ex rel. Larocque v. Murphy (1865) 1 Daly, 462; Re Gilman (1887) 6 Dem. 358, 15 N. Y. S. R. 718; St. Amant v. De Beixcedon (1851) 3 Sandf. (N. Y.) 703; Goldie v. Goldie (1902) 77 App. Div. 12, 79 N. Y. Supp. 268; Protter v. Lovell (1915) 91 Misc. 417, 155 N. Y. Supp. 275.

North Dakota.—State v. Root (1896) 5 N. D. 487, 57 Am. St. Rep. 568, 67 N. W. 590.

Oklahoma.—Nichols v. State (1913) 8 Okla. Crim. Rep. 550, 129 Pac. 673.

Oregon.—State v. Sieber (1907) 49 Or. 1, 88 Pac. 313; State ex rel. Stillwell v. Stillwell (1916) 80 Or. 610, 157 Pac. 970.

Pennsylvania.—Com. v. Snowden (1868) 1 Brewst. 218.

South Carolina.—State v. Nathans (1897) 49 S. C. 199, 27 S. E. 52.

Utah.—Young v. Cannon (1880) 2 Utah, 560.

Washington.—State v. Canutt (1901) 26 Wash. 68, 66 Pac. 130; State ex rel. Victor Boom Co. v. Peterson

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(1902) 29 Wash. 571, 70 Pac. 71; State ex rel. Martin v. Pendergast (1905) 39 Wash. 132, 81 Pac. 824.

Wyoming.—Laramie Nat. Bank v. Steinhoff (1898) 7 Wyo. 464, 53 Pac. 299.

III. Criminal contempt.

There is a certain class of contempts which, though not committed within the presence of the court, and therefore technically classed as constructive contempts, directly reflect on the honor and dignity of the court, and from their nature are necessarily within the knowledge of the court. Among contempts of this kind are scurrilous publications in the newspapers, reflecting on the integrity of the court; and as to these it is held in some jurisdictions that the court may proceed on its knowledge of the facts, and of its own motion issue a rule or other writ commanding the contemnor to appear and show cause why he should not be punished for contempt. Thus, in Telegram Newspaper Co. v. Conn. (1898) 172 Mass. 294, 44 L.R.A. 159, 70 Am. St. Rep. 280, 52 N. E. 445, wherein it appeared that a corporation had published an article in a newspaper circulated in the place where the trial was pending, and which was calculated to prejudice the jury and prevent a fair trial, the court, holding such publication to be a criminal contempt, and that the court could of its own motion, without affidavit or petition by any party, punish the offender, stated the rule as follows: "In the present case it was not necessary that a formal complaint should first have been made to the court. The contempt, if there was one, was not, strictly speaking, committed in the presence of the court, but it related to a trial then proceeding before the court. In each case a summons to the plaintiffs in error was issued by the court, of its own motion and without complaint made, to show cause why the corporations should not be adjudged in contempt for publishing an article dealing with a matter on trial before the court. When it comes in any manner to the knowledge of the presiding justice of a court that articles are published in a newspaper circulated in the place where the court is held, which are calculated to prevent a fair trial of a cause then on trial before the court, the court of its own motion can institute proceedings for contempt. Such a power in the court is necessary for its own protection against an improper interference with the due administration of justice, and it is not dependent upon the complaint of any of the parties litigant. If the publication amounts to a contempt of court, because it interferes with the due administration of justice in a cause before the court, the contempt is analogous to a contempt committed in the presence of the court."

Likewise in People ex rel. Atty. Gen. v. News-Times Pub. Co. (1905) 35 Colo. 253, 84 Pac. 912, appeal dismissed in (1907) 205 U. S. 454, 51 L. ed. 879, 27 Sup. Ct. Rep. 556, 10 Ann. Cas. 689, a proceeding before the supreme court for contempt in having caused to be published in a newspaper circulating at the place of holding court, a series of articles disrespectful to the court and tending to impede the administration of justice, the proceeding was initiated by the attorney general on unverified information. It was insisted that the proceedings were void as in violation of the statute (Colo. Rev. Code, § 356), which provided that contempts committed without the presence of the court should be proceeded against by affidavit. Holding that the statute applied only to civil constructive contempt, and did not include criminal constructive contempt, the court, after an exhaustive discussion, summed up its ruling as follows: "No constitutional right of the respondent was invaded in issuing the citation upon an unverified information, because, as has been seen, our Constitution does not cover the offense of contempt, but leaves this violation of the law—as to what constitutes contempts, and its defenses, and the procedure for its punishment—as it was at common law. . . . No statutory right of the respondent was violated in proceeding on an unverified information, because, as we have seen, the offense charged was a criminal contempt, and we have no statute defining

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criminal contempts, or providing the procedure for their punishment. . . . No common-law right of the respondent was violated, because, as will be seen by the authorities hereinafter cited, it was permissible at common law to initiate this proceeding upon an unverified information. This court has no power to compel the verification of an information for contempt. . . . To hold the verification of the information essential would be to deprive this court of the power in many cases to punish for criminal constructive contempts, which power, as we have seen, has been by our decisions declared to be inherent and essential to the existence of the court. The fact that the proceeding may result in a fine or imprisonment furnishes no sufficient reason why the information should be verified. There are certain actions in tort where the proceeding may result in the seizure and imprisonment of the body of the defendant, yet it has never been contended that the complaint initiating the action must be verified." The court in that case disapproved Thomas v. People (1890) 14 Colo. 254, 9 L.R.A. 569, 23 Pac. 326, wherein it was held that a proceeding for contempt, consisting of disrespectful and prejudicial language used in a motion for a change of venue, could not be instituted except by affidavit as provided by the Code. Criticizing this decision, the court pointed out the failure to distinguish between criminal and civil contempts, and stated that the case could not be considered as authority for procedure in the matter of criminal contempts.

In Wyatt v. Poole (1892) 17 Colo. 252, 28 Pac. 961, a proceeding against a deputy secretary of state for refusal to produce certain books before the grand jury, the court recognized the distinction between criminal and civil contempts, but in that case the decision turned on the sufficiency of the statement of facts, and not on the necessity of verification.

In the case of Re Deaton (1890) 105 N. C. 59, 11 S. E. 244, it appeared that certain grossly disrespectful articles were published in a newspaper concerning a mayor's court. The mayor instituted contempt proceedings of his own motion, and without affidavit. Holding that in proceedings for contempt proper, whether committed within or without the presence of the court, an affidavit was not necessary, the court said: "Proceedings 'as for contempt' should always be based upon affidavits. We do not think that this is required in proceedings for contempt proper, which, whether the contempt is committed in the presence of the court or not, are begun by the court, ex mero motu, to preserve its dignity, to maintain order, or to enforce the respect due it, and obedience to its process." However, the court reversed the case for the failure of the superior court to review the facts, on appeal to it from the mayor's court, and remanded it to the superior court to the end that it might review the facts as found by the mayor, and if thereon the defendant was found guilty, to pass sentence according to law.

Similarly, in Re Moore (1869) 63 N. C. 397, a proceeding for contempt in causing an article reflecting on the court to be published in the newspapers, the court held that the affidavit was not necessary as a prerequisite to the proceedings, but that the court could of its own motion issue a rule to show cause. In this case it was said: "The other objection, that the rule was made without affidavit, or other legal proof of the facts upon which it is based, is equally untenable. It is admitted that where the proof is furnished by the senses of the judges, it may be acted on. Here there was such proof. We knew by our senses that a newspaper containing the paper referred to, purporting to be signed by Mr. Moore and others, had been extensively circulated and was then in the court room; and the want of a disavowal on his part that he had signed the paper or consented to its publication furnished prima facie proof, not sufficient for final action, but all sufficient as ground for the rule. On his appearance he was at liberty to deny the fact without an oath, and the denial, like the plea of 'Not guilty,' would

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simply have put the fact in issue, and he would have been entitled to have the rule discharged, unless the fact was proved by direct testimony. Instead of that, he admits the fact. So this is no legitimate ground of complaint."

In Hughes v. Territory (1906) 10 Ariz. 119, 6 L.R.A.(N.S.) 572, 85 Pac. 1058, it was held that the publication in a newspaper circulated in the place of trial, of articles reflecting on the integrity of the court, was in the nature of a direct contempt and the court of its own motion, and without affidavit, might cause the publisher to appear and show cause why he should not be punished for contempt.

Similarly, in State v. Morrill (1855) 16 Ark. 386, it appeared that the rule was issued on the unsworn statement of a member of the bar, and a conviction had for publishing articles reflecting on the court.

In State v. Frew (1884) 24 W. Va. 416, 49 Am. Rep. 257, wherein the contempt complained of consisted of disrespectful publications in a newspaper, and the proceedings were initiated on the unsworn statement of a member of the bar, the court, holding that while, ordinarily, constructive contempt proceedings must be begun by affidavit or sworn statement, where the contempt was such that the court necessarily had knowledge of it an affidavit was unnecessary, said: "In direct contempts it is almost uniformly the practice for the judge to act on his own information. He acts upon the evidence of his own senses. And in the case of constructive contempts, if he has the same kind of evidence, he is equally at liberty to act upon it. In some cases the character of the offense may be more complicated and less susceptible of furnishing such proofs of its existence as will authorize the court to act upon it. In such cases a sworn statement is necessary, and should always be required as the foundation of the rule. But a publication in a newspaper is not of that class, and especially is such the case when the publication charged as the contempt is an editorial article in a newspaper, published in the very city or town in which the court is at the time being held. Such a publication furnishes not only the evidence of its character, but the paper in which it is published furnishes the names of the publishers." It was further held in that case that the statute (Code § 27, chap. 147) enumerating contempts which might be punished summarily by the courts did not apply to the supreme court of appeals.

But in State v. McClaugherty (1889) 33 W. Va. 250, 10 S. E. 407, a contempt proceeding had in a circuit court, it was held that, disrespectful articles published in newspapers not being included in the statutory enumeration, the circuit court had no power to proceed on its own motion, an affidavit being necessary.

In Carl v. State (1912) 102 Ark. 122, 143 S. W. 909, a proceeding for contempt for causing the publication of an article reflecting on the integrity and dignity of the court, the proceeding was initiated by a citation issued by the clerk of the court, notifying the contemnor to appear and answer a specified charge. Holding that the charge was a criminal, constructive contempt, and as such could be proceeded against by unsworn notification, the court said: "The cases which hold to the contrary entirely ignore the distinction between civil contempts, where the court cannot proceed unless so moved by a party aggrieved, and criminal contempts, where only the maintenance of the court's dignity is involved. In the latter class of cases it is primarily the duty of the court itself to see that it is not brought into public contempt by words or conduct of individuals. It is not bound to wait for some third person to initiate proceedings, for it would be anomalous to say that the first duty rests with the court, and yet it must wait for some individual to institute proceedings before the court can take any steps to maintain its own dignity. . . . The spectacle of a court of record and general jurisdiction being without power to initiate a proceeding to punish for contempt the author of publications in the press of the state, reflecting upon

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the dignity, integrity, and honor of the court and judges, and calculated to bring it and them into public disfavor and contempt, without an affidavit of some third person first made setting out the charge, would be pitiful in the extreme, and was not contemplated by our statutes and under our Constitution. The court would thus be rendered impotent, powerless to protect its authority and enforce its mandates and retain the respect and confidence of the people, for whose benefit it was organized and exists, except by the grace of some third person."

However, in some jurisdictions the rule that proceedings in constructive contempt must be based on an affidavit or other sworn statement is strictly enforced, and no exception with respect to criminal contempts is recognized. Thus, in Wilson v. Territory (1874) 1 Wyo. 155, it was held that a judge could not, on his own motion, issue an attachment without affidavit, for a contempt consisting in causing the publication of articles reflecting on the court. And it was further held in this case that the subsequent filing of an affidavit by the judge did not cure the error.

And in State v. Kaiser (1890) 20 Or. 50, 8 L.R.A. 584, 20 Pac. 964, it was held that an alleged contempt, consisting of scurrilous publications in a newspaper, could only be proceeded against by affidavit in accordance with the statute (Code, § 653), providing for proceedings to punish contempts committed without the presence of the court, and that the court erred in initiating the proceeding on its own motion.

In Com. v. Dandridge (1823) 2 Va. Cas. 408, wherein the contempt complained of consisted in addressing insulting remarks to a judge on the courthouse steps, when the court was not actually sitting, it was held that a written statement prepared by the judge, setting out the facts alleged to constitute the contempt, was sufficient, without affidavits, though in this case it appeared that affidavits were also filed.

In Snyder v. State (1898) 151 Ind. 553, 52 N. E. 152, it was held that proceedings for an indirect contempt, alleged to have been committed by a meeting of attorneys, in a room adjoining the court room, consisting of disrespectful remarks addressed to the judge, who was present, could not be based on the statement of the judge himself, but, being an indirect contempt, the proceeding should have been initiated by verified information.

In Saunderson v. State (1898) 151 Ind. 550, 52 N. E. 151, certain attorneys alleged to be guilty of an indirect contempt of court, in having adopted at a bar meeting resolutions in relation to the procedure and practice in the court, were proceeded against by grand jury indictment. The court, holding such procedure to be contrary to the statute, said: "A direct contempt is one committed in the presence of the court, while the facts in relation to an indirect contempt are brought before the court by affidavit. There is no place in either case for any action of the grand jury. Even, therefore, if the proceedings here taken before the grand jury were properly authenticated by its foreman, and not simply by the signature of the prosecuting attorney, they would still not be a compliance with the statute. Neither would a simple information by the prosecuting attorney or any other officer, under his oath of office, be sufficient. The requirement of the statute is explicit,—that the facts be brought before the court 'by an information duly verified by the oath or affirmation of some officer of the court or other responsible person.'"

In Le Hane v. State (1896) 48 Neb. 105, 66 N. W. 1017, it appeared that the court of its own motion, and without an information supported by oath, summarily imposed a fine on an attorney for contempt in producing a libelous publication in support of an affidavit for a change of venue. This the court held to be constructive contempt, if contempt at all, and that proceedings could not be had therefor except on information under oath.

In the case of Re Wood (1890) 82 Mich. 75, 45 N. W. 1113, the contempt consisted in indorsing on the back of a check given in payment of a fine

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formerly imposed on him, words alleged to have been disrespectful to the court. This check was shown to the court by the clerk, whereupon a rule to show cause was issued, and on the refusal of the accused to appear in person a writ of attachment was issued against him. Holding that an affidavit was necessary as a basis for constructive contempt proceedings, the court said: "The method of procedure is entirely different in the two classes of contempts. A direct contempt, committed in the immediate view and presence of the court, will be noticed by the court, and, on its own motion, it will punish summarily in the mode pointed out by the statute. But those not committed in its immediate view and presence must be brought before the court by affidavit of the persons who witnessed them, or have knowledge of them; and a rule is made, based upon such affidavit, either that an attachment issue, or that the accused show cause at a certain time and place why he should not be punished for the alleged contempt. . . . In the case under consideration, the fact was not made to appear by affidavit, upon which the alleged contempt proceedings are predicated; and the court therefore obtained no jurisdiction, either to order Mr. Wood to show cause or to cause him to be arrested for the misconduct alleged."

IV. Proceeding instituted by prosecuting attorney.

In some jurisdictions, where the information or complaint on which proceedings in constructive contempt are based is made by the prosecuting attorney, it is held that no further verification is necessary, his oath of office being sufficient.

Thus, in Hurley v. Com. (1905) 188 Mass. 443, 74 N. E. 677, 8 Ann. Cas. 757, the court, holding that an information or petition in contempt proceedings signed by an assistant district attorney was a sufficient verification, said: "In the present case the proceedings were begun by a formal complaint to the court, made by the first assistant district attorney of Suffolk county in his official capacity. He is one of the prosecuting officers of the court, duly sworn to the proper performance of his official duties. While the making of a complaint of this kind is not required of him by any statute, it is in the general line of the duties which he is regularly performing. A complaint of this kind, signed by him as a public officer, may fairly be said to carry with it the sanction of his oath of office. In the absence of a statute or of an established rule of law requiring that in all cases the complaint itself shall be sworn to, we think the matter was brought to the attention of the court with such support and assurance of its verity as justified the issuance of process and the subsequent hearing. . . . Assuming, as we do, that a statement of a constructive criminal contempt should be properly verified before action is taken upon it by a court, we are of opinion that a formal presentation by a sworn prosecuting officer is a sufficient verification to justify judicial action."

Likewise, in Poindexter v. State (1913) 109 Ark. 179, 46 L.R.A.(N.S.) 517, 159 S. W. 197, wherein an attorney was charged with contempt in inviting the sheriff and a juror into his room and giving them whisky, the court, holding that an information under the official oath of the prosecuting attorney need not be further verified, said: "The information under the official oath of the prosecuting attorney and the citation directed by the judge to be issued by the clerk, setting forth the information showing the grounds upon which the petitioners were cited to appear and show cause why they should not be dealt with for contempt, were sufficient to give the court jurisdiction. The information made by the prosecuting attorney under his official oath was sufficient, even though not specially verified by him, to meet the requirements of the law, as an accusation setting forth the offense with which the petitioners were charged."

In State ex rel. Crow v. Shepherd (1903) 177 Mo. 205, 99 Am. St. Rep. 624, 76 S. W. 79, a proceeding for contempt in publishing scandalous and disrespectful articles about the court,

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initiated on the unsworn information of the attorney general, it was held that the information, being made by the attorney general, ex officio, and supported by his official oath, needed no other verification.

In People v. Gard (1912) 175 Ill. App. 486, affirmed in (1913) 259 Ill. 238, 102 N. E. 255, writ of error dismissed in (1914) 235 U. S. 691, 59 L. ed. 428, 35 Sup. Ct. Rep. 206, the court stated the rule to be that an information or complaint in contempt proceedings, presented by a person other than the state's attorney or attorney general, was required to be verified, and an affidavit accompanying such information or complaint could not be treated as a part thereof. It was held, however, in that case that the contempt was direct and consequently no formal complaint was necessary.

On the other hand it has been held that the rule requiring the verification of the information on complaint in constructive contempt proceedings admits of no exceptions, and though it is made by a prosecuting attorney, it must be verified. Thus, in Gandy v. State (1882) 13 Neb. 445, 14 N. W. 143, wherein a contempt proceeding for alleged corrupt attempt to influence the jury was initiated by the unsworn petition of the district attorney, the court, reversing the lower court, held that all proceedings for constructive contempt must be based on an information under oath, and therefore the proceeding was a nullity.

In Saunderson v. State (1898) 151 Ind. 550, 52 N. E. 151, it was held that under the statute (Burns's Rev. Stat. 1894, § 1024, Horner's Rev. Stat. 1897, § 1010) providing that no rule should issue in proceedings for constructive contempt except on information duly verified by oath, an indictment of the grand jury signed by the prosecuting attorney, but not sworn to by him, was insufficient as a basis for the proceeding.

V. Waiver of verification.

It has been held that a failure to object in proper time to a petition in contempt proceedings, on the ground that it is not sworn to, amounts to a waiver of the defect, and the contemnor may not later object to the jurisdiction on that ground. Sona v. Aluminum Castings Co. (1914) 131 C. C. A. 232, 214 Fed. 936.

Similarly, in the case of Re Odum (1903) 133 N. C. 250, 45 S. E. 569, 14 Am. Crim. Rep. 296, which was a prosecution for contempt in having unlawfully influenced a juror, the court, while recognizing the statutory rule that proceedings as for contempt should be based on affidavits (N. C. Code, § 654), held that the contemnor waived any rights he might have had by being sworn, at his request, and making answer in that form to the charge.

In Atchison, T. & S. F. R. Co. v. State (1912) 35 Okla. 532, 130 Pac. 940, a proceeding for contempt in having violated an order of the Corporation Commission, instituted by an unverified information, it was held that the defect, if any, was waived by answering to the information without moving to quash or set it aside.

In State v. Frew (1884) 24 W. Va. 416, 49 Am. Rep. 257, it was held that by submitting to answer and admitting the facts necessary to support the attachment, all preliminary objections to want of verification were waived.

In the case of Re Cheeseman (1886) 49 N. J. L. 115, 60 Am. Rep. 596, 6 Atl. 513, a publisher of disrespectful articles concerning the court was adjudged to be in contempt, in a proceeding instituted by the court on its own motion, without affidavit. It was held that while, ordinarily, an affidavit should be presented before a rule to show cause or an attachment is issued, where the accused answers without objecting to the absence of a preliminary affidavit, he waives his right.

M. B.

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UNIVERSITY STATE BANK, Respt.,
v.
JOSEPH ELLISON et al.,
and
H. W. STEEVES, Appt.

Washington Supreme Court (Dept. No. 1) — April 12, 1915.

(85 Wash. 55, 147 Pac. 645.)

Subrogation — by mortgagor paying after transfer.

The satisfaction by and transfer to the mortgagor of a chattel mortgage, after the property has been transferred subject to the mortgage, does not extinguish the debt; but the mortgagor is entitled to subrogation to the rights of the mortgagee.

[*See note on this question beginning on page* 242.]

APPEAL by defendant Steeves from a judgment of the Superior Court for King County in plaintiff's favor in an action brought to foreclose a chattel mortgage. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Aust & Terhune, and Miller & Lysons, for appellant:

Plaintiff is not entitled to subrogation.

Phœnix Mut. L. Ins. Co. v. Beaman, 5 Kan. App. 772, 48 Pac. 1007; 37 Cyc. 382; Crowell v. Hospital of Saint Barnabas, 27 N. J. Eq. 655.

Mr. John Mills Day, for respondent:

The mortgagor was entitled to subrogation to the rights of the mortgagee.

27 Am. & Eng. Enc. Law, 2d ed. 207-210; 37 Cyc. 402, 406, 465; Wood v. Smith, 51 Iowa, 156, 50 N. W. 581; Orrick v. Durham, 79 Mo. 174; Laird v. Wittkowski, 67 App. Div. 476, 73 N. Y. Supp. 1115; San Francisco Sav. Union v. Long, 6 Cal. Unrep. 60, 53 Pac. 907; Peirce v. Garrett, 65 Ill. App. 682; Hare v. Headley, 54 N. J. Eq. 545, 35 Atl. 445; York v. Landis, 65 N. C. 535; Harrisburg Bank v. German, 3 Pa. St. 300.

Parker, J., delivered the opinion of the court:

The plaintiff University State Bank commenced this action in the superior court for King county against the defendants Joseph Ellison, H. W. Steeves, and others, seeking foreclosure of a chattel mortgage executed by Ellison upon the personal property of a laundry plant in Seattle. The mortgage and the note it was given to secure became the property of the plaintiff through mesne assignments. The title to the mortgaged property passed to the defendant Steeves through mesne conveyances. Decree of foreclosure being rendered by the superior court and the mortgaged property ordered sold to pay the balance due upon the debt secured thereby, the defendant Steeves has appealed therefrom to this court.

The controlling facts may be summarized as follows: In June, 1908, the defendant Ellison, being then indebted to Sadie Saunders in the sum of $1,215, executed and delivered to her as evidence thereof his promissory note, and at the same time executed and delivered to her to secure such indebtedness a chattel mortgage upon the personal property of a laundry plant in Seattle then owned by him. This mortgage was duly filed for record in the office of the auditor of King county on August 4, 1908. On April 6, 1909, Ellison sold and conveyed the mortgaged property to Ellison's Hand Laundry, a corporation, by bill of sale in usual form, containing

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general covenants of warranty, wherein he agreed to defend the title to the property against all lawful claims made thereon, "*except as to encumbrances now of record and known to party of the second part,*" the grantee. This exception from the covenants of warranty and agreement to defend the title on the part of Ellison, it is plain from the record before us, had particular reference to this mortgage and the comparatively small balance due thereon, which at that time was $216.60. The existence of this encumbrance was well known to the grantee as well as to Ellison. As a consideration for this conveyance of the mortgaged property, Ellison received from this grantee, the corporation which had just been organized, a large proportionate amount of its capital stock, and as part of the transaction he returned to the corporation a number of shares of this stock, to the end that it might be sold by the corporation to aid in liquidating the indebtedness of the business, which indebtedness included, among other things, this $216.60 balance due on this mortgage indebtedness. We mention this as being some affirmative evidence tending to show that there was consideration for this exception from Ellison's covenants of warranty and his agreement to defend the title, though the conveyance, with the exception expressly stated therein, of itself, we think, imports a consideration therefor. On April 14, 1909, Sadie Saunders sold and assigned the note and mortgage to the Northwest Trust & Safe Deposit Company. On February 14, 1910, Ellison's Hand Laundry sold and conveyed the mortgaged property to Chin Loy, who at the same time assumed and agreed to pay the balance due upon the mortgage indebtedness. On March 20, 1910, the balance due upon the note and mortgage not having been paid by Ellison's Hand Laundry or Chin Loy, the Northwest Trust & Safe Deposit Company appropriated from funds on deposit with it, belonging to Ellison, an amount equal to the balance due it upon the mortgage debt. This evidently was done at the time without Ellison's consent. Thereupon Ellison demanded and received from the Northwest Trust & Safe Deposit Company an assignment to himself of the mortgage, which assignment was duly executed and delivered to him, together with the note. On March 21, 1910, Ellison, for the purpose of securing an indebtedness owing by him to respondent University State Bank, assigned to it the note and mortgage. The title to the mortgaged property through mesne conveyances passed to the appellant Steeves, who was the owner thereof at the time of the commencement of this action and the rendering of the foreclosure decree therein, appellant's title being subject to the lien of the mortgage to the extent of the balance due upon the note secured thereby, unless the assignment of the mortgage and surrender of the note to Ellison by the Northwest Trust & Safe Deposit Company resulted in extinguishing them both for all purposes, so that neither he nor the respondent, his assignee, could thereafter have any rights of subrogation thereunder.

The evidence tends to show, and the trial court so found, that appellant Steeves and all of his predecessors in interest since the making of the mortgage, actually knew of its existence and of the fact that the debt secured thereby had not been wholly paid. We are inclined to accept the trial court's finding as to this fact, but, in any event, there was at all times since the conveyance to Ellison's Hand Laundry this balance due upon the mortgage, and the mortgage was of record in the auditor's office and unsatisfied of record. This of itself is, in any event, sufficient to bind those who became interested in the property subsequent to the execution and recording of the mortgage.

Respondent rested its right of foreclosure upon the theory that by virtue of Ellison's Hand Laundry

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accepting conveyance of the property from Ellison, subject to the mortgage, Chin Loy's accepting conveyance of the property from Ellison's Hand Laundry, subject to the mortgage, and his agreeing at the same time to assume and pay the balance due thereon, and the taking of an assignment of the mortgage by Ellison, with the surrender to him of the note from the Northwest Trust & Safe Deposit Company, Ellison, and in turn respondent University State Bank, by subrogation became possessed of all rights of the Northwest Trust & Safe Deposit Company, so far as such rights might be enforced against the property by foreclosure of the mortgage to pay the balance due upon the debt secured thereby. This apparently was also the theory upon which the trial court rendered its decree of foreclosure in favor of respondent. Appellant contends that the transfer of the note and mortgage by the Northwest Trust & Safe Deposit Company to Ellison, upon it receiving from him the balance due thereon, was in effect a complete extinguishing of the debt evidenced by the note and secured by the mortgage, because of the fact that Ellison, as between himself and the Northwest Trust & Safe Deposit Company, was the principal debtor. This is a plausible theory, viewed superficially. It does not follow, however, that Ellison would be the principal debtor as between himself and some other person, fund, or property liable for the debt, which person, fund, or property Ellison might be entitled to have treated as the principal debtor, so as to secure for himself such subrogation rights as sureties are entitled to exercise.

We shall not rest our conclusion upon the fact that Chin Loy expressly assumed and agreed to pay the balance due upon the mortgage debt, since that assumption of the mortgage debt was not an agreement to which Ellison was a party. We shall proceed upon the assumption that Ellison's right of subrogation must rest upon the agreement to which he was a party, to wit, his conveyance to Ellison's Hand Laundry, whereby it took the title subject to the mortgage. If we should proceed upon the assumption that Ellison's grantee had agreed with him to assume and pay the balance due upon the mortgage debt, as well as merely receiving the title subject to the mortgage, our problem might possibly be somewhat simpler and easier of solution. For then the answer would be found in the doctrine that "a mortgagor who, after selling the land to one who assumes and agrees to pay the mortgage debt, is compelled to pay the debt himself, is entitled to be subrogated to the rights of the mortgagee, and may foreclose the mortgage for his own benefit; for the vendor becomes in effect the surety and the vendee the principal." 37 Cyc. 465.

This doctrine finds support in many decisions, among others that of Orrick v. Durham, 79 Mo. 174, where we find the following:

"Leaving then for the moment Durham out of view, had Orrick, who was primarily personally bound to Shaw for the $333.33 debt, paid the same off, either voluntarily or under compulsion, would he not, upon clear principles of equity, have been entitled to be subrogated to the rights of the mortgagee Shaw? Does it make any difference, as suggested by respondents' counsel, that Orrick paid his own debt to Shaw? There is neither anomaly nor solecism in a mortgagor, under certain circumstances, who pays his own mortgage debt, becoming subrogated to the rights of the mortgagee as against a subsequent encumbrance or purchase. In Halsey v. Reed, 9 Paige, 446, 453, it was held in a case involving the principle under consideration, that if the mortgagor 'had paid the amount of the bond and mortgage voluntarily to the present holders thereof, he would have had a right to demand

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an assignment of the same, to enable him to enforce payment out of the premises'. In Stillman v. Stillman, 21 N. J. Eq. 127, 129, it is expressly held that one may purchase his own mortgage on land that he has sold, and although such purchase may render the bond unavailing, yet where lands are conveyed, as these were, subject to the mortgage as part of the consideration, the mortgage is the principal security, and, even if the mortgagor pays the bond, he is entitled to be subrogated as to the mortgagee, and to be repaid out of the land what he has paid on his own bond. Kamena v. Huelbig, 23 N. J. Eq. 78, is a clear enunciation of the same equitable principle. In short, this is now a well-recognized feature of equity jurisprudence. Sheldon, Subrogation, §§ 24, 26; Moore's Appeal, 88 Pa. 450, 32 Am. Rep. 469; Johnson v. Zink, 51 N. Y. 333.

"Another view of this question is pertinent. If a party owning land encumbered by mortgage for his debt, sells it to another, who, as a part of the purchase money, agrees to pay this mortgage debt, as between themselves the vendor becomes the security of the vendee for the mortgage debt. Brandt, Suretyship & Guaranty, § 24. And in such case he is entitled, on payment of the debt, to be subrogated to the rights of the mortgagee, and may, to that end, compel the assignment of the mortgage to him. This rests upon the principle that, in equity, the land becomes the primary fund for the payment of the debt. Johnson v. Zink, 51 N. Y. 333; 1 Story, Eq. § 499."

Now since respondent is not seeking to hold appellant Steeves or any of his predecessors in interest under the mortgage personally liable, but is seeking merely to subject the mortgaged property, as being primarily liable to the satisfaction of the balance due upon the mortgage debt, it seems to us that this doctrine is, by analogy, applicable here in support of respondent's claim of its right to have this mortgaged property so subjected to the payment of the balance due upon the mortgage debt. It seems to us that the doctrine is equally applicable whether the new principal debtor be an individual, or whether some particular property or fund becomes primarily liable for the payment of the debt, and in that sense becomes the new principal debtor as between it and the original principal debtor. Nor are we without authorities lending support to this view.

Subrogation—by mortgagor paying after transfer.

In Johnson v. Zink, 51 N. Y. 333, there was involved a situation much like this so far as the application of this doctrine thereto is concerned. In that case the conveyance was made "subject to the mortgage," though apparently it affirmatively appeared from other evidence that the mortgage debt was regarded as a part of the consideration of the purchase price. The grantor, being personally liable for the mortgage debt, took up the note and mortgage, and sued to foreclose the same, claiming his right so to do by virtue of the doctrine of subrogation. Disposing of this branch of the case the court said:

"The conveyance by the mortgagor of the mortgaged premises, 'subject to' the mortgage in question, to Comstock, conveyed to him the equity of redemption only, and consequently the mortgage was to be discharged and satisfied out of those premises, before any right or interest therein was acquired by the grantee; and as between those parties it is clearly equitable that such discharge and satisfaction should be made out of the said premises, and that the obligor and mortgagor should not, in exoneration thereof, personally be called upon to pay the same out of his individual property. The effect of the transaction was, in equity, to make the land the primary fund for the payment of the debt, and to place the plaintiff in the situation or relation of surety therefor only. This principle is clearly established. See Jumel v. Jumel, 7

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Paige, 591–594; Halsey v. Reed, 9 Paige, 446–453, etc.; Marsh v. Pike, 10 Paige, 595; Cherry v. Monro, 2 Barb. Ch. 618; Ferris v. Crawford, 2 Denio, 595; Stebbins v. Hall, 29 Barb. 524, 529, 538.

"This relation between the mortgagor and his grantee does not deprive the obligee from enforcing the bond against the obligor. He is entitled to his debt, and has a right to avail himself of all his securities. Equity, however, requires that the obligor, on the payment of the debt out of his own funds, should be subrogated to the rights of the obligee, so that he can reimburse himself by a recourse to the mortgaged premises for that purpose. This cannot prejudice the creditor, and it is clearly equitable as between the debtor and the owner of the land. He clearly has no right or color of right, justice, or equity to claim that he, notwithstanding the conveyance of the property subject to the mortgage, and thus entitling him only to its value over and above it, should in fact enjoy and hold it discharged of the encumbrance, without any contribution toward its discharge and satisfaction from the land. This equitable principle is fully recognized in most of the cases above cited. Indeed, it is so consistent with right and justice as to require no authorities to sustain it."

This view finds support in Woodbury v. Swan, 58 N. H. 380, and Gregory v. Arms, 48 Ind. App. 562, 96 N. E. 196. In the last-cited case it is said: "Where a person takes a deed to real estate subject to encumbrances thereon, he does not thereby become personally liable to discharge the pre-existing liens, but, in the absence of any showing to the contrary, the purchaser is deemed to have deducted the amount of the prior encumbrances from the purchase price, and the land in his hands becomes the primary source of funds, out of which the encumbrances are to be paid."

These remarks and the authorities cited in connection therewith are of interest here, touching the question of the consideration for the exception from the covenants of warranty and agreement to defend the title. In this connection some contention is sought to be made touching the sufficiency of this consideration, which also seems to be an attack upon the conveyance from Ellison to Ellison's Hand Laundry, upon the theory that the par value of the stock given by Ellison's Hand Laundry, the corporation, to Ellison for the laundry, exceeded the value of the property. This is a problem that might be of some interest were we dealing with the rights of creditors of Ellison's Hand Laundry in a bankruptcy or insolvency proceeding. It is, however, a matter wholly foreign to our present inquiry. Appellant has no right to complain of that conveyance. It manifestly was good as between Ellison and Ellison's Hand Laundry, the corporation, and rests upon a sufficient consideration so far as the rights of appellant are concerned, and it plainly, we think, evidences an intent on the part of Ellison and Ellison's Hand Laundry that, as between them, Ellison should not be required to pay the mortgage debt, but that the property should answer therefor.

The doctrine of subrogation is not so restricted in its application as formerly. In Murray v. O'Brien, 56 Wash. 361, 372, 28 L.R.A.(N.S.) 998, 105 Pac. 843, we said: "The remedy is no longer limited to sureties and quasi sureties, but is freely applied by courts of equity in all cases where good conscience and equity dictate that a debt paid by one under any sort of legal coercion ought to be paid by another. Arnold v. Green, 116 N. Y. 566, 23 N. E. 1; Parsons v. Urie, 104 Md. 238, 8 L.R.A.(N.S.) 559, 64 Atl. 927, 10 Ann. Cas. 280; Pom. Eq. Jur. §§ 798, 799; Re Bruce (D. C.) 158 Fed. 123; Beach, Eq. Jur. 802–804; Twombly v. Cassidy, 82 N. Y. 155; Kinkead v. Ryan, 65 N. J. Eq. 726, 55 Atl. 730."

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Our more recent decision in Pease v. Syler, 78 Wash. 24, 138 Pac. 310, lends support to these views.

We conclude that the trial court properly disposed of the cause, and its judgment is therefore affirmed.

Morris, Ch. J., and Holcomb, Mount, and Chadwick, JJ., concur.

ANNOTATION.

Rights in mortgage security, of mortgagor or intermediate grantee who pays the mortgage debt after conveying the property.

I. Introductory, 242.
II. Assignment, 242.
III. Subrogation:
a. In general, 243.
b. Where a second mortgage is taken upon transfer, 249.
c. Rights upon judicial sale of mortgaged premises, 249.
d. Exceptions, 250.

I. Introductory.

The right of a mortgagor who has paid the debt secured by the mortgage after a transfer of the property by him depends upon the contract between him and his transferee. If by that contract it is the duty of the mortgagor to pay the debt, he cannot keep the mortgage security alive after paying it. Gregory v. Arms (1911) 48 Ind. App. 562, 96 N. E. 196; Wadsworth v. Williams (1868) 100 Mass. 126; Mertens v. Wakefield (1901) 35 Misc. 501, 71 N. Y. Supp. 1062. A mortgagor who, for a sufficient consideration, conveys the mortgaged land to another by deed with full covenant, reserving a life estate therein, without any agreement on the part of the grantee, in the deed or otherwise, to pay the mortgage, and later, voluntarily, and to protect the life estate, pays off the indebtedness and causes the mortgage lien to be discharged of record, has not the equitable right of subrogation to the original lien under the mortgage, as against his grantee. Van Valkenburg v. Jantz (1915) 161 Wis. 336, 154 N. W. 373. A purchaser of the mortgaged premises, who has conveyed the same by warranty deed, cannot take an assignment of the mortgage and retain it as a security; by assignment to him it is extinguished as a security. Mickles v. Townsend (1859) 18 N. Y. 575; Mickles v. Dillaye (1878) 15 Hun (N. Y.) 296.

But if by the contract of sale, the duty of paying the mortgage, as between the mortgagor and his transferee, rests upon the latter, the mortgagor, upon thereafter paying the mortgage, may keep the security thereof alive. This may be done by means of an assignment to the mortgagor. In the absence of an assignment the equitable doctrine of subrogation will be applied, and the mortgagor subrogated to the mortgage security. These remedies are taken up in detail in the following subdivisions.

II. Assignment.

When the grantee of the mortgaged premises has assumed the debt or purchased subject thereto, the mortgagor may purchase the mortgage and take an assignment thereof.

Beach v. Waite (1913) 21 Cal. App. 304, 131 Pac. 880; Barker v. Parker (1827) 4 Pick. (Mass.) 505 (see infra); Scribner v. Malinowski (1907) 148 Mich. 446, 111 N. W. 1032 (see infra); Merritt v. Byers (1891) 46 Minn. 74, 48 N. W. 417; Fogarty v. Hunter (1917) 83 Or. 183, 162 Pac. 964; Morris v. Oakford (1848) 9 Pa. 498.

A mortgagor who had conveyed the land, taking back a bond for title from his grantee, and who thereafter remained in possession of the land, was held entitled to take an assignment of the mortgage, and hold it as against creditors of his grantee, in Hatch v. Kimball (1836) 14 Me. 9.

In Kinnear v. Lowell (1852) 34 Me. 299, a mortgagor who had conveyed the premises was afterwards compelled to pay the mortgage on execution, whereupon the mortgagees "released and conveyed" to him all their rights under the mortgage; thereafter he brought a writ of entry as assignee in sustaining his action, the court states

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that, having been compelled to pay the debt secured by the mortgage, he became entitled to a reclamation of it, and to be regarded as the assignee thereof for its enforcement against the estate.

See Semon v. Terhune (1885) 40 N. J. Eq. 364, 2 Atl. 18, infra, III. c.

It is stated, obiter, in Tice v. Annin (1816) 2 Johns. Ch. (N. Y.) 125, that if a mortgagee sells the equity of redemption by execution at law to satisfy the mortgage debt, and then proceeds at law against the mortgagor or his other property to obtain the residue of the debt unsatisfied by the sale of the equity of redemption, or if the whole debt is satisfied by such sale, he must assign over to the mortgagor the bond and mortgage to enable him to compel the purchaser of the equity of redemption to refund him the debt out of the land mortgaged.

See Kinnaird v. Trollope (1888) L. R. 39 Ch. Div. (Eng.) 636, 57 L. J. Ch. N. S. 905, 59 L. T. N. S. 433, 37 Week. Rep. 234, infra, III. a.

The assignment of the mortgage to the mortgagor, after he has sold and conveyed the property subject to the mortgage, does not extinguish it. Pratt v. Buckley (1900) 175 Mass. 115, 55 N. E. 889; Baker v. Northwestern Guaranty Loan Co. (1886) 36 Minn. 185, 30 N. W. 464 (may thereafter be assigned). The mortgage may thereafter be enforced. Beach v. Waite (1913) 21 Cal. App. 304, 131 Pac. 880; Pratt v. Buckley (Mass.) supra; Merritt v. Byers (1891) 46 Minn. 74, 48 N. W. 417; Fogarty v. Hunter (1917) 83 Or. 185, 162 Pac. 964. In Beach v. Waite (Cal.) supra, the mortgagee had begun foreclosure proceedings against the mortgagor and his grantee, whereupon the mortgagor settled with the mortgagee, took an assignment of the mortgage, and had the foreclosure proceedings continued in the name of the mortgagee.

A grantee to whom land is conveyed subject to a mortgage, by mesne conveyance from the mortgagor, cannot claim an estoppel against the mortgagor on the theory that the mortgage was not excepted from his covenant of warranty. Merritt v. Byers (1891) 46 Minn. 34, 48 N. W. 417.

III. Subrogation.

a. In general.

It is a general rule, well sustained by the authorities, that a mortgagor who has paid the debt secured by the mortgage, after a transfer of the property, is entitled to be subrogated to the rights of the mortgagee under the mortgage, where the amount due on the mortgage was taken into consideration and deducted from the purchase price, or where the purchase was simply of the equity of redemption. As just stated, this rule is applied in cases in which the purchaser assumed the mortgage. Flagg v. Geltmacher (1881) 98 Ill. 293; Kinney v. Wells (1894) 59 Ill. App. 271; Josselyn v. Edwards (1877) 57 Ind. 212; Hoffman v. Risk (1877) 58 Ind. 113; Smith v. Ostermeyer (1879) 68 Ind. 432; Risk v. Hoffman (1879) 69 Ind. 137; Begein v. Brehm (1889) 123 Ind. 160, 23 N. E. 496; Minnesota Loan & T. Co. v. Peteler Car Co. (1916) 132 Minn. 277, 156 N. W. 255; Orrick v. Durham (1883) 79 Mo. 174; Wayman v. Jones (1894) 58 Mo. App. 313 (dictum); Hoysradt v. Holland (1870) 50 N. H. 433 (dictum); Passumpsic Sav. Bank v. Weeks (1819) 59 N. H. 239; Marsh v. Pike (1843) 1 Sandf. Ch. (N. Y.) 213, affirmed in (1844) 10 Paige, 595; Calvo v. Davies (1878) 73 N. Y. 211, 29 Am. Rep. 130 (dictum); Ayers v. Dixon (1879) 78 N. Y. 318 (dictum); Howard v. Robbins (1902) 170 N. Y. 498, 63 N. E. 530; Laird v. Wittkowski (1902) 67 App. Div. 476, 73 N. Y. Supp. 1115; Warner v. York (1903) 25 Ohio C. C. 310, 15 Ohio C. D. 310; Hampe v. Manke (1912) 28 S. D. 501, 134 N. W. 60 (dictum); Stevens v. Goodenough (1854) 26 Vt. 676.

In Howard v. Robbins (1902) 170 N. Y. 498, 63 N. E. 530, supra, one who mortgaged property as an agent of another to whom he afterwards conveyed a quitclaim deed was held entitled to be subrogated to the mortgage, upon paying the same, as against those who held through a purchaser from the mortgagor's principal, who assumed payment of the mortgage.

In Hubbard v. Knight (1897) 52 Neb. 400, 72 N. W. 473, a mortgagor who had conveyed an undivided

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half interest in the mortgaged real estate to one who assumed to pay a considerable portion of the mortgage was held entitled to be subrogated to the rights of the mortgagee, upon subsequently paying the mortgage, as against an assignee of a second mortgage, placed on the undivided interest by the purchaser. And in Cherry v. Monro (1848) 2 Barb. Ch. (N. Y.) 618, a partner who had sold and transferred his interest in the partnership property to his partner and comortgagor, who assumed payment of the partnership debts, including the mortgage in question, was held entitled to be subrogated to the rights of the mortgagee upon paying the mortgage.

Even though the grantee does not assume to pay the mortgage debt, if he receives a conveyance of the property subject to the debt, the mortgagor, upon subsequently paying the debt, is entitled to be subrogated to the rights of the mortgagee. Kay v. Castleberry (1911) 99 Ark. 618, 139 S. W. 645; Howard v. Burns (1917) 279 Ill. 256, 116 N. E. 703; Gregory v. Arms (1911) 48 Ind. App. 562, 96 N. E. 196; Wood v. Smith (1879) 51 Iowa, 156, 50 N. W. 581; Kinnear v. Lowell (1852) 34 Me. 299 (mortgagor who was compelled to pay the mortgage debt, in a suit upon it, sued as assignee of the mortgage); North End Sav. Bank v. Snow (1908) 197 Mass. 339, 125 Am. St. Rep. 368, 83 N. E. 1099 (dictum); Baker v. Terrell (1863) 8 Minn. 195, Gil. 165; Gerdine v. Menage (1889) 41 Minn. 417, 43 N. W. 91; Jumel v. Jumel (1839) 7 Paige (N. Y.) 591 (mortgage paid by administrator of mortgagor's estate); Johnson v. Zink (1873) 51 N. Y. 333; Stanhope's Estate (1896) 6 Pa. Dist. R. 179. In Woodbury v. Swan (1878) 58 N. H. 380, a mortgagor who had been compelled, upon execution, to pay the mortgage debt, was held entitled to be subrogated to the rights of the mortgagee as against those holding through a foreclosure of a second mortgage, given by a subsequent purchaser of the mortgaged premises.

See Hubbard v. Knight (1897) 52 Neb. 400, 72 N. W. 473.

As to right of subrogation where land is sold at judicial sale, see infra, III. c.

A grantee who takes subject to the mortgage is presumed to have included the mortgage debt in the purchase price. Kay v. Castleberry (1911) 99 Ark. 618, 139 S. W. 645.

Various statements of this rule appear. The rule has been announced that "where a mortgage debt forms a part of the consideration of the purchase, although the purchaser has not entered into any contract or agreement, by deed or other writing, to pay it, he is bound to that extent to indemnify the grantor." Wood v. Smith (1879) 51 Iowa, 156, 50 N. W. 581. It has been stated that when a conveyance of the mortgaged property is made, subject to the mortgage, the amount due upon the mortgage must have constituted a part of the price to be paid for the estate, so that it became the duty of the purchaser to pay the mortgage debt if he would relieve the estate from the encumbrance. Kinnear v. Lowell (1852) 34 Me. 299. In Johnson v. Zink (1873) 51 N. Y. 333, it is stated that "the presumption is, where premises are conveyed subject to a mortgage, and the equity of redemption only is sold and conveyed, that the amount thereof is not paid to the vendor, but is deducted from the full value of the property."

A conveyance by quitclaim deed has been held, in a case in which the mortgagor took an assignment upon paying the mortgage, to be in effect a conveyance subject to the mortgage. Scribner v. Malinowski (1907) 148 Mich. 446, 111 N. W. 1032, holding that a husband who, with his wife, had executed a mortgage, might, after he had quitclaimed his interest in the land to his wife, take an assignment of the mortgage without discharging it, so that an assignee of the husband might foreclose.

See Howard v. Robbins (1902) 170 N. Y. 498, 63 N. E. 530.

In Cornell v. Prescott (1847) 2 Barb. (N. Y.) 16, one of two persons who had purchased mortgaged property, assuming the payment of the mortgage thereon, who thereafter paid his share of the mortgage and afterwards sold his interest to his coten-

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ant, was held entitled to be subrogated to the rights of the mortgagee, upon paying the balance of the mortgage. Upon the sale to the cotenant the purchaser assumed the payment of the mortgage.

In Hoffman v. Risk (1877) 58 Ind. 113, the mortgage was held not to be extinguished, where the mortgagor paid the amount thereof to a purchaser of the mortgaged property who had assumed payment of the mortgage, and who had purchased or paid off the same. The mortgagor in the action was attempting to recover the amount thus paid, on the theory that it was paid under a mistake and in ignorance of the conveyance to the purchaser to whom he had thus paid, and of such purchaser's agreement to pay off the indebtedness.

In Arnold v. Green (1889) 116 N. Y. 566, 23 N. E. 1, an owner of premises on which there was a mortgage contracted to sell the same, subject to the mortgage, which the vendee agreed to pay. There being a delay in the completion of the sale, the vendor paid off the mortgage to the mortgagee, who refused to assign it, and received a discharge which was placed upon record. Subsequently, in an action to compel the specific performance of the contract of sale, the vendor was held entitled to be subrogated to the rights of the mortgagee under the mortgage. The court states that the vendor, by the payment of the mortgage, became the equitable assignee thereof, and entitled to enforce it for his own reimbursement and the protection of his interests in the land. The court further states that the land itself was the primary fund for the payment of the encumbrance, which was not the personal debt of the vendor, but which, if enforced, would require him to raise the money and pay it, or else lose his interest in the premises; that "he held the legal title to the land as security for the payment of the purchase price, and as trustee for the plaintiffs [the vendees], the equitable owners;" that in such a situation the vendor was not a mere volunteer or stranger in making the payment, but had an actual interest to protect, against the lien of the mortgage.

It is stated, obiter, in Shinn v. Shinn (1879) 91 Ill. 477, that a mortgagor who has sold out his interest in the land to his comortgagor would be entitled to be subrogated to the rights of the mortgagee, if at any time he had been called upon to pay the whole or a part of the mortgage.

The right of subrogation has been sustained where the mortgagor sold to one who took with notice of the mortgage, and excepted the mortgage from the covenant of warranty in his deed. Gerdine v. Menage (1889) 41 Minn. 417, 43 N. W. 91. In this case two mortgages had been given upon the property in question, together with other property of the mortgagor. After a sale of the property in question, the second mortgage had been assigned to the mortgagor, who undertook to foreclose the same, and purchased the mortgaged premises at the foreclosure sale. After the time of redemption from this sale had expired the mortgagor, to whom the first mortgage had been assigned, caused the satisfaction of the same to be entered of record. Subsequently the plaintiff purchased the premises from one to whom the mortgagor had conveyed before the foreclosure above referred to, and accepted a quitclaim deed therefor. The foreclosure of the second mortgage had been irregular, and an action was brought by the plaintiff to set aside the foreclosure proceeding and the sale and certificate thereon. In this action the mortgagor, conceding the invalidity of the proceeding, alleged that he had by mistake caused the first mortgage to be discharged of record, and prayed that both mortgages be declared subsisting liens, and for a foreclosure. In considering the right of the mortgagor the court states that if the plaintiff in the action was a bona fide purchaser, subrogation would not be allowed. The court then states that it was sufficiently obvious that the investigation of the title, which as purchaser he was bound to make, would have put him on inquiry and led to information as to the true state of facts in the case; and, this being true, he was presumptively chargeable with notice of defendant's rights. Accordingly, the mortgagor

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was held entitled to the relief affirmatively asked for in the answer, namely, a judgment declaring the first mortgage a lien, and for a foreclosure of both mortgages upon the land.

The decision in Ferris v. Crawford (1845) 2 Denio (N. Y.) 595, where a mortgage had been paid in part by money received from a sale of collateral securities given by the mortgagor to the mortgagee, is based upon the theory that, the mortgage having thus been paid in part by money received from the mortgagor, he was entitled to be subrogated to the rights of the mortgagee under the mortgage, as against a purchaser who had purchased subject to the mortgage.

A vendor who has conveyed to one who assumes the payment of notes secured by a vendor's lien is subrogated to the vendor's lien upon the subsequent payment of the note by himself. Knox v. McCain (1884) 13 Lea (Tenn.) 197. That a grantor who has conveyed land on which there is a vendor's lien is subrogated to the rights of the lien holder, upon paying the money secured by the lien, which his grantee assumed, is held also in Henson v. Reed (1888) 71 Tex. 726, 10 S. W. 522.

In some cases the intention of the mortgagor in paying the mortgage has been emphasized. It has been held that the mortgagor is entitled to be subrogated to the rights of the mortgagee, where he had no intention, at the time of paying the debt, of canceling it, but intended to obtain the note and deed of trust in order to subject the property to the payment of the debt, and the purchaser knew the debt was to be deducted from the purchase price. Kay v. Castleberry (1911) 99 Ark. 618, 139 S. W. 645. When the mortgage in question was given, an exchange of property had already been arranged, and the mortgagor was borrowing the money to secure which the mortgage was given, for the benefit of the purchaser. The property was afterwards transferred to other purchasers, but always subject to the mortgage debt. The mortgagor subsequently paid the debt and was held entitled to be subrogated to the rights of the mortgagee as against the owner of the property. It is stated on these facts that the debt as between the mortgagor and his grantee was primarily that of the grantee, and the mortgagor was the grantee's surety that in securing the loan he was acting for the accommodation of his grantee and, although liable for the payment of the note, was only liable in a secondary way, as surety. The mortgagor, upon paying the debt, apparently took an assignment, but this is not altogether clear. In other cases also the fact that the mortgagor in paying the mortgage did not intend to cancel it, but on the contrary intended to keep the note and mortgage alive for the purpose of recovery from the purchaser, is emphasized. Smith v. Ostermeyer (1879) 68 Ind. 432. The intention not to discharge the mortgage has been emphasized in other cases, in which the mortgagor was held entitled to take an assignment of the mortgage without discharging it. Scribner v. Malinowski (1907) 148 Mich. 446, 111 N. W. 1032.

A mortgagor who had been compelled to pay the mortgage, after he had conveyed the property to one who assumed the payment thereof, was held entitled to be subrogated to the rights of the mortgagee against his grantee, in Holland Reformed School v. De Lazier (1915) 84 N. J. Eq. 442, 93 Atl. 199, affirmed in (1916) 85 N. J. Eq. 497, 97 Atl. 253. In this case the holder of the mortgage had foreclosed the same, and sued the mortgagor for the deficiency. Upon payment of this deficiency by the mortgagor, he took an assignment in writing of the judgment of foreclosure. The action in this case was not one to foreclose the mortgage, as that had already been done, but to recover the amount paid by the mortgagor.

In Kinnaird v. Trollope (1888) L. R. 39 Ch. Div. (Eng.) 636, 57 L. J. Ch. N. S. 905, 59 L. T. N. S. 433, 37 Week. Rep. 284, a mortgagee began an action against the mortgagor, who had conveyed the mortgaged premises to one who assumed payment of the mortgage, upon the covenant contained in the mortgage for payment of the sum secured thereby. The mortgagee was held entitled to judgment for the

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amount of the mortgage, but only on the terms that, upon receiving payment of that sum, he reconvey the mortgaged property to the mortgagor, subject to any equity of redemption that may be subsisting in any person other than the defendant. The case thus recognizes the equitable right of the mortgagor to be protected in payment of the mortgage, under the circumstances discussed in the present note. The case, however, is not one of subrogation, but more nearly approaches that of an assignment.

The right of the mortgagor to subrogation was sustained in Baldwin v. Thompson (1834) 6 La. 474; but his right to summary process by seizure and sale was denied because there was no authentic evidence of the payment which, in this jurisdiction, must be shown by a notarial act to authorize an order of seizure and sale. The action in this case was against a second purchaser, who, so far as appears, had not assumed payment of the mortgage.

An administrator who sold all the right, title, and interest of the decedent in and to certain mortgaged land, and who subsequently paid the mortgage out of the general assets of the estate, was held entitled to charge the land with the amount so paid, in Greenwell v. Heritage (1880) 71 Mo. 459. The court states that the estate paid a debt for which the land was bound, and subject to which it was sold by the administrator, and whether the equity of the estate to reimbursement out of the land be denominated as a right of substitution or subrogation, or there be no name whatever by which it can be characterized, it is a clear equity which will be recognized and enforced. The court, in deciding this case, relies upon the earlier case of Welton v. Hull (1872) 50 Mo. 296. It is stated in the Welton Case that the payment of a mortgage debt by an administrator, after the land had been sold by him, did not extinguish the encumbrance, but upon the payment of the debt the estate became entitled to the amount so paid, to be made out of the lands in the hands of the purchaser at the administrator's sale; and it is stated to be not exactly a subrogation of the estate to the rights of the creditor, but is in the nature of a subrogation, or rather a return to the estate of a security which had been pledged for the payment of a debt. Upon rehearing in Welton v. Hull, Adams, J., states that "the real estate was sold subject to the deed of trust;" but in the original opinion, Bliss, J., states that "the land was appraised and sold precisely as though no such deed [trust deed] existed. It seems to have brought a full price, being 6/7 of the appraised value."

In holding that executors to whom a mortgage given by their decedent had been transferred might foreclose the same, the court in Stillman v. Stillman (1870) 21 N. J. Eq. 126, states that "the transfer of the mortgage to the executors of the mortgagor does not satisfy it. The land was owned by a third person, and the mortgage was a valid encumbrance upon it. One may purchase his own mortgage on land that he has sold, and although such purchase may render the bond unavailing, yet where lands are conveyed as these were, subject to the mortgage as part of the consideration, the mortgage is the principal security, and, even if the obligor pays the bond, he is entitled to be subrogated as to the mortgage, and to be repaid out of the land what he has paid on his own bond."

A grantee of the mortgaged premises, who has assumed the mortgage, is entitled to be subrogated to the rights of the mortgagee upon payment thereof, as against his grantee, who also assumed the mortgage. Stover v. Tompkins (1892) 34 Neb. 465, 51 N. W. 1040; McLean v. Towle (1845) 3 Sandf. Ch. (N. Y.) 118. A subsequent purchaser from the mortgagor, who in turn conveyed to one who assumed payment of the debt, was held entitled to be subrogated to the rights of the mortgagee under a judgment of foreclosure, upon payment of the balance of the judgment after sale of the premises, against a purchaser, with notice, of the equity of redemption from the second purchaser. Todd v. Oglebay (1901) 158 Ind. 595, 64 N. E. 32, second appeal in (1905) 166 Ind. 250, 76 N. E. 238.

The right of subrogation exists

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against a grantee of the property other than the immediate grantee from the mortgagor. This is true when there is a line of purchasers, each of whom assumes payment of the debt. Flagg v. Geltmacher (1881) 98 Ill. 293; Hoffman v. Risk (1877) 58 Ind. 113; Smith v. Ostermeyer (1879) 68 Ind. 432; Risk v. Hoffman (1879) 69 Ind. 137; Wood v. Smith (1879) 51 Iowa, 156, 50 N. W. 581. It is also true in case of a purchase subject to the debt. Kay v. Castleberry (1911) 99 Ark. 618, 139 S. W. 645.

It is not necessary that the assumption of mortgage by a subsequent purchaser be made to or accepted by the mortgagor. It is sufficient if such purchaser agrees with his grantor to assume the mortgage debt. The promise is for the benefit of the mortgagor, and he may sue upon it. Risk v. Hoffman (1879) 69 Ind. 137.

An assignee of a second mortgage, placed on the mortgaged premises by the purchaser, holds subject to the mortgagor's right of subrogation. Hubbard v. Knight (1897) 52 Neb. 400, 72 N. W. 473.

See Woodbury v. Swan (1878) 58 N. H. 380, supra; and also Merritt v. Byers (1891) 46 Minn. 74, 48 N. W. 417, supra, II.

In fact, subrogation has been allowed as against a purchaser through mesne conveyances, who neither assumed the debt nor accepted a conveyance subject to the mortgage, where the immediate purchaser assumed the debt. Begein v. Brehm (1890) 123 Ind. 160, 23 N. E. 496. The mortgagor had transferred the property to a purchaser, who had assumed the payment of the mortgage debt, and had placed his name on the mortgage note; subsequently this purchaser conveyed the property to another purchaser, and he to a third purchaser, and it was sought to enforce the mortgage against the property in his hands; the last two purchasers did not assume the payment of the mortgage indebtedness. In holding the mortgagor entitled to subrogation against the then owner, the court treats the debt as that of the first purchaser, and states that the owner, having acquired title to the property with notice of the encumbrance, held it subject to the payment of the mortgage debt in whosesoever hands it might be found, other than those of the first purchaser, the principal debtor. It is held that no notice of the agreement between the mortgagor and his grantee, whereby the latter assumed the payment of the mortgage debt, was necessary; but that, assuming notice necessary, the purchaser had constructive notice thereof.

The court in Cherry v. Monro (1848) 2 Barb. Ch. (N. Y.) 618, speaking of the right of a purchaser of the land from a surviving partner, who had assumed payment of the debt, with reference to the right of the retiring partner, states that the deed from the retiring to the surviving partner, under which the purchaser derived his title to the premises in question, showed upon its face that there was a mortgage upon the lot, and that the premises were conveyed subject to that mortgage, and that this would have been constructive notice of the mortgage and of the equitable right of the retiring partner to have the debts charged upon the mortgaged premises as the primary fund, even if the mortgage itself had not been upon record. But the court states further that this is not a case in which a notice of the prior equity of a retiring partner was necessary to preserve his right, for the purchaser did not and could not claim any strict legal right to have the debt charged upon the retiring partner personally, instead of upon the lot on which it was charged by the mortgage; and as between mere equitable claims he who is first in time is superior in rights.

Where the mortgagor has paid after suit has been begun against him, it is not necessary that the purchaser have notice of the suit to render him liable to the mortgagor; the mortgagor may voluntarily pay the debt and recover of the purchaser. Risk v. Hoffman (1879) 69 Ind. 137. That the mortgagor may voluntarily pay the debt is held also in Baker v. Terrell (1863) 8 Minn. 195, Gil. 165.

In some cases the payment has been made in pursuance of a judgment, and this fact is emphasized. Thus, in

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Gregory v. Arms (1911) 48 Ind. App. 562, 96 N. E. 196, where an administrator of the mortgagor had paid the debt in pursuance of a judgment, the court concludes that the mortgagor, by conveying the land to a grantee, who accepted subject to the mortgage, occupied the relation of surety, and states that "if, however, decedent was only secondarily liable as surety, and appellant paid the debt after due allowance and adjudication by the court, the payment was not voluntary, and appellant's right of subrogation was made out."

b. Where a second mortgage is taken upon transfer.

It has been held that a mortgagor who has sold the mortgaged premises, taking back a second mortgage to secure the purchase money, is entitled to be subrogated to the rights of his mortgagee, upon paying the first mortgage, as against one to whom he assigned, without recourse, the note and the second mortgage, subject to the condition therein contained, that the mortgagor therein should pay the first mortgage. Swett v. Sherman (1872) 109 Mass. 231. The assignee of the second mortgage, to whom the first mortgage had also been assigned, was accordingly denied the right to compel the mortgagor to pay his note, secured by the first mortgage. A similar decision appears in Orrick v. Durham (1883) 79 Mo. 174, where the estate was conveyed by the mortgagor to his purchaser by a deed imposing upon the purchaser the duty of paying the first mortgage. An assignee of such second mortgage was held to stand in no better position in respect thereto than the purchaser from the first mortgagor. The right of a mortgagor to be subrogated to the position of a prior mortgagee is stated, in Passumpsic Sav. Bank v. Weeks (1879) 59 N. H. 239, not to be defeated by his having taken a second mortgage as security for the payment of the first.

See Knoblauch v. Foglesong (1888) 38 Minn. 459, 38 N. W. 366, infra, III. d.

c. Rights upon judicial sale of mortgaged premises.

The right of a mortgagor whose equity of redemption has been sold at execution sale, to be subrogated to the rights of the mortgagee upon subsequently paying the mortgage, has been sustained, where the execution sale took place subject to the mortgage. Parsons v. Urie (1906) 104 Md. 238, 8 L.R.A.(N.S.) 559, 64 Atl. 927, 10 Ann. Cas. 278. A similar decision appears in Cox v. Wheeler (1838) 7 Paige (N. Y.) 248, where a mortgage payable in instalments was foreclosed as to one of the instalments, and the premises sold subject to the future instalment. The mortgagor, who was afterwards obliged to pay the remaining instalments by a suit at law upon his bond, was in equity held entitled to be subrogated to the rights of the mortgagee so as to obtain remuneration by means of the lien of the mortgage upon the land. A mortgagor who had given two mortgages to the same person, and afterwards sold the premises subject thereto, was held entitled to be subrogated to the first mortgage, in an action to recover the amount of the note secured thereby, brought by the mortgagee, who had foreclosed the second mortgage and purchased at the foreclosure sale, which was made free of all encumbrances except the first mortgage. Rogers v. Hedemark (1897) 70 Minn. 441, 73 N. W. 252. That the right of subrogation exists has been stated to be true, where land mortgaged to secure three notes is sold upon foreclosure of the mortgage as to two of the notes, subject to the third note, and purchased by the mortgagee. Such mortgagee is held not entitled to sue the mortgagor and recover on the third note. Shermer v. Merrill (1876) 33 Mich. 284. Redeeming the land is not the only remedy of the mortgagor. Ibid. Where land is sold at foreclosure sale under a prior mortgage, the owner, who thereafter pays an amount due on a mortgage given by him, is stated to be entitled to be subrogated to the rights of the mortgagee, in Semon v. Terhune (1885) 40 N. J. Eq. 368, 2 Atl. 18. In paying off the mortgage the mortgagor took an assignment of the bond and mortgage to a third person, who brought an action to foreclose.

In Barker v. Parker (1827) 4 Pick. (Mass.) 505, a mortgagor whose in-

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terest in the mortgaged premises had been sold on execution, and to whom the mortgagee thereafter released all his right, title, and interest, was held entitled to maintain writ of entry to secure possession of the mortgaged premises, against one who held under the execution purchaser. The court holds the execution sale to be the same as an absolute sale by the mortgagor. With reference to the right of the mortgagor to redeem, the court states that it is true he had this right, but he could not be compelled to redeem by his creditors; that all the right he had after the sale of his equity was the mere right of redemption, and this right was not inconsistent with his holding as assignee of the mortgage; that "as the tenants have acquired the estate of the mortgagor, they cannot object to his purchasing the estate of the mortgagee. Their rights can by no imposibility be impaired by it. They still have the right to redeem, unless it has been lost by their own laches." Nothing is said as to the execution sale having taken place subject to the mortgage.

On the contrary, the right of a mortgagor, after the equity of redemption had been sold at an execution sale, to be subrogated to the rights of a mortgagee who held a prior mortgage on the premises, subject to which the execution sale was had, was denied in Rogers v. Meyers (1873) 68 Ill. 92. This decision is based upon the ground that the mortgagor had the right to redeem from the execution sale, and this being so he should pursue that remedy.

d. Exceptions.

Subrogation is an equitable remedy, and, where the equities are against subrogation, it will not be allowed. Thus, it has been held that a mortgagor is not entitled to subrogation upon paying the mortgage after he has sold the property, where he took a second mortgage upon the premises in making the sale, and assigned this to the holder of the first mortgage. Knoblauch v. Foglesong (1888) 38 Minn. 459, 38 N. W. 366. It was held in this case that the mortgagor was not entitled to subrogation, even though he was not liable for the payment of the second mortgage. The court states that when the mortgagor took a second mortgage, and then sold it to one to whom he had previously executed the first mortgage, without any reference to or reservation of any supposed rights on his part arising out of the arrangement between him and the person to whom he sold the premises regarding the payment of the first mortgage, to which the mortgagee was in no wise a party, he must be taken to have consented that the assignee should hold both mortgages, with his legal right unaffected by any outside arrangement between the mortgagor and the purchaser; that one of these rights would be that any money received from the mortgagor upon the first mortgage should be treated not as a purchase of the mortgage, but as a payment, so as to enhance the value of his security on the second.

When a grantee to whom the premises have been conveyed, subject to the mortgage, pays the same, the mortgagor's obligation is canceled, and while the grantee may keep the mortgage alive for the purpose of securing a debt incurred by him, as to such debt the mortgagor is a stranger; and, if he pays the debt thus secured, he is not entitled to subrogation, since he is then in the position of a stranger paying the debt of another. Union Bank v. Schneider (1911) 70 Misc. 377, 128 N. Y. Supp. 878. Upon appeal the appellate division in reversing this judgment, stated additional facts, and held that the mortgagor was not a stranger to the transaction; but the question of subrogation did not arise. (1911) 147 App. Div. 1, 131 N. Y. Supp. 738.

The right of a mortgagor to recover the mortgaged property has been denied in certain forms of actions. Thus, the right of one of two joint mortgagors of chattel property, who had sold his interest to his comortgagor, who assumed the payment of the debt, to be subrogated to the lien of the mortgage upon paying the same so as to entitle him to maintain his claim in a trial of the right of property, was denied in Allison v. Pattison (1891) 96 Ala. 159, 11 So. 194.

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It is stated that, by the agreement between the mortgagors, the one who purchased the interest of the other became bound to repay the seller what he had paid out, but that obligation did not spring out of the original transaction in which the mortgage was given; it grew out of a subsequent contract, and the mortgage was no security for that. W. A. E.

STATE OF IDAHO
v.
NATIONAL SURETY COMPANY, Respt.

T. C. COFFIN, Intervener, Appt.

Idaho Supreme Court — December 13, 1916.

(29 Idaho, 670, 161 Pac. 1026.)

Attorney and client — lien on public fund — conflict of laws.

1. The right to enforce an attorney's lien against the proceeds of a judgment in favor of the state, in this jurisdiction, depends upon constitutional and statutory provisions. This court will not be bound by, or follow, decisions of appellate courts of other jurisdictions in the enforcement of attorneys' liens against the proceeds of a judgment in favor of the state and in the custody of the court, where such decisions are directly in conflict with the Constitution and statutory provisions of this state.

[*See note on this question beginning on page* 274.]

Same — attorney for state.

2. Section 4900, Rev. Codes, as amended by Sess. Laws 1911, chap. 167, p. 563, fails to provide for an attorney's lien in favor of an attorney who appears on behalf of the state, which attaches to a verdict, report, decision, or judgment in favor of the state, or to the proceeds thereof. Said statute makes no reference to the sovereign power and the sovereign is not included within the foregoing statutory provisions, either by express words or by necessary implication. As the government of the state is established for the good of the whole, and can only be supported by means of its revenues, courts, in the construction of general laws, will not ordinarily apply to the state such as upon their face seem to have been intended only to declare or regulate the rights and remedies of individuals and which, if so applied, would have the effect of obstructing the speedy collection of the public revenues.

Same — provision for payment.

3. Held, that no equitable lien attaches in favor of an attorney for services alleged to have been rendered the state that is enforceable against the proceeds of a judgment in the custody of the court, where the Constitution and the provisions of the statutes in express terms provide the procedure that must be followed in order to authorize the payment of any claim against the state.

Same — public policy.

4. Section 18, art. 4, of the Constitution, provides that "the governor, secretary of state, and attorney general shall constitute . . . a board of examiners, with power to examine all claims against the state, except salaries or compensations of officers fixed by law," etc. This clause of the Constitution is supplemented by the statutes (§ 146, Rev. Codes, as amended by Sess. Laws 1913, chap. 15, p. 58), as follows: "It shall be the duty of the state board of examiners to examine all claims against the state, except salaries and compensation of officers fixed by law. . . . " All claims of whatever character against the state must be submitted to the state board of examiners for their approval or rejection. To permit state officers to be harrassed and hindered

Headnotes by BUDGE, J.

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in the recovery of moneys embezzled by public officials, and to stop such moneys in transitu and charge the same with an attorney's lien for alleged services rendered the state in procuring said judgment, would be contrary to good public policy and detrimental to the due administration of the affairs of the state.

State — creation of claim against.

5. Any indebtedness created or attempted to be created against the state, by a state officer whose duty it is under the law to represent the state in an action to recover moneys embezzled by a state officer, in excess of the appropriation made to such officer, is void.

Same — audit and allowance.

6. Held, that there is a total absence of constitutional or statutory authority, authorizing the state depository board to create an indebtedness of the character sought to be recovered by appellant in this action, and all expenses authorized by law to be incurred by said board, in the performance of its official duty, must be audited and allowed as provided by law, by the state board of examiners.

(Sullivan, Ch. J., dissents.)

APPEAL by intervener from an order of the District Court for Ada County dissolving a temporary restraining order and refusing to take further jurisdiction of proceedings in intervention instituted by him to enforce an attorney's lien against the proceeds of a judgment obtained by the state for services rendered it. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **Richards & Haga, V. P. Coffin,** and **T. C. Coffin** for appellant.

Messrs. **J. H. Peterson,** Attorney General, **A. A. Fraser,** and **J. T. Pence** for the State.

Messrs. **Hawley & Hawley** for respondent.

Budge, J., delivered the opinion of the court:

One O. V. Allen was elected at the biennial election held on November 8, 1910, to the office of state treasurer of the state of Idaho for the years 1911 and 1912, and on November 5, 1912, Allen was re-elected to said office for the years 1913 and 1914. The National Surety Company of New York, to insure the faithful performance of all the duties of the office of state treasurer by Allen, furnished a bond to the state of Idaho in the penal sum of $200,000. During Allen's terms of office as such state treasurer he embezzled from the state of Idaho large sums of money that came into his hands. Suit was brought by the state of Idaho, as plaintiff, against the National Surety Company, a corporation, as defendant, in the district court of the third judicial district, to recover the moneys so embezzled, which resulted in a judgment being entered in favor of the state of Idaho and against the National Surety Company in the sum of $145,264.34, and it was further ordered in said judgment that the state of Idaho do hold and retain, in addition to said sum of $145,264.34, the payments made to the state depository board of the state of Idaho by and on behalf of the Bank of Nampa, namely, $7,414, together with costs and disbursements incurred in the action, amounting to the sum of $648.25.

The appellant herein appeared as one of the attorneys for the state in the trial of said cause in the district court. Shortly after the entry of the above-mentioned judgment, appellant, upon learning that the National Surety Company, through its attorneys, was about to pay to the state depository board the amount of the judgment recovered, and thereby procure a satisfaction thereof, made and filed his application in the district court wherein said judgment was rendered, for permission to file a complaint in intervention, wherein he sought to subject a portion of said judgment to the payment of his attorney's fees, alleged in his complaint in intervention to be due him for services rendered to the state in pro-

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curing said judgment, and for certain costs and expenditures made by him, alleged to have been incurred in connection with the preparation and trial of said cause. Permission was granted to appellant by the trial judge to file his complaint in intervention and his affidavit in support thereof, whereupon the trial court granted a temporary injunction, wherein it was ordered that the National Surety Company, its attorneys, and each and all of them, were temporarily restrained from paying, either to the state or its representatives, the entire amount of said judgment, and directed that so much thereof as appellant claimed was due him for legal services rendered, to wit, $12,500, together with fees and expenditures alleged to have been incurred by appellant in connection with the preparation and trial of said cause, namely, $1,556-.93, be retained by counsel for said National Surety Company until the further order of the court. The foregoing order was made on the 15th day of September, 1916. On the same date, the state of Idaho, by its attorney general, J. H. Peterson, and A. A. Fraser, Esq., and J. T. Pence, Esq., moved, upon the minutes of the court, to dissolve the temporary restraining order theretofore issued. Said motion came on for hearing before the court, the state of Idaho being represented by the attorneys heretofore named; Messrs. Hawley & Hawley appearing as counsel for the National Surety Company, and Messrs. Richards & Haga, and V. P. Coffin, Esq., and T. C. Coffin, Esq., appearing as counsel for intervener. Said motion was argued by counsel for the respective parties and taken under advisement.

On September 19th the appellant, by his attorneys, moved the court for permission to file an amended complaint in intervention; said motion being supported by his affidavit, which motion was granted by the court. Whereupon the amended complaint in intervention and affidavit were filed. On the same day the trial court entered an order: "that the temporary restraining order theretofore issued should be vacated and the money should be permitted to be paid to the state depository board; that the court should order the state depository board to then deposit the amount of $14,056.93 in a special fund in the state treasury, to be designated as State of Idaho v. National Surety Company Fund, to be kept in such fund until the petitioner's claim is acted on in due course, or until further orders of the court; . . . that the balance of the proceeds of said judgment be paid to the state depository board and by them into the public treasury of the state of Idaho; that the plaintiff and defendant be not required to answer the petition of intervener herein; that this court entertain no further jurisdiction in said case other than such as may be necessary to carry this order into effect."

It was further provided in said order that, whereas it appeared to the court that the petitioner would perfect an immediate appeal from the order to the supreme court, that said order is an appealable order, that one ground of such appeal will be that the court should have ordered the sum of $14,056.93 of the proceeds of said judgment paid into that court, and should then have proceeded to try the issues between the petitioner and the state of Idaho as to whether the state should be compelled to pay petitioner for legal services rendered and expenses incurred, out of the proceeds of the judgment in favor of the state, and, if so, how much, and that "whereas the petitioner has applied to this court for a stay of the judgment entered herein, pending the determination of his appeal, so far as the same relates to the payment of said sum of $14,056.93 into the special fund in the state treasury, whereas it appears possible that in the event said sum is paid into the state treasury, even though it be into a special fund, said appeal would be fruitless so far as the

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question just above mentioned is concerned, now, therefore, for the purpose of keeping said amount of $14,056.93 in statu quo until said appeal is perfected and the matter comes within the jurisdiction of the supreme court, it is hereby ordered that a stay of proceedings be and is hereby granted until 12 o'clock noon, Saturday, September 23, 1916, as to that portion of this order which requires $14,056.93 of the proceeds of said judgment to be paid to the state depository board and by said board to be paid into a special fund in the state treasury, and the operation of this order, . . . to that extent and to that extent only, is suspended for that length of time." Said order further provided that appellant should immediately perfect his appeal to the supreme court, and furnish an undertaking on such appeal. Whereupon counsel for intervener duly perfected an appeal to this court from the order made and entered in the district court, on September 21, 1916.

After the appeal had been duly perfected, T. C. Coffin, Esq., intervener below and appellant here, made an application for an order that the fund heretofore referred to be kept within the control and jurisdiction of this court until the appeal be determined. Thereupon this court, upon the filing of a good and sufficient bond, made an order to John W. Eagleson, as state treasurer of the state of Idaho, that he, as state treasurer, receive said amount of $14,056.93 from the defendant, and deposit and hold the same in a special fund, subject to the orders of this court.

This appeal is prosecuted from the order of the district court, dissolving the temporary restraining order heretofore referred to, and refusing to take further jurisdiction of the proceedings in intervention instituted by the appellant. For a reversal of said order, the appellant assigns and relies upon the following assignments of error:

1. The court erred in that it ordered and adjudged that said temporary restraining order be vacated and dissolved. The court also erred in that it did not grant the prayer of the amended complaint in intervention that said temporary restraining order be continued in full force and effect, pending the final judgment of the court herein.

2. The court erred in that it ordered and adjudged that the defendant pay the full amount of said judgment to the state depository board. The court also erred in that it did not grant the prayer of the amended complaint in intervention, that said defendant National Surety Company, a corporation, and its attorneys, Hawley & Hawley and James H. Hawley, Esq., their servants and agents, and each and all of them, be ordered to forthwith deposit with the clerk of said court said sum of $14,056.93, proceeds of said judgment, there to await the further orders of said court.

3. The court erred in that it ordered and adjudged that the plaintiff and defendant be not required to answer the petition of intervener herein. The court also erred in that it did not grant the prayer of the amended complaint in intervention that all parties herein who have or claim to have interests or rights adverse to this intervener be required to answer the amended complaint in intervention within ten days of the service upon them or their attorneys of the same.

4. The court erred in that it ordered and adjudged that said court entertain no further jurisdiction in said cause other than such as might be necessary to carry the order appealed from into effect.

The question presented to this court upon the record in this case is, in substance and effect: Conceding for the purposes of this case that there is no fund or appropriation in the state treasury out of which the attorney's fee and expenses, necessarily incurred in obtaining the judgment heretofore

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mentioned in favor of the state, can lawfully be paid, can the fund arising from the judgment itself be stopped in transitu by order of the court, and charged while in the custody of the law with the payment of the attorney's fees and costs incurred in creating the fund, by asserting an attorney's lien against it?

As we view it, if, under the Constitution and statutes of this state, an attorney's lien for services rendered the state may be asserted against funds arising from a judgment procured in favor of the state, the trial court erred in dissolving the temporary injunction, in refusing to retain jurisdiction of the case, and refusing to require the state of Idaho and the National Surety Company to answer the amended complaint in intervention of the appellant herein. The various assignments of error heretofore stated, being all directed to the above propositions, may be considered collectively.

At the outset it may be conceded that if this were an action between individuals or private corporations, and notice were duly given to the judgment debtor as provided by law, the fund arising from the judgment would be subject to and chargeable with the attorney's fee, and the same would be an enforceable lien against the proceeds of said judgment, together with costs and expenses incurred in obtaining the same. Kerns v. Washington Water Power Co. 24 Idaho, 525, 135 Pac. 70.

It will, therefore, be unnecessary for us to discuss that particular phase of this case, and we will confine ourselves to the question of the application of attorneys' liens against the state or funds belonging to it. In doing so, we are not unmindful of the numerous cases that have been cited by able counsel in their brief and so earnestly argued upon presentation of this cause, for the purpose of establishing the right of an attorney to a lien upon the proceeds of a judgment in favor of his client, for his fees and necessary and proper expenses, even where the client is the sovereign. There were a number of cases cited by counsel in their brief which would seem to bear out their theory, in the absence of constitutional provisions and statutory enactments directly in conflict with the doctrine announced therein. Upon examination we find some of these cases are not in point, for the reason that, prior to the employment of the attorneys who represented the sovereign, necessary appropriations were made by the legislature to meet the expenses and attorneys' fees, in advance of the services rendered and expenses incurred. In other cases attorney's retaining liens have been upheld upon the theory that these liens existed from the necessities of commerce and the necessities of the public service. In our opinion the right to enforce a lien of the character sought to be enforced in this case, if any exists, against the state in this jurisdiction, must depend upon constitutional and statutory authority, and we are not inclined to follow the decisions of appellate courts or other states where they directly conflict with the Constitution and statutory provisions of our own commonwealth.

Attorney and client—lien on public fund—conflict of laws.

The common law as to the compensation of attorneys has been abrogated in this state by statute, and is now a matter of contract, either express or implied. Section 4900, Rev. Codes, as amended by the Session Laws of 1911, chap. 167, p. 563, is as follows: "The measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties, which is not restrained by law. From the commencement of an action, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon

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his client's cause of action or counterclaim, which attaches to a verdict, report, decision or judgment in his client's favor and the proceeds thereof in whosoever hands they may come; and cannot be affected by any settlement between the parties before or after judgment; but parties to actions or proceedings are entitled to costs and disbursements, as hereinafter provided."

The foregoing statutory provision fails to provide for an attorney's lien in favor of an attorney who appears on behalf of the state, which attaches to a verdict, report, decision, or judgment in favor of the state, or to the proceeds thereof. In other words, the statute makes no reference to the sovereign power, and the sovereign is not included within the foregoing statutory provision, either by express words or by necessary implication.

Same—attorney for state.

In the case of Hendrick v. Posey, 104 Ky. 8, 45 S. W. 525, 46 S. W. 702, it appeared that appellant was attorney general of the state of Kentucky from September 7, 1891, to January 6, 1895, and as such, during that time, instituted suits against the Kentucky Midland Railway Company and recovered judgments aggregating $11,000; that appellant had said judgments made a prior lien in favor of the state; that the property of the railway company was sold after the expiration of appellant's term of office; that the master commissioner under the order of the court was directed to pay to the commonwealth $7,578.65, its pro rata share of said judgment; that appellant, believing that he had a right so to do, received the money from the commissioner as the attorney for the commonwealth, and contended that, inasmuch as the auditor and governor had refused to fix the amount of his compensation according to statute, he had a right to receive and retain the money paid him by appellee, and that he had a special lien thereon by virtue of § 107, Ky. Stat. The supreme court of Kentucky did not agree with his contention, but to the contrary held that § 107, Ky. Stat. (which is similar to § 4900, Rev. Codes, as amended, supra), had no application to the commonwealth, and cited in support thereof Com. v. Cook, 8 Bush, 220, 8 Am. Rep. 456, where the court held that: "The commonwealth is not embraced by an act which is made to operate between individuals, unless there is something in the act which shows an intention to subject the state to the same rule. . . . As the government of the state is established for the good of the whole, and can only be supported by means of its revenues, courts in the construction of general laws will not ordinarily apply to the state such as upon their face seem to have been intended only for declaring or regulating the rights and remedies of private individuals, and which, if so applied, will have the effect of obstructing . . . speedy collection of the public dues." Divine v. Harvie, 7 T. B. Mon. 439, at page 443, 18 Am. Dec. 194.

This rule of law the court in its opinion held to be founded "not only upon the highest public policy, but as warranted by the firmly established maxim 'that general statutes do not bind the sovereign, unless expressly mentioned in them.' Laws are prima facie made for the government of the citizen, and not of the state herself." Compton v. State, 38 Ark. 601.

The appellant is seeking to recover an alleged indebtedness due him, or, in other words, to enforce a claim against the state, and it is immaterial that the moneys out of which he seeks to compensate himself have not yet found their way into the state treasury. It is a claim against the state nevertheless. It is quite evident that a debt cannot be recovered against the state under any general statute regulating the recovery of debts, unless the statute by express terms

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or necessary implication authorizes such a procedure. "It is a settled rule that in general statutes which regulate the recovery of debts the government is not bound unless they are made applicable to it in express terms or by necessary implication." This is no invidious or prerogative right, but a rule founded on well-ascertained public policy, necessary to protect the public interest against the negligence of public officers, and especially to guard the public revenue. It is a rule adopted in many if not all of the states, and probably in most other countries, and has been sanctioned by repeated judicial decisions. United States v. Wilson, 8 Wheat. 256, 5 L. ed. 611; United States v. Hoar, 2 Mason, 314, Fed. Cas. No. 15,373; United States v. Greene, 4 Mason, 433, Fed. Cas. No. 15,258; United States v. Hewes, Crabbe, 307, Fed. Cas. No. 15,359; Stoughton v. Baker, 4 Mass. 528, 3 Am. Dec. 236; People v. Rossiter, 4 Cow. 143; Com. v. Baldwin, 1 Watts, 54, 26 Am. Dec. 33; Rex v. Allen, 15 East, 340, 104 Eng. Reprint, 873.

This same principle is announced in the case of Wood v. State, 125 Ind. 219, 25 N. E. 190, where the court held that "the law will not permit the administration of governmental affairs to be embarrased by the seizure of public property or public funds to pay debts due individuals."

The proceeds of the judgment recovered against the National Surety Company is a public fund, which had been embezzled by a public official, and recovered back. It belongs to the state, and it is out of this fund that appellant seeks the payment of the claim which he contends is due him, and insists that his claim became a lien and enforceable as such against the moneys of the state, and that he has a right to stop this money in transitu and subject it to his lien before it reaches the state treasury; that his right to have a portion of said fund paid to him by order of the court is not limited by the provisions of § 4900, Rev. Codes, as amended, supra, but that he has an equitable lien, which should be enforced by the trial court, whose duty it is to protect its officers in the matter of the payment to them of such fees and disbursements as may be found to be due them by the court. With this contention we are not in accord, for the reason that no equitable lien attaches in favor of the appellant where the Constitution and statutes in express terms provide an adequate remedy and where the procedure for pursuing this remedy is expressly provided it must be followed in order to authorize the payment of any claim against the state.

Same—provision for payment.

Section 18, art. 4, of the Constitution provides that "the governor, secretary of state, and attorney general shall constitute . . . a board of examiners, with power to examine all claims against the state, except salaries or compensations of officers fixed by law. . . ."

This clause of the Constitution is supplemented by the statutes (§ 146, Rev. Codes, as amended by Sess. Laws 1913, chap. 15, p. 58), as follows: "It shall be the duty of the state board of examiners to examine all claims [against the state], except salaries and compensation of officers fixed by law. . . . The board may approve or disapprove any claim or demand against the state, or any item thereof, or may recommend a less amount in payment of the whole, or any item thereof, and a decision of a majority of the members shall stand as the decision of the board."

The above sections of the Constitution and statutes require all claims against the state of an unliquidated character to be submitted to the state board of examiners for approval or rejection.

Same—public policy.

To adopt a different rule in this case or any case, no matter how just the claim might be, to permit state officers to be harassed and

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hindered in the recovery of moneys embezzled by public officials, by way of attorneys' liens for services alleged to have been rendered the state, would be contrary to good public policy and detrimental to the due administration of the affairs of the government.

But even if the position taken by learned counsel were correct, there must be a valid claim. The lien is merely ancillary to the claim. If there is no valid claim there can be no lien.

It is quite evident that the appellant must rely upon a contract of employment, either by the attorney general or the state depository board, or both. That being true, it becomes necessary to determine to what extent these officials may bind the state for the payment of claims made against it for such services rendered as the appellant seeks to recover for.

Section 1827, Rev. Codes, provides: "The state auditor and attorney general may employ other counsel than the county attorney, and the expenses must be paid out of the state treasury."

Section 13, art. 7, of the Constitution provides that "no money shall be drawn from the treasury, but in pursuance of appropriations made by law."

The latter clause of § 1827, supra, namely, " . . . and the expenses must be paid out of the state treasury," this court held in the case of Kingsbury v. Anderson, 5 Idaho, 771, 51 Pac. 744, did not make an appropriation for the payment of such services, and in the absence of an appropriation the auditor properly refused to issue a state warrant in payment for legal services of counsel employed by the state auditor, under the provisions of § 1827, supra.

Therefore, if appellant's contract of employment was made with the attorney general it must have been understood by appellant that it was in pursuance of an appropriation made by law. It will be recalled that the legislature convened in regular session subsequent to the discovery of the embezzlement of the state funds by Allen, and the presumption is that they made ample provisions for the payment of such expenses as would necessarily be incurred in recovering the moneys so embezzled. The legislature, at its biennial session in 1915, made an appropriation for the attorney general's office, for that and the ensuing year, of $29,200, for the payment of the salary of the attorney general, the salary of assistant attorneys, stenographers, and other expenses, and provided in said act, among other things, that "any indebtedness created, or attempted to be created, against the state . . . in violation of the provisions of this act or any indebtedness attempted to be created against the state . . . in excess of the proper appropriation, whether made by this act or by other provisions of law, shall be void." Sess. Laws 1915, chap. 159, § 6, p. 350.

State—creation of claim against.

It is, therefore, quite evident that the attorney general was without authority to create any indebtedness against the state in excess of the appropriation for his office, and if there was no appropriation out of which the claim of the appellant could be paid, any attempt to create an indebtedness in favor of appellant by the attorney general, if the attorney general did attempt to create any indebtedness against the state in excess of his appropriation, would be absolutely void.

An examination of the statutes with reference to the duties of the state depository board convinces us at once that there is a total absence of statutory or any authority given it, whereby it is authorized to create an indebtedness of the character sought to be enforced by the appellant, and such expenses as they are authorized to incur in connection with the performance of their duties as members of such board, and in carrying out the

Same—audit and allowance.

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provisions of the statutes defining their powers and duties, must be audited and allowed as provided by law, by the state board of examiners, and paid out of the general fund of the state.

From what has been said it follows that the attorney general would be without authority to employ appellant, and thereby charge the state with a claim for services rendered in excess of the appropriation made for his office for the years 1915 and 1916; but admitting that the attorney general had authority to employ appellant, under the constitutional and statutory provisions heretofore cited, the claim for services rendered, being one against the state, and not being a fixed salary, would necessarily have to be submitted to the state board of examiners for allowance or rejection.

The presumption is that the state will pay all valid claims properly presented against it, and for that purpose has provided a method whereby all claims against the state may be presented to a constitutional board with exclusive power to examine, audit, and allow such claims, in whole or in part, as are found to be legal charges against the state, and, as was announced by this court in the case of Rathbun v. State, 15 Idaho, 273, 97 Pac. 335, a laborer or materialman may have a claim against the state within the meaning of that term, and yet be entitled to no lien to secure the payment of the same. That is, in our opinion, the position that appellant, as well as all other claimants against the state, occupies, under the Constitution and laws of this state. They must present their claims to the properly constituted board for allowance or rejection, or for the procurement of a recommendatory judgment for submission to the legislature.

From what has been said it follows that the trial court did not err in refusing to continue in full force and effect the temporary restraining order issued and heretofore referred to, and requiring the National Surety Company and its attorneys to deposit with the clerk of said court the sum of $14,056.93, a portion of the proceeds of the judgment recovered in favor of the state, and to require the state and the National Surety Company to answer the amended complaint in intervention of the appellant. The order of this court heretofore made, directing that John W. Eagleson, as state treasurer, receive said sum of $14,056.93 from the National Surety Company, and place the same in a special fund, subject to the order of this court, as directed in its order of September 22, 1916, is hereby vacated, and the state treasurer directed to place the above-mentioned sum into the proper fund as provided by law.

The judgment of the trial court is affirmed. Costs are awarded to respondent.

Morgan, J., concurs.

Sullivan, Ch. J., dissenting:

I am unable to concur in the conclusion reached by the majority of the court. The majority opinion proceeds upon the theory, as I understand it, that, under certain constitutional provisions and under the laws of this state, an attorney who has been engaged to prosecute a claim in favor of the state, and obtains judgment for the state, has not an equitable, charging lien against said judgment before it is paid over to the state.

The lien claimed in this case is not claimed under the Attorneys' Lien Law of the state, and the main question to be determined is whether the attorney is entitled to the payment of a reasonable attorney's fee for the services rendered in procuring a judgment amounting to nearly $154,000 in favor of the state. The amount of an attorney's fee is not involved in this appeal.

If it were held on this appeal that the attorney's fee and certain costs were payable out of the proceeds of said judgment, the matter would then have to be sent back to the dis-

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trict court to determine the value of the attorney's services.

In limine, since the matter involved in this case has been injected largely into the politics of the last campaign, and great injustice done the appellant by reason of misrepresentations made, as has appeared from the public press of the state and otherwise, I shall state the facts involved in considerable detail and the law applicable to those facts.

The main action against the surety company by the state to recover the loss occasioned by the defalcation on Allen's official bond was commenced in November, 1915. It appears from the record that appellant was employed as special counsel for the state in said matter on or about the 15th day of December, 1915, by the attorney general and the state depository board of the state of Idaho. At the time of said employment the compensation of appellant was not fixed, but it was mutually understood that he should be paid the reasonable value of his services. He began his work under such employment about the 17th day of December, 1915, and was engaged therein practically without intermission from said date until the 22d day of July, 1916. In the course of his employment, he worked under the direction of the state depository board, and, pursuant to directions received by him from said board, he was permitted to have the assistance of a former deputy state treasurer, who was then confined in the state penitentiary, and was very familiar with the books kept by the state treasurer Allen, since he had kept said books of account and knew where all the false entries had been made. With such assistance the appellant made a complete examination into the affairs of the state treasurer during the whole of said Allen's term as state treasurer, covering the years of 1911, 1912, 1913, and 1914. Said examinations were made upon the orders of the state depository board for two purposes: First, to ascertain and report whether everything irregular in said office had been discovered and pointed out by certain experts; and, second, to obtain data and information upon which to file an amended complaint in said action. During that time appellant was called upon by said depository board to act in the capacity of special guard of the penitentiary during the entire time that said deputy state treasurer was assisting appellant in said work, and during the entire trial was called upon by said board to act in the capacity of special guard for said ex-treasurer and his said deputy, who were in attendance during the trial. The appellant had entire charge of the preparation of said cause for trial, and the entire charge of said case at said trial. He drew all pleadings of the plaintiff in said cause, including the findings of fact and conclusions of law and decree.

Appellant is a resident of Pocatello, Idaho, and has been a resident there since the 8th day of December, 1915, and maintains an office there. Pursuant to his said employment and the wishes of the attorney general and the state depository board, he has been away from his office in Pocatello from December 17, 1915, up to the time of the trial of said cause in July, 1916, with the exception of perhaps two weeks. In the preparation of said cause for trial, certain depositions were taken in Chicago, Illinois, and appellant personally went to Chicago and was present at the taking of said depositions.

While acting as special guard for said Allen and his deputy, who were then confined in the state penitentiary, he incurred certain expenses for meals while they were in the city, and certain expenses for taxicab to take them to and from the penitentiary and to and from the court, such expenses amounting in all to $168.85, no part of which has been paid by the state.

The stenographer who reported said case charged over $900 for his

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services, which has not been paid, and it appears that there are no appropriations available out of which said expenses can be paid, and that unless they can be paid out of the proceeds of said judgment, deficiencies will be created in violation of the provisions of the law. Sess. L. 1915, p. 361. The appellant has no other remedy than the subjecting of said judgment to the payment of his expenses and fees, and if all of the proceeds of said judgment are paid into the state treasurer, petitioner claims that he will be remediless.

Appellant claims that his services were reasonably worth $12,500, but concedes that he has not the right to fix the value of such services, and states in his complaint in intervention as follows: "That this affiant concedes that it is not his right to fix the amount of his compensation, and is likewise of the opinion that it is not right and just, under the circumstances, that the state depository board should be permitted to fix the same, and this affiant asks nothing more than his day in court, with an opportunity to have this honorable court [the district court] after full hearing, determine the right of this affiant to compensation out of said judgment, and the fair and reasonable amount of such compensation; and that a portion of the proceeds of said judgment be placed in such shape that should this honorable court decide in favor of this affiant the means of enforcing such judgment will not be taken away."

The appellant thus admits that he cannot fix his attorney's fee in said matter, but claims that the reasonable value of his services is $12,500, and all that he asks is to have the question submitted to a court of competent jurisdiction in order to have it determine the value of his services.

It appears from the record that he was regularly employed to perform this service; that he performed it with honor to himself and with great profit to the state. The state accepted his services, and ought it not, in common fairness and honesty, be willing to pay the reasonable value of such services? But the majority holds that the contract of employment between the state depository board and the appellant was absolutely void, for the reason that no appropriation had been made for the payment of such services. The majority opinion states: "Therefore, if appellant's contract of employment was made with the attorney general, it must have been understood by appellant that it was in pursuance of an appropriation made by law."

Why say "it must have been understood" that such contract of employment was in pursuance of an appropriation made by law, when it was known to all concerned that no such appropriation had been made?

Then for the majority to argue "that it must have been understood," etc., is certainly very remarkable when we take into consideration that, for the purposes of this appeal, the allegations of the complaint in intervention must be taken as true. The majority opinion, after quoting that part of Laws 1915, § 6, p. 350, declaring any indebtedness created or attempted to be created in excess of the appropriations made shall be absolutely void, states: "It is, therefore, quite evident that the attorney general was without authority to create any indebtedness against the state in excess of the appropriation for his office, and if there was no appropriation out of which the claim of the appellant could be paid, any attempt to create an indebtedness in favor of appellant by the attorney general, if the attorney general did attempt to create any indebtedness against the state in excess of his appropriation, would be absolutely void."

It might be inferred from the foregoing quotation from the majority opinion that the attorney general alone made the contract of employment with the appellant, but that idea is not borne out by the

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first paragraph of the complaint in intervention, which is as follows: "That he was employed as special counsel for the plaintiff in the above-entitled cause on or about the 15th day of December, 1915, by J. H. Peterson, attorney general of the state of Idaho, and by the state depository board of the state of Idaho."

The record therefore clearly shows that the appellant was employed to perform the services he did perform by the attorney general and the state depository board.

As I view it, there was no effort made in this matter to create a claim against the state. The attorney general, the depository board, and the appellant all well knew that there was no attempt in this matter to create a claim against the state. If the officers so understood it, they are clearly guilty of a crime. They knew that if they did undertake to do that they were violating the provisions of Sess. Laws 1915, p. 361, which declares: "No officer, employee or state board . . . shall enter, or attempt or offer to enter into any contract or agreement creating any expense, or incurring any liability, moral, legal or otherwise, or at all, in excess of the appropriation made by law for the specific purpose or purposes for which such expenditure is to be made, or liability incurred. . . . Any indebtedness attempted to be created against the state in violation of the provisions of this act, or any indebtedness attempted to be created against the state in excess of the appropriation provided for in any act, shall be void."

Section 3 of said act provides that "any person or persons violating the provisions of this act shall be deemed guilty of a misdemeanor, and shall be disqualified from holding any state office," etc.

The parties to this contract certainly knew of those provisions, and they all knew that the only way that the cost and expense and attorneys' fees in this action could be legally paid would be out of the judgment recovered against the surety company. It seems to me to be most unreasonable to contend in this matter that the compensation of the appellant in procuring said judgment is a claim against the state that necessarily must be presented to the board of examiners, and could not be paid until an appropriation had been made therefor, unless that was the contract between the parties, and a contract was distinctly made that the compensation should not be paid out of the proceeds of the judgment obtained.

That section of the Law of 1915 above quoted clearly contemplates and refers to matters or purposes for which an appropriation has been made, since it is declared that "no officer . . . shall enter, or attempt or offer to enter into any contract or agreement creating any expense, or incurring any liability, moral, legal or otherwise, or at all, in excess of the appropriation made by law for the specific purpose or purposes for which such expenditure is to be made, or liability incurred."

That section of the statute clearly does not apply to a case like the instant case, for no specific appropriation was ever made for the employment of counsel in the instant case.

In a similar case, that of Kirby v. State, 68 Misc. 626, 125 N. Y. Supp. 742, the court, in considering a statute like the one above quoted, said "that it was not the intention of the legislature that the provisions of the Finance Law quoted should be applicable to such a case as the one at bar."

I shall not presume that it was the intention of the depository board to violate that statute and thus become liable to be deprived of their offices. The reasonable presumption is that, there being no specific appropriation for the payment of counsel fees and expenses in prosecuting the instant case, the board contemplated that the attor-

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ney's fees and costs must be paid out of the judgment rendered. Under the statute, as it now stands, the claims against the state must be filed with the state auditor, and, before they are presented to the board of examiners for allowance, the state auditor must certify as follows: "I certify that the above account has been audited and found correct; that there is authority of law for its payment; that there is sufficient money in the proper fund for its payment; and that proper receipts for each item charged accompany the account.

If the act of the legislature requiring such a certificate from the auditor before any claim may be presented to the board of examiners is a valid act, it would be impossible to have any claim passed upon by the board except those for the payment of which appropriations had been made.

Is it reasonable to presume that the depository board, in the employment of the appellant to prosecute said case, intended that he should never receive anything for his services, or that he should not be reimbursed for the necessary cash he paid out in the preparation of the case for trial? I think not; and I do not believe that it was the intent that he should prosecute said case at his own cost and expense and the state go scot-free from paying for his services and the necessary expense for court stenographers and other legal costs involved in the case.

The depository board employed two attorneys to resist this claim of the appellant in the district court, and the record shows that those two attorneys were paid out of the proceeds of this very judgment that the board now claims is too sacred to be touched in any manner for the payment of legal costs or for the value of the attorney's services in procuring said judgment. Said attorneys urged upon this court the proposition that the intervener must present his claim to the board of examiners, when as a matter of fact they were paid their attorneys' fees for urging that proposition out of this very judgment, and without having presented their claims to the board of examiners. It has been said that consistency is a jewel.

When a reasonable view of this case is taken under the law as it stands, when it is considered that no appropriation was ever made for attorneys' fees or the cost of the prosecution of this case, for the reason that the legislature did not foresee that it would be necessary to go to such an expense, no reason appears why the state authorities should not protect the interests of the state, even though it required a part of the judgment recovered in favor of the state to pay the costs and expense of such prosecution, and this could be done without creating any claim against the state that would require an appropriation to be made to pay it.

Everyone knows, every lawyer knows, and the state authorities know the persistency with which surety companies contest their liability upon any of the bonds given by them, and the necessity of having a lawyer to prosecute such case who is able to cope with the best lawyers in the land, such as surety companies usually employ, and the danger of loss to the state unless such cases are thoroughly tried—these and many other things conclusively show the wisdom of the depository board in employing counsel who could properly protect the interests of the state. The further fact that the depository board knew that it had no authority to enter into any contract or agreement creating an expense or incurring any liability in excess of the appropriation made by law for any specific purpose is convincing to me that they did not intend to violate the law, but did intend that the attorney's fee as well as the other legal costs of this prosecution should be paid out of the judgment, and thus create no claim against the state.

It is true no money can be drawn out of the treasury of the state

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without an appropriation, but the money represented by this judgment never was in the treasury of the state, and there is the distinction. The majority opinion holds that it is a part of the revenue of the state, when in fact it clearly could not become a part of the revenue of the state in the state treasury until it had been paid into the state treasury, and it has never been in the state treasury. The state brought this action in the district court against the surety company. It recovered a judgment, and about $14,000 of that judgment is still in the hands of the court and has never been in the possession of the state.

Section 13, art. 7, of the state Constitution is as follows: "No money shall be drawn from the treasury, but in pursuance of appropriations made by law."

The money represented by the judgment in question never has been in the treasury, and that section has no application whatever to the payment of attorneys' fees and the legal costs of the prosecution of this case. The district court has full authority to require attorneys' fees and all legal costs to be paid out of said judgment before the balance is turned into the treasury of the state. The money stolen from the state by the ex-treasurer and his deputy was taken from the state treasury, but the money represented by this judgment was never in the state treasury until a portion of it was paid there under the direction of the court. The balance of about $14,000 never has been in the state treasury. It is now held in the hands of the court. It never has become a part of the revenue of the state, held by the treasury of the state; hence it is clear that said section of the Constitution above quoted has no application whatever to said fund now in the hands of the court.

I will now proceed to cite authorities which, as I view it, fully sustain the position above taken.

The doctrine is well established that an attorney's general or retaining lien is a common-law lien, which has its origin in the inherent power of courts over the relation between attorneys and clients. The courts have the power to enforce the performance by the attorney of his duties toward his client and this power enables the court to protect the rights of an attorney against his client. This lien is one which the courts have long recognized and protected. See Everett v. Alpha Portland Cement Co. 141 C. C. A. 55, 225 Fed. 931; Re Wilson (D. C.) 12 Fed. 235.

The equitable charging lien, which is the one involved in this case, is entirely different from the common-law lien, and it will be noted from the authorities that all characteristics of a charging lien are in their inherent nature equitable. As long ago as 1795, Lord Kenyon, Chief Justice, said that "the principle . . . was settled long ago, namely, that the party should not run away with the fruits of the cause without satisfying the legal demands of his attorney, by whose industry, and, in many instances, at whose expense, those fruits are obtained." Read v. Dupper, 6 T. R. 361, 101 Eng. Reprint, 595.

The case of Louisville, N. & St. L. R. Co. v. Wilson, 138 U. S. 501, 34 L. ed. 1023, 11 Sup. Ct. Rep. 405, quotes with approval the following from the supreme court of West Virginia (Renick v. Ludington, 16 W. Va. 392): "The lien (even in cases of quantum meruit) is in the nature of an equitable lien (Brown v. Bigley, 3 Tenn. Ch. 623), and is based on the natural equity, that the plaintiff ought not to be allowed to appropriate the whole of the judgment in his favor without paying thereout for the services of his attorney in obtaining such judgment."

If the proceeds of the judgment in this case had been paid over to the state, a different case would be presented, but since the fund on which the lien is claimed is still in

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the hands of the court, and never has been in the treasury of the state and never has been a part of the state's revenue, it ought not to be permitted to be withdrawn from the court without first paying the appellant a reasonable compensation as attorney's fee.

The question now presented is whether or not the principles which establish the right of an attorney to a lien upon the proceeds of a judgment in favor of his client for his necessary and proper expenses, and for his fees, apply where the client is the sovereign state.

At the time the legislature was in session in 1915, the only claim which it was known that the state of Idaho had against the former state treasurer and his sureties was a claim of $93,000, being the actual shortage in cash in the treasurer's office that had been taken from the state treasury, and the legislature, if they considered the matter at all, which it is not at all likely they did, no doubt concluded that it was a very simple matter to establish the state's case against the surety company; but the state depository board and the executive officers having this matter in charge, after the adjournment of the legislature, made certain investigations which led them to believe that the claim of the state against the surety company was greatly in excess of said sum, and considered it highly essential that the state's interests should be placed in the hands of counsel skilled in mathematics and possessing some knowledge of bookkeeping. They certainly knew that proper preparation was essential to ultimate success against the surety company and that the case could not be prepared for trial and the evidence collected without incurring some expense. They also knew that legal counsel could not be obtained without some provision being made for his compensation, since the legislature had made no provision therefor by appropriation. Thus, an emergency was placed before the state officials. The rights of the state were here involved, which, not having been foreseen by the legislature, was left unprovided for, and it was the bounden duty of the officers of the state to use their best judgment in obtaining for the state whatever it was entitled to recover from the surety company, and to do this certain expense must be incurred, including counsel fees. That existing appropriations were insufficient to meet the state's expenses in obtaining the large benefits which ultimately accrued from this litigation is clearly evidenced by the fact that necessary expenses were incurred, amounting to $1,556.93 in excess of those appropriations, and counsel fees, for which no appropriation whatever had been made.

The results of the litigation fully justified the state officers in the course pursued. At the very outset the state officers were confronted with the fact that there was an absence of an appropriation out of which to pay counsel or to pay the expenses of the trial. And is it more than fair to assume that no attorney would have been willing to take such a case if there were no means by which he could be paid? That no attorney would be willing to pay out of his own money for the necessary expenses of his client unless he relied upon some contract by which he could be reimbursed for his disbursements?

The state officers and the appellant, it must be presumed, knew that all the indebtedness incurred in excess of existing appropriations was void, and that he could have no claim against the state for his fees or expenses, unless there were appropriations available out of which they could be paid. He therefore did not rely upon a claim against the state, within the ordinary meaning or acceptation of that phrase. It is apparent that the officers of the state and the counsel employed realized that the compensation for services and reimbursements for expenses must be made a charge

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upon the fund recovered or they could not be paid at all.

Had no judgment been recovered in this case counsel could not have recovered a single dollar, and, under the decision of the majority, he is now unable to recover 1 cent of the money expended by him in procuring witnesses and in preparing said case for trial, to say nothing of his fees.

Appellant was employed and actually tried the case, and for his compensation no funds are available other than the proceeds of this judgment.

It will not be presumed that the officers of the state intended to put up a "job" on appellant and procure the great legal services he performed, and then beat him out of his compensation by claiming that their contract of employment was void.

A very similar case was presented to the attorney general of New York, where an action was instituted to test the constitutionality of what was known as the "Eighty-cent Gas Law," and it was most vital to the interests of the state that the law should be upheld. The attorney general was confronted with the necessity of employing counsel with technical knowledge, the absence of any appropriation out of which his fees could be paid, and the following positive statutory enactment: "A state officer, employee, board, department or commission shall not contract indebtedness on behalf of the state, nor assume to bind the state, in an amount in excess of money appropriated or otherwise available."

The attorney general employed counsel in the case of Kirby v. State, 68 Misc. 626, 125 N. Y. Supp. 742, and the court, in the face of such a situation, made use of the following language: "a legislature, in making appropriations for a current year for the attorney general's office, could not foresee the exact amount required for all unanticipated emergencies and contingencies and provide specifically for the payment of each of them. It appropriated an amount for the contingent expenses of the office, and left the attorney general clothed with the authority of the executive law to safeguard the interest of the state according to the necessities of each case as it arose. The attorney general, being charged with a positive duty of defending actions brought against the state, could not justify a refusal to perform such duty on the ground that the legislature had made no appropriation to meet an emergency which it could not foresee. If such were the case, the state might suffer great loss and the attorney general would be derelict and culpable. Neither could the legislature properly provide for the defense of an action not brought while it was in session, requiring the employment of special and technical counsel. . . . The claimant, under such agreement, rendered valuable services to the state, protected its interest, and the litigation ultimately resulted in the establishment of the validity of the law. The laborer is worthy of his hire; and the state, having accepted and received the benefit of the claimant's skill and services, should, in fairness and equity, pay their just worth."

The opinion in the above-quoted case is very instructive and peculiarly applicable to the facts of this case. The depository board accepted for the state the benefit of appellant's skill and services in the trial of the instant case, and it should, in all fairness and equity, pay the just worth or value of such services.

It appears from the record that the state officers who have charge of this matter have offered to pay appellant an attorney's fee of $750, which is $157 less than the amount charged by the special court reporter in the case. It is alleged in the complaint in intervention, and so far as this proceeding is concerned is admitted as true, that said alleged offer to pay appellant $750 was not made by the depository

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board, upon an impartial effort to set a fair and reasonable value upon appellant's services, but it was the result of wilful failure to exercise an honest judgment, and was made for the express purpose of depriving appellant of a fair and reasonable compensation for the services rendered, thus presenting an issue of law and fact to be determined by the court.

As significant of the views taken by the depository board in other similar matters, the failure of the Bank of Nampa might be cited, since that matter has become a part of the history of the state. An unusual situation arose in that matter. The personal sureties on the depository bond of the bank turned over to the state a number of mortgages, real and chattel, and considerable personal property. To realize the greatest returns from these securities, it was necessary to take possession of and administer the property, which consisted of live stock, crops, etc. No state official could perform those duties. No office was created and no appropriation existed, designed by law to meet such a situation. Must the state lose the benefit of these securities, or were the executive powers of the sovereignty sufficient to meet those conditions? The attorney general very properly ruled that the state depository board could employ such labor and assistance as were necessary, and could pay all necessary compensation and expenses incurred in the administration and liquidation of these securities out of the funds thus created. The ruling of the attorney general was evidently correct, and is supported by ample authority. The soundness of the attorney general's opinion in that matter is based upon the evident economic principle that the sole lawful interest of the state in that property was only the net profits after all proper expenses of administration and liquidation had been paid out of the property itself. In the absence of statutory command as to the methods to be employed, the executive branch of the government not only may, but in the discharge of its duty must, employ such practical business methods as will produce the best results for the state.

The view taken of that matter by the executive department was the only reasonable view to be taken; but suppose that department had concluded that there was no appropriation to pay the expense of administering on the estate of the defunct bank, and thus occasioned great loss to the state, the officers would certainly be held to be derelict in their duty. And so, in the case at bar, if they neglect to perform their duty and prosecute this case with reasonable diligence, they would have violated their official duty.

I will now proceed to investigate the legal principles involved in applying to the state the general rule as to attorneys' equitable liens. Can a lien exist as a matter of right upon the property of the sovereign, and, if so, under what circumstances is the remedy available for its enforcement?

In the case of Briggs v. A Light Boat, 7 Allen, 287, and 11 Allen, 157, it was held that a lien did exist against the United States under the facts of that particular case, and that a remedy for its enforcement was available. Three light boats had been built for the United States by a contractor. Upon completion they were paid for, and the United States had actual possession of them. Briggs and another claimed and perfected a statutory materialman's lien upon the boats for lumber furnished to the contractor to be used in their construction. They then petitioned for the enforcement of the lien, and the trial court held that no lien could exist against public property in the possession of the United States, and used by them as an instrumentality of government. From that judgment the petitioners appealed and obtained a reversal. The supreme court held (7 Allen, 287) that the

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lien had attached under the statute while the boats were in the possession of the contractor, and that the United States was a purchaser from him, taking the property subject to the lien. The court said: "The truth is that, when the government becomes the purchaser of property, it takes the title subject to the same rules as those which regulate the transfer of it to private persons. If it is subject to liens or encumbrances, it passes cum onere. So it is held in cases of ordinary maritime liens. If the government becomes the owner of the vessel by purchase, forfeiture, or otherwise, it takes a title subject to the same liens for salvage, wages, bottomry, and other claims as would attach to it if sold to private persons."

The matter was then referred to the assessor and auditor, upon whose reports judgment was entered for the amount found due the petitioners. The United States then appealed, and in the decision (11 Allen, 157) the court said:

"The question which has now been argued is not of the petitioners' title, but of the mode of asserting it; not of right, but of remedy. The United States do not now deny that they took their title subject to the lien of the petitioners. That point was determined by this court, after full consideration, upon the former argument of one of these cases. . . .

"At that argument, the attention of counsel was chiefly, and of the court exclusively, directed to the question of title; it was assumed by the court that the lien carried with it the right to maintain this process; the effect of the possession of the United States upon the possibility of enforcing the lien in this form of proceeding, although involved in the ruling which the superior court had made at the trial, was not considered."

It is there held that it is an elementary principle of English and American constitutional law that no direct suit can be brought against the sovereign without its consent, and the court, among other things, said:

"Nor is this case like one in which the government has, by bringing a civil action to enforce its own rights to property in the possession of an individual, submitted itself to the jurisdiction of the court, and, being itself the actor, needs the assistance of the court to recover its property.

"The United States have never, by general statute or special order, submitted themselves or their rights in this matter to the jurisdiction of the state courts. But, on the contrary, as soon as notified of these petitions, and before answering on the merits, they filed a special appearance, and a plea distinctly setting forth the grounds on which they claimed exemption from the state process."

The exemption of the state from suit in its own courts was held to apply also to the United States in the state courts, and after referring to the fact that the property subjected to this lien had been delivered to the United States by the contractor, and the price paid by them to him, the court said: "The petitioners suffered the title to pass, and the possession to be delivered, to the United States, before they took one step in the state courts to establish their lien." 11 Allen, 164.

The distinction between that case and one like the case at bar, where the proceedings were instituted before the property came into the possession of the sovereign, is then stated as follows: "If they had filed their petitions and attached the vessels before these came into the possession of the United States, they might well have contended that the courts of the commonwealth had acquired a jurisdiction of the cases, which could not be devested until the object of the suit was accomplished."

In the case of United States v. Wilder, 3 Sumn. 308, Fed. Cas. No. 16,694, a lien asserted against goods of the United States was upheld

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and enforced. Mr. Justice Story delivered the opinion in that case, and it was argued on behalf of the government that it is a prerogative of sovereignty that no lien can exist against the sovereign. The court said: "The argument rests the objection upon the ground of public inconvenience, if it should be held that, whenever a lien exists against a private person, it is to be held that the like lien attaches against the United States."

It was pointed out in that case that the law enforces a contribution in such a case, upon the ground of justice and equity. The court said: "And it gives a lien in rem for the contribution, not as the only remedy, but as, in many cases, the best remedy, and in some cases the only remedy. . . . It is said that, in cases where the United States are a party, no remedy by suit lies against them for the contribution; and hence the conclusion is deduced that there can be no remedy in rem. Now I confess that I should reason altogether from the same premises to the opposite conclusion. . . . I cannot, therefore, but think that the circumstance that the United States can in no other way be compelled to make a just contribution of its share in the general average, so far from constituting a ground to displace the lien created by the Maritime Law, does in fact furnish a strong reason for enforcing it. For I know no reason why this court should create, by its own mere authority, an exemption nowhere found recognized in the Maritime Law, and standing upon no very clear or urgent ground of public policy. . . . The argument, therefore, addressed to this court on behalf of the government, ab inconvenienti, does not seem to have any very solid foundation. On the other hand, the argument ab inconvenienti on the other side is very cogent and persuasive, for it is beyond doubt that, if there be no lien, there is no remedy to enforce an incontrovertible right."

Mr. Justice Story then quotes from Vattel as follows: "If there exists any difficulty on this account, it is equally conformable to prudence, to the delicacy of sentiment which ought to be particularly conspicuous in a sovereign, and to the love of justice, to cause them to be decided by the tribunals of the state. This is the practice of the states that are civilized and governed by laws."

This state ought to be governed by laws, rather than by the mere caprice and whim of any board.

In the Siren Case, 7 Wall. 152, 19 L. ed. 129, the steamer Siren was captured by the United States Navy in February, 1865. A prize crew was placed in charge, and she was ordered to Boston for adjudication. On her way she stopped at New York, and, proceeding thence, ran into and sunk the sloop Harper. On her arrival in Boston, a libel in prize was filed against her by the United States, and she was condemned and sold. The proceeds of the sale were deposited with the Assistant Treasurer of the United States, subject to the order of the court. In rendering the decision of the court, Mr. Justice Field cites several authorities, and, after reviewing the Light Boat Cases, says: "A claim or lien existing and continuing will be enforced by the courts whenever the property upon which it lies becomes subject to their jurisdiction and control. Then the rights and interests of all parties will be respected and maintained. . . . So, if the property belonging to the government, upon which claims exist, is sold upon judicial decree, and the proceeds are paid into the registry, the court would have jurisdiction to direct the claims to be satisfied out of them."

Upon these principles the case was remanded, "with directions to assess the damages and pay them out of the proceeds of the vessel before distribution to the captors."

The question as to whether a lien can be enforced in such cases was well considered by the courts in the Light Boat Cases, and in those

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cases, after a full review of authorities, it was held that such a lien cannot be enforced, where in order to do this successfully it is necessary to bring suit against the United States. It is also held that no suit in rem can be maintained against the property of the United States when it would be necessary to take such property out of the possession of the government by writ or process of the courts. It is a well-established doctrine that proceedings in rem to enforce a lien against the property of the United States are only forbidden in cases, where, in order to sustain the proceeding, the possession of the United States must be invaded under processes of the court. The doctrine is well established, when the government itself seeks its rights at the hands of the court, equity requires that the rights of other parties interested in the subject-matter shall be protected.

In Cunningham v. Macon, & B. R. Co. 109 U. S. 446, 27 L. ed. 992, 3 Sup. Ct. Rep. 292, it was said: "It has been held, in a class of cases where property of the state, or property in which the state has an interest, comes before the court and under its control in the regular course of judicial administration, without being forcibly taken from the possession of the government, the court will proceed to discharge its duty in regard to that property. And the state, if it chooses to come in as plaintiff, as in prize cases, or to intervene in other cases when she may have a lien or other claim on the property, will be permitted to do so, but subject to the rule that her rights will receive the same consideration as any other party interested in the matter, and be subjected in like manner to the judgment of the court. Of this class are the cases of The Siren, 7 Wall. 152, 157, 19 L. ed. 129, 131; The Davis (United States v. Douglas) 10 Wall. 20, 19 L. ed. 875, . . . and others."

In United States v. Wickersham (C. C.) 10 Fed. 505, it was held that it may be assumed that the United States, whenever it comes into court and brings its suit against a citizen, consents to submit to and carry out whatever decrees may be lawfully made against it in the course of the legal procedure.

The principle upon which those cases rest applies to an attorney's lien. And it was so held in the case of Re Paschal (Texas v. White) 10 Wall. 483, 19 L. ed. 992. In that case Mr. Paschal had been retained as special counsel for the state of Texas, and had conducted to a successful conclusion a great deal of litigation in regard to certain indemnity bonds. Out of moneys collected by Paschal, upon judgments which he had obtained for the state, he retained $47,325 to cover his counsel fees and disbursements. The state appeared by other counsel, and moved the court to strike Paschal's name from the docket as its attorney, and to order him to deposit the $47,325 in court for its benefit. The defense of Paschal was that he had an attorney's lien upon this money, and that he held it under his lien for compensation and expenses. The argument of the state was that the United States Supreme Court was without jurisdiction to pass upon a claim set up by a citizen against the state of Texas, that it is a presumption of law that a sovereign power will do justice, and that those who contract with the state must rely on the discretion and good faith of the legislative body. The court in that case briefly reviews the authorities dealing with attorneys' liens as between private parties, which, it says, are "decidedly in favor of his lien," and then says: "As the original retainer was made in Texas, we are inclined to the opinion that the rights of the parties are to be regulated by the laws of that state. But, if this be not the case, this court would be guided by what it deems to be the prevailing rule in this country; and, according to this rule, we are of opin-

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ion that the respondent has a lien on the fund in his hands for his disbursements and professional fees in relation to the indemnity bonds."

Here we have a direct decision that an attorney's lien was a valid and subsisting right, even against the state. This case is practically on all fours with the instant case, since the funds are still in the hands of the court who rendered the judgment in favor of the state, and have not been turned over to the state. The court has jurisdiction of such funds to pay all proper costs and expenses incurred in such litigation.

In the case of State v. Ampt, 6 Ohio, Dec. Reprint, 699, the court held that the "attorney has a lien upon the money of the state which comes into his hands, as the fruit of his services for his compensation and necessary expenses, the same as though his client were an individual, and he can apply the same in payment of such compensation and expenses."

Upon the principles laid down in the foregoing cases, it is clear that a sovereign as well as an individual can obtain the services of an attorney under such circumstances as will give to the attorney the right to assert a lien for his disbursements and fees against funds in the hands of the court, obtained upon a judgment in favor of the state.

The above cases, or the most of them, were discussed and applied by the supreme court of Minnesota in a case wherein the conclusion reached is precisely that contended for by the appellant. They were held to establish the right of an attorney as against his client, the sovereign, to assert and enforce a lien for his fees and expenditures under a contract of employment similar to that in the case at bar. Washington County v. Clapp, 83 Minn. 512, 86 N. W. 775. In that case it was held that the only part of the recovery which could be legally termed "public funds" was the amount remaining after the expenses of litigation were paid. So, in the case at bar, the amount of this judgment belonging to the state as a part of its public funds would only be what remained after paying the entire cost of the litigation, including attorneys' fees. In the Clapp Case the court said: "There is no sound distinction to be drawn between money expended in such proceedings in the way of disbursements and in the way of attorneys' fees. . . . It must be noted that the doctrine is founded upon the fact that such fund is created by the exertions of the attorney, and grows out of his contract relation with reference thereto, and has application only to such a condition. The statute (§ 687, supra) does not prohibit such application as was made in this instance by respondents. If they had not retained their fees, but had paid over to the county the entire amount collected, then the method of collecting their claim against the county would be regulated by the section cited."

This case is directly in point, as I view it.

In the case of Union P. R. Co. v. United States, 2 Wyo. 170, goods belonging to the United States were shipped under the usual bill of lading contract over the lines of the railroad company from Omaha to Rawlins, Wyoming. The goods were stored and held by the railroad company under claim of a common carrier's lien for freight charges. Without paying the charges, the Federal government brought this action in replevin to recover the goods. The court held that, had the ownership of this property been in a private citizen, "the company would have had the usual common carrier's lien upon it for these charges." The only question presented was, whether the same lien was good upon the property of the United States. The court first considered the case upon the theory that government property is exempt from a common carrier's lien, and that the government can retain or waive this exemption. As to that theory it was held that in that particular case, if the exemption did

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exist, it had been waived. The court, however, goes directly to the real merits of the situation in a very able investigation as to whether such exemptions do exist, and said: "But the exemption does not exist. The exemption would incalculably cripple the public service, the liability would equally promote it; no consideration of justice or policy favors, every consideration of justice and policy forbids, the exemption; the liability enlarges, the exemption narrows, sovereign action; the liability, not the exemption, is a privilege, and therefore an attribute of sovereignty. The learned counsel for the defense in error has submitted to us no adjudication to the contrary which we should follow as a guide or respect as advisory; and we are convinced that such an adjudication does not exist. On the other hand, all the analogies of the Commercial and Maritime Law, and the Federal decisions under that law, are directly the other way. In 9 Wheat. 409, 6 L. ed. 122, The St. Jago de Cuba, it was decided in 1824 that seamen and materialmen who served and supplied the ship after her seizure as a slaver had respectively liens upon her against the United States for wages and supplies, and that she stood pledged to them accordingly."

This is a very instructive case, and we quote further from it: "The counsel for the government claims that the district court could render a judgment for but not against it; we have listened with attention and respect to his argument, advanced in favor of this proposition, and candor requires us to admit that he has presented it as well as it could be presented; but candor also compels us to say that the proposition is throughout and throughout a fallacy. To what consequence does the proposition lead? The United States may invoke the jurisdiction of the court; it may accept that which does and discard that which does not accord with its supposed interests; it may dictate the exercise of the administration of the law; it is not bound by the rules of equal justice; it is a privileged suitor; the district court having rendered a judgment against it, this court must reverse; having rendered one for it, this court can only affirm; it can sit in appeal, must mechanically obey, cannot revise; nay, further, having brought the suit, and effected a caption, its aim is accomplished; it needs no judgment, for but one judgment can be rendered in the case, and that in its favor; if, having made the caption, it neglects to prosecute the writ, a motion to dismiss for want of prosecution will be unavailing; still further, the demand in the writ for judgment is meaningless, the undertaking of the sureties without force, the writ is superfluous, and the suit is farcical, because it is intended to effectuate under the forms of law what can as well be accomplished by the violent hand, under an irresponsible will. Does not the proposition result in a pure reductio ad absurdum?"

It was there held that a suit cannot be instituted against the property of the government, if the bringing or the institution of the suit requires the issuance of process against the government, or the disturbance of its possession of its property; that the exemption is personal, and the will to retain is a will to waive it in the exercise of sovereign interests. When it does waive the privilege invoking the jurisdiction of the court, it submits to that jurisdiction, presenting a claim for adjudication. It asks that the claim be adjudicated on its merits, and allowed or rejected accordingly. In closing the court said: "Were we to send the case to the district court, we should direct it to embrace in its judgment the attorneys' fees, fixed at a reasonable amount, upon the principle above stated."

The railroad company, however, waived the fees, and judgment was entered in the supreme court for the transportation charges and

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costs. See also United States v. Boyd (C. C.) 79 Fed. 858.

It must be borne in mind that the fund sought to be charged with the attorney's fee and expenses in this case has never been in the possession of the state, and, in my view of the matter, under the facts and law of this case, there is ample authority for holding that the appellant is entitled to the payment of his legal expenses and attorneys' fees out of the fund now in the hands of the court.

It has been contended by counsel for the state that this is a claim against the state, and that the Constitution and statutes provide an exclusive procedure for obtaining payment. There is nothing in this contention. If the appellant were seeking to have a claim presented to the state board of examiners, and to have it paid out of the treasury, then there might be something in that contention; but such is not the case. Appellant is seeking to subject to the payment of his fees a fund that has never been in the state treasury, and the state's possession of the fund could not be disturbed by such payment.

In this case no process has ever been issued against the state of Idaho or any of its officers, no possession of the state has ever been or can be disturbed. No personal judgment can be given against the state upon which execution can be levied upon any state property. This is a proceeding in rem against the property, not in possession of the state, but in the hands of the court, and any decree that may be rendered will be satisfied out of the property now in the hands of the court. The state was not brought into court by any process. It came in voluntarily, by itself, as plaintiff, seeking the assistance of the court for the recovery of a judgment against the surety company. By so doing it submitted to the jurisdiction of the court, and cannot in one breath ask the court for its assistance in recovering a judgment against a surety company, and in the next breath deny to the court the right to protect its officers in that proceeding, and to administer justice fairly and honestly in that case.

The state has accepted the services of appellant. The record shows that he served the state faithfully and well, and no sufficient reason is shown why the state should attempt to evade its liability to pay for his services. Can any good reason be offered why the state in this matter should be unaffected by considerations of morality and right, which ordinarily bind the conscience? The observance of honesty and fair-dealing on the part of the state becomes of higher importance —of higher importance to the state —than the money involved in this case. It was said in Woodruff v. Trapnall, 10 How. 207, 13 L. ed. 390, that "we naturally look to the action of a sovereign state to be characterized by a more scrupulous regard to justice, and a higher morality, than belong to the ordinary transactions of individuals."

Is there any justice or morality in the state's attempting to avoid the payment of just compensation for services that it contracted for and received, and which services were of great value to the state? It seems to me that, under the pleadings in this case, the honor and good faith of the state is put to the test, and no hair-splitting statutory constructions should be made by the state to avoid the payment of an obligation, where it has received the services.

Section 10, art. 5, and § 18, art. 4, of the state Constitution, provides a process by which a claimant, seeking to enforce a claim against the state, may overcome two obstacles which, in the absence of those provisions, would make it impossible for him to obtain any remedy whatever. The first is to divert the possession of its personal property or money; the second, to bring the sovereign within the jurisdiction of the court. If neither of these obstacles is presented to a claimant seeking to enforce payment against

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the state, how can it be reasonably said that he must nevertheless pursue methods or a procedure that has no application whatever? The board of examiners may hear claims against the state in order that they may be paid out of the money in the possession of the state, or in its treasury. They cannot order such claims paid out of money that never was in the possession of the state treasury, and, unless the claim presented to such board is to be paid out of the treasury, the board has no jurisdiction whatever, either under the Constitution or the law, to pass upon it. The board has jurisdiction of the money in the possession of the state in so far as the payment of claims against the state out of such money is concerned, but it has no jurisdiction whatever to pass upon any claim which has to be paid out of funds which are within the exclusive jurisdiction and control of the court, and never has been in the state treasury.

The main question before the court is as to whether the attorneys' fees and costs of the litigation in this case may be paid out of the judgment obtained, and it is clear to me that they ought to be so paid, and that the case should be remanded to the district court to determine a reasonable fee to be paid to the appellant.

Petition for rehearing denied, January 4, 1917.

ANNOTATION.

Lien of attorney on public fund or property.

This note does not include cases of the lien of an attorney for a private client upon claims against the state or other public body.

The authorities support the decision in the reported case (STATE v. NATIONAL SURETY CO. ante, 251), that, in the absence of constitutional or legislative authority, an attorney can acquire no lien on a public fund or property.

In Compton v. State (1882) 38 Ark. 601, it was held that, without legislative authority, there could be no attorney's lien on moneys recovered for the state, and that, without such authority, the governor had no power to make a contract that would give such a lien, and that the court could not stop the money in transit to the treasury. The governor's contract in fact did not specify the mode or measure of compensation. The court stated that by the early common law an attorney had no general lien upon the judgment recovered, and that the "charging lien" upon the judgment was carved out by the English courts for the protection of attorneys and solicitors, lest a party run away with the fruits of the litigation. That as to the Statute of Liens, the general rule was that the state was not bound by a statute unless expressly named. But whether the act applied to the state or not, the governor had no power to employ counsel in the absence of statute.

An attorney of a taxpayer, who institutes a suit on behalf of all the taxpayers of the county and recovers for the county treasury money illegally appropriated cannot assert a lien thereon for his services, and recover a judgment against the county. Marion County v. Rives (1909) 133 Ky. 477, 118 S. W. 309.

An attorney's lien for services rendered his client, a county, cannot be successfully asserted against money appropriated to such client by an act of the legislature while such money is in the custody or under the control of the state treasurer. State ex rel. Sayre v. Moore (1894) 40 Neb. 854, 25 L.R.A. 774, 59 N. W. 755.

Hendrick v. Posey (1898) 104 Ky. 8, 45 S. W. 525, 46 S. W. 702, is sufficiently dealt with in the opinion of the court in the reported case (STATE v. NATIONAL SURETY CO. ante, 251).

The cases where a lien was allowed seem to show little, if anything, in opposition to the general rule.

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Re Paschal (Texas v. White) (1871) 10 Wall. (U. S.) 483, 19 L. ed. 992, is sufficiently referred to in the dissenting opinion in STATE v. NATIONAL SURETY CO., with the important exception that the larger part of the attorney's claim, being for services in the suit in which he had collected the moneys in question, was under a contract made with him by the governor, whose power so to contract under a special statute was undisputed, and which stated: "Your compensation will be dependent upon the action of a future legislature, unless a recovery is had in the suit, in which event I shall feel authorized to let you retain it out of the amount received."

In Washington County v. Clapp (1901) 83 Minn. 512, 86 N. W. 775, quoted from in the dissenting opinion in STATE v. NATIONAL SURETY CO., it was held that where a county had employed other counsel to assist the county attorney in the collection of delinquent personal taxes, and such counsel had made a collection, they had an equitable lien or set-off as against the fund collected for the reasonable value of their services, and that the funds so collected were, while in their hands, "county funds," although the net funds would ultimately be divided among the state, a city, the county, and various school districts, the statute providing that the county might employ the services of any attorney at law to assist the county attorney, and "pay for such services out of the county funds," the reasonable value of the services being stipulated in the suit concerning the lien.

In State v. Ampt (1879) 6 Ohio Dec. Reprint, 699, quoted from in the dissenting opinion in the reported case (STATE v. NATIONAL SURETY CO. ante, 251), the state under a statute had employed the defendant to collect from a county the state's share of certain taxes misappropriated by the county, and had sued him for money retained, less a reasonable sum to be deducted therefrom for compensation as attorney, admitting his right to retain the money and assert a lien thereon.

B. B. B.

L. KOMMEL & SON
v.
CHAMPLAIN TRANSPORTATION COMPANY.

Vermont Supreme Court—November 19, 1918.

(— Vt. —, 105 Atl. 253.)

Carrier — wrongful delivery — authority terminated — assignee of business.

1. A common carrier is liable to the consignor for delivering goods to one who purchased the business of the consignee without the knowledge of the consignor or the carrier, although the sale of the goods was made to the purchaser of the business under the belief that he was acting as agent for the consignee, and such purchaser had frequently received goods from the carrier for the consignee while he was in the latter's employ.

[*See note on this question beginning on page* 279.]

Same — condoning wrongful delivery.

2. That a stranger pays part of the bill for goods charged to the account of the supposed buyer does not show that the credit was transferred to such stranger, so as to condone the wrongful delivery of the goods by the carrier to him.

Same — delivery at street address.

3. Consigning goods to a supposed purchaser at a given street address does not justify the carrier's delivery of them at the station to a stranger who had purchased the business of the consignee, which he was carrying on at the address named.

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Same — culpable conduct of consignee.

4. A consignor is not estopped to hold the carrier liable for wrongful delivery by the culpable conduct of the consignee in placing the one to whom delivery was made in charge of the business without notifying the carrier of the change.

EXCEPTIONS by plaintiff to rulings of the City Court of Burlington, made during the trial of an action brought to recover damages for failure of defendant to deliver goods consigned by plaintiff to another, which resulted in a judgment for defendant. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Max L. Powell, for plaintiff:

Where a common carrier receives goods to transport and deliver at a certain point to a person named, and immediately upon their arrival delivers them to another person, the carrier is liable as such, and not as a warehouseman.

Winslow v. Vermont & M. R. Co. 42 Vt. 700, 1 Am. Rep. 365.

The responsibility of the carrier, as such, continues after the goods have reached their destination until the party entitled to them has had a reasonable time to call for, examine, and take them.

Blumenthal v. Brainerd, 38 Vt. 402, 91 Am. Dec. 349.

Messrs. **Rufus E. Brown** and **Theodore E. Hopkins**, for defendant:

The carrier is not bound to deliver to the consignee personally, nor to give notice to him of the arrival of the goods.

Blumenthal v. Brainerd, 38 Vt. 402, 91 Am. Dec. 349.

Defendant was justified in delivering the goods to M. J. Solomon, as the apparently authorized agent of the consignee.

Tier v. Lampson, 35 Vt. 179, 82 Am. Dec. 634; Bradish v. Belknap, 41 Vt. 172; 4 R. C. L. Carriers, § 283; Farmers' & M. Bank v. Champlain Transp. Co. 18 Vt. 131, 23 Vt. 186, 56 Am. Dec. 68; Lakeshore & M. S. R. Co. v. Luce, 11 Ohio C. C. 543, 5 Ohio C. D. 225; Wilson v. Adams Exp. Co. 27 Mo. App. 360; Dunbar v. Boston & P. R. Corp. 110 Mass. 26, 14 Am. Rep. 576; Winslow v. Vermont & M. R. Co. 42 Vt. 700, 1 Am. Rep. 365; Mattson v. Minnesota & N. W. R. Co. 5 Ann. Cas. 503, note; Com. v. People's Exp. Co. 201 Mass. 564, 131 Am. St. Rep. 416, 88 N. E. 420; Ela v. American Merchants' Union Exp. Co. 29 Wis. 611, 9 Am. Rep. 619; Locklin v. Davis, 71 Vt. 321, 45 Atl. 224; Strong v. Ellsworth, 26 Vt. 366; Belheumer v. Thomas, 78 Vt. 279, 62 Atl. 719; Burton v. Barlow, 55 Vt. 434.

Miles, J., delivered the opinion of the court:

This is an action against the defendant for failure to deliver goods consigned by the plaintiff to B. J. Fayette. The case was tried by the municipal court of the city of Burlington, Vermont, and from the facts found by that court it appears that the plaintiff, on April 26, 1912, shipped from New York, via the Hudson Navigation Company, two cases of dry goods, consigned to B. J. Fayette, 77 North street, Burlington, Vermont, which in due course of transportation were received by the defendant and transported to its dock in Burlington, for delivery to the consignee. While doing business at 77 North street, Fayette conducted a mercantile business, having a telephone in his store for general use, and employing several assistants in his business, among whom was M. J. Solomon, a brother-in-law of Fayette. During the time he was in trade, all freight consigned to him, coming over the defendant's transportation line, was taken from defendant's dock warehouse and hauled by Fayette's own teams, and by Fayette's direction notice was to be given to him by telephone when freight was received at such dock warehouse, and Fayette would send his teams and remove such freight. Fayette sometimes went after the goods himself, and at other times he would send some of his employees. Fayette's instructions to the defendant were to deliver such freight to any one of his employees

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who came for it, and allow them to receipt for it. Acting under these instructions, M. J. Solomon, upon several occasions, called for and receipted for goods consigned to Fayette. On August 1, 1911, Fayette sold his business on 77 North street, Burlington, Vermont, to Solomon, and went into the fruit business on another street in Burlington, allowing his telephone to remain in the North street store in his name and number, until after the delivery of the goods in controversy.

In April, 1912, the plaintiff's traveling salesman called at the North street store, supposing that Fayette was still in business there, and took an order for the cases of goods in question from Solomon, supposing he was selling the goods to Fayette. Solomon had previously ordered goods for Fayette from the plaintiff, which had been received and paid for by Fayette. At the time of the order, plaintiff's salesman made no inquiry as to who was purchasing the goods, and Solomon did not disclose that he was the owner of the store at that time. The goods purchased on this order were shipped by boat from New York and consigned to Fayette at 77 North street, Burlington, Vermont. In due time the goods were received by defendant, and unloaded from their steamboat upon their wharf in Burlington, and defendant's freight agent at once called Fayette by telephone at 77 North street, Burlington, and directed that he be notified of the arrival of the goods, and to send for and take them away. Solomon at once went with a team for the goods, and received and receipted for them in the name of Fayette, "by M. J. Solomon." Fayette had nothing to do with the store on North street, or with its management, after he sold to Solomon, nor did Solomon continue in the service of Fayette after that date. The fact of the sale was unknown to either the plaintiff or defendant until after the delivery of the goods to Solomon.

After the delivery of the goods, the plaintiff presented to Solomon a bill for them, who paid thereon $15 in cash and a check for $40, signed by Fayette, and made payable to and indorsed by himself, and no further payments have been made on the bill, and this suit is brought to recover the balance due on the bill.

The municipal court found that the defendant was in possession of the goods at the time of the delivery as warehouseman, and that as such it was in the exercise of ordinary care, prudence, and precaution when delivering the goods to Solomon. To this last finding the plaintiff excepts, on the grounds that there was no evidence supporting that finding. The plaintiff also excepts to the judgment, and to the court's failure to find as requested in plaintiff's request No. 2. The court found substantially as requested in No. 2, and that exception requires no further consideration.

The plaintiff, in support of his exception to the findings that the defendant was in possession of the goods as warehouseman, refers us to the transcript and the findings of the court. To determine that question it is not only necessary to look into the evidence and findings, but it is also necessary to consider, in connection therewith, when the liability of the carrier terminates and that of the warehouseman begins, for that question is a mixed question of law and fact. 4 R. C. L. 820, ¶ 275; Joslyn v. Grand Trunk R. Co. 51 Vt. 92.

What is the nature of a common carrier's liability, when it has transported property over its line, and deposited it in its warehouse or on its wharf or platform, to await delivery to the consignee, is a question on which three distinct views have been taken in different jurisdictions, no one of which can be said to have been so far generally accepted as to have become the prevailing rule. One is denominated the Massachusetts rule, under which the carrier ceases to be liable as carrier as soon as the goods are placed in his

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warehouse, after which it is liable only as warehouseman. Another is denominated the New Hampshire rule, under which merely placing the goods in the warehouse does not discharge the carrier as such; but he remains liable until the consignee has had a reasonable time after the arrival of the goods to inspect and take them away in the common course of business. And the third is denominated the New York rule, which differs from the New Hampshire rule only in that the New York rule gives the consignee a reasonable time in which to inspect and take the goods away after notice of the arrival of the goods. 4 R. C. L. 750, ¶ 219.

This court has never followed the Massachusetts rule, but has followed the New Hampshire rule, in so far as to hold the carrier liable as such until the consignee has had a reasonable time in which to inspect and take away the goods after their arrival. Blumenthal v. Brainerd, 38 Vt. 402, 91 Am. Dec. 349; Winslow v. Vermont & M. R. Co. 42 Vt. 700, 1 Am. Rep. 365. The defendant has called to our attention no evidence tending to prove that the goods were held by the defendant as warehouseman, and that its liability as carrier had terminated when the delivery was made, and from an examination of the transcript we are unable to find any evidence of that fact.

The finding of the court that the goods in question were being held by the defendant as warehouseman at the time of the delivery is without supporting evidence, and the exception of the plaintiff in that respect must be sustained, and the judgment below reversed, unless no judgment on the facts found could have been rendered against the defendant as a common carrier.

This state has never departed from the common-law rule that the common carrier stands in the relation of insurer of the property intrusted to him, and is liable for any damage to the goods while in his custody, by whatever cause, unless by act of God or the public enemy, though entirely faultless (Blumenthal v. Brainerd, supra); and for the delivery of goods to the wrong consignee he is liable, unless the consignor's negligence or misconduct induced the misdelivery by the carrier. See Vermont cases above cited, and Joslyn v. Grand Trunk R. Co. supra, 4 R. C. L. 846, ¶ 298.

The bill of lading in this case required the goods to be delivered to the consignee, B. J. Fayette, named in the bill of lading; and though Fayette had no knowledge of that fact, nor interest in the goods shipped, that fact, in no way justified the defendant in delivering them to one not entitled to receive them. Without authority of the plaintiff the defendant was not justified in delivering the goods to anyone but the consignee or to his order; and it was the duty of the defendant to hold the goods until called for by the consignee or the plaintiff, and a delivery to one not entitled to receive them, though induced to make such delivery through the fraud of a third party, will not excuse the carrier. Winslow v. Vermont & M. R. Co. supra; Southern Exp. Co. v. Van Meter, 17 Fla. 783, 35 Am. Rep. 107; Pacific Exp. Co. v. Shearer, 160 Ill. 215, 37 L.R.A. 177, 53 Am. St. Rep. 324, 43 N. E. 816; Price v. Oswego & S. R. Co. 50 N. Y. 213, 10 Am. Rep. 475. The facts of this case are so similar to those in Winslow v. Vermont & M. R. Co. supra, that to sustain the judgment in this case would overrule that case, besides being in conflict with the great weight of authority outside of this state. This rule may seem harsh in some cases; but experience has firmly established the fact that in a great majority of cases this strict requirement imposed upon the common carrier is for the public good.

Carrier—wrongful delivery—authority terminated—assignee of business.

The defendant urges upon its former course of delivery of goods shipped to Fayette. To be sure, it

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enabled Solomon to perpetrate a fraud upon the defendant; but the plaintiff was not in any way responsible for that, and, so far as the case shows, was ignorant of it. The defendant also argues that, because Solomon ordered the goods in the name of Fayette, in the absence of negligence or knowledge of fraud, the common carrier would not be liable, and cites Wilson v. Adams Exp. Co. 27 Mo. App. 360, and Dunbar v. Boston & P. R. Corp. 110 Mass. 26, 14 Am. Rep. 576, in support of its claims.

These cases, when rightly considered, are not in conflict with the rule laid down in Winslow v. Vermont & M. R. Co. supra, also cited by the defendant in this connection; besides, if they were, we should adhere to our own decisions, which we think are in line with the weight of authority in this country and in England.

The defendant also argues that the plaintiff ratified the delivery by receiving payment from Solomon of a part of the purchase price. This position, we think, is not well taken. The credit was given to Fayette, and the fact that Solomon paid part of the purchase price, without more, is not sufficient to show that the credit was transferred from Fayette to Solomon. The fact that the goods were addressed to Fayette, 77 North street, in Burlington, is not sufficient to justify the defendant in delivering the goods to Solomon, as argued by the defendant. The case does not show that it was expected that they were to be delivered at that address. The number of the street was given for the purpose of aiding the defendant in identifying the consignee, but that address in no way relieved the defendant from its liability to deliver to the proper party, or to hold the goods until it could do so.

Same—condoning wrongful delivery.

Same—delivery at street address.

The defendant further argues that the plaintiff is estopped from urging his claim against the defendant because of the culpable conduct of Fayette. What we have said above about Fayette's connection with this case sufficiently answers this argument. The plaintiff had nothing to do with Fayette's conduct, and is not responsible for it. Cases can be found where goods have been ordered under an assumed name and delivered to him by the carrier, in which the carrier has been held not liable to the consignor for such delivery; but those cases are not in point, for in those we have seen the credit was given to the party ordering the goods under an assumed name, while here the goods were not delivered to the person to whom the credit was given.

Same—culpable conduct of consignee.

Judgment reversed, and judgment for the plaintiff, and cause remanded for the assessment of damages.

ANNOTATION.

Carrier: delivery of goods to one whose authority to act for consignee has ceased.

I. In general, 279.
II. Delivery to purchaser of business, 280.
III. Delivery to former employee, 280.
IV. Delivery to husband or wife of consignee after separation, 280.

I. In general.

The authorities are to the effect that a carrier who delivers goods to one other than the consignee does so at his peril as to such other's authority to receive the same, and that the necessary authority cannot arise from the fact that the consignee's business has been purchased by the one to whom delivery was made, or by the fact that the latter is a former employee of the consignee, or is his or her husband or wife, if living apart.

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American Merchants' Union Exp. Co. v. Milk (1874) 73 Ill. 224; Angle v. Mississippi & M. R. Co. (1859) 9 Iowa, 487; Missouri P. R. Co. v. Weil (1899) 8 Kan. App. 839, 57 Pac. 853; Stowe v. United States Exp. Co. (1914) 179 Mich 349, 146 N. W. 158; Lester v. Delaware, L. & W. R. Co. (1895) 92 Hun, 342, 36 N. Y. Supp. 907; L. KOMMEL & SON v. CHAMPLAIN TRANSP. CO. (reported herewith) ante, 275.

II. Delivery to purchaser of business.

The reported case (L. KOMMEL & SON v. CHAMPLAIN TRANSP. CO. ante, 275) seems to have been the only case to have passed upon this particular question, but the decision therein, to the effect that a carrier who delivers goods to one to whom the consignee has sold his business, rather than to the consignee himself, was liable to the consignor for wrongful delivery, seemingly is in keeping with the general principles which have been applied to similar cases. In this the one to whom delivery was made was a former employee of the consignee, who had been in the habit of receiving and receipting for goods consigned to his employer at the place where delivery of the goods in suit was made.

It was also further held in this case that the above conclusion would obtain although the consignee was himself guilty of culpable conduct, and notwithstanding the fact that the plaintiff consignor gave credit to the former employee by receiving from him a part of the purchase price, there being no other indication that the credit for the consignment was transferred by the consignor from the consignee to the former employee, who had purchased the business.

III. Delivery to former employee.

In American Merchants' Union Exp. Co. v. Milk (1874) 73 Ill. 224, an action by a consignee of a package of money for wrongful delivery thereof to a former employee of the plaintiff, it was held that the delivery of the package to one on the assumption that he was the agent of the consignee did not relieve the carrier from liability, since the supposed agent had no authority to act, because no longer in the consignee's service, and the carrier acted at its peril as to his authority. In this case the person to whom the delivery was made had formerly been in the consignee's employment as a clerk and bookkeeper, and had occasionally, although without authority to do so, receipted for express packages consigned to his employer, but the package in suit was obtained on a forged order, the carrier having demanded written authority from the owner.

And in Angle v. Mississippi & M. R. Co. (1859) 9 Iowa, 487, where a consignee of goods sought to recover damages for wrongful delivery of the goods, it was held that where a carrier delivered a shipment to a supposed agent of the consignee, it did so at its peril as to his authority, and consequently that the defendant could not justify a delivery to a firm conducting a forwarding house, as agent of the consignee, by showing that another firm of which it was the successor, and which had been dissolved, and had held a general order for the delivery to it, as agent, of all goods consigned to the plaintiff, although the new firm was composed of a portion of the members of the old one.

In Lester v. Delaware, L. & W. R. Co. (1895) 92 Hun, 342, 36 N. Y. Supp. 907, it was held that where a carrier delivered goods to the person to whom they were consigned, and who had been in the employment of the plaintiff after termination of the agency and notice by the plaintiff, the true owner, not to do so, it was liable for conversion of the goods, and this even though the former agent had a lien on the goods for freight paid by him, it appearing that he at the time was indebted to the plaintiff in a larger sum.

See also the reported case (L. KOMMEL & SON v. CHAMPLAIN TRANSP. CO. ante, 275).

IV. Delivery to husband or wife of consignee after separation.

In Stowe v. United States Exp. Co. (1914) 179 Mich. 349, 146 N. W. 158, it was held that delivery of a shipment of goods by the agent of an express company at the consignee's place of residence, as given by the city directory, was not a delivery to the consignee, although his wife, from

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whom he had separated, still lived at such place and his name was upon the door plate, and the deliveryman, upon inquiry of a servant, was told that it was the residence of the consignee, who, in fact, however, no longer lived there, and had not done so for more than a year.

And in Missouri P. R. Co. v. Weil (1899) 8 Kan. App. 839, 57 Pac. 853, the court applied the rule that a carrier of goods as bailee is bound in law to deliver the same to the consignee or to his authorized agent, holding that such a carrier was liable for wrongful delivery where it made delivery to the consignee's husband, who had separated from her, she holding the bill of lading, which had not been transferred. G. J. C.

LOUISA SCHWENN, Respt.,
v.
WILLIAM SCHWENN et al., Appts.

Wisconsin Supreme Court—January 5, 1918.

(166 Wis. 420, 166 N. W. 171.)

Conspiracy — to defeat contract — liability.

1. Persons participating in a successful conspiracy with a man to dissipate his property, so as to deprive his divorced wife of the benefit of her antenuptial contract for payment of a specified sum to her at his death, are liable to her in damages.

[*See note on this question beginning on page* 287.]

Parties — suit for damages — conspiracy.

2. The personal representative of the estate of decedent is not the proper party plaintiff in a suit to hold liable in damages persons who conspired with decedent to dissipate his property so as to deprive his divorced wife of the benefit of her antenuptial contract for a sum of money to be paid her at his death.

APPEAL by defendants from an order of the Circuit Court for Dane County overruling a demurrer to the complaint in an action brought to recover damages for alleged conspiracy by defendants to deprive plaintiff of the benefit of an antenuptial contract for a sum of money, to be paid at the death of her husband. *Affirmed.*

Statement by Kerwin, J.

The complaint in this action sets forth substantially the following facts: That the plaintiff and Fritz Schwenn intermarried September 30, 1902; that prior to the marriage a written antenuptial contract of marriage settlement was made between the parties, a copy of which contract is attached to the complaint; that on October 18, 1909, in an action by the plaintiff against said Fritz Schwenn, judgment of absolute divorce was entered in favor of plaintiff; that in said judgment it was determined that Fritz Schwenn was the owner of notes, mortgages, and securities of the value of $10,000; that an appeal was taken to the supreme court from said judgment, and that upon said appeal the judgment was modified by awarding plaintiff $1,000 as division of property, and further providing that such judgment should not operate to bar or in any way disturb plaintiff's rights to the sum of $500 or any sum which plaintiff might be entitled to, under the terms of the antenuptial contract between the parties; that the antenuptial contract provided for the payment of $500 in case plaintiff survived said

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Fritz Schwenn; that the amount due under the antenuptial contract has not been paid, nor any part thereof; that for the purpose of cheating and defrauding plaintiff and hindering, delaying, and preventing her from recovering the amount so due her, or any part thereof, the defendants and said Fritz Schwenn entered into a conspiracy to fraudulently transfer, dispose of, or cancel the notes, mortgages, and securities so held by said Fritz Schwenn, the same constituting all the property of which he was the owner or possessed, and that he was possessed of no other means of any kind out of which the claim of plaintiff or other creditors can be satisfied or collected; that a portion of said mortgages and notes were personal obligations of some of the defendants herein; that in accordance with the purpose of said conspiracy the defendants and Fritz Schwenn fraudulently and without consideration caused said notes and mortgages so held against some of the defendants to be satisfied or surrendered, and defendants collected and retained the proceeds of other notes, mortgages, or securities held by him, such proceeds being turned over to and accepted by them for the fraudulent purpose aforesaid, with the intent on the part of said Fritz Schwenn to escape the payment to plaintiff of the amount due upon said antenuptial contract; that defendants were fully cognizant of the intent and purpose of Fritz Schwenn, and shared and participated therein; that as a result of said fraudulent acts of defendants and Fritz Schwenn all property of which he was the owner and of which he was possessed was, prior to his death, disposed of to and acquired by the defendants; that Fritz Schwenn left no property out of which plaintiff's claims under said antenuptial contract can be paid or satisfied in whole or in part, or out of which the claims of other creditors of said Fritz Schwenn can be satisfied, and other creditors have been and will thereby be prevented from recovering of the estate of said Fritz Schwenn any portion of their claims or demands against said Fritz Schwenn; that the property so unlawfully acquired by and turned over to defendants herein for the fraudulent purposes aforesaid is more than sufficient to satisfy the claims in favor of plaintiff or other creditors of Fritz Schwenn; that through the consummation of said conspiracy the plaintiff has been deprived of any remedy against the estate of Fritz Schwenn under the contract before referred to, and has been thereby damaged in the sum of $500, with interest as provided by law, from the date of the death of Fritz Schwenn; that Fritz Schwenn died in May, 1912, at Minneapolis, Minnesota. Judgment is demanded against the defendants for the sum of $500, with interest, and costs.

The defendants demurred to the complaint, first, on the ground that there was a defect of parties plaintiff, in that the complaint shows the plaintiff is not the administrator or executor of the estate of Fritz Schwenn; and, second, on the ground that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was overruled, and from an order overruling it this appeal was taken.

Mr. F. K. Shuttleworth for appellants.

Messrs. Grady & Farnsworth, for respondent:

The complaint states a cause of action to recover damages resulting to plaintiff from the consummation of an unlawful conspiracy to fraudulently dispose of property in which she had an interest, and induce the breach of a contract to which she was a party.

Peck v. Vandemark, 99 N. Y. 29, 1 N. E. 41; 19 Am. & Eng. Enc. Law, 2d ed. 1244; Martens v. Reilly, 109 Wis. 464, 84 N. W. 840; Gebhardt v. Holmes, 149 Wis. 428, 135 N. W. 860; Angle v. Chicago, St. P. M. & O. R. Co. 151 U. S. 1, 38 L. ed. 55, 14 Sup. Ct. Rep. 240.

The action was maintainable to charge defendants as trustees and recover personal judgment against them if they have disposed of the property fraudulently acquired.

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German Bank v. Leyser, 50 Wis. 258, 6 N. W. 809; Mason v. Pierron, 69 Wis. 588, 34 N. W. 921; Chamberlin v. Jones, 114 Ind. 458, 16 N. E. 178; Reeg v. Burnham, 55 Mich. 39, 20 N. W. 708, 21 N. W. 431; Doney v. Clark, 55 Ohio St. 294, 45 N. E. 316; Miller v. Davidson, 8 Ill. 518, 44 Am. Dec. 715; Russell v. Clark, 7 Cranch, 87, 3 L. ed. 277; 14 Am. & Eng. Enc. Law, 2d ed. 318; Birley v. Staley, 5 Gil. & J. 432, 25 Am. Dec. 303; Whitney v. Kimball, 4 Ind. 546, 58 Am. Dec. 638; Overmire v. Haworth, 48 Minn. 372, 31 Am. St. Rep. 660, 51 N. W. 121; National Tradesmen's Bank v. Wetmore, 124 N. Y. 241, 26 N. E. 548; Mueller v. Bruss, 112 Wis. 406, 88 N. W. 229.

Kerwin, J., delivered the opinion of the court:

We have set forth the substance of the complaint in the statement of facts. It clearly states that the defendants combined and conspired to produce a breach of the contract obligations of Fritz Schwenn to the plaintiff, and prevent her from receiving the benefits provided for her in the contract, and that they succeeded in producing a breach of the contract to the injury of plaintiff in the sum of $500. The facts set forth in the complaint include all the elements which have been held in several decisions of this court to be essential in an action for damages for an executed conspiracy to injure. Martens v. Reilly, 109 Wis. 464, 84 N. W. 840; Patnode v. Westenhaver, 114 Wis. 460, 90 N. W. 467; Randall v. Lonstrof, 126 Wis. 147, 3 L.R.A.(N.S.) 470, 105 N. W. 663, 5 Ann. Cas. 371; White v. White, 132 Wis. 121, 111 N. W. 1116; McLennan v. Church, 163 Wis. 411, 158 N. W. 73, and other cases in this court.

In the instant case, upon the allegations of the complaint, there was a combination of two or more persons to do an unlawful act, to wit, to produce a breach of a contract obligation, accomplishment of that purpose, and resulting damage to the person designed to be injured.

In White v. White, 132 Wis. 121, 111 N. W. 1116, the rule applicable to such a situation is thus, in effect, stated: Any combination of two or more persons to do an unlawful act, as to breach a contract, by any means which is carried out, is an actionable conspiracy for which those participating must respond in damages to the person injured.

Counsel for appellants relies upon Field v. Siegel, 99 Wis. 605, 47 L.R.A. 433, 75 N. W. 397, where it is held that a general creditor cannot maintain an action against his debtor and others with whom he conspired to place all his property beyond the reach of his creditors, to recover damages. Much that is said in the opinion does not seem to apply to that case, and certainly does not apply to the instant case. In Field v. Siegel, the conspiracy entered into was to defraud creditors generally, while in the case at bar the action is against the defendants who entered into a conspiracy for the express purpose of breaching the contract between Fritz Schwenn and plaintiff and preventing her from recovering the fruits thereof, and which did in fact accomplish that purpose. In Field v. Siegel it is suggested that it is essential to the recovery of damages for a consummated conspiracy to injure that the damages "must be a clear and necessary consequence of the fraudulent act, and of a character to be clearly defined and ascertained." There can be no question but that such elements are clearly alleged in the case at bar. It is also said in the Field-Siegel Case: "No action lies for simply conspiring to do an unlawful act. It is the doing the act itself, and the resulting actual damage to the plaintiff, which furnish the ground of the action." This statement is good law, but the precise situation so stated to be essential to such an action as this is clearly alleged in the complaint in the instant case, and seems to have been in the case with which the court was dealing.

Again the court said in Field v. Siegel: "An act which, if done by one alone, constitutes no ground of an action on the case, cannot be

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made the ground of such action by alleging it to have been done by and through a conspiracy of several." That was expressly said not to be the law of this state in State ex rel. Durner v. Huegin, 110 Wis. 189, 62 L.R.A. 700, 85 N. W. 1046, 15 Am. Crim. Rep. 332. It will be seen that the Field Case, as treated by the court, is quite different from the instant case, as appears from the reasoning of the court in that case.

The holding here is that where, as in the present case, there is charged a conspiracy to defeat or breach one specific contract, or certain specific contracts, by the fraudulent transfer of the debtor's property, an action for damages lies against the conspirators. Whether such an action would lie where the conspiracy is to defraud creditors generally, as in Field v. Siegel, supra, is not decided.

Conspiracy—to defeat contract—liability.

As regards the first ground of demurrer it is only necessary to say that it is wholly without merit. The action was not brought against Fritz Schwenn or his estate, but against the defendants who conspired with him and obtained his property. Further discussion seems unnecessary.

Parties—suit for damages—conspiracy.

Our conclusion is that the complaint must be sustained, upon the authority of many cases decided by this court since Field v. Siegel, supra.

The order of the court below must therefore be affirmed, and anything said in Field v. Siegel, supra, in conflict with this opinion, must be deemed overruled.

The following opinion was filed January 22, 1918:

Winslow, Ch. J., concurring in the result:

With considerable doubt I have concurred in the conclusion that the complaint states a good cause of action, but I wish to make it plain that my concurrence goes no further than the facts of the present case require, and I also wish to briefly state why this is so.

The present case, as set forth in the complaint, is a case where a husband (now deceased) entered into a conspiracy with his children and heirs at law to prevent the payment to his divorced wife of the sum secured to be paid to her after his death by antenuptial contract with her; and carried out the conspiracy by transferring to them before his death all of his property, amounting to $10,000, leaving no estate out of which the money agreed to be paid by the antenuptial contract (viz., the sum of $500) could be collected.

The antenuptial contract contained a number of other provisions with regard to the residence of the parties upon the wife's farm, the disposal of the income of the farm, the duties of each in case of sickness of the other, the duty of the husband as to repairs, insurance, and payment of taxes on the farm, etc., which will be found more fully stated in the statement of facts in the divorce action (Schwenn v. Schwenn, 143 Wis. 399, 127 N. W. 948).

Here was not a mere money obligation, but a contract, providing for the doing of numerous things by each party, all arising out of or closely connected with the marital relation. The existence and validity of this contract had been admitted and practically adjudicated in a previous action between the parties (Schwenn v. Schwenn, supra). The defendants are alleged to have successfully conspired with the divorced husband to put all his property out of his hands, so that there was no estate at his death, for the very purpose of defeating the fundamental agreement on the part of the husband, on which the whole fabric of the antenuptial agreement rested, namely, the agreement that the wife should be paid a definite sum from the husband's estate, in case she survived him.

The cases in this court upon which the argument in support of

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the complaint really rests are the cases of Martens v. Reilly, 109 Wis. 464, 84 N. W. 840; Randall v. Lonstrof, 126 Wis. 147, 3 L.R.A.(N.S.) 470, 105 N. W. 663, 5 Ann. Cas. 371; White v. White, 132 Wis. 121, 111 N. W. 1116, and McLennan v. Church, 163 Wis. 411, 158 N. W. 73.

There is no question but that this court distinctly held in the Martens Case that if two or more persons successfully conspired to produce the breaking of a contract, the injured party may recover his damages in an action at law against the conspirators. The contract breached in that case was a contract for the leasing of lands for a term of years, with a privilege of purchase, and a number of other provisions as to the use of the premises, etc. In the Lonstrof Case the object of the conspiracy was "the breaching of the marriage contract, and the desertion of the wife by the husband, leaving her in destitution." In the White Case also it was a marriage contract which was breached as the result of a successful conspiracy; and in the McLennan Case it was a contract for the conveyance of land. The contract breached in the case of Angle v. Chicago, St. P. M. & O. R. Co. 151 U. S. 1, 38 L. ed. 55, 14 Sup. Ct. Rep. 240, where a similar ruling was made, was a contract for the construction of 65 miles of railroad, which had been partially performed. So it appears that all of the cases which seem to be relied upon to sustain the reasoning of the court in the present case were cases where the contracts breached were contracts of a continuing nature, or contracts only partially carried out, covering numerous transactions, with duties and obligations on both sides.

On the ground that the contract in the present case was of this nature, and not a mere debt, I have, with some doubt, concurred in the result. I go no further, however. When the abstract question is squarely presented whether a transfer of a debtor's property to third persons, with intent to simply avoid payment of one debt or a number of debts (the transferees participating in the intent), is an actionable conspiracy within the rule of the Martens Case, I shall feel entitled to examine it unembarrassed by anything decided in the present case. In my judgment that question is not here presented.

There are, as it seems to me, a number of important considerations which will then demand careful attention, which have not been presented or even suggested in the present case. I desire to mention briefly and without argument some of the considerations which I have in mind.

In the first place, a transfer of property by a debtor does not *necessarily* cause a breach of the debtor's contract with a creditor. It may or it may not. The debtor may acquire other property,—in fact, frequently does,—and be entirely able to pay his debt within a short time, and hence it could never be certainly established that damage had resulted from the conspiracy until the Statute of Limitations had run or until the debtor had been discharged from the debt by death or the bankrupt court. But there is another consideration which seems of greater weight. Such a transfer is absolutely void so far as the creditor is concerned. As to him the property remains the property of his debtor. If it be in existence and be leviable, it may be levied on by attachment or execution, or if nonleviable it may be reached by garnishment and subjected to the creditor's claim.

Even though the property be concealed or disposed of by transferees a court of equity will, after it appears that an execution will not bring the money, compel the application of the value or proceeds of the property to the payment of the debt, by the use of those equitable remedies which are well understood and need not be enumerated here.

These considerations make it clear that, when the conspirators (i. e. the transferees) are known, the fact

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of the fraudulent transfer has not breached the contract or made a future breach certain in any legal sense. The debt may yet be satisfied out of the transferred property itself, if to be found, and, if not, by equitable remedy against the transferee personally. The result of the conspiracy is not to prevent the creditor from getting his money, but is simply to reduce somewhat his chance of so doing, and perhaps to make the process longer.

This reduction of the chances of ultimate recovery is manifestly too speculative a thing to be measured in damages, but there must be actual legal damage shown to support an action for conspiracy, hence the difficulty of supporting such an action, founded simply on a fraudulent transfer of property to defeat creditors, before any attempt to collect the debt by pursuing the property itself has been made.

This is in accordance with the weight of authority everywhere, except in the state of Pennsylvania. Field v. Siegel, 47 L.R.A. 433 and note (99 Wis. 605, 75 N. W. 397); 12 R. C. L. p. 645, § 152, and notes 11 and 14.

The court's opinion draws a distinction between a conspiracy to defeat one specific contract, or certain specific contracts, and a conspiracy to defeat creditors generally, holding that in the first-named case the action for conspiracy may be maintained, but leaving the question open as to the last-named case.

There is, of course, no difference in the quality of the act, whether the fraudulent transfer of property be made with intent to defeat one or ten or a hundred creditors. Nor is there any logical ground for holding that the one creditor has any special remedy which the ten or the hundred have not. If this were the law, then it would follow that, in an action brought by one creditor claiming conspiracy to defeat his claim alone, the conspirators could come in and prove that their intent was, not to defeat the plaintiff's claim alone, but the claims of ninety-nine other honest men as well, and walk out of court with a clean bill of health. This would be absurd.

Now, if an action for damages for conspiracy lies whenever a transfer of this kind is made, it must lie in favor of each separate creditor, because each suffers a separate injury. Every such action is an action at law in which the defendants are entitled, under the Constitution, to a jury trial. Const. art. 1, § 5. Suppose there are fifty creditors with claims aggregating $25,000, and the property fraudulently conveyed aggregates $5,000. Of course, the total damages recovered cannot exceed the value of the property transferred. If all the creditors commenced their actions at once and pressed them to trial and judgment, so that the amount of debts became fixed and certain, a pro rata division might be made, perhaps, of the damages; but can anyone acquainted with legal proceedings regard such a thing as possible or probable? A court of law has no machinery to handle such matters. This is not on account of any mere artificial rules of procedure, or of the magical effect of the words "law" or "equity," but on account of the practical impossibility of doing jury business as business without a jury can be done. As before said, each creditor will have his own separate cause of action; the alleged conspirators will be entitled to demand a jury trial in every such action; they will be entitled also to contest separately the validity of every claim; indeed they may be obliged to do so. Can anyone imagine any more involved mass of litigation than such a situation would produce, and can anyone imagine a satisfactory result coming therefrom? And how many years would it take to work out such result? The situation would be practically impossible in every case where there are many creditors and a small amount of property transferred. These considerations, among others,

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doubtless induced the courts to hold with practical unanimity (as held by this court in the Field Case, supra) that a general creditor has no cause of action for conspiracy resulting from a fraudulent transfer of his debtor's property, but that his remedy is to reach after the property itself by attachment, garnishment, supplementary proceedings, or by appeal to equity, after having exhausted his legal remedies against his debtor without success. To my mind this doctrine seems to be good law, good sense, and good administration, and when the question is necessary to be decided I shall want some better reasons for abandoning it than have been given in the present case.

Vinje, J.:

I concur in the foregoing opinion of Mr. Chief Justice Winslow.

Eschweiler, J.:

I, also.

ANNOTATION.

Civil liability for conspiring to aid debtor to evade payment of his pecuniary obligations.

I. Géneral rule, 287.
II. Creditor with a lien, 291.
III. Liability for aiding husband to defraud wife, 292.

I. General rule.

Merely to conspire to commit a wrong is not actionable, and imposes no civil liability upon the members of the conspiracy. To enable the injured person to maintain an action for damages based upon a conspiracy, it must be shown that the defendants have been guilty of the commission of a wrongful act in violation of some right of the complainants, and that damage has resulted as a proximate consequence of the wrongful act complained of. Applying this general doctrine to the question under consideration, it is clear that a mere general creditor without a lien has no interest in the debtor's property, and hence is not legally injured by any conspiracy with the debtor to aid him in disposing of his property in order to evade the payment of his financial obligations, and cannot maintain an action based upon such conspiracy. Adler v. Fenton (1861) 24 How. (U. S.) 407, 16 L. ed. 696; Menner v. Slater (1905) 148 Cal. 284, 83 Pac. 35; Pullen v. Headberg (1912) 53 Colo. 502, 127 Pac. 954; Austin v. Barrows (1874) 41 Conn. 287; Smith v. Blake (1804) 1 Day (Conn.) 258; Matthews v. Pass (1855) 19 Ga. 141; Tasker v. Moss (1882) 82 Ind. 62; Green v. Kimble (1843) 6 Blackf. (Ind.) 552; Chamberlin v. Jones (1888) 114 Ind. 458, 16 N. E. 178; Bitzer v. Washburn (1908) 121 Iowa, 462, 96 N. W. 978; Moody v. Burton (1847) 27 Me. 427, 46 Am. Dec. 612; Lamb v. Stone (1831) 11 Pick. (Mass.) 527; Wellington v. Small (1849) 3 Cush. (Mass.) 145, 50 Am. Dec. 719; Bradley v. Fuller (1875) 118 Mass. 239; Fernandez v. La Mothe (1910) 147 Mo. App. 644, 127 S. W. 408; Raymond v. Blancgrass (1908) 36 Mont. 449, 15 L.R.A.(N.S.) 976, 93 Pac. 648; Hurwitz v. Hurwitz (1894) 10 Misc. 353, 31 N. Y. Supp. 25; Gardiner v. Sherrod (1822) 9 N. C. (2 Hawks) 173; Security State Bank v. Reger (1915) — Okla. —, 151 Pac. 1170; Klous v. Hennessey (1881) 13 R. I. 332; Mowry v. Schroder (1849) 4 Strobh. L. (S. C.) 69; Le Gierse v. Kellum (1886) 66 Tex. 242, 18 S. W. 509; Hall v. Eaton (1853) 25 Vt. 458; Field v. Siegel (1898) 99 Wis. 605, 47 L.R.A. 433, 75 N. W. 397.

The holdings of the New York cases on this matter are not entirely clear.

Hurwitz v. Hurwitz (1894) 10 Misc. 353, 31 N. Y. Supp. 25, supra, cites, as authority for its holding, Braem v. Merchants' Nat. Bank (1891) 127 N. Y. 508, 28 N. E. 597, and holds that Quinby v. Strauss (1882) 90 N. Y. 664, is not in point on the question. The Quinby Case is not reported in full, and it is therein pointed out that the questions presented on appeal were mainly as to the rulings on the trial, receiving or rejecting evidence. The

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opinion, as reported, is to the effect that the action was brought by plaintiffs as judgment creditors of defendant Cavenaugh. The complaint alleged that Cavenaugh and defendant Joseph H. Strauss, his attorney, fraudulently conspired together to keep Cavenaugh's personal property out of the reach of his creditors by the execution of chattel mortgages thereon, to secure fictitious debts—one of them to Strauss—under which the property was sold and bid off by Strauss, or in his interest. The property exceeded in value the amount of plaintiffs' judgment. The court charged in substance that, if the jury were satisfied that defendants were guilty of the conspiracy charged, plaintiffs were entitled to a verdict for the amount of the judgments, and for such amount for the trouble and inconvenience as the jury should consider had been proved to have been sustained by plaintiffs. The court says as to this: "The learned counsel also argues that the principle of damages submitted to the jury was incorrect; that nominal damages only should be allowed. The defendant was, as the jury found, a wrongdoer, and it lies not in his mouth to say that the property may still be taken under execution. It exceeds in value the plaintiffs' judgment, and has been fraudulently appropriated by the defendant to his own use. It is just that he should pay the creditor, whose claim he sought to defeat and no legal reason is shown why he should not do so."

In the Braem Case, the judgment creditor, whose execution had been issued and returned nulla bona for the reason that the sheriff had sold the debtor's property in satisfaction of another execution issued upon a judgment taken by confession, which amounted to an unlawful preference, brought suit to recover damages from the creditor receiving the proceeds of the execution sale. The right to recover damages was denied. The court pointed out that defendant's judgment was taken according to the forms of law, and it was founded upon a valid debt due the judgment debtor, and it is said that "the only question, then, to arise had relation to the proceeds of the sale, and did not concern the property itself, and they, to the extent of the plaintiffs' claim after payment of the Gere judgment, may properly have been made the subject of contest between the plaintiffs and defendant. Nothing back of the sale then had any practical significance, except in its bearing upon the matter of the disposition of the fund. And while remedies at law, either affirmative or defensive, may be supported in behalf of the judgment creditor having a lien upon, or a purchaser on execution sale of, tangible personal property transferred by the judgment debtor in fraud of his creditors before the levy, the same rule is not applicable to the proceeds received by the fraudulent vendee on sale by him of the property. They, for the pursuit of the creditor, are the subject of equitable jurisdiction only."

In this connection it is to be noted that this note is limited to cases involving liability of an intermeddler for aiding a debtor to dispose of his property in order to defraud his creditors, and hence does not include cases involving the remedies between bona fide creditors, as affected by the fact that one of them secures an unlawful preference over others.

It has been pointed out that in civil actions for conspiracy the gist of the action is not the conspiracy, but the damages resulting from the conspiracy; and, where the judgment creditor does not show that he has suffered any loss from the conspiracy to prevent him from realizing on his judgment, he cannot recover damages. Pullen v. Headberg (1912) 53 Colo. 502, 127 Pac. 954.

One of the grounds for denying a right of action to a creditor is that no action will lie in favor of a creditor against his debtor for putting his property beyond the reach of legal process, and what would not be actionable if done by a debtor is not actionable when participated in by others. Klous v. Hennessey (1881) 13 R. I. 332.

In Moody v. Burton (1847) 27 Me. 427, 46 Am. Dec. 612, supra, the court said that, "stripped of the allegations describing the manner in which the

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alleged fraud was perpetrated, the declaration presents the common case of a fraudulent conveyance of property, made for the purpose and with the intent to defraud creditor. Creditors may consider such conveyances to be unlawful and void, and may cause the property to be applied to the payment of their debts by the use of any of the different legal and equitable processes applicable to their case, and afforded by the law for that purpose. Some one of those processes has been found to be well suited to such a purpose, and, by a proper selection and use of it, a creditor, upon satisfactory proof, may obtain payment from property so conveyed, or from its proceeds in the hands of a fraudulent holder. Omitting the selection of any of the long-established remedies and the usual course of procedure, it is now proposed by an action on the case to seek, not the property fraudulently conveyed or its proceeds, but a judgment against those who were parties to the fraud for the amount of damages which the plaintiff can prove that he has suffered by reason of such fraudulent conveyance. If such an action can be maintained in this, it may in every other case, where a fraudulent conveyance has been made of real or personal property with an intention to defraud creditors. If such an action upon such proof can be maintained by anyone, it may be also by each creditor. There is nothing to give one a right superior to that of another. It is one of the essential elements of a special action on the case that the plaintiff is entitled to recover damages for the injury which he has suffered, irrespective of the rights of other persons to recover in like manner damages for injuries suffered by them from the same act or cause. All are entitled to compensation for the injuries suffered from the same cause, and each may recover it for himself. The first suit commenced can have no effect upon subsequent suits commenced by others. The damages in such actions are not measured by proof or consideration of the benefit which the wrongdoer may have derived from his wrongful or unlawful act. They are limited and measured only by the injury which his conduct has occasioned. If, therefore, the principles which regulate this form of action are to be regarded and preserved, all creditors who have been injured by a fraudulent conveyance of their debtor's property must have an equal right to recover damages to the extent to which each has thereby been a loser. And the effect upon a party receiving such a conveyance must be to subject him to damages in no degree regulated by the amount of property received, and limited only by the injury occasioned, it may be, to very numerous creditors, similarly situated and injured. To place him in such a position, the whole law regulating the rights and liabilities arising out of proof that one has received a conveyance of a debtor's property with an intention to defraud his creditors must be changed. That law, as it has been administered in civil actions, does not punish a person for becoming a party to such a fraud. Does not punish the debtor and vendor, who has thus conveyed his property. It only deprives the purchaser of all benefit to be derived from it, but declaring his title thus obtained to be void, when it may injuriously affect the rights of creditors. It leaves the moral turpitude and other injurious effect upon creditors and upon society to be punished, as the sovereign power may provide. To allow each creditor to maintain an action on the case against a fraudulent purchaser to recover damages, supposing them to be capable of legal estimation, would be to make use of a civil action for the recovery of sums in the nature of a penalty, to the full amount of all which could be recovered. . . . How are the damages which a creditor may thus recover to be proved and estimated? The plaintiff had obtained no lien on the property conveyed by attachment, judgment, or in any other manner. Had no special property in or claim to it. The only proof of loss or injury, which he could make would be that his debtor had fraudulently conveyed his property without having received any value for it, and with the intent to avoid the payment of his debt. And

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that he had no other means of obtaining payment. All other creditors could make the same proof. Upon such proof he could not be entitled to recover the amount of his debt; for that is still subsisting, and it may yet be collected. Nor could he be entitled to recover the value of the property conveyed, for to that he had no better claim than other creditors. He has not therefore lost it. If it had not been fraudulently conveyed, it was as probable that it might have been applied to the payment of other debts as to his own. The debtor might have disposed of it fairly and for a valuable consideration, or have lost it by accident or misfortune. The only loss or injury shown by the proof would be that he had been deprived of a chance or possibility of obtaining payment from that property. This would be stating his loss or injury too strongly, for he would still have the chance of attaching or securing it, or its proceeds, in the hands of the fraudulent holder. A jury would be authorized then to estimate the value only of his chance to secure it, and have it applied to the payment of his debt while in the hands of his debtor; for this only has he lost. There would be no data, tables, or other means afforded by which such a chance could be estimated. The loss or injury would be too uncertain and remote for legal estimation. An action like the present can be maintained only by proof of a direct, certain, and material injury."

In Wellington v. Small (1849) 3 Cush. (Mass.) 145, 50 Am. Dec. 719, supra, it is said that "the uncertainty of the plaintiff's damage seems, of itself alone, to be a sufficient reason for his not recovering. In an action on the case ex delicto, the plaintiff must show injury and damage; and these must be shown as facts by legal proofs, except in a few cases where, by the rule of law, damage is presumed from the act complained of. This case does not fall within that exception. How could this plaintiff prove that he suffered any damage from the acts of the defendant, which are averred in the declaration? How could he prove that he would have secured his debt by attaching the property of his debtor, if the defendant had not intermeddled with it? Other creditors might have attached it before him, or it might have been stolen or destroyed while in the debtor's possession. The fact that the plaintiff has suffered actual damage from the defendant's conduct is not capable of legal proof, because it is not within the compass of human knowledge, and therefore cannot be shown by human testimony. It depends on numberless unknown contingencies, and can be nothing more than a matter of conjecture."

In Hall v. Eaton (1853) 25 Vt. 458, supra, it is held that an action on the case for the fraud of the defendant, in combining with plaintiff's debtor in attaching all the debtor's personal property for his benefit, and concealing the same, in order to prevent the plaintiff from enforcing the payment of his debt, cannot be sustained; but the proper remedy is either to attach the property fraudulently held, or charge the defendant as trustee, or seek aid in a court of equity.

In Daniel v. Vacarro (1883) 41 Ark. 316, the court recognized the common-law rule that a creditor without a lien cannot maintain an action against persons who combined with his debtor to enable the latter to defraud his creditors, but held that the rule had been changed by statute, which expressly authorizes an action under such circumstances.

A trustee in bankruptcy cannot maintain an action for damages for conspiracy to remove and dispose of the goods of the bankrupt, prior to the time of adjudication, where the defendants did not receive the goods or any of the proceeds thereof. Friedman v. Myers (1907) 30 Ohio C. C. 303.

In Whitman v. Spencer (1852) 2 R. I. 124, it is held that where the goods of a debtor are taken away by third persons, with the intent to secrete them in order to compel the creditor to compromise their claims, the parties participating in the removal are liable to the creditor.

It has been held, however, that

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where persons conspire together to secure goods of another, by one of them buying the goods, transferring them to the others, and then absconding, the conspirators are liable for the damage thus occasioned. Place v. Minster (1878) 65 N. Y. 89. To the same effect, under very similar circumstances, are Moore v. Tracy (1831) 7 Wend. (N. Y.) 229, and Kelsey v. Murphy (1856) 26 Pa. 78.

And especially in Pennsylvania it is held that persons who conspired with a failing debtor, and aided him to dispose of his property to defraud his creditors, are liable in damages to such creditors, the conspiracy being the gist of the action. Mott v. Danforth (1837) 6 Watts (Pa.) 304, 31 Am. Dec. 468; Collins v. Cronin (1887) 117 Pa. 35, 11 Atl. 869; Merchants & M. Nat. Bank v. Tinker (1893) 158 Pa. 17, 27 Atl. 838; Beaven v. Herr (1860) 17 Phila. Leg. Int. 300; Penrod v. Morrison (1830) 2 Penr. & W. (Pa.) 126.

In Meredith v. Johns (1807) 1 Hen. & M. (Va.) 585, a court of equity refused to interfere with the judgment rendered in a court of law for damages in favor of a creditor against third persons, for fraudulently aiding the debtor to remove his property in order to defraud the creditor.

II. Creditor with a lien.

A creditor with a lien has a right of action against persons who interfere with the property of his debtor upon which he has a lien, so as to prevent the levy or sale by the sheriff to satisfy his judgment. Chamberlin v. Jones (1888) 114 Ind. 458, 16 N. E. 178 (stating rule); Adams v. Paige (1829) 7 Pick. (Mass.) 542; Yates v. Joyce (1814) 11 Johns. (N. Y.) 136; Gardner v. Heartt (1846) 3 Denio (N. Y.) 232; Tams v. Lewis (1862) 42 Pa. 402; Hall v. Eaton (1853) 25 Vt. 458 (stating rule); Smith v. Tonstill (1687) Carth. 34, 90 Eng. Reprint, 607; Mynn v. Coughton (1628) Cro. Car. 109, 79 Eng. Reprint, 696; Hodges v. Marks (1618) 2 Cro. Jac. 486, 79 Eng. Reprint, 414.

But where an attachment upon property has been discharged, the plaintiff in the attachment has no interest in the attached property, and hence cannot maintain an action for conspiracy against the debtor and third persons who aided him to dispose of his property in order to defeat the plaintiff in the collection of his claim. Menner v. Slater (1905) 148 Cal. 284, 83 Pac. 35.

And upon the ground that the case was analogous to that of a lien upon property, it has been held that where the collector has assessed property of taxpayers, in an effort to claim special tax levy, under authority of the court, to be used in liquidating bonds, persons who conspired together to dispose of the property and defeat the efforts of the collector are liable in damages to the judgment creditor. Findlay v. McAllister (1884) 113 U. S. 104, 28 L. ed. 930, 5 Sup. Ct. Rep. 401.

Adams v. Paige (1829) 7 Pick. (Mass.) 542, supra, holds that an action will lie in behalf of a creditor of a partnership, having an attachment lien upon partnership property, against persons having claims against individual members of the partnership, who conspired to attach the partnership property on fictitious claims, and who in this manner secured the property, to the exclusion of the plaintiffs.

In the foregoing case, in sustaining the right of an attaching creditor to maintain an action for conspiracy to defeat an attachment, it is pointed out that "it is not necessary to maintain an action of the case, that there should be any mortal turpitude in the act complained of. It lies whenever a damage is occasioned by a wrong done. It is founded upon the mere justice and conscience of the case, and is in the nature of a bill in equity. . . . The action of trespass on the case is a universal remedy given for all personal wrongs and injuries without force; so-called, because the plaintiff's whole case or cause of complaint is set forth at length in the original writ. . . . Where any special consequential damage arises, which could not be foreseen and provided for in the ordinary course of justice, the party injured is allowed to bring a special action on his own case by a writ formed according to the peculiar circumstances of his own particular

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grievance. For, wherever the common law gives a right or prohibits an injury, it also gives a remedy by action; and, therefore, wherever a new injury is done, a new method of remedy must be pursued. . . . This, to be sure, is familiar law; but it was objected that this action would not lie without proving a real fraudulent intent, partaking of moral turpitude, and this principally because of the strong terms made use of in the declaration. We see no necessity of proving, nor do we impute to the defendants, any wicked or corrupt design to cheat or defraud the plaintiffs. It is enough that they associated together and aided each other to do an unlawful act prejudicial to the plaintiffs, so that in regard to the Law of Debtor and Creditor it is fraudulent."

Even where a creditor has a general judgment lien upon the debtor's property, he cannot hold a third person liable for aiding a debtor to remove the property in order to prevent the collection of the judgment, unless it appears that as a matter of fact the judgment might have been collected from the property. For example, if the property was so heavily encumbered by liens, prior to the judgment lien, that the judgment could not have been collected therefrom, in any event the judgment creditor can recover, at the most, only nominal damages against third persons who aided the debtor to remove the property. Kemp v. Nichols (1894) 4 La. Ann. 174.

III. Liability for aiding husband to defraud wife.

The few cases that have passed upon the question of liability of third persons for aiding a husband to dispose of his property to defraud his wife of her rights in his property, growing out of the marital relation, are not in accord. This is apparently due to the fact that the question has been presented to the courts from different standpoints. Where the liability of third persons has been asserted on the ground that the wife, by means of a judgment for alimony, has become a creditor of the husband, it has been held that, since the wife had no lien on the property, the general rule heretofore referred to, that third persons are not liable for conspiring with a debtor to defraud his creditors, should apply, and it is held that the wife is not entitled to recover damages of the conspirators. This is the holding in Raymond v. Blancgrass (1908) 36 Mont. 449, 15 L.R.A.(N.S.) 976, 93 Pac. 648.

And see Harrison v. Redden (1894) 53 Kan. 265, 36 Pac. 325, holding that the wife had no right of action against a lawyer for advising her husband to dispose of his property and withdraw from the jurisdiction of the court, since the actual damages from the defendant's conduct were not capable of proof.

In Iddings v. Whitacre (1913) 34 Ohio C. C. 427, 1 Ohio App. 223, holding that the wife may recover judgment for damages from persons who conspire with her husband to cheat and defraud her by converting all of his property into money, in order to enable her husband to take his money beyond the jurisdiction of the court, to prevent her from recovering alimony, and to deprive her of her right of dower in his real estate, which was held in trust for him by one of the conspirators, the decision is based upon the ground that the property of the husband is subject to the support of his wife, where the rights of bona fide creditors or purchasers do not intervene, and she cannot lawfully be deprived of this interest in her husband's property, except by bona fide disposal thereof by her husband, and it is a fraud upon her for her husband and others to convert his property into money with the intention of depriving her of her right of support and dower therein. This right is not affected by a judgment for alimony, since this is the only legal means for enforcing the wife's interest in the husband's property.

And see on this point the reported case (SCHWENN v. SCHWENN, ante, 281), where the same result is reached, where the wife's interest in the husband's property was represented by a contract with the husband, by which he was to pay her a certain amount annually for her support. Third per-

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sons who conspired with the husband to enable him to evade this obligation were held liable, apparently on the theory that they aided in the breach of a contract.

Third persons are also held liable for conspiring with the husband in this regard in Hoefler v. Hoefler (1896) 2 App. Div. 8, 37 N. Y. Supp. 436, subsequent appeal in (1896) 12 App. Div. 84, 42 N. Y. Supp. 1035, and see (1897) 21 App. Div. 633, 47 N. Y. Supp. 1138, which is affirmed in (1897) 154 N. Y. 760, 49 N. E. 1098. In this case, as reported in 12 App. Div. at page 89, it is said that "in the case at bar the husband was in contempt for violating an absolute order of the court in the plaintiff's favor, requiring the husband to pay her money. There was no contingency about it. Under the statutes of this state, the plaintiff was entitled to proceedings against the husband to compel its payment, and to punish him for contempt. Of this right the plaintiff was deprived by the intermeddling of the defendant, in placing the husband beyond the jurisdiction of the court. The damage in this case (the loss of the alimony) was not remote or contingent. The grasp of the law was upon this husband, and upon his property and earnings, for the benefit of the wife, which the husband could not escape unless he was placed beyond the jurisdiction of the court so that its order could not be enforced against him, so that the direct consequence of the defendant's acts was that she lost her support and the remedy to compel its payment. The damages were, therefore, the natural and legitimate result of the defendant's acts."

A. G. S.

INTERNATIONAL NEWS SERVICE
v.
ASSOCIATED PRESS.

United States Supreme Court—December 23, 1918.

(248 U. S. 215, 63 L. ed. —, 39 Sup. Ct. Rep. 68.)

Injunction — against pirating news.

1. A co-operative association of newspapers organized for the gathering, distributing, and publishing of news may enjoin a rival news agency from selling as its own news taken from the bulletins issued by the former association or any of its members, or from newspapers published by them.

Appeal — objections waived below.

2. The objection that the individual rights of members of a co-operative news-gathering and publishing organization may not be enforced in an equity suit brought by the organization as a corporate entity will be regarded by the Federal Supreme Court as waived, where the suit in substance was brought for the benefit of complainant's members, and no specific objection based upon the want of parties appears to have been made below.

Literary property — news.

3. As between rival news-gathering and publishing agencies news must be regarded as quasi property, irrespective of the rights of either as against the public.

Unfair competition — pirating news — property rights.

4. No general and absolute property in news as such is essential to the right of a news-gathering and publishing agency to protection in a court of equity against unfair competition by a rival agency.

Equity — clean hands — relief against pirating news.

5. The practice of a news-gathering and publishing agency of taking the news of a rival as a "tip" to be investigated, and, if verified by independent investigation, of utilizing gainfully

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the result of the investigation, does not necessarily show such an unconscientious and inequitable attitude towards its rival—such being the common practice among news agencies—as to fix upon it the taint of unclean hands, and debar it on that ground from relief against the bodily appropriation of its news matter by such rival, either in its original form or after rewriting without independent investigation and verification.

(Brandeis, J., dissents.)

PETITION for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a decree which modified a decree of the District Court for the Southern District of New York, granting an interlocutory injunction in a suit against petitioner, by directing that the injunction also provide against the bodily appropriation of the words or substance of complainant's news so long as it has any commercial value. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **Samuel Untermyer, Louis Marshall,** and **William A. De Ford,** for petitioner:

In the absence of a copyright derived from a legislative enactment, the publication of such work amounts to a dedication of it to the public, and confers a universal right of reproduction and use, whether for purposes of gain or otherwise.

American Tobacco Co. v. Werckmeister, 207 U. S. 284, 52 L. ed. 208, 28 Sup. Ct. Rep. 72, 12 Ann. Cas. 595; White-Smith Music Pub. Co. v. Apollo Co. 209 U. S. 1, 52 L. ed. 655, 28 Sup. Ct. Rep. 319, 14 Ann. Cas. 628; Bobbs-Merrill Co. v. Straus, 210 U. S. 346, 52 L. ed. 1091, 28 Sup. Ct. Rep. 722; Donaldsons v. Becket, 4 Burr, 2408, note; 98 Eng. Reprint, 257, 2 Bro. P. C. 129, 1 Eng. Reprint, 837; Tribune Co. v. Associated Press, 116 Fed. 126; New York Times Co. v. Sun Printing & Pub. Asso. 123 C. C. A. 54, 204 Fed. 586; Walter v. Steinkopff [1892] 3 Ch. 489, 61 L. J. Ch. N. S. 521, 67 L. T. N. S. 184, 40 Week. Rep. 599; Drone, Copyright, 169, 170; Bowker, Copyright, 88, 89; Wheaton v. Peters, 8 Pet. 591, 8 L. ed. 1055; Jefferys v. Boosey, 4 H. L. Cas. 815, 10 Eng. Reprint, 681, 3 C. L. R. 625, 24 L. J. Exch. 81, 1 Jur. N. S. 615; Holmes v. Hurst, 174 U. S. 85, 43 L. ed. 905, 19 Sup. Ct. Rep. 606; Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co. 155 N. Y. 241, 41 L.R.A. 846, 63 Am. St. Rep. 666, 49 N. E. 872.

The principle that applies to literary property is equally applicable to any idea, trade secret, or business plan which one may conceive or originate.

Peabody v. Norfolk, 98 Mass. 452, 96 Am. Dec. 664; Bristol v. Equitable Life Assur. Soc. 132 N. Y. 264, 28 Am. St. Rep. 568, 30 N. E. 506; Stein v. Morris, 120 Va. 390, 91 S. E. 177; Hamilton Mfg. Co. v. Tubbs, 216 Fed. 401; Haskins v. Ryan, 71 N. J. Eq. 575, 64 Atl. 436; Westcott Chuck Co. v. Oneida Nat. Chuck Co. 199 N. Y. 247, 139 Am. St. Rep. 907, 92 N. E. 639, 20 Ann. Cas. 858; Montegut v. Hickson, 178 App. Div. 94, 164 N. Y. Supp. 858.

Publication is the act by which a thing is made public, or is given publicity.

LeRoy v. Jamison, 3 Sawy. 369, Fed. Cas. No. 8,271; United States v. Williams, 3 Fed. 486; United States v. Comerford, 25 Fed. 903; D'Ole v. Kansas City Star Co. 94 Fed. 842; State use of Torreyson v. Grey, 21 Nev. 378, 19 L.R.A. 134, 32 Pac. 190; Sproul v. Pillsbury, 72 Me. 21.

None of the elements of unfair competition are to be found in this case.

Davies v. Bowes, 209 Fed. 54; McLean v. Fleming, 96 U. S. 245, 24 L. ed. 828; Lawrence Mfg. Co. v. Tennessee Mfg. Co. 138 U. S. 537, 34 L. ed. 997, 11 Sup. Ct. Rep. 396; Coats v. Merrick Thread Co. 149 U. S. 562, 37 L. ed. 847, 13 Sup. Ct. Rep. 966; Elgin Nat. Watch Co. v. Illinois Watch Case Co. 179 U. S. 675, 45 L. ed. 381, 21 Sup. Ct. Rep. 270; Singer Mfg. Co. v. June Mfg. Co. 163 U. S. 169, 185, 41 L. ed. 118, 124, 16 Sup. Ct. Rep. 1002; Dover Stamping Co. v. Fellows, 163 Mass. 191, 28 L.R.A. 448, 47 Am. St. Rep. 448, 40 N. E. 265; Bamforth v. Douglass Post Card Mach. Co. 158 Fed. 355; Tribune Co. v. Associated Press, 116 Fed. 126.

The respondent, having pursued as against the petitioner the same practices which it is now seeking to enjoin, has no standing in equity.

Clinton E. Worden & Co. v. Cali-

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fornia Fig Syrup Co. 187 U. S. 516, 47 L. ed. 282, 23 Sup. Ct. Rep. 161; Manhattan Medicine Co. v. Wood, 108 U. S. 218, 27 L. ed. 706, 2 Sup. Ct. Rep. 436; Prince Mfg. Co. v. Prince's Metallic Paint Co. 135 N. Y. 24, 17 L.R.A. 129, 31 N. E. 990; Edward Thompson Co. v. American Law Book Co. 62 L.R.A. 607, 59 C. C. A. 148, 122 Fed. 922; Uri v. Hirsch, 123 Fed. 568; Nebraska Teleph. Co. v. Western Independent Long Distance Teleph. Co. 68 Neb. 772, 95 N. W. 18; Pittsburgh, C. C. & St. L. R. Co. v. Crothersville, 159 Ind. 330, 64 N. E. 914; Fetridge v. Wells, 4 Abb. Pr. 144.

News of events of spontaneous origin is, and has always been held to be, public, and complainant has no property right in such news.

Davies v. Bowes, 209 Fed. 54; National Teleg. News Co. v. Western U. Teleg. Co. 119 Fed. 299; Bowker, Copyright, 88, 89; Springfield v. Thame, 89 L. T. N. S. 242, 19 Times L. R. 650; Clayton v. Stone, 2 Paine, 382, Fed. Cas. No. 2,872; Baker v. Selden, 101 U. S. 99, 25 L. ed. 841; New York Times Co. v. Star Co. 195 Fed. 110, 123 C. C. A. 54, 204 Fed. 586; Walter v. Steinkopff [1892] 3 Ch. 489, 61 L. J. Ch. N. S. 521, 67 L. T. N. S. 184, 40 Week. Rep. 599; Tribune Co. v. Associated Press, 116 Fed. 126; Press Pub. Co. v. Monroe, 51 L.R.A. 353, 19 C. C. A. 429, 38 U. S. App. 429, 73 Fed. 196; Ladd v. Oxnard, 75 Fed. 731; Jeweler's Mercantile Agency v. Jeweler's Weekly Pub. Co. 155 N. Y. 241, 41 L.R.A. 846, 63 Am. St. Rep. 666, 49 N. E. 872; Board of Trade v. Hadden-Krull Co. 109 Fed. 705; Board of Trade v. C. B. Thomson Commission Co. 103 Fed. 902; Cleveland Tel. Co. v. Stone, 105 Fed. 794.

It is not even the subject of copyright.

National Teleg. News Co. v. Western U. Teleg. Co. 60 L.R.A. 805, 56 C. C. A. 198, 119 Fed. 294; Bowker, Copyright, pp. 88, 89; Springfield v. Thame, 89 L. T. N. S. 242, 19 Times L. R. 650; Clayton v. Stone, 2 Paine, 382, Fed. Cas. No. 2,872; Baker v. Selden, 101 U. S. 99, 25 L. ed. 841; New York Times Co. v. Star Co. 195 Fed. 110, 123 C. C. A. 54, 204 Fed. 586; Walker v. Steinkopff [1892] 3 Ch. 489, 61 L. J. Ch. N. S. 521, 67 L. T. N. S. 184, 40 Week. Rep. 599; Tribune Co. v. Associated Press, 116 Fed. 126.

Equity recognizes a property right in, or in the commercial value of, an organization, instrumentality, or service, devised and used to obtain and confidentially handle and distribute news of events of spontaneous origin, and will use its powers to protect such service, in its handling and distribution of such matter, as long as it remains confidential, and no longer, or to the point of publication, and no further.

Board of Trade v. Christie Grain & Stock Co. 198 U. S. 236, 251, 49 L. ed. 1031, 1039, 25 Sup. Ct. Rep. 637; National Teleg. News Co. v. Western U. Teleg. Co. 60 L.R.A. 805, 56 C. C. A. 198, 119 Fed. 294; F. W. Dodge Co. v. Construction Information Co. 183 Mass. 62, 60 L.R.A. 810, 97 Am. St. Rep. 412, 66 N. E. 204; Kiernan v. Manhattan Quotation Teleg. Co. 50 How. Pr. 196; Exchange Teleg. Co. v. Howard, 22 Times L. R. 375; Tribune Co. v. Associated Press, 116 Fed. 126; Cleveland Teleg. Co. v. Stone, 105 Fed. 794.

Complainant, assuming that it had a property right in its "trade secret" knowledge of news (which equity will protect), lost that right by its authorized publication and sale thereof.

Kiernan v. Manhattan Quotation Teleg. Co. 50 How. Pr. 194; Exchange Teleg. Co. v. Gregory [1896] 1 Q. B. 147, 65 L. J. Q. B. N. S. 262, 74 L. T. N. S. 83, 60 J. P. 52; Exchange Teleg. Co. v. Central News [1897] 2 Ch. 48, 66 L. J. Ch. N. S. 672, 76 L. T. N. S. 591, 45 Week. Rep. 595; Peabody v. Norfolk, 98 Mass. 452, 96 Am. Dec. 664; F. W. Dodge Co. v. Construction Information Co. 183 Mass. 62, 60 L.R.A. 810, 97 Am. St. Rep. 412, 66 N. E. 204; Board of Trade v. Hadden-Krull Co. 109 Fed. 705; National Teleg. News Co. v. Western U. Teleg. Co. 60 L.R.A. 805, 56 C. C. A. 198, 119 Fed. 294; Illinois Commission Co. v. Cleveland Teleg. Co. 56 C. C. A. 205, 119 Fed. 301; Board of Trade v. Christie Grain & Stock Co. 198 U. S. 236, 49 L. ed. 1031, 25 Sup. Ct. Rep. 637; Board of Trade v. Cella Commission Co. 76 C. C. A. 28, 145 Fed. 28; Board of Trade v. Tucker, 137 C. C. A. 255, 221 Fed. 305; Hunt v. New York Cotton Exch. 205 U. S. 333, 51 L. ed. 825, 27 Sup. Ct. Rep. 529.

Mr. Hiram W. Johnson also for petitioner.

Messrs. Stetson, Jennings, & Russell, Frederick W. Lehmann, and **Winfred T. Denison,** for respondent:

News as a business commodity is property.

Hunt v. New York Cotton Exch. 205 U. S. 322, 333, 51 L. ed. 821, 825, 27 Sup. Ct. Rep. 529; Board of

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Trade v. Christie Grain & Stock Co. 198 U. S. 236, 250, 49 L. ed. 1031, 1039, 25 Sup. Ct. Rep. 637; Board of Trade v. L. A. Kinsey Co. 69 L.R.A. 59, 64 C. C. A. 669, 130 Fed. 513; Board of Trade v. Tucker, 137 C. C. A. 255, 221 Fed. 305; National Teleg. News Co. v. Western U. Teleg. Co. 60 L.R.A. 805, 56 C. C. A. 198, 119 Fed. 294; Board of Trade v. McDearmott Commission Co. 143 Fed. 188; Board of Trade v. Hadden Krull Co. 109 Fed. 705; John D. Park & Sons Co. v. Hartman, 12 L.R.A. (N.S.) 135, 82 C. C. A. 158, 153 Fed. 31; Board of Trade v. Cella Commission Co. 76 C. C. A. 28, 145 Fed. 28; F. W. Dodge Co. v. Construction Information Co. 183 Mass. 62, 60 L.R.A. 810, 97 Am. St. Rep. 412, 66 N. E. 204; Kiernan v. Manhattan Quotation Teleg. Co. 50 How. Pr. 196; Exchange Teleg. Co. v. Howard, 22 Times L. R. 375; Exchange Teleg. Co. v. Gregory [1896] 1 Q. B. 147, 65 L. J. Q. B. N. S. 262, 74 L. T. N. S. 83, 60 J. P. 52; Exchange Teleg. Co. v. Central News [1897] 2 Ch. 48, 66 L. J. Ch. N. S. 672, 76 L. T. N. S. 591, 45 Week. Rep. 595; Cox v. Land & Water Journal Co. L. R. 9 Eq. 324, 21 L. T. N. S. 548, 18 Week. Rep. 206, 39 L. J. Ch. N. S. 152.

This property right does not expire with the mere first appearance of the news either in a single paper or on a bulletin board, but continues and is entitled to protection so long as the news has property value.

Board of Trade v. Christie Grain & Stock Co. 198 U. S. 251, 49 L. ed. 1039, 25 Sup. Ct. Rep. 637; National Teleg. News Co. v. Western U. Teleg. Co. 60 L.R.A. 805, 56 C. C. A. 198, 119 Fed. 294; Fonotipia v. Bradley, 171 Fed. 951; Prest-O-Lite Co. v. Davis, 209 Fed. 917; Prest-O-Lite Co. v. Avery Lighting Co. 161 Fed. 648; Prest-O-Lite Co. v. Post & L. Co. 163 Fed. 63; Prest-O-Lite Co. v. Bogen, 209 Fed. 915; Searchlight Gas Co. v. Prest-O-Lite Co. 131 C. C. A. 626, 215 Fed. 692; Prest-O-Lite Co. v. Heiden, L.R.A. 1915F, 945, 135 C. C. A. 515, 219 Fed. 845; Universal Film Co. v. Copperman, 134 C. C. A. 305, 218 Fed. 577; Ferris v. Frohman, 223 U. S. 424, 56 L. ed. 492, 32 Sup. Ct. Rep. 263; Board of Trade v. Cella Commission Co. 76 C. C. A. 28, 145 Fed. 31.

The rule by which literary property is supposed to cease upon an unrestricted publication, without copyright, is entirely inapplicable to the conditions which make and support the status of news as property.

Millar v. Taylor, 4 Burr. 2303, 98 Eng. Reprint, 201; Donaldson v. Beckett, 2 Bro. P. C. 129, 1 Eng. Reprint, 837, 4 Burr. 2408, note, 98 Eng. Reprint, 257, note; Story, Const. § 1152; French v. Maguire, 55 How. Pr. 471; Holmes v. Hurst, 174 U. S. 82, 43 L. ed. 904, 19 Sup. Ct. Rep. 606; Drone, Copyright, 116; Baker v. Selden, 101 U. S. 99, 105, 25 L. ed. 841, 844.

Even if the rule relative to loss of property rights by unrestricted publication were applicable to this type of property, the injunction nevertheless was properly granted, because the publication here is subject to restriction by imperative implication.

Board of Trade v. Tucker, 221 Fed. 307; Board of Trade v. McDearmott Commission Co. 143 Fed. 188; Werckmeister v. American Lithographic Co. 68 L.R.A. 591, 69 C. C. A. 503, 134 Fed. 321, affirmed in 207 U. S. 299, 52 L. ed. 217, 28 Sup. Ct. Rep. 72, 12 Ann. Cas. 595; Tompkins v. Halleck, 133 Mass. 32, 43 Am. Rep. 480; Aronson v. Baker, 43 N. J. Eq. 365, 12 Atl. 177.

Complainant is also entitled to the injunction, both at common law and under the Federal Trade Commission Act, against the unfair competition of the defendant at any time and by any means whatever.

Aikens v. Wisconsin, 195 U. S. 194, 201, 49 L. ed. 154, 158, 25 Sup. Ct. Rep. 3; United States v. Eastman Kodak Co. 226 Fed. 74, 230 Fed. 524; United States v. American Can Co. 230 Fed. 887; Ames, Tort Because of Wrongful Motive, 18 Harv. L. Rev. 420; Tuttle v. Buck, 107 Minn. 145, 22 L.R.A.(N.S.) 599, 131 Am. St. Rep. 446, 119 N. W. 946, 16 Ann. Cas. 807; Dunshee v. Standard Oil Co. 152 Iowa, 626, 36 L.R.A.(N.S.) 26[illegible], 132 N. W. 371; United States v. Hamburgh-American S. S. Line, 216 Fed. 973; United States v. Hamburg-Amerikanische Packet, 200 Fed. 806; United States v. American-Asiatic S. S. Co. 220 Fed. 235; Eastern States Retail Lumber Dealers' Asso. v. United States, 234 U. S. 600, 614, 58 L. ed. 1490, 1500, L.R.A.1915A, 788, 34 Sup. Ct. Rep. 951; Gompers v. Buck's Stove & Range Co. 221 U. S. 418, 437, 438, 55 L. ed. 797, 804, 34 L.R.A.(N.S.) 874, 31 Sup. Ct. Rep. 492; Nash v. United States, 229 U. S. 373, 376, 57 L. ed. 1232, 1235, 33 Sup. Ct. Rep. 780; Standard Oil Co. v. United States, 221 U. S. 1, 43, 55 L. ed. 619, 638, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; Central Lumber Co. v. South Dakota,

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226 U. S. 157, 160, 57 L. ed. 164, 169, 33 Sup. Ct. Rep. 66; United States v. Great Lakes Towing Co. 208 Fed. 743; United States v. Pacific & A. R. & Nav. Co. 228 U. S. 87, 57 L. ed. 742, 33 Sup. Ct. Rep. 443; Ware-Kramer Co. v. American Tobacco Co. 180 Fed. 167.

The defense of "unclean hands" is entirely without foundation, either in law or in fact.

Board of Trade v. Christie Grain & Stock Co. 198 U. S. 250, 49 L. ed. 1039, 25 Sup. Ct. Rep. 637; D. R. Wilder Mfg. Co. v. Corn Products Ref. Co. 236 U. S. 165, 172, 59 L. ed. 520, 525, 35 Sup. Ct. Rep. 398, Ann. Cas. 1916A, 118; Prince Mfg. Co. v. Prince's Metallic Paint Co. 135 N. Y. 24, 17 L.R.A. 129, 31 N. E. 990; Fetridge v. Wells, 4 Abb. Pr. 144; Manhattan Medicine Co. v. Wood, 108 U. S. 218, 27 L. ed. 706, 2 Sup. Ct. Rep. 436; Primeau v. Granfield, 180 Fed. 851; Chute v. Wisconsin Chemical Co. 185 Fed. 115; Bentley v. Tibbals, 138 C. C. A. 489, 223 Fed. 252; Talbot v. Independent Order of Owls, 136 C. C. A. 268, 220 Fed. 660; Edward Thompson Co. v. American Law Book Co. 62 L.R.A. 607, 59 C. C. A. 148, 122 Fed. 923; American Sugar Ref. Co. v. McFarland, 229 Fed. 284, on appeal, 241 U. S. 85, 60 L. ed. 904, 36 Sup. Ct. Rep. 498; Cropper v. Davis, 156 C. C. A. 90, 243 Fed. 316; Trice v. Comstock, 61 L.R.A. 176, 57 C. C. A. 646, 121 Fed. 620; Shaver v. Heller & M. Co. 65 L.R.A. 878, 48 C. C. A. 48, 108 Fed. 821; Knapp v. S. Jarvis Adams Co. 70 C. C. A. 536, 135 Fed. 1008; Mason v. Carrothers, 105 Me. 392, 74 Atl. 1030; Yale Gas Stove Co. v. Wilcox, 64 Conn. 101, 25 L.R.A. 90, 42 Am. St. Rep. 159, 29 Atl. 303; Lord v. Smith, 109 Md. 42, 71 Atl. 430; Munn & Co. v. Americana Co. 83 N. J. Eq. 309, L.R.A. 1916D, 116, 91 Atl. 87; Luebke v. Salzwedel, 157 Wis. 601, 147 N. W. 831; Employing Printers Club v. Dr. Blosser Co. 122 Ga. 509, 69 L.R.A. 90, 106 Am. St. Rep. 137, 50 S. E. 354, 2 Ann. Cas. 694; Lone Star Salt Co. v. Blount, 49 Tex. Civ. App. 138, 107 S. W. 1163; Vulcan Detinning v. American Can Co. 72 N. J. Eq. 387, 12 L.R.A.(N.S.) 102, 67 Atl. 339.

Mr. Peter S. Grosscup also for respondent.

Mr. Justice Pitney delivered the opinion of the court:

The parties are competitors in the gathering and distribution of news and its publication for profit in newspapers throughout the United States. The Associated Press, which was complainant in the district court, is a co-operative organization, incorporated under the Membership Corporations Law of the state of New York, its members being individuals who are either proprietors or representatives of about 950 daily newspapers published in all parts of the United States. That a corporation may be organized under that act for the purpose of gathering news for the use and benefit of its members, and for publication in newspapers owned or represented by them, is recognized by an amendment enacted in 1901 (N. Y. Laws 1901, chap. 436). Complainant gathers in all parts of the world, by means of various instrumentalities of its own, by exchange with its members, and by other appropriate means, news and intelligence of current and recent events of interest to newspaper readers, and distributes it daily to its members for publication in their newspapers. The cost of the service, amounting approximately to $3,500,000 per annum, is assessed upon the members and becomes a part of their costs of operation, to be recouped, presumably with profit, through the publication of their several newspapers. Under complainant's by-laws each member agrees, upon assuming membership, that news received through complainant's service is received exclusively for publication in a particular newspaper, language, and place specified in the certificate of membership; that no other use of it shall be permitted; and that no member shall furnish or permit anyone in his employ or connected with his newspaper to furnish any of complainant's news in advance of publication to any person not a member. And each member is required to gather the local news of his district and supply it to the Associated Press and to no one else.

Defendant is a corporation organized under the laws of the state of New Jersey, whose business is the gathering and selling of news to its customers and clients, con-

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sisting of newspapers published throughout the United States, under contracts by which they pay certain amounts at stated times for defendant's service. It has widespread news-gathering agencies; the cost of its operations amounts, it is said, to more than $2,000,000 per annum; and it serves about 400 newspapers located in the various cities of the United States and abroad, a few of which are represented, also, in the membership of the Associated Press.

The parties are in the keenest competition between themselves in the distribution of news throughout the United States; and so, as a rule, are the newspapers that they serve, in their several districts.

Complainant in its bill, defendant in its answer, have set forth in almost identical terms the rather obvious circumstances and conditions under which their business is conducted. The value of the service, and of the news furnished, depends upon the promptness of transmission, as well as upon the accuracy and impartiality of the news; it being essential that the news be transmitted to members or subscribers as early or earlier than similar information can be furnished to competing newspapers by other news services, and that the news furnished by each agency shall not be furnished to newspapers which do not contribute to the expense of gathering it. And further, to quote from the answer: "Prompt knowledge and publication of world-wide news is essential to the conduct of a modern newspaper, and by reason of the enormous expense incident to the gathering and distribution of such news, the only practical way in which a proprietor of a newspaper can obtain the same is, either through co-operation with a considerable number of other newspaper proprietors in the work of collecting and distributing such news, and the equitable division with them of the expenses thereof, or by the purchase of such news from some existing agency engaged in that business."

The bill was filed to restrain the pirating of complainant's news by defendant in three ways: First, by bribing employees of newspapers published by complainant's members to furnish Associated Press news to defendant before publication, for transmission by telegraph and telephone to defendant's clients for publication by them; second, by inducing Associated Press members to violate its by-laws and permit defendant to obtain news before publication; and third, by copying news from bulletin boards and from early editions of complainant's newspapers and selling this, either bodily or after rewriting it, to defendant's customers.

The district court, upon consideration of the bill and answer, with voluminous affidavits on both sides, granted a preliminary injunction under the first and second heads; but refused at that stage to restrain the systematic practice admittedly pursued by defendant, of taking news bodily from the bulletin boards and early editions of complainant's newspapers and selling it as its own. The court expressed itself as satisfied that this practice amounted to unfair trade, but as the legal question was one of first impression, it considered that the allowance of an injunction should await the outcome of an appeal. 240 Fed. 983, 996. Both parties having appealed, the circuit court of appeals sustained the injunction order so far as it went, and upon complainant's appeal modified it and remanded the cause, with directions to issue an injunction also against any bodily taking of the words or substance of complainant's news until its commercial value as news had passed away. Post, 317, 157 C. C. A. 436, 245 Fed. 244, 253. The present writ of certiorari was then allowed. 245 U. S. 644, 62 L. ed. 528, 38 Sup. Ct. Rep. 10.

The only matter that has been argued before us is whether defendant may lawfully be restrained from ap-

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propriating news taken from bulletins issued by complainant or any of its members, or from newspapers published by them, for the purpose of selling it to defendant's clients. Complainant asserts that defendant's admitted course of conduct in this regard both violates complainant's property right in the news and constitutes unfair competition in business. And notwithstanding the case has proceeded only to the stage of a preliminary injunction, we have deemed it proper to consider the underlying questions, since they go to the very merits of the action and are presented upon facts that are not in dispute. As presented in argument, these questions are: (1) Whether there is any property in news; (2) whether, if there be property in news collected for the purpose of being published, it survives the instant of its publication in the first newspaper to which it is communicated by the news gatherer; and (3) whether defendant's admitted course of conduct in appropriating for commercial use matter taken from bulletins or early editions of Associated Press publications constitutes unfair competition in trade.

The Federal jurisdiction was invoked because of diversity of citizenship, not upon the ground that the suit arose under the copyright or other laws of the United States. Complainant's news matter is not copyrighted. It is said that it could not, in practice, be copyrighted, because of the large number of despatches that are sent daily; and, according to complainant's contention, news is not within the operation of the Copyright Act. Defendant, while apparently conceding this, nevertheless invokes the analogies of the law of literary property and copyright, insisting as its principal contention that, assuming complainant has a right of property in its news, it can be maintained (unless the Copyright Act be complied with) only by being kept secret and confidential; and that upon the publication with complainant's consent of uncopyrighted news by any of complainant's members in a newspaper or upon a bulletin board, the right of property is lost, and the subsequent use of the news by the public or by defendant for any purpose whatever becomes lawful.

A preliminary objection to the form in which the suit is brought may be disposed of at the outset. It is said that the circuit court of appeals granted relief upon considerations applicable to particular members of the Associated Press, and that this was erroneous because the suit was brought by complainant as a corporate entity, and not by its members; the argument being that their interests cannot be protected in this proceeding any more than the individual rights of a stockholder can be enforced in an action brought by the corporation. From the averments of the bill, however, it is plain that the suit in substance was brought for the benefit of complainant's members, and that they would be proper parties, and, except for their numbers, perhaps necessary parties. Complainant is a proper party to conduct the suit as representing their interest; and since no specific objection, based upon the want of parties, appears to have been made below, we will treat the objection as waived. See Equity Rules 38, 43, 44.

Appeal—objections waived below.

In considering the general question of property in news matter, it is necessary to recognize its dual character, distinguishing between the substance of the information and the particular form or collocation of words in which the writer has communicated it.

No doubt news articles often possess a literary quality, and are the subject of literary property at the common law; nor do we question that such an article, as a literary production, is the subject of copyright by the terms of the act as it now stands. In an early case at the circuit Mr. Justice Thompson held in effect that a newspaper was

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not within the protection of the Copyright Acts of 1790 [1 Stat. at L. 124, chap. 15] and 1802 [2 Stat. at L. 171, chap. 36] (Clayton v. Stone, 2 Paine, 382, Fed. Cas. No. 2872). But the present act is broader; it provides that the works for which copyright may be secured shall include "all the writings of an author," and specifically mentions "periodicals, including newspapers" (Act of March 4, 1909, chap. 320, §§ 4 and 5, 35 Stat. at L. 1075, 1076, Comp. Stat. 1916, §§ 9520, 9521). Evidently this admits to copyright a contribution to a newspaper, notwithstanding it also may convey news; and such is the practice of the copyright office, as the newspapers of the day bear witness. See Copyright Office Bulletin No. 15 (1917), pp. 7, 14, 16, 17.

But the news element—the information respecting current events contained in the literary production—is not the creation of the writer, but is a report of matters that ordinarily are publici juris; it is the history of the day. It is not to be supposed that the framers of the Constitution, when they empowered Congress "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries" (Const. art. 1, § 8, ¶ 8), intended to confer upon one who might happen to be the first to report a historic event the exclusive right for any period to spread the knowledge of it.

We need spend no time, however, upon the general question of property in news matter at common law, or the application of the Copyright Act, since it seems to us the case must turn upon the question of unfair competition in business. And, in our opinion, this does not depend upon any general right of property analogous to the common-law right of the proprietor of an unpublished work to prevent its publication without his consent; nor is it foreclosed by showing that the benefits of the Copyright Act have been waived. We are dealing here, not with restrictions upon publication, but with the very facilities and processes of publication. The peculiar value of news is in the spreading of it while it is fresh; and it is evident that a valuable property interest in the news as news cannot be maintained by keeping it secret. Besides, except for matters improperly disclosed, or published in breach of trust or confidence, or in violation of law, none of which is involved in this branch of the case, the news of current events may be regarded as common property. What we are concerned with is the business of making it known to the world, in which both parties to the present suit are engaged. That business consists in maintaining a prompt, sure, steady, and reliable service designed to place the daily events of the world at the breakfast table of the millions at a price that, while of trifling moment to each reader, is sufficient in the aggregate to afford compensation for the cost of gathering and distributing it, with the added profit so necessary as an incentive to effective action in the commercial world. The service thus performed for newspaper readers is not only innocent, but extremely useful in itself, and indubitably constitutes a legitimate business. The parties are competitors in this field; and, on fundamental principles, applicable here as elsewhere, when the rights or privileges of the one are liable to conflict with those of the other, each party is under a duty so to conduct its own business as not unnecessarily or unfairly to injure that of the other. Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 254, 62 L. ed. 260, 277, L.R.A.1918C, 497, 38 Sup. Ct. Rep. 65, Ann. Cas. 1918B, 641.

Obviously, the question of what is unfair competition in business must be determined with particular reference to the character and circumstances of the business. The question here is not so much the rights of either party as against the public, but their rights as between

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themselves. See Morison v. Moat, 9 Hare, 241, 258, 68 Eng. Reprint, 492. And although we may and do assume that neither party has any remaining property interest as against the public in uncopyrighted news matter after the moment of its first publication, it by no means follows that there is no remaining property interest in it as between themselves. For, to both of them alike, news matter, however little susceptible of ownership or dominion in the absolute sense, is stock in trade, to be gathered at the cost of enterprise, organization, skill, labor, and money, and to be distributed and sold to those who will pay money for it, as for any other merchandise. Regarding the news, therefore, as but the material out of which both parties are seeking to make profits at the same time and in the same field, we hardly can fail to recognize that for this purpose, and as between them, it must be regarded as quasi property, irrespective of the rights of either as against the public.

Literary property—news.

In order to sustain the jurisdiction of equity over the controversy, we need not affirm any general and absolute property in the news as such. The rule that a court of equity concerns itself only in the protection of property rights treats any civil right of a pecuniary nature as a property right (Re Sawyer, 124 U. S. 200, 210, 31 L. ed. 402, 405, 8 Sup. Ct. Rep. 482; Re Debs, 158 U. S. 564, 593, 39 L. ed. 1092, 1105, 15 Sup. Ct. Rep. 900); and the right to acquire property by honest labor or the conduct of a lawful business is as much entitled to protection as the right to guard property already acquired (Truax v. Raich, 239 U. S. 33, 37, 38, 60 L. ed. 131, 133, 134, L.R.A.1916D, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283; Brennan v. United Hatters, 73 N. J. L. 729, 742, 9 L.R.A.(N.S.) 254, 118 Am. St. Rep. 727, 65 Atl. 165, 9 Ann. Cas. 698; Barr v. Essex Trades Council, 53 N. J. Eq. 101, 30 Atl. 881). It is this right that furnishes the basis of the jurisdiction in the ordinary case of unfair competition.

Unfair competition—pirating news—property rights.

The question whether one who has gathered general information or news at pains and expense for the purpose of subsequent publication through the press has such an interest in its publication as may be protected from interference has been raised many times, although never, perhaps, in the precise form in which it is now presented.

Board of Trade v. Christie Grain & Stock Co. 198 U. S. 236, 250, 49 L. ed. 1031, 1039, 25 Sup. Ct. Rep. 637, related to the distribution of quotations of prices on dealings upon a board of trade, which were collected by plaintiff and communicated on confidential terms to numerous persons, under a contract not to make them public. This court held that, apart from certain special objections that were overruled, plaintiff's collection of quotations was entitled to the protection of the law; that, like a trade secret, plaintiff might keep to itself the work done at its expense, and did not lose its right by communicating the result to persons, even if many, in confidential relations to itself, under a contract not to make it public; and that strangers should be restrained from getting at the knowledge by inducing a breach of trust.

In National Teleg. News Co. v. Western U. Teleg. Co. 60 L.R.A. 805, 56 C. C. A. 198, 119 Fed. 294, the circuit court of appeals for the seventh circuit dealt with news matter gathered and transmitted by a telegraph company, and consisting merely of a notation of current events having but a transient value, due to quick transmission and distribution; and, while declaring that this was not copyrightable although printed on a tape by tickers in the offices of the recipients, and that it was a commercial, not a literary, product, nevertheless held that the business of gathering and communicating the news—the service of

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purveying it—was a legitimate business, meeting a distinctive commercial want and adding to the facilities of the business world, and partaking of the nature of property in a sense that entitled it to the protection of a court of equity against piracy.

Other cases are cited, but none that we deem it necessary to mention.

Not only do the acquisition and transmission of news require elaborate organization and a large expenditure of money, skill, and effort; not only has it an exchange value to the gatherer, dependent chiefly upon its novelty and freshness, the regularity of the service, its reputed reliability and thoroughness, and its adaptability to the public needs, but also, as is evident, the news has an exchange value to one who can misappropriate it.

The peculiar features of the case arise from the fact that, while novelty and freshness form so important an element in the success of the business, the very processes of distribution and publication necessarily occupy a good deal of time. Complainant's service, as well as defendant's, is a daily service to daily newspapers; most of the foreign news reaches this country at the Atlantic seaboard, principally at the city of New York; and because of this, and of time differentials, due to the earth's rotation, the distribution of news matter throughout the country is principally from east to west; and, since in speed the telegraph and telephone easily outstrip the rotation of the earth, it is a simple matter for defendant to take complainant's news from bulletins or early editions of complainant's members in the eastern cities, and at the mere cost of telegraphic transmission cause it to be published in western papers issued at least as early as those served by complainant. Besides this and irrespective of time differentials, irregularities in telegraphic transmission on different lines, and the normal consumption of time in printing and distributing the newspaper, result in permitting pirated news to be placed in the hands of defendant's readers sometimes simultaneously with the service of competing Associated Press papers; occasionally, even earlier.

Defendant insists that when, with the sanction and approval of complainant, and as the result of the use of its news for the very purpose for which it is distributed, a portion of complainant's members communicate it to the general public by posting it upon bulletin boards so that all may read, or by issuing it to newspapers and distributing it indiscriminately, complainant no longer has the right to control the use to be made of it; that when it thus reaches the light of day it becomes the common possession of all to whom it is accessible; and that any purchaser of a newspaper has the right to communicate the intelligence which it contains to anybody and for any purpose, even for the purpose of selling it for profit to newspapers published for profit in competition with complainant's members.

The fault in the reasoning lies in applying as a test the right of the complainant as against the public, instead of considering the rights of complainant and defendant, competitors in business, as between themselves. The right of the purchaser of a single newspaper to spread knowledge of its contents gratuitously, for any legitimate purpose not unreasonably interfering with complainant's right to make merchandise of it, may be admitted; but to transmit that news for commercial use, in competition with complainant,—which is what defendant has done and seeks to justify,—is a very different matter. In doing this defendant, by its very act, admits that it is taking material that has been acquired by complainant as the result of organization and the expenditure of labor, skill, and money, and which is salable by complainant for money, and that defendant, in appropriating it

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and selling it as its own, is endeavoring to reap where it has not sown, and by disposing of it to newspapers that are competitors of complainant's members is appropriating to itself the harvest of those who have sown. Stripped of all disguises, the process amounts to an unauthorized interference with the normal operation of complainant's legitimate business precisely at the point where the profit is to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not, with special advantage to defendant in the competition because of the fact that it is not burdened with any part of the expense of gathering the news. The transaction speaks for itself, and a court of equity ought not to hesitate long in characterizing it as unfair competition in business.

The underlying principle is much the same as that which lies at the base of the equitable theory of consideration in the law of trusts,—that he who has fairly paid the price should have the beneficial use of the property. Pom. Eq. Jur. § 981. It is no answer to say that complainant spends its money for that which is too fugitive or evanescent to be the subject of property. That might, and for the purposes of the discussion we are assuming that it would, furnish an answer in a common-law controversy. But in a court of equity, where the question is one of unfair competition, if that which complainant has acquired fairly at substantial cost may be sold fairly at substantial profit, a competitor who is misappropriating it for the purpose of disposing of it to his own profit and to the disadvantage of complainant cannot be heard to say that it is too fugitive or evanescent to be regarded as property. It has all the attributes of property necessary for determining that a misappropriation of it by a competitor is unfair competition because contrary to good conscience.

The contention that the news is abandoned to the public for all purposes when published in the first newspaper is untenable. Abandonment is a question of intent, and the entire organization of the Associated Press negatives such a purpose. The cost of the service would be prohibitive if the reward were to be so limited. No single newspaper, no small group of newspapers, could sustain the expenditure. Indeed, it is one of the most obvious results of defendant's theory that, by permitting indiscriminate publication by anybody and everybody for purposes of profit in competition with the news gatherer, it would render publication profitless, or so little profitable as in effect to cut off the service by rendering the cost prohibitive in comparison with the return. The practical needs and requirements of the business are reflected in complainant's by-laws, which have been referred to. Their effect is that publication by each member must be deemed not by any means an abandonment of the news to the world for any and all purposes, but a publication for limited purposes; for the benefit of the readers of the bulletin or the newspaper as such; not for the purpose of making merchandise of it as news, with the result of depriving complainant's other members of their reasonable opportunity to obtain just returns for their expenditures.

It is to be observed that the view we adopt does not result in giving to complainant the right to monopolize either the gathering or the distribution of the news; or, without complying with the Copyright Act, to prevent the reproduction of its news articles; but only postpones participation by complainant's competitor in the processes of distribution and reproduction of news that it has not gathered, and only to the extent necessary to prevent that competitor from reaping the fruits of complainant's efforts and expenditure, to the partial exclusion of complainant, and in violation of the principle that underlies the maxim, "Sic utere tuo," etc.

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It is said that the elements of unfair competition are lacking because there is no attempt by defendant to palm off its goods as those of the complainant, characteristic of the most familiar, if not the most typical, cases of unfair competition. Howe Scale Co. v. Wyckoff, Seamans, & Benedict, 198 U. S. 118, 140, 49 L. ed. 972, 986, 25 Sup. Ct. Rep. 609. But we cannot concede that the right to equitable relief is confined to that class of cases. In the present case the fraud upon complainant's rights is more direct and obvious. Regarding news matter as the mere material from which these two competing parties are endeavoring to make money, and treating it, therefore, as quasi property for the purposes of their business because they are both selling it as such, defendant's conduct differs from the ordinary case of unfair competition in trade principally in this: that, instead of selling its own goods as those of complainant, it substitutes misappropriation in the place of misrepresentation, and sells complainant's goods as its own.

Besides the misappropriation, there are elements of imitation, —of false pretense—in defendant's practices. The device of rewriting complainant's news articles, frequently resorted to, carries its own comment. The habitual failure to give credit to complainant for that which is taken is significant. Indeed, the entire system of appropriating complainant's news and transmitting it as a commercial product to defendant's clients and patrons amounts to a false representation to them and to their newspaper readers that the news transmitted is the result of defendant's own investigation in the field. But these elements, although accentuating the wrong, are not the essence of it. It is something more than the advantage of celebrity of which complainant is being deprived.

The doctrine of unclean hands is invoked as a bar to relief; it being insisted that defendant's practices against which complainant seeks an injunction are not different from the practice attributed to complainant, of utilizing defendant's news, published by its subscribers. At this point it becomes necessary to consider a distinction that is drawn by complainant, and, as we understand it, was recognized by defendant also in the submission of proofs in the district court, between two kinds of use that may be made by one news agency of news taken from the bulletins and newspapers of the other. The first is the bodily appropriation of a statement of fact or a news article, with or without rewriting, but without independent investigation or other expense. This form of pirating was found by both courts to have been pursued by defendant systematically with respect to complainant's news, and against it the circuit court of appeals granted an injunction. This practice complainant denies having pursued, and the denial was sustained by the finding of the district court. It is not contended by defendant that the finding can be set aside, upon the proofs as they now stand. The other use is to take the news of a rival agency as a "tip" to be investigated, and, if verified by independent investigation, the news thus gathered is sold. This practice complainant admits that it has pursued and still is willing that defendant shall employ.

Both courts held that complainant could not be debarred on the ground of unclean hands upon the score of pirating defendant's news, because not shown to be guilty of sanctioning this practice.

As to securing "tips" from a competing news agency, the district court (240 Fed. 991, 995), while not sanctioning the practice, found that both parties had adopted it in accordance with common business usage, in the belief that their conduct was technically lawful, and hence did not find in it any sufficient ground for attributing unclean hands to complainant. The circuit court of appeals (post, 317, 157 C. C. A. 436, 245 Fed. 247) found

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that the tip habit, though discouraged by complainant, was "incurably journalistic," and that there was "no difficulty in discriminating between the utilization of tips and the bodily appropriation of another's labor in accumulating and stating information."

We are inclined to think a distinction may be drawn between the utilization of tips and the bodily appropriation of news matter, either in its original form or after rewriting and without independent investigation and verification; whatever may appear at the final hearing, the proofs as they now stand recognize such a distinction; both parties avowedly recognize the practice of taking tips, and neither party alleges it to be unlawful or to amount to unfair competition in business. In a line of English cases a somewhat analogous practice has been held not to amount to an infringement of the copyright of a directory or other book containing compiled information. In Kelly v. Morris, L. R. 1 Eq. 697, 701, 702, 7 Eng. Rul. Cas. 102, Vice Chancelor Sir William Page Wood (afterwards Lord Hatherley), dealing with such a case, said that defendant was "not entitled to take one word of the information previously published without independently working out the matter for himself, so as to arrive at the same result from the same common sources of information, and the only use that he can legitimately make of a previous publication is to verify his own calculations and results when obtained." This was followed by Vice Chancellor Giffard in Morris v. Ashbee, L. R. 7 Eq. 34, where he said: "In a case such as this no one has a right to take the results of the labor and expense incurred by another for the purposes of a rival publication, and thereby save himself the expense and labor of working out and arriving at these results by some independent road." A similar view was adopted by Lord Chancellor Hatherley and the former Vice Chancellor, then Giffard, L. J., in Pike v. Nicholas, L. R. 5 Ch. 251, 39 L. J. Ch. N. S. 435, 18 Week. Rep. 321, 7 Eng. Rul. Cas. 108, and shortly afterwards by the latter judge in Morris v. Wright, L. R. 5 Ch. 279, 287, where he said, commenting upon Pike v. Nicholas: "It was a perfectly legitimate course for the defendant to refer to the plaintiff's book, and if, taking that book as his guide, he went to the original authorities and compiled his book from them, he made no unfair or improper use of the plaintiff's book; and so here, if the fact be that Mr. Wright used the plaintiff's book in order to guide himself to the persons on whom it would be worth his while to call, and for no other purpose, he made a perfectly legitimate use of the plaintiff's book."

A like distinction was recognized by the circuit court of appeals for the second circuit in Edward Thompson Co. v. American Law Book Co. 62 L.R.A. 607, 59 C. C. A. 148, 122 Fed. 922, and in West Pub. Co. v. Edward Thompson Co. 100 C. C. A. 303, 176 Fed. 833, 838.

In the case before us, in the present state of the pleadings and proofs, we need go no further than to hold, as we do, that the admitted pursuit by complainant of the practice of taking news items published by defendant's subscribers as tips to be investigated, and, if verified, the result of the investigation to be sold,—the practice having been followed by defendant also, and by news agencies generally,—is not shown to be such as to constitute an unconscientious or inequitable attitude towards its adversary so as to fix upon complainant the taint of unclean hands, and debar it on this ground from the relief to which it is otherwise entitled.

Equity—clean hands—relief against pirating news.

Injunction—against pirating news.

There is some criticism of the injunction that was directed by the district court upon the going down of the mandate from the circuit court of appeals. In brief, it re-

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strains any taking or gainfully using of the complainant's news, either bodily or in substance, from bulletins issued by the complainant or any of its members, or from editions of their newspapers, "*until its commercial value as news to the complainant and all of its members has passed away.*" The part complained of is the clause we have italicized; but if this be indefinite, it is no more so than the criticism. Perhaps it would be better that the terms of the injunction be made specific, and so framed as to confine the restraint to an extent consistent with the reasonable protection of complainant's newspapers, each in its own area and for a specified time after its publication, against the competitive use of pirated news by defendant's customers. But the case presents practical difficulties; and we have not the materials, either in the way of a definite suggestion of amendment, or in the way of proofs, upon which to frame a specific injunction; hence, while not expressing approval of the form adopted by the district court, we decline to modify it at this preliminary stage of the case, and will leave that court to deal with the matter upon appropriate application made to it for the purpose.

The decree of the Circuit Court of Appeals will be affirmed.

Mr. Justice **Clarke** took no part in the consideration or decision of this case.

Mr. Justice **Brandeis**, dissenting:

There are published in the United States about 2,500 daily papers.[1] More than 800 of them are supplied with domestic and foreign news of general interest by the Associated Press,—a corporation without capital stock, which does not sell news or earn or seek to earn profits, but serves merely as an instrumentality by means of which these papers supply themselves at joint expense with such news. Papers not members of the Associated Press depend for their news of general interest largely upon agencies organized for profit.[2] Among these agencies is the International News Service, which supplies news to about 400 subscribing papers. It has, like the Associated Press, bureaus and correspondents in this and foreign countries; and its annual expenditures in gathering and distributing news are about $2,000,000. Ever since its organization in 1909, it has included among the sources from which it gathers news, copies (purchased in the open market) of early editions of some papers published by members of the Associated Press and the bulletins publicly posted by them. These items, which constitute but a small part of the news transmitted to its subscribers, are generally verified by the International News Service before transmission; but frequently items are transmitted without verification; and occasionally even without being rewritten. In no case is the fact disclosed that such item was suggested by or taken from a paper or bulletin published by an Associated Press member.

No question of statutory copyright is involved. The sole question for our consideration is this: Was the International News Service properly enjoined from using, or causing to be used gainfully, news of which it acquired knowledge by lawful means (namely, by reading publicly posted bulletins or papers purchased by it in the open market), merely because the news had been originally gathered by the Associated Press and continued to be of value to some of its members,

[1] See American Newspaper Annual and Directory (1918) pp. 4, 10, 1193-1212.

[2] The Associated Press, by Frank B. Noyes, Sen. Doc. No. 27, 63d Congress, First Session. In a brief filed in this court by counsel for the Associated Press the number of its members is stated to be 1030. Some members of the Associated Press are also subscribers to the International News Service.

Strictly the member is not the publishing concern, but an individual who is the sole or part owner of a newspaper, or an executive officer of a company which owns one. By-laws, art, 2, § 1.

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or because it did not reveal the source from which it was acquired?

The "ticker" cases, the cases concerning literary and artistic compositions, and cases of unfair competition, were relied upon in support of the injunction. But it is admitted that none of those cases affords a complete analogy with that before us. The question presented for decision is new; and it is important.

News is a report of recent occurrences. The business of the news agency is to gather systematically knowledge of such occurrences of interest and to distribute reports thereof. The Associated Press contended that knowledge so acquired is property, because it costs money and labor to produce and because it has value for which those who have it not are ready to pay; that it remains property and is entitled to protection as long as it has commercial value as news; and that to protect it effectively, the defendant must be enjoined from making, or causing to be made, any gainful use of it while it retains such value. An essential element of individual property is the legal right to exclude others from enjoying it. If the property is private, the right of exclusion may be absolute; if the property is affected with a public interest, the right of exclusion is qualified. But the fact that a product of the mind has cost its producer money and labor; and has a value for which others are willing to pay, is not sufficient to insure to it this legal attribute of property. The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use. Upon these incorporeal productions the attribute of property is continued after such communication only in certain classes of cases where public policy has seemed to demand it. These exceptions are confined to productions which, in some degree, involve creation, invention, or discovery. But by no means all such are endowed with this attribute of property. The creations which are recognized as property by the common law are literary, dramatic, musical, and other artistic creations; and these have also protection under the copyright statutes. The inventions and discoveries upon which this attribute of property is conferred only by statute are the few comprised within the Patent Law. There are also many other cases in which courts interfere to prevent curtailment of plaintiff's enjoyment of incorporeal productions; and in which the right to relief is often called a property right, but is such only in a special sense. In those cases, the plaintiff has no absolute right to the protection of his production; he has merely the qualified right to be protected as against the defendant's acts, because of the special relation in which the latter stands or the wrongful method or means employed in acquiring the knowledge or the manner in which it is used. Protection of this character is afforded where the suit is based upon breach of contract or of trust, or upon unfair competition.

The knowledge for which protection is sought in the case at bar is not of a kind upon which the law has heretofore conferred the attributes of property; nor is the manner of its acquisition or use nor the purpose to which it is applied, such as has heretofore been recognized as entitling a plaintiff to relief.

First: Plaintiff's principal reliance was upon the "ticker" cases; but they do not support its contention. The leading cases on this subject rest the grant of relief, not upon the existence of a general property right in news, but upon the breach of a contract or trust concerning the use of news communicated; and that element is lacking here. In Board of Trade v. Christie Grain & Stock Co. 198 U. S. 236, 250, 49 L. ed. 1031, 1039, 25 Sup. Ct. Rep. 637, the court said the board "does not lose its rights by communicating

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the result [the quotations] to persons, even if many, in confidential relations to itself, under a contract not to make it public, and strangers to the trust will be restrained from getting at the knowledge by inducing a breach of trust, and using knowledge obtained by such a breach." And it is also stated there (page 251): "Time is of the essence in matters like this, and it fairly may be said that, if the contracts with the plaintiff are kept, the information will not become public property until the plaintiff has gained its reward." The only other case in this court which relates to this subject is Hunt v. New York Cotton Exch. 205 U. S. 322, 51 L. ed. 821, 27 Sup. Ct. Rep. 529. While the opinion there refers the protection to a general property right in the quotations, the facts are substantially the same as those in the Christie Case, which is the chief authority on which the decision is based. Of the cases in the lower Federal courts and in the state courts it may be said that most of them, too, can, on their facts, be reconciled with this principle, though much of the language of the courts cannot be.[3] In spite of anything that may appear in these cases to the contrary, it seems that the true principle is stated in the Christie Case, that the collection of quotations "stands like a trade secret." And in Dr. Miles Medical Co. v. John D. Park & Sons Co. 220 U. S. 373, 402, 55 L. ed. 502, 516, 31 Sup. Ct. Rep. 376, this court says of a trade secret: "Anyone may use it who fairly, by analysis and experiment, discovers it. But the complainant is entitled to be protected against invasion of its right in the process by fraud or by breach of trust or contract." See John D. Park & Sons Co. v. Hartman, 12 L.R.A.(N.S.) 135, 82 C. C. A. 158, 153 Fed. 24, 29.

The leading English case, Exchange Teleg. Co. v. Gregory & Co. [1896] 1 Q. B. 147, 65 L. J. Q. B. N. S. 262, 74 L. T. N. S. 83, 60 J. P. 52, is also rested clearly upon a breach of contract or trust, although there is some reference to a general property right. The later English cases seem to have rightly understood the basis of the decision, and they have not sought to extend it further than was intended. Indeed, we find the positive suggestion in some cases that the only ground for relief is the manner in which knowledge of the report of the news was acquired.[4]

If the news involved in the case at bar had been posted in violation of any agreement between the Associ-

[3] Board of Trade v. Tucker, 137 C. C. A. 255, 221 Fed. 305; Board of Trade v. Price, 130 C. C. A. 302, 213 Fed. 336; McDearmott Commission Co. v. Board of Trade, 7 L.R.A.(N.S.) 889, 77 C. C. A. 479, 146 Fed. 961, 8 Ann. Cas. 759; Board of Trade v. Cella Commission Co. 76 C. C. A. 28, 145 Fed. 28; National Teleg. News Co. v. Western U. Teleg. Co. 60 L.R.A. 805, 56 C. C. A. 198, 119 Fed. 294; Illinois Commission Co. v. Cleveland Teleg. Co. 56 C. C. A. 205, 119 Fed. 301; Board of Trade v. Hadden-Krull Co. 109 Fed. 705; Cleveland Tel. Co. v. Stone, 105 Fed. 794; Board of Trade v. C. B. Thomson Commission Co. 103 Fed. 902; Kiernan v. Manhattan Quotation Teleg. Co. 50 How. Pr. 194. The bill in F. W. Dodge Co. v. Construction Information Co. 183 Mass. 62, 60 L.R.A. 810, 97 Am. St. Rep. 412, 66 N. E. 204, was expressly based on breach of contract or of trust. It has been suggested that a board of trade has a right of property in its quotations because the facts reported originated in its exchange. The point has been mentioned several times in the cases, but no great importance seems to have been attached to it.

[4] In Exchange Teleg. Co. v. Howard, 22 Times L. R. 375, 377, it is intimated that it would be perfectly permissible for the defendant to take the score from a newspaper supplied by the plaintiff and publish it. And it is suggested in Exchange Teleg. Co. v. Central News [1897] 2 Ch. 48, 54, 66 L. J. Ch. N. S. 672, 76 L. T. N. S. 591, 45 Week. Rep. 595, that there are sources from which the defendant might be able to get the information collected by the plaintiff and publish it without committing any wrong. Copinger, Copyright, 5th ed. p. 35, explains the Gregory Case on the basis of the breach of confidence involved. Richardson, Copyright, p. 39, also inclines to put the case "on the footing of implied confidence."

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ated Press and its members, questions similar to those in the "ticker" cases might have arisen. But the plaintiff does not contend that the posting was wrongful or that any papers were wrongfully issued by its subscribers. On the contrary, it is conceded that both the bulletins and the papers were issued in accordance with the regulations of the plaintiff. Under such circumstances, for a reader of the papers purchased in the open market, or a reader of the bulletins publicly posted, to procure and use gainfully information therein contained, does not involve inducing anyone to commit a breach either of contract or of trust, or committing or in any way abetting a breach of confidence.

Second: Plaintiff also relied upon the cases which hold that the common-law right of the producer to prohibit copying is not lost by the private circulation of a literary composition, the delivery of a lecture, the exhibition of a painting, or the performance of a dramatic or musical composition.[5] These cases rest upon the ground that the common law recognizes such productions as property which, despite restricted communication, continues until there is a dedication to the public under the Copyright Statutes or otherwise. But they are inapplicable for two reasons: (1) At common law, as under the Copyright Acts, intellectual productions are entitled to such protection only if there is underneath something evincing the mind of a creator or originator, however modest the requirement. The mere record of isolated happenings, whether in words or by photographs not involving artistic skill, are denied such protection;[6] (2) at common law, as under the Copyright Acts, the element in intellectual productions which secures such protection is not the knowledge, truths, ideas, or emotions which the composition expresses, but the form or sequence in which they are expressed; that is, "some new collocation of visible or audible points,—of lines, colors, sounds, or words." See White-Smith Music Co. v. Apollo Co. 209 U. S. 1, 19, 52 L. ed. 655, 662, 28 Sup. Ct. Rep. 319, 14 Ann. Cas. 628; Kalem Co. v. Harper Bros. 222 U. S. 55, 63, 56 L. ed. 92, 96, 32 Sup. Ct. Rep. 20, Ann. Cas. 1913A, 1285. An author's theories, suggestions, and speculations, or the systems, plans, methods, and arrangements of an originator, derive no such protection from the statutory copyright of the book in which they are set forth;[7] and they are likewise

[5] Ferris v. Frohman, 223 U. S. 424, 56 L. ed. 492, 32 Sup. Ct. Rep. 263; American Tobacco Co. v. Werckmeister, 207 U. S. 284, 299, 52 L. ed. 208, 217, 28 Sup. Ct. Rep. 72, 12 Ann. Cas. 595; Universal Film Mfg. Co. v. Copperman, 134 C. C. A. 305, 218 Fed. 577; Werckmeister v. American Lithographic Co. 68 L.R.A. 591, 69 C. C. A. 553, 134 Fed. 321; Drummond v. Altemus, 60 Fed. 338; Boucicault v. Hart, 13 Blatchf. 47; Fed. Cas. No. 1,692; Crowe v. Aiken, 2 Biss. 208, Fed. Cas. No. 3,441; Boucicault v. Fox, 5 Blatchf. 87, Fed. Cas. No. 1,691; Bartlett v. Crittenden, 5 McLean, 32, Fed. Cas. No. 1,076; Bartlette v. Crittenden, 4 McLean, 300, Fed. Cas. No. 1,082; Tompkins v. Halleck, 133 Mass. 32, 43 Am. Rep. 480; Aronson v. Baker, 43 N. J. Eq. 365, 12 Atl. 177; Caird v. Sime, L. R. 12 App. Cas. 326, 57 L. J. P. C. N. S. 2, 57 L. T. N. S. 634, 36 Week. Rep. 199; Nicols v. Pitman, L. R. 26 Ch. Div. 374, 53 L. J. Ch. N. S. 552, 50 L. T. N. S. 254, 32 Week. Rep. 631, 48 J. P. 549; Abernethy v. Hutchinson, 3 L. J. Ch. 209, 1 Hall & Tw. 28, 47 Eng. Reprint, 1313; Turner v. Robinson, 10 Ir. Eq. Rep. 121.

[6] Compare Bleistein v. Donaldson Lithographing Co. 188 U. S. 239, 250, 47 L. ed. 460, 462, 23 Sup. Ct. Rep. 298; Higgins v. Keuffel, 140 U. S. 428, 432, 35 L. ed. 470, 472, 11 Sup. Ct. Rep. 731; Burrow-Giles Lithographic Co. v. Sarony, 111 U. S. 53, 58–60, 28 L. ed. 349, 351, 352, 4 Sup. Ct. Rep. 279; Baker v. Selden, 101 U. S. 9, 105, 106, 25 L. ed. 841, 844; Clayton v. Stone, 2 Paine, 382, Fed. Cas. No. 2,872; National Teleg. News Co. v. Western U. Teleg. Co. 60 L.R.A. 805, 56 C. C. A. 198, 119 Fed. 294, 296–298; Banks Law Pub. Co. v. Lawyers' Co-op. Pub. Co. 94 C. C. A. 647, 169 Fed. 386, 391, 17 Ann. Cas. 957.

[7] Baker v. Selden, 101 U. S. 99, 25 L. ed. 841; Perris v. Hexamer, 99 U. S. 674, 25 L. ed. 308; Barnes v. Miner, 122 Fed. 480, 491; Burnell v. Chown, 69 Fed. 993; Tate

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denied such protection at common law.[8]

That news is not property in the strict sense is illustrated by the case of Sports & G. Press Agency v. "Our Dogs" Pub. Co. [1916] 2 K. B. 880, 85 L. J. K. B. N. S. 1573, 115 L. T. N. S. 378, 32 Times L. R. 651, where the plaintiff, the assignee of the right to photograph the exhibits at a dog show, was refused an injunction against defendant, who had also taken pictures of the show and was publishing them. The court said that, except in so far as the possession of the land occupied by the show enabled the proprietors to exclude people or permit them on condition that they agree not to take photographs (which condition was not imposed in that case), the proprietors had no exclusive right to photograph the show and could therefore grant no such right. And it was further stated that, at any rate, no matter what conditions might be imposed upon those entering the grounds, if the defendant had been on top of a house or in some position where he could photograph the show without interfering with the physical property of the plaintiff, the plaintiff would have no right to stop him. If, when the plaintiff creates the event recorded, he is not entitled to the exclusive first publication of the news (in that case a photograph) of the event, no reason can be shown why he should be accorded such protection as to events which he simply records and transmits to other parts of the world, though with great expenditure of time and money.

Third: If news be treated as possessing the characteristics not of a trade secret, but of literary property, then the earliest issue of a paper of general circulation or the earliest public posting of a bulletin which embodies such news would, under the established rules governing literary property, operate as a publication, and all property in the news would then cease. Resisting this conclusion, plaintiff relied upon the cases which hold that uncopyrighted intellectual and artistic property survives private circulation or a restricted publication; and it contended that in each issue of each paper a restriction is to be implied that the news shall not be used gainfully in competition with the Associated Press or any of its members. There is no basis for such an implication. But it is also well settled that where the publication is in fact a general one, even express words of restriction upon use are inoperative. In other words, a general publication is effective to dedicate literary property to the public, regardless of the actual intent of its owner.[9] In the cases dealing with lecturers, dramatic and musical performances, and art exhibitions,[10] upon which plaintiff relied, there was no general publication in print comparable to the issue of daily newspapers or the unrestricted public posting of bulletins. The principles governing those cases differ more or less in application, if not in theory, from the principles governing the issue of printed copies; and in so far as they do differ, they have no application to the case at bar.

Fourth: Plaintiff further contended that defendant's practice constitutes unfair competition because there is "appropriation without cost to itself of values created by" the plaintiff; and it is upon this

v. Fullbrook [1908] 1 K. B. 821, 2 B. R. C. 93, 77 L. J. K. B. N. S. 577, 98 L. T. N. S. 706, 24 Times L R. 347, 52 Sol. Jo. 279, 14 Ann. Cas. 428; Chilton v. Progress Printing & Pub. Co. [1895] 2 Ch. 29, 34; Kenrick & Co. v. Lawrence & Co. L. R. 25 Q. B. Div. 99, 38 Week. Rep. 779; Pike v. Nicholas, L. R. 5 Ch. 251, 39 L. J. Ch. N. S. 435, 18 Week. Rep. 321, 7 Eng. Rul. Cas. 108.

[8] Bristol v. Equitable Life Assur. Soc. 132 N. Y. 264, 28 Am. St. Rep. 568, 30 N. E. 506; Haskins v. Ryan, 71 N. J. Eq. 575, 64 Atl. 436.

[9] Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co. 155 N. Y. 241, 41 L.R.A. 846, 63 Am. St. Rep. 666, 49 N. E. 872; Wagner v. Conried, 125 Fed. 798, 801; Larrowe-Loisette v. O'Loughlin, 88 Fed. 896.

[10] See cases in note 5, supra; Richardson, Copyright, p. 128.

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ground that the decision of this court appears to be based. To appropriate and use for profit, knowledge and ideas produced by other men, without making compensation or even acknowledgment, may be inconsistent with a finer sense of propriety; but, with the exceptions indicated above, the law has heretofore sanctioned the practice. Thus it was held that one may ordinarily make and sell anything in any form, may copy with exactness that which another has produced, or may otherwise use his ideas without his consent and without the payment of compensation, and yet not inflict a legal injury;[11] and that ordinarily one is at perfect liberty to find out, if he can by lawful means, trade secrets of another, however valuable, and then use the knowledge so acquired gainfully, although it cost the original owner much in effort and in money to collect or produce.[12]

Such taking and gainful use of a product of another which, for reasons of public policy, the law has refused to endow with the attributes of property, does not become unlawful because the product happens to have been taken from a rival and is used in competition with him. The unfairness in competition which hitherto has been recognized by the law as a basis for relief lay in the manner or means of conducting the business; and the manner or means held legally unfair involves either fraud or force or the doing of acts otherwise prohibited by law. In the "passing off" cases (the typical and most common case of unfair competition), the wrong consists in fraudulently representing by word or act that defendant's goods are those of plaintiff. See Hanover Star Mill. Co. v. Metcalf, 240 U. S. 403, 412, 413, 60 L. ed. 713, 717, 718, 36 Sup. Ct. Rep. 357. In the other cases, the diversion of trade was effected through physical or moral coercion, or by inducing breaches of contract or of trust, or by enticing away employees. In some others, called cases of simulated competition, relief was granted because defendant's purpose was unlawful; namely, not competition, but deliberate and wanton destruction of plaintiff's business.[13]

That competition is not unfair in

[11] Flagg Mfg. Co. v. Holway, 178 Mass. 83, 59 N. E. 667; Bristol v. Equitable Life Assur. Soc. 132 N. Y. 264, 28 Am. St. Rep. 568, 30 N. E. 506; Keystone Type Foundry v. Portland Pub. Co. 108 C. C. A. 508, 186 Fed. 690.

[12] Chadwick v. Covell, 151 Mass. 190, 6 L.R.A. 839, 21 Am. St. Rep. 442, 23 N. E. 1068; Tabor v. Hoffman, 118 N. Y. 30, 36, 16 Am. St. Rep. 740, 23 N. E. 12; James v. James, L. R. 13 Eq. 421, 41 L. J. Ch. N. S. 353, 26 L. T. N. S. 568, 20 Week. Rep. 434. Even when knowledge is compiled, as in a dictionary, and copyrighted, the suggestions and sources therein may be freely used by a later compiler. The copyright protection merely prevents his taking the ultimate data while avoiding the labor and expense involved in compiling them. Pike v. Nicholas, L. R. 5 Ch. 251, 39 L. J. Ch. N. S. 435, 18 Week. Rep. 321, 7 Eng. Rul. Cas. 108; Morris v. Wright, L. R. 5 Ch. 279, 22 L. T. N. S. 78, 18 Week. Rep. 327; Edward Thompson Co. v. American Law Book Co. 62 L.R.A. 607, 59 C. C. A. 148, 122 Fed. 922; West Pub. Co. v. Edward Thompson Co. 100 C. C. A. 303, 176 Fed. 833. It is assumed that, in the absence of copyright, the data compiled could be freely used. See Morris v. Ashbee, L. R. 7 Eq. 34, 40, 19 L. T. N. S. 550. Compare also Chilton v. Progress Printing & Pub. Co. [1895] 2 Ch. 29.

[13] "Trust Laws & Unfair Competition" (U. S. Bureau of Corporation, March 15, 1915), pp. 301-331, 332-461; Nims, Unfair Competition & Trademarks, chap. xix.; Sperry & H. Co. v. Pommer, 199 Fed. 309, 314; Racine Paper Goods Co. v. Dittgen, 96 C. C. A. 433, 171 Fed. 631; Schonwald v. Ragains, 32 Okla. 223, 39 L.R.A.(N.S.) 854, 122 Pac. 203; Atty. Gen. ex rel. James v. National Cash Register Co. 182 Mich. 99, 148 N. W. 420, Ann. Cas. 1916D, 638; Witkop & H. Co. v. Great Atlantic & P. Tea Co. 69 Misc. 90, 124 N. Y. Supp. 956, 958; Dunshee v. Standard Oil Co. 152 Iowa, 618, 36 L.R.A.(N.S.) 263, 132 N. W. 371; Tuttle v. Buck, 107 Minn. 145, 22 L.R.A.(N.S.) 599, 131 Am. St. Rep. 446, 119 N. W. 946, 16 Ann. Cas. 807.

The cases of Fonotipia Limited v. Bradley, 171 Fed. 951, and Prest-O-Lite Co. v. Davis, 209 Fed. 917, which were strongly relied upon by the plaintiff, contain expressions indicating rights possibly broad enough to sustain the injunction in the case at bar; but both cases involve ele-

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a legal sense, merely because the profits gained are unearned, even if made at the expense of a rival, is shown by many cases besides those referred to above. He who follows the pioneer into a new market, or who engages in the manufacture of an article newly introduced by another, seeks profits due largely to the labor and expense of the first adventurer; but the law sanctions, indeed encourages, the pursuit.[14] He who makes a city known through his product must submit to sharing the resultant trade with others who, perhaps for that reason, locate there later. Delaware & H. Canal Co. v. Clark, 13 Wall. 311, 20 L. ed. 581; Elgin Nat. Watch Co. v. Illinois Watch Co. 179 U. S. 665, 673, 45 L. ed. 365, 378, 21 Sup. Ct. Rep. 270. He who has made his name a guaranty of quality protests in vain when another with the same name engages, perhaps for that reason, in the same lines of business; provided, precaution is taken to prevent the public from being deceived into the belief that what he is selling was made by his competitor. One bearing a name made famous by another is permitted to enjoy the unearned benefit which necessarily flows from such use, even though the use proves harmful to him who gave the name value. Brown Chemical Co. v. Meyer, 139 U. S. 540, 544, 35 L. ed. 247, 249, 11 Sup. Ct. Rep. 625; Howe Scale Co. v. Wyckoff, Seamans & Benedict, 198 U. S. 118, 49 L. ed. 972, 25 Sup. Ct. Rep. 609; Donnell v. Herring-Hall-Marvin Safe Co. 208 U. S. 267, 52 L. ed. 481, 28 Sup. Ct. Rep. 288; Waterman Co. v. Modern Pen Co. 235 U. S. 88, 59 L. ed. 142, 35 Sup. Ct. Rep. 91. See Saxlehner v. Wagner, 216 U. S. 375, 54 L. ed. 525, 30 Sup. Ct. Rep. 298.

The means by which the International News Service obtains news gathered by the Associated Press is also clearly unobjectionable. It is taken from papers bought in the open market or from bulletins publicly posted. No breach of contract, such as the court considered to exist in Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 254, 62 L. ed. 260, 277, L.R.A.1918C, 497, 38 Sup. Ct. Rep. 65, Ann. Cas. 1918B, 461, or of trust, such as was present in Morison v. Moat, 9 Hare, 241, 68 Eng. Reprint, 492, and neither fraud nor force, are involved. The manner of use is likewise unobjectionable. No reference is made by word or by act to the Associated Press, either in transmitting the news to subscribers, or by them in publishing it in their papers. Neither the International News Service nor its subscribers is gaining or seeking to gain in its business a benefit from the reputation of the Associated Press. They are merely using its product without making compensation. See Bamforth v. Douglass Post Card & Mach. Co. 158 Fed. 355; Tribune Co. v. Associated Press, 116 Fed. 126. That, they have a legal right to do, because the product is not property, and they do not stand in any relation to the Associated Press, either of contract or of trust, which otherwise precludes such use. The argument is not advanced by characterizing such taking and use a misappropriation.

It is also suggested that the fact that defendant does not refer to the Associated Press as the source of the news may furnish a basis for the relief. But the defendant and its subscribers, unlike members of the Associated Press, were under no contractual obligation to disclose the source of the news; and there is no rule of law requiring acknowledgment to be made where uncopyrighted matter is reproduced. The

ments of "passing off." See also Prest-O-Lite Co. v. Davis, 215 Fed. 349; Searchlight Gas Co. v. Prest-O-Lite Co. 131 C. C. A. 626, 215 Fed. 692; Prest-O-Lite Co. v. Bogen, 209 Fed. 915; Prest-O-Lite Co. v. Avery Lighting Co. 161 Fed. 648. In Prest-O-Lite Co. v. Auto Acetylene Light Co. 191 Fed. 90, the bill was dismissed on the ground that no deception was shown.

[14] Magee Furnace Co. v. Le Barron, 127 Mass. 115; Ricker v. Portland & R. F. R. Co. 90 Me. 395, 403, 38 Atl. 338.

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International News Service is said to mislead its subscribers into believing that the news transmitted was originally gathered by it, and that they in turn mislead their readers. There is, in fact, no representation by either of any kind. Sources of information are sometimes given because required by contract; sometimes because naming the source gives authority to an otherwise incredible statement; and sometimes the source is named because the agency does not wish to take the responsibility itself of giving currency to the news. But no representation can properly be implied from omission to mention the source of information except that the International News Service is transmitting news which it believes to be credible.

Nor is the use made by the International News Service of the information taken from papers or bulletins of Associated Press members legally objectionable by reason of the purpose for which it was employed. The acts here complained of were not done for the purpose of injuring the business of the Associated Press. Their purpose was not even to divert its trade, or to put it at a disadvantage by lessening defendant's necessary expenses. The purpose was merely to supply subscribers of the International News Service promptly with all available news. The suit is, as this court declares, in substance one brought for the benefit of the members of the Associated Press, who would be proper, and, except for their number, perhaps necessary, parties; and the plaintiff conducts the suit as representing their interest. It thus appears that the protection given by the injunction is not actually to the business of the complainant news agency; for this agency does not sell news nor seek to earn profits, but is a mere instrumentality by which 800 or more newspapers collect and distribute news. It is these papers severally which are protected; and the protection afforded is not from competition of the defendant, but from possible competition of one or more of the 400 other papers which receive the defendant's service. Furthermore, the protection to these Associated Press members consist merely in denying to other papers the right to use as news, information which, by authority of all concerned, had theretofore been given to the public by some of those who joined in gathering it; and to which the law denies the attributes of property. There is in defendant's purpose nothing on which to base a claim for relief.

It is further said that, while that for which the Associated Press spends its money is too fugitive to be recognized as property in the common-law courts, the defendant cannot be heard to say so in a court of equity, where the question is one of unfair competition. The case presents no elements of equitable title or of breach of trust. The only possible reason for resort to a court of equity in a case like this is that the remedy which the law gives is inadequate. If the plaintiff has no legal cause of action, the suit necessarily fails. Levy v. Walker, L. R. 10 Ch. Div. 436, 449, 48 L. J. Ch. N. S. 273, 39 L. T. N. S. 654, 27 Week. Rep. 370. There is nothing in the situation of the parties which can estop the defendant from saying so.

Fifth: The great development of agencies now furnishing country-wide distribution of news, the vastness of our territory, and improvements in the means of transmitting intelligence, have made it possible for a news agency or newspapers to obtain, without paying compensation, the fruit of another's efforts, and to use news so obtained gainfully in competition with the original collector. The injustice of such action is obvious. But to give relief against it would involve more than the application of existing rules of law to new facts. It would require the making of a new rule in analogy to existing ones. The unwritten law possesses capacity for

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growth; and has often satisfied new demands for justice by invoking analogies or by expanding a rule or principle. This process has been in the main wisely applied and should not be discontinued. Where the problem is relatively simple, as it is apt to be when private interests only are involved, it generally proves adequate. But with the increasing complexity of society, the public interest tends to become omnipresent; and the problems presented by new demands for justice cease to be simple. Then the creation or recognition by courts of a new private right may work serious injury to the general public, unless the boundaries of the right are definitely established and wisely guarded. In order to reconcile the new private right with the public interest, it may be necessary to prescribe limitations and rules for its enjoyment; and also to provide administrative machinery for enforcing the rules. It is largely for this reason that, in the effort to meet the many new demands for justice incident to a rapidly changing civilization, resort to legislation has latterly been had with increasing frequency.

The rule for which the plaintiff contends would effect an important extension of property rights and a corresponding curtailment of the free use of knowledge and of ideas; and the facts of this case admonish us of the danger involved in recognizing such a property right in news, without imposing upon newsgatherers corresponding obligations. A large majority of the newspapers and perhaps half the newspaper readers of the United States are dependent for their news of general interest upon agencies other than the Associated Press. The channel through which about 400 of these papers received, as the plaintiff alleges, "a large amount of news relating to the European war of the greatest importance and of intense interest to the newspaper reading public," was suddenly closed. The closing to the International News Service of these channels for foreign news (if they were closed) was due not to unwillingness on its part to pay the cost of collecting the news, but to the prohibitions imposed by foreign governments upon its securing news from their respective countries and from using cable or telegraph lines running therefrom. For aught that appears, this prohibition may have been wholly undeserved; and at all events the 400 papers and their readers may be assumed to have been innocent. For aught that appears, the International News Service may have sought then to secure temporarily by arrangement with the Associated Press the latter's foreign news service. For aught that appears, all of the 400 subscribers of the International News Service would gladly have then become members of the Associated Press, if they could have secured election thereto.[15] It is possible, also, that a large part of the readers of these papers were so situated that they could not secure prompt access to papers served by the Associated Press. The prohibition of the foreign governments might as well have been extended to the channels through which news was supplied to the more than a thousand other daily papers in the

[15] According to the by-laws of the Associated Press no one can be elected a member without the affirmative vote of at least four fifths of all the members of the corporation or the vote of the directors. Furthermore, the power of the directors to admit anyone to membership may be limited by a right of protest to be conferred upon individual members. See by-laws, article 3, § 6. "The members of this corporation may, by an affirmative vote of seven eighths of all the members, confer upon a member (with such limitations as may be at the time prescribed) a right of protest against the admission of new members by the board of directors. The right of protest, within the limits specified at the time it is conferred, shall empower the member holding it to demand a vote of the members of the corporation on all applications for the admission of new members within the district for which it is conferred except as provided in § 2 of this article."

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United States not served by the Associated Press; and a large part of their readers may also be so located that they cannot procure prompt access to papers served by the Associated Press.

A legislature, urged to enact a law by which one news agency or newspaper may prevent appropriation of the fruits of its labors by another, would consider such facts and possibilities and others which appropriate inquiry might disclose. Legislators might conclude that it was impossible to put an end to the obvious injustice involved in such appropriation of news without opening the door to other evils, greater than that sought to be remedied. Such appears to have been the opinion of our Senate, which reported unfavorably a bill to give news a few hours' protection;[16] and which ratified, on February 15, 1911, the convention adopted at the Fourth International American Conference;[17] and such was evidently the view also of the signatories to the International Copyright Union of November 13, 1908;[18] as both these conventions expressly exclude news from copyright protection.

Or legislators dealing with the subject might conclude that the right to news values should be protected to the extent of permitting recovery of damages for any unauthorized use, but that protection by injunction should be denied, just as courts of equity ordinarily refuse (perhaps in the interest of free speech) to restrain actionable libels,[19] and for other reasons decline to protect by injunction mere political rights;[20] and as Congress has prohibited courts from enjoining

[16] Senate Bill No. 1728, 48th Congress, First Session. The bill provides:

"That any daily or weekly newspaper, or any association of daily or weekly newspapers, published in the United States or any of the territories thereof, shall have the sole right to print, issue, and sell, for the term of eight hours, dating from the hour of going to press, the contents of said daily or weekly newspaper, or the collected news of said newspaper association, exceeding one hundred words.

"Sec. 2. That for any infringement of the copyright granted by the first section of this act the party injured may sue in any court of competent jurisdiction and recover in any proper action the damages sustained by him from the person making such infringement, together with the costs of suit."

It was reported on April 18, 1884, by the Committee on the Library, without amendment, and that it ought not to pass. Journal of the Senate, 48th Congress, First Session, p. 548. No further action was apparently taken on the bill.

When the copyright legislation of 1909, finally enacted as Act of March 4, 1909, chap. 320, 35 Stat. at L. 1075, Comp. Stat. 1916, § 9517, was under consideration, there was apparently no attempt to include news among the subjects of copyright. Arguments before the Committees on Patents of the Senate and House of Representatives on Senate Bill No. 6330 and H. R. Bill No. 19,853, 59th Congress, First Session, June 6, 7, 8, and 9, and December 7, 8, 10, and 11, 1906; Hearings on Pending Bills to Amend and Consolidate Acts Respecting Copyright, March 26, 27, and 28, 1908.

[17] 38 Stat. at L. 1785, 1789, art. 2.

[18] Bowker, Copyright: Its History and its Law, pp. 330, 612, 613. See the similar provisions in the Berne Convention (1886) and the Paris Convention (1896). Id. pp. 612, 613.

In 1898 Lord Herschell introduced in Parliament a bill, § 11 of which provides: "Copyright in respect of a newspaper shall apply only to such parts of the newspaper as are compositions of an original literary character, to original illustrations therein, *and to such news and information as have been specially and independently obtained.*" (Italics ours.) House of Lords, Sessional Papers, 1898, vol. 3, Bill No. 21. Birrell, Copyright in Books, p. 210. But the bill was not enacted, and in the English law as it now stands there is no provision giving even a limited copyright in news as such. Act of December 16, 1911, 1 and 2 Geo. V. chap. 46.

[19] Boston Diatite Co. v. Florence Mfg. Co. 114 Mass. 69, 18 Am. Rep. 310; Prudential Assur. Co. v. Knott, L. R. 10 Ch. 142, 44 L. J. Ch. N. S. 192, 31 L. T. N. S. 866, 23 Week. Rep. 249.

[20] Giles v. Harris, 189 U. S. 475, 47 L. ed. 909, 23 Sup. Ct. Rep. 639. Compare Swafford v. Templeton, 185 U. S. 487, 46 L. ed. 1005, 22 Sup. Ct. Rep. 783; Green v. Mills, 30 L.R.A. 90, 16 C. C. A. 516, 25 U. S. App. 383, 69 Fed. 852, 859.

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the illegal assessment or collection of Federal taxes.[21] If a legislature concluded to recognize property in published news to the extent of permitting recovery at law, it might, with a view to making the remedy more certain and adequate, provide a fixed measure of damages, as in the case of copyright infringement.[22]

Or again, a legislature might conclude that it was unwise to recognize even so limited a property right in published news as that above indicated; but that a news agency should, on some conditions, be given full protection of its business; and to that end a remedy by injunction as well as one for damages should be granted, where news collected by it is gainfully used without permission. If a legislature concluded (as at least one court has held, New York & C. Grain & Stock Exch. v. Board of Trade, 127 Ill. 153, 2 L.R.A. 411, 19 N. E. 855) that, under certain circumstances, news-gathering is a business affected with a public interest, it might declare that, in such cases, news should be protected against appropriation only if the gatherer assumed the obligation of supplying it at reasonable rates and without discrimination, to all papers which applied therefor. If legislators reached that conclusion, they would probably go further, and prescribe the conditions under which and the extent to which the protection should be afforded; and they might also provide the administrative machinery necessary for insuring to the public, the press, and the news agencies, full enjoyment of the rights so conferred.

Courts are ill-equipped to make the investigations which should precede a determination of the limitations which should be set upon any property right in news, or of the circumstances under which news gathered by a private agency should be deemed affected with a public interest. Courts would be powerless to prescribe the detailed regulations essential to full enjoyment of the rights conferred, or to introduce the machinery required for enforcement of such regulations. Considerations such as these should lead us to decline to establish a new rule of law in the effort to redress a newly disclosed wrong, although the propriety of some remedy appears to be clear.

Mr. Justice Holmes:

When an uncopyrighted combination of words is published there is no general right to forbid other people repeating them,—in other words, there is no property in the combination or in the thoughts or facts that the words express. Property, a creation of law, does not arise from value, although exchangeable,—a matter of fact. Many exchangeable values may be destroyed intentionally without compensation. Property depends upon exclusion by law from interference, and a person is not excluded from using any combination of words merely because someone has used it before, even if it took labor and genius to make it. If a given person is to be prohibited from making the use of words that his neighbors are free to make, some other ground must be found. One such ground is vaguely expressed in the phrase "unfair trade." This means that the words are repeated by a competitor in business in such a way as to convey a misrepresentation that materially injures the person who first used them, by appropriating credit of some kind which

[21] Revised Statutes, § 3224, Comp. Stat. 1916, § 5947; Snyder v. Marks, 109 U. S. 189, 27 L. ed. 901, 3 Sup. Ct. Rep. 157; Dodge v. Osborn, 240 U. S. 118, 60 L. ed. 557, 36 Sup. Ct. Rep. 275.

[22] Act of March 4, 1909, § 25, chap. 320, 35 Stat. at L. 1075, 1081, Comp. Stat. 1916, §§ 9517, 9546, provides, as to the liability for the infringement of a copyright, that, "in the case of a newspaper reproduction of a copyrighted photograph such damages shall not exceed the sum of two hundred dollars nor be less than the sum of fifty dollars;" and that in the case of infringement of a copyrighted newspaper the damages recoverable shall be $1 for every infringing copy, but shall not be less than $250, nor more than $5,000.

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the first user has earned. The ordinary case is a representation by device, appearance, or other indirection that the defendant's goods come from the plaintiff. But the only reason why it is actionable to make such a representation is that it tends to give the defendant an advantage in his competition with the plaintiff, and that it is thought undesirable that an advantage should be gained in that way. Apart from that, the defendant may use such unpatented devices and uncopyrighted combinations of words as he likes. The ordinary case, I say, is palming off the defendant's product as the plaintiff's; but the same evil may follow from the opposite falsehood,—from saying, whether in words or by implication, that the plaintiff's product is the defendant's; and that, it seems to me, is what has happened here.

Fresh news is got only by enterprise and expense. To produce such news as it is produced by the defendant represents by implication that it has been acquired by the defendant's enterprise and at its expense. When it comes from one of the great news-collecting agencies like the Associated Press, the source generally is indicated, plainly importing that credit; and that such a representation is implied may be inferred with some confidence from the unwillingness of the defendant to give the credit and tell the truth. If the plaintiff produces the news at the same time that the defendant does, the defendant's presentation impliedly denies to the plaintiff the credit of collecting the facts and assumes that credit to the defendant. If the plaintiff is later in western cities, it naturally will be supposed to have obtained its information from the defendant. The falsehood is a little more subtle, the injury a little more indirect, than in ordinary cases of unfair trade, but I think that the principle that condemns the one condemns the other. It is a question of how strong an infusion of fraud is necessary to turn a flavor into a poison. The dose seems to be strong enough here to need a remedy from the law. But as, in my view, the only ground of complaint that can be recognized without legislation is the implied misstatement, it can be corrected by stating the truth; and a suitable acknowledgment of the source is all that the plaintiff can require. I think that, within the limits recognized by the decision of the court, the defendant should be enjoined from publishing news obtained from the Associated Press for hours after publication by the plaintiff unless it gives express credit to the Associated Press; the number of hours and the form of acknowledgment to be settled by the district court.

Mr. Justice McKenna concurs in this opinion.

NOTE.

The opinions in the circuit court of appeals in this case, under the title Associated Press v. International News Service, are reported infra, for the purposes of comparison with the opinions rendered in the United States Supreme Court.

ASSOCIATED PRESS
v.
INTERNATIONAL NEWS SERVICE.

United States Circuit Court of Appeals, Second Circuit — June 21, 1917.

(157 C. C. A. 436, 245 Fed. 244.)

Injunction — against wrongful appropriation of news.

1. An association of newspapers organized for gathering and publica-

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tion of news may enjoin a rival agency from procuring news from employees of its members and from bulletins and newspaper editions, and selling such news as the property of such rival, so long as the commercial value of the news lasts.

Definition — "news."

2. The word "news" means no more (laying aside hoax and intentional falsehood) than apparently authentic reports of current events of interest.

Property — definition.

3. Property in its most general sense covers everything that has an exchangeable value.

Same — news as.

4. News has an exchangeable value, and is therefore property, entitled to protection under the law.

Same — elements of value.

5. The elements which give news its exchangeable value so as to make it property are regularity, reliability, and promptness in gathering and transmitting it.

Same — duration of right.

6. A corporation organized by newspapers for the gathering and transmission of news has a property right in the news gathered until all its members have had an opportunity to utilize it in their various papers at the usual hours of publication from day to day.

Secrets — conditions of value.

7. A trade secret must remain private to have its best value.

Copyright — protection of fact statements.

8. A copyright does not protect fact statements as such.

Literary property — effect of publication.

9. Publication at common law terminates an author's rights in his manuscript and the fruits of his brain.

News — publication by paper — effect on owner.

10. The publication by a paper of news obtained from a corporation of which it is a member, and to which the news belongs, is not an abandonment of the news to the public, to the injury of other members of the corporation.

Equity — power to act — absence of legal terms.

11. Equity is not stayed because a name does not fit, or one is not at hand accurately to describe a wrong of a kind necessarily infrequent.

Unfair competition — wrongful appropriation of news.

12. The taking by a news-gathering association of news published by a member of a rival association, and transmitting it as its own to its members, for use in competition with members of the association which gathered it, is unlawful competition, and may be enjoined as such.

(Ward, Circuit Judge, dissents in part.)

CROSS APPEALS from an order of the District Court of the United States for the Southern District of New York, granting a preliminary injunction restraining defendant from appropriating news gathered by plaintiff; plaintiff appealing from so much of the order as refused to grant injunction pendente lite, and defendant appealing from the order granting the injunction. *Modified.*

Statement by **Hough**, Circuit Judge:

Cross appeals from order entered in district court for southern district of New York granting in part only the preliminary injunction moved for by plaintiff.

The writ in question (reduced to its lowest terms) restrains defendant from (1) procuring any agent or employee of plaintiff, or any of its members, to give or permit defendant to take, for a consideration or otherwise, any "news" received from or gathered for plaintiff, and from using or selling "any news so obtained." The injunction as granted also (2) enjoins defendant from procuring any newspaper represented by a member of plaintiff to

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violate any agreement established by the charter or by-laws of plaintiff. Defendant alleges as error the issuance of the writ above outlined.

Plaintiff's motion for relief asked for what the court below granted, and further that defendant be enjoined from "copying, transmitting, selling, using, or causing to be copied, etc., any of the news furnished by plaintiff, from bulletins or newspapers published by a member" of plaintiff, and also from "competing with plaintiff" or its members by the unfair methods set forth in the bill. Injunction in substantially this form having been refused, plaintiff's appeal assigns such refusal for error.

Plaintiff is chartered by New York, under a general statute known as the Membership Corporation Law (Consol. Laws, chap. 35), —an act used for the organization of clubs and the like. It has no capital stock, its membership is selective, its business is the gathering of news all over the world, and the very great expense of such acquisition and transmission of information is borne by ratable levy or assessment upon its "members." Such members are practically about 950 newspaper owners distributed over the United States; but, since such owners are frequently corporations, each corporate contributor must furnish a natural person to act as the legal member of this New York corporation. Such natural person is commonly called the "representative" of whatever newspaper he serves.

Defendant is a business corporation of New Jersey, has capital stock, is engaged as a rival in the same business as plaintiff, and seeks a profit by selling the news or information it acquires to customers, usually newspaper publishers.

Some publications are members of the Associated Press, and also customers of the International; but such double service is unusual. The parties hereto are undoubtedly in keen competition, as are usually the journals served by one or the other in any given city.

News received at a principal office of plaintiff is disseminated by telegraph or telephone to members at a distance, and (in the largest cities at all events) the offices of journals taking the fullest or largest Associated Press service contain a machine (furnished by plaintiff) of the printing telegraph type whereon the incoming news is shown automatically.

Every newspaper has, of course, a staff for the investigation of local happenings; if such paper is a member of plaintiff, it may be required to furnish to other members and through plaintiff the news of its locality. This is an important part of the Associated Press scheme of news acquisition, viz., the co-operative feature.

Plaintiff's by-laws explicitly forbid any member from imparting to any one Associated Press news "in advance of publication," or to "conduct his business in such a manner" that such news so furnished to him "may be communicated to any person, firm, corporation, or association not entitled to receive the same,"—i. e., anyone not in good standing with and in the Associated Press. The by-laws fix times of the day before which publication of members' newspapers shall not occur, but the exhibition of bulletins at its offices within each paper's own territory is not a violation of these rules.

The business of gathering, stating, transmitting, and selling statements of fact as "news" did not originate with either party hereto, and the general methods of journalists in regard to this department of activity are not in dispute, although (as appears hereafter) argument is hung on one old prevalent and undisputed habit of newsgatherers.

The principal facts upon which the court below based the first head of injunction are that in Cleveland, Ohio, is published a newspaper which has Associated Press membership, and had for a considerable

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time in its employ a "telegraph editor," who would naturally receive incoming Associated Press items. This man (in accordance with bylaws) was charged with the transmission to plaintiff of Cleveland news possessed of more than local interest, and (properly) received pay from plaintiff for so doing. Defendant corrupted this editor to apprise its agents of what he thus learned, and disseminated such news as the result of its own legitimate labor.

The second head of injunction is based on the fact that there is in New York City a newspaper which has the service of both plaintiff and defendant. In its publication office is one of the printing telegraph machines aforesaid, and the managers of said newspaper were induced to permit agents of defendant to enter their office, read what was "coming in" on the machine, and use the information thus acquired as the basis for telegraphic and other items, represented as the gatherings of its own employees from original sources; or at least they were not otherwise marked or described.

The material facts on which plaintiff moved for such injunctive relief as was refused below are undisputed and as follows:

The natural place for receiving news from Europe (and indeed beyond) is the Atlantic seaboard, and especially New York. Bulletins and early editions, put out by members of plaintiff in the seaboard cities, are read by agents of defendant, and the substance thereof transmitted by wire westward, sold to defendant's customers, and by them printed, perhaps without any knowledge on their part that the origin of and sole basis for defendant's despatch is (e. g.) a bulletin posted in New York by a member of plaintiff, as the result of plaintiff's efforts, and certainly without any such information given them by defendant. That this practice obtains the answer admits, and justifies the same as matter of law, while alleging (in substance) that it is no more than a part or legitimate outgrowth of the newspaper habit of utilizing "tips."

This word signifies a bare intimation that something has happened. When such "tip" has been verified by independent investigation on the part of the person receiving it, the facts may be and are disseminated as discovered by the journal or news agency getting the "tip." This practice may, we believe, be regarded as universal in newsgathering circles. The district judge did not consider the utilization of "tips" as having any necessary bearing on the bodily appropriation and sale of news from early editions and bulletins, and felt satisfied that as matter of law plaintiff should have all the relief demanded, but, regarding this last question as to the effect of "publication" by an Associated Press paper as one of first impression, refused the third demand of plaintiff, and remitted the matter to this court.

Argued before Ward, Rogers, and Hough, Circuit Judges.

Messrs. **Peter S. Grosscup, Fred B. Jennings,** and **Winfred T. Denison** for plaintiff.

Messrs. **Samuel Untermyer, William A. DeFord,** and **Henry A. Wise** for defendant.

Hough, Circuit Judge, delivered the opinion of the court:

Defendant does not admit the facts above stated, as to procuring news from a telegraph machine in the office of a publisher; we think them fairly and fully proven. The evidence adduced for the defense on all the other points above mentioned amounts to an assertion that what defendant is accused of wrongfully doing plaintiff itself does and has done, and it is, indeed, a part of the newsgathering trade. Upon these propositions of fact are rested the conclusions that (1) if the acts are wrong, plaintiff cannot ask relief in equity when its own hands are unclean; and (2) if they are not wrong, i. e., illegal, no ground for relief exists. In our opinion the facts concerning the Cleveland epi-

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sode are proved as stated; the plaintiff does not and has not copied and sold news from bulletins, etc., of papers using defendant's service; and the "tip" habit, though discouraged by plaintiff, is incurably journalistic.

If the facts are as we have now found them, no party asserts that the acts restrained by the injunction as issued can be justified, either in law or morals. The right to proceed in equity to restrain inducing to breach of contract we have recognized in American Malting Co. v. Keitel, 126 C. C. A. 277, 209 Fed. 351; and the inequity of seeking profit by procuring the breach of any confidential relation by an employee is fully considered in Peabody v. Norfolk, 98 Mass. 452, 96 Am. Dec. 664, and F. W. Dodge Co. v. Construction Information Co. 183 Mass. 62, 60 L.R.A. 810, 97 Am. St. Rep. 412, 66 N. E. 204. The relations (inter sese) of the members of the Associated Press are quite as confidential as those of master and trusted servant; the same reasoning applies. The order, so far as attacked by defendant's appeal, we consider granted in the fair exercise of discretion, and therefore proper.

Plaintiff's appeal, being from a refusal to grant injunction pendente lite, is of an infrequent kind; but still more rare is the presentation by such appeal of a clear-cut question of law, upon undisputed facts, largely admitted in the pleadings. These facts enable us to render opinion without danger of even seeming to trench upon discretionary matters. We are practically requested to act by the district court itself.

There is no difficulty in discriminating between the utilization of "tips" and the bodily appropriation of another's labor in accumulating and stating information. As a matter of fact, one who, on hearing a rumor or assertion, investigates and verifies it, whether with much or little effort, acquires knowledge by processes of his own; the result is his. In all the relations of life, most of what most of us say we know is but the result of verifying "tips," given, consciously or unconsciously, by those in our environment. As a matter of law or rule, it is impossible to say in advance what measure of investigation or verification must satisfy the censor, and the law does not seek to compel the vain or impossible. Doubtless there have been, and will be again, instances where the asserted or pretended investigation is but an excuse for appropriation,—where no reasonable man would believe that any effort had been made, except to conceal the absence of original work; but no such case is before us.

What is before us, and on the pleadings, is whether it is lawful, and, if unlawful, whether equity affords a remedy, for the admitted practice or habit of appropriating from bulletins and early editions the result of plaintiff's labors, and selling or otherwise gainfully using the same, either in the plaintiff's form or after passing it under the hand of a "rewrite" man. This adjective is the trade description of one who changes the language or sequence of some composition of words; his labors do not change the substance, and are immaterial to the present controversy.

Defendant justifies bodily appropriation without independent investigation, because (1) all plaintiff ever has in possession or for communication are facts; (2) all defendant takes are facts, and (3) there can be no property in facts; but (4) if there be any such property, it is lost at the moment any member of plaintiff, in accordance with its own rules, publishes said facts by showing a bulletin or distributing an edition.

Plaintiff replies that it is (a) untrue that facts alone constitute its stock in trade; it deals in news; and (b) in news there is a property right recognized by reason and authority. Further, (c) such property right inures to and persists in the plaintiff entity and each one of its members, and (d) is not exhausted by the act of a single member, which

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act is (e) improperly called by defendant "publication," a word inappropriate to "news," which is not literary property. Finally (f) plaintiff complains of defendant's admitted practices as unfair competition.

(1, 2, a) With the existence of a truth, with physical facts per se, neither plaintiff nor defendant is concerned; for them facts in that absolute sense are but as ore in a mountain or fish in the sea,—valueless unless and until by labor mined or caught for use. Nor are facts, even after ascertainment, news, unless they have that indefinable quality of interest which attracts public attention. Neither is news always synonymous with facts, in the sense of verity; indeed, much news ultimately proves fictitious, yet it is excellent news notwithstanding. The word means no more (laying aside hoaxing and intentional falsehood) than apparently authentic reports of current events of interest.

Definition—"news."

When one copies a statement from a bulletin, he cannot assert himself to be possessed of any certain fact other than that of his own appropriation. The only fact he knows is that the bulletin maker made an assertion; but he has taken the news, because that is what the bulletin proclaimed, if its maker was skilful in his business.

(3, b) Whether there is or can be any property in fact per se, any more than there is in ideas or mental concepts, is a metaphysical query that can be laid aside; for there is no doubt, either on reason or authority, that there is a property right in news capable of and entitled to legal protection. Property, nomen generalissimum, covers everything that has an exchangeable value (Slaughter House Cases, 16 Wall. 127, 21 L. ed. 425), that news possesses the quality stated seems obvious enough, when it is observed that defendant takes it, in order to exchange it against dollars.

Property—definition.

Same—news as.

Special or trade news of divers kinds constitutes property, as has often been decided (Hunt v. New York Cotton Exch. 205 U. S. 322, 51 L. ed. 821, 27 Sup. Ct. Rep. 529; Dr. Miles Medical Co. v. John D. Park & Sons Co. 220 U. S. 402, 55 L. ed. 516, 31 Sup. Ct. Rep. 376; Board of Trade v. Christie Grain & Stock Co. 198 U. S. 236, 49 L. ed. 1031, 25 Sup. Ct. Rep. 637, affirming Board of Trade v. L. A. Kinsey Co. 69 L.R.A. 59, 64 C. C. A. 669, 130 Fed. 507, and citing with approval National Teleg. News Co. v. Western U. Teleg. Co. 60 L.R.A. 805, 56 C. C. A. 198, 119 Fed. 294; F. W. Dodge Co. v. Construction Information Co. 183 Mass. 62, 60 L.R.A. 810, 97 Am. St. Rep. 412, 66 N. E. 204; Exchange Teleg. Co. v. Central News [1897] 2 Ch. 48, 66 L. J. Ch. N. S. 672, 76 L. T. N. S. 591, 45 Week. Rep. 595; Kiernan v. Manhattan Quotation Teleg. Co. 50 How. Pr. 194; Board of Trade v. Cella Commission Co. 76 C. C. A. 28, 145 Fed. 28); and the point was assumed as settled by us in Board of Trade v. Tucker, 137 C. C. A. 255, 221 Fed. 305.

There is no distinction entailing a legal difference, between news of the prices of corporate securities or commodities, of sporting events, or opportunities of profitable contracting, and news of current political, social, or national events. Both require labor and expense in acquisition, transmission, and dissemination, both have exchangeable values, and all alike lose by exposure the quality of news which, when it becomes history, may remain important, but its commercial value has largely gone.

In the National Teleg. News Co. Case, 60 L.R.A. 805, 56 C. C. A. 198, 119 Fed. 300, the property rights of the "great news agencies" were referred to as existing for the same reasons as obtained in respect of market quotations; and, as we have indicated, that decision was approvingly cited by the Supreme

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Court in the decision which we think settled the general proposition that all news as commercially sold is property. Board of Trade v. Christie Grain & Stock Co. 198 U. S. 236, 49 L. ed. 1031, 25 Sup. Ct. Rep. 637.

Assuming, now, the existence at some time of some property right in plaintiff and to its news, the qualities producing exchangeable value may be noted. Regularity and reliability, the fruits of organization and expenditure, are, of course, necessary; but all that is vain unless the news is fresh, early, and, if not always first in point of time, as prompt as any. Time is of the essence, and the basic question on this branch of the discussion is: How long does the property quality endure in news?

Same—elements of value.

(4, c, d, e) Plaintiff is a membership corporation, its members cooperate in newsgathering, and each has in his own locality a several right to and ownership in the results of plaintiff's labors, viz., the news. The rights of members, whether printing in Duluth or Galveston, New York or San Francisco, are equal, and the aggregate of their rights is the plaintiff's right. If it be admitted that plaintiff's right of property in its news once existed, such existence was for the benefit of all its members, who, however (owing to the earth's method of rotation), cannot simultaneously exercise their several rights. Yet all exercise them at the same hour of their several days.

Same—duration of right.

It is sought, if not to limit the doctrine of property in news to the time during which it remains locked up in the breast of its gatherer, to interpret the decisions cited as meaning only that news is, "like a trade secret" (198 U. S. 250), lost when divulged in the course of business. Doubtless the analogy of restraining in equity wrongful knowledge of private business methods was very useful in developing the doctrine that the "courts ought to protect in every reasonable way" the "valuable right of property" in information. F. W. Dodge Co. v. Construction Information Co. 183 Mass. 62, 60 L.R.A. 810, 97 Am. St. Rep. 412, 66 N. E. 204. But news is far more than a trade secret, for that must remain private to have its best value, while news is obtained for publicity alone. The true line of decision is indicated by the conclusion of the court in the Christie Case—that the "information will not become public property until the plaintiff has gained his reward." 198 U. S. 251, 49 L. ed. 1031, 25 Sup. Ct. Rep. 637. Of course, this means his reasonable reward; and, as in that instance of trade quotations, divulging the same to one patron's office full of customers did not reasonably terminate plaintiff's property, so here it is reasonable and just that each member of plaintiff and plaintiff itself should have a property right in its news until the reasonable reward of each member is received, and that means (with due allowance for the earth's rotation) until plaintiff's most Western member has enjoyed his reward, which is, not to have his local competitor supplied in time for competition with what he has paid for. Surely this is a modest limit of rights.

Secrets—conditions of value.

But the foregoing is thought to be avoided, if not controverted, by dwelling on the word "publication," and insisting in substance that when (e. g.) a single New York paper (being a member of plaintiff) prints an item and sells a copy of that edition, all the world can copy as it pleases, to any extent and for any purpose, commercial or otherwise, because nothing but copyright protects that paper, and copyright does not cover statements of fact, but merely their literary dress or form.

The argument assumes that what plaintiff is interested in, and is trying to preserve, is literary property, or anything capable of copyright protection. It may be grant-

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ed that the newspaper first giving out the news in question is copyrighted, that fact statements are not thereby protected as such, and that publication at common law terminated an author's rights in his manuscript and the fruits of his brain;[1] yet it still remains true that plaintiff's property in news is not literary at all, that it is not capable of copyright, and that "publication," as that word is used in the long line of decisions regarding literary rights, has no determinative bearing on this case. No one before ever attributed to publication a sense that would limit a lawful business to a few degrees of longitude. The word is legally very old, and of no one certain meaning. Publication of evidence in equity or admiralty, of banns, of libel, etc., bears but remote relation to the act which is thought once to have terminated an author's property, and now is a requisite to statutory copyright. The thought, however, running through all the uses of the word, is an advising of the public,—a making known of something to them for a purpose. It follows that the crucial inquiry is as to that purpose: Is it lawful?

Copyright—protection of fact statements.

Literary property—effect of publication.

In all the "quotation" cases, it was held that the purpose of the publicity given was not to let other people sell the quotations, and that that purpose was lawful.[2] As we put it in the Tucker Case, 137 C. C. A. 255, 221 Fed. 307: "The posting of . . . quotations on a blackboard . . . is not the sort of publication which will terminate complainant's property right in them."

Thus it appears that not all publications are alike, and this is true, even under the Copyright Acts. In Werckmeister v. American Lithographic Co. 68 L.R.A. 591, 69 C. C. A. 553, 134 Fed. 321, an opinion by Townsend, J., of which it has been said that it "left little to be added to the discussion" (American Tobacco Co. v. Werckmeister, 207 U. S. 299, 52 L. ed. 208, 28 Sup. Ct. Rep. 72, 12 Ann. Cas. 595), that learned judge said that the use of "publication" without explanation or qualification was unfortunate. "The nature of the property in question in large measure determines the extent of public right." And it was held that unless there was an "abandonment of copyright or dedication to the public," the owner of a thing capable of copyright could "expressly or by implication confine the enjoyment of such subject to some occasion or definite purpose."

We have assumed the newspaper first printing to be copyrighted, and no doubt its publication of its early edition was a general publication; but it could not copyright, abandon, nor destroy what it did not own, and it did not own plaintiff's property in the news, nor that of its own fellow members in California. It did own the right to print in New York, but we discover no magic in the word "publication" which takes away or terminates the rights of others.

News—publication by paper—effect on owner.

Plaintiff's purpose in furnishing the (e. g.) New York paper with news was to have a use made of it not inconsistent with its own reasonable reward for its labor from its property and that of all the other members of plaintiff. That measure of use and reward is lawful; defendant deprives plaintiff thereof, and can show no equities; therefore defendant should be enjoined.

(f) Unfair competition, like all

[1] This is the general view. Werckmeister v. American Lithographic Co. 68 L.R.A. 591, 69 C. C. A. 553, 134 Fed. 321; Tribune Co. v. Associated Press (C. C.) 116 Fed. 127; Holmes v. Hurst, 174 U. S. 85, 43 L. ed. 904, 19 Sup. Ct. Rep. 606. The opposite opinion is divertingly sustained by Mr. Augustine Birrell in "Authors in Court," found among "Res Judicatæ."

[2] Board of Trade v. McDearmott Commission Co. (C. C.) 143 Fed. 188, is probably the most extreme instance of publicity, not amounting to abandonment; i. e., to the kind of "publication" here contended for.

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oft-uttered legal phrases, has acquired rather a narrow use. In McLean v. Fleming, 96 U. S. 251, 24 L. ed. 830, a decision which is near the foundation of American case law on this subject, it was said that what equity enjoins the wrongdoer from depriving another of is "the advantage of celebrity." This thought has led to the feeling that what a plaintiff must be robbed of is the good will and business ease resulting from his well-known name, or the attractive dressing, wrapping, or form of his product; that such robbery must be by imitation; and that the test of such imitation is the effect upon the public, or that part thereof likely to require wares such as those in controversy.

But this is not all the law, nor the only sort of unfairness in business methods, practised by a competitor, and resulting in a continuing tort, for which the law affords no adequate remedy—that comes under the condemnation of equity. If defendant appropriated from an early edition of a New York paper what it wanted, and sold it, as extracted from said newspaper or as obtained per Associated Press, such action would still be obnoxious to what we have said concerning plaintiff's property rights in the news procured by itself; but, since no deception would be wrought upon the public, no action for unfair competition would lie along the lines just indicated. When and if such appropriated news is sold as the fruit of defendant's own efforts, and under its own name, it is a plain case of deception, assuming defendant's customers to be honorable men, anxious for good wares,—an assumption necessarily made, in the absence of evidence to the contrary. Yet an action of such nature would lack the element of imitation, usually relied upon.

Equity, however, is not stayed because a name does not fit, or one is not at hand to accurately describe a wrong of a kind necessarily infrequent. If defendant takes what someone else owns, and sells it as of right, in rivalry with the owner, such competition is more than unfair; it is patently unlawful, and the wider term comprises the narrower. But, laying aside the right of property as the ultimate foundation of suit, the business method of selling, in competition with plaintiff and its members, something falsely represented as gathered by defendant otherwise than from bulletins and early editions, is unfair, because it is parasitic and untrue. It is immoral, and that is usually unfair to someone.[3]

Equity—power to act—absence of legal terms.

Unfair competition—wrongful appropriation of news.

The flexibility of equity in granting relief against unfair methods of business was well stated by Ingraham, J., in Burrow v. Marceau, 124 App. Div. 665, 109 N. Y. Supp. 105: "No hard and fast rule can be laid down, . . . where it is clearly established that an attempt is being made by one person to get the business of another by . . . fraud and deceit, a court of equity will" intervene.[4]

And in Weinstock L. & Co. v. Marks, 109 Cal. 529, 30 L.R.A. 182, 50 Am. St. Rep. 57, 42 Pac. 142, it was said: "Equity does not concern itself about the means by which wrong is done; it deals with the result of the fraud, which moves the arm of the law and strikes down all

[3] Decisions granting relief from competition without the usual imitation elements, but with the fraud apparent, are Enoch Morgan's Sons Co. v. Wendover, 10 L.R.A. 283, 43 Fed. 420; American Fibre Chamois Co. v. De Lee, 67 Fed. 329; Barnes v. Pierce (C. C.) 164 Fed. 213; Fonotipia Talking Mach. Co. v. Bradley (C. C.) 171 Fed. 951; Prest-O-Lite v. Davis (C. C.) 209 Fed. 917, affirmed 131 C. C. A. 491, 215 Fed. 349; Prest-O-Lite v. Heiden, L.R.A.1917F, 945, 135 C. C. A. 515, 219 Fed. 845.

[4] See this principle applied to enjoin a competitor from imitating the fashion of a model gown, bought from plaintiff by pretending to be an intending wearer. Montegut v. Hickson, 178 App. Div. 94, 164 N. Y. Supp. 858.

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efforts, where fraud is practised in securing the trade of a rival dealer."

To commercially distribute news not gathered by the sender is, under the facts shown here, an invasion of property rights; to send it out as one's own labor is marked by that dolus which is fraud, and that is the basis of the doctrine of unfair competition in its wide sense.

Since (to summarize the matter) any bodily taking for sale of plaintiff's news, without other labor than the perception thereof, before the reasonable reward of industry is secured as above indicated, is an unlawful invasion of property rights, and any sale thereof in competition with plaintiff under pretense of individual gathering thereof is a tort of the nature of unfair competition, the plaintiff's motion for injunction should have been granted substantially as made.

Injunction—against wrongful appropriation of news.

The order appealed from is modified, as indicated, and the cause remanded, with directions to issue injunction against any bodily taking of the words or substance of plaintiff's news, until its commercial value as news has, in the opinion of the District Court, passed away. The exact form of words to be used, and the insertion or omission of a definite time limit on copying and sale, will be settled in the court below in any manner not inconsistent with this opinion. One bill of costs in this court to plaintiff.

Ward, Circuit Judge, dissenting in part:

A distributer of news—that is, of his information about things that have happened—neither invents nor composes nor manufactures anything; nor does he supply something which the public buys because it believes it originates with him and wants his article; nor does he own the news, but only his knowledge of the news. Therefore analogies from property created or protected by the patent, copyright, or trademark statutes, or by the principles regulating unfair competition, are wholly inapplicable. The distributer's knowledge of news which he has gathered is his property so long as he keeps it to himself or communicates it only to others on condition that they will do so. He will be protected against anyone who surreptitiously obtains this information from one of his members, subscribers, or employees, or by any form of pilfering or unfair means. Such were the cases of Kierman v. Manhattan Quotation Teleg. Co. 50 How. Pr. 194; Exchange Teleg. Co. v. Gregory [1896] 1 Q. B. 147, 65 L. J. Q. B. N. S. 262, 74 L. T. N. S. 83, 60 J. P. 52; Exchange Teleg. Co. v. Central News [1897] 2 Ch. 48, 66 L. J. Ch. N. S. 672, 76 L. T. N. S. 591, 45 Week. Rep. 595; Peabody v. Norfolk, 98 Mass. 452, 96 Am. Dec. 664; F. W. Dodge Co. v. Construction Information Co. 183 Mass. 62, 60 L.R.A. 810, 97 Am. St. Rep. 412, 66 N. E. 204; Board of Trade v. Hadden-Krull Co. (C. C.) 109 Fed. 705; National Teleg. News Co. v. Western U. Teleg. Co. 60 L.R.A. 805, 56 C. C. A. 198, 119 Fed. 294; Illinois Commission Co. v. Cleveland Teleg. Co. 56 C. C. A. 205, 119 Fed. 301; Board of Trade v. Christie Grain & Stock Co. 198 U. S. 236, 49 L. ed. 1031, 25 Sup. Ct. Rep. 637; Board of Trade v. Cella Commission Co. 76 C. C. A. 28, 145 Fed. 28; Board of Trade v. Tucker, 137 C. C. A. 255, 221 Fed. 305; Hunt v. New York Cotton Exch. 205 U. S. 333, 51 L. ed. 825, 27 Sup. Ct. Rep. 529. In every one of these cases the court found that the defendant got the news or the quotations surreptitiously, and enjoined him for that reason. They abundantly support an injunction on the first grounds mentioned in the opinion of the court.

But if the distributer publishes, to use a word in this connection which I think has been unreasonably criticized, or abandons or dedicates or communicates his information to the world, his right of property in his information and his right to be protected against the use of it is gone. The Supreme Court in the

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Christie Case, supra, 198 U. S. 250, 49 L. ed. 1031, 25 Sup. Ct. Rep. 637, likened property in news to property in trade secrets. The two are strikingly similar. The owner of a trade secret will be given protection against any breach of confidence in respect to it by his employees and against any dishonest discovery of it by third parties. If, however, he communicates the secret to another without condition, or if anyone by his own efforts, for instance, by analysis of a secret compound, learns how it is made, such person may use it without any accountability to the original discoverer. That the discoverer spent much time and money in discovering the secret would not be regarded as a reason why such persons, learning it honestly, should not make use of it.

In this case the complainant furnishes news to its members for the express purpose of their putting it on their bulletin boards and issuing it to the public in their newspapers. This is what they live on. After this it seems to me pure fiction to say that any property in the distributer survives. Everything in the nature of a confidence about the communication has ceased. That the rotation of the earth is slower than the electric current is a physical fact the complainant must reckon with in doing its business. That news dedicated to the public with the complainant's consent by the morning newspapers in New York can be telegraphed in time to appear in the morning newspapers of San Francisco cannot qualify the legal effect of the dedication.

There being not the least evidence of anything fraudulent or underhanded in this method of obtaining news, I think the injunction should be denied.

Affirmed by the Supreme Court of the United States, December 23, 1918, in (U. S. Adv. Ops. 1918–19, p. 79), 248 U. S. 215, 63 L. ed. —, ante, 293, 39 Sup. Ct. Rep. 68.

NOTE.

In view of the widespread interest in the reported case (ASSOCIATED PRESS v. INTERNATIONAL NEWS SERVICE, ante, 317), it has been deemed advisable to publish the opinions of the Circuit Court of Appeals for comparison with the opinions of the United States Supreme Court (International News Service v. Associated Press, ante, 293) in the same case, affirming the decision of the former court.

THOMAS T. SIDELINKER
v.
YORK SHORE WATER COMPANY.

Maine Supreme Judicial Court — December 18, 1918.

(— Me. —, 105 Atl. 122.)

Eminent domain — wrongful exercise — liability.

1. The attempt by a public service corporation to exercise its right of eminent domain for a private purpose under the guise of a public one renders it liable in tort to one injured thereby, although there is no interference with the physical possession of the property.

[*See note on this question beginning on page* 331.]

Eminent domain — right to abandon proceedings.

2. A corporation lawfully exercising its right of eminent domain may, prior to the determination of damages, abandon its attempt to take a particular parcel of property, since the rights of the parties have not become reciprocally vested.

Same — delay — liability for damages.

3. Undue and unreasonable delay or

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other misconduct on the part of one seeking to exercise the right of eminent domain may render him liable in damages upon abandonment of his proceedings.

Judgment — consent — effect.

4. A consent decree without hearing estops the parties from denying the facts which it purports to establish.

Tort — wrongfully asserting title to property.

5. An individual who, without malice, wrongfully asserts and presses by suit, or otherwise, a claim to property of another, is not guilty of tort, if he does not physically interfere with such property or its possession.

Damages — rule for computing.

6. The rule for computing damages is that plaintiff shall be made whole.

Eminent domain — right to suspend operations on property.

7. An owner of timber land is justified in suspending operations for removing the timber from the property when a corporation vested with right of eminent domain files notice in the proper form, and in the proper office, that it has taken his land for a public use.

Damages — wrongful exercise of right of eminent domain.

8. The damages to be awarded for wrongful interference, by an attempted exercise of the right of eminent domain, with lumbering operations on real estate, may include the advanced taxes paid because of inability to get the timber off the property, and the loss caused by sacrifice of preparation made for stripping the land.

REPORT by the Supreme Judicial Court for York County for the determination by the Law Court of an action brought to enjoin defendant from taking plaintiff's timber land by eminent domain. *Judgment for plaintiff.*

The facts are stated in the opinion of the court.

Mr. E. P. Spinney, for plaintiff:

Defendant cannot escape liability for damages by filing its abandonment proceedings.

York Shore Water Co. v. Card, 116 Me. 483, 102 Atl. 321, Ann. Cas. 1918D, 945; 15 Cyc. 942; Clarke v. Manchester, 56 N. H. 502; Van Valkenburgh v. Milwaukee, 43 Wis. 574.

Messrs. Ralph W. Hawkes and **Josiah Chase** for defendant.

Deasy, J., delivered the opinion of the court:

The defendant corporation, having by legislative grant the right of eminent domain, attempted to condemn and take timber owned by the plaintiff. A notice of taking and later a petition for assessment of damages were filed, as provided by its charter. The damages were not determined. Before the time set for hearing the plaintiff applied to this court, sitting in equity, for an injunction on the ground that the proposed taking was for private purposes. A bond was filed and temporary injunction granted.

Another suit in equity, brought against the same defendant by Samuel M. Bowden, was pending at the same time, involving other lands which the defendant was attempting to condemn and take. The Bowden Case was reported to the law court, and in the opinion (114 Me. 150, 95 Atl. 779) the purpose of taking in that case was held to be a private purpose. On this ground the bill was sustained, and a permanent injunction ordered issued.

After the decision in the above case was announced, defendant abandoned its attempt to take the plaintiff's (Sidelinker's) land, and filed with the county commissioners and gave to the plaintiff notices of such abandonment. Later the plaintiff's bill was sustained without hearing, and the injunction made permanent. It seems to be conceded that there was an agreement between the parties to the pending suit that it should abide the result of the Bowden Case. In the meantime the plaintiff, who had, at the time the notice of taking was filed, planned and prepared to operate his land, suspended such operation until after the defendant's abandonment.

The plaintiff brings this action of tort, alleging that by the defendant's acts above outlined he has

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been "hindered and prevented from operating said described timber land." There is no proof and no allegation that the defendant entered upon the plaintiff's land, or in any way interfered with the plaintiff's possession of the same, other than by filing notice of taking and petition for assessment of damages as above stated.

The acts complained of, as above outlined, stated in chronological sequence, are as follows:

July 12, 1913.—Bowden equity suit begun.

September 26, 1913.—Notice filed by the defendant in the office of the county commissioners of York county, setting forth that the defendant "has taken and hereby does take" the plaintiff's land involved in this suit.

September 27, 1913.—Letter written by the defendant's attorney to the plaintiff, inclosing copy of notice, and saying: "Under the charter of the York Shore Water Company the filing of the paper of which the inclosed copy is an exact duplicate constitutes a taking of your land and timber for all purposes, subject to their paying the fair value for the same."

November, 1913.—Petition filed by the defendant with the county commissioners of York county, praying for determination of compensation.

December 8, 1913.—Plaintiff's bill against defendant, praying for injunction, filed, and subpœna issued. Temporary injunction granted, upon filing bond.

November 24, 1915.—Rescript from law court having been received, Bowden bill sustained, and writ of permanent injunction ordered to issue.

January, 1916.—Notice of abandonment by defendant given to plaintiff, and filed with county commissioners.

January 23, 1916.—Plaintiff's (Sidelinker's) bill sustained, and perpetual injunction ordered to issue.

In the meantime, from the autumn of 1913 until the autumn of 1916, the plaintiff suspended operation on his land described in the condemnation proceedings. The plaintiff says this suspension was by reason of the defendant's attempted taking of the land.

The essence of the plaintiff's case is the charge that the attempted condemnation, while professedly for public, was in truth and in fact for private, purposes.

Eminent domain —right to abandon proceedings.

Granting a lawful taking, the abandonment was warranted, for at its date, damages not having been determined, the rights of the parties had not become reciprocally vested. Furbish v. Kennebec County, 93 Me. 117, 44 Atl. 364.

The abandonment before determination of compensation of property properly taken for public purposes does not ordinarily cause liability. Damages suffered by the landowner are in such case incident to the ownership of property.

Same—delay —liability for damages.

It has been held, however, that undue and unreasonable delay or other misconduct in the proceedings will render the corporation liable for damages. Winkelman v. Chicago, 213 Ill. 360, 72 N. E. 1066; Cushman v. Smith, 34 Me. 247.

What the plaintiff in this case complains of is not delay or misconduct in a condemnation proceeding lawfully initiated, but the wrongful beginning of such proceeding. His complaint is that the defendant, having power to take his land for public purposes, proceeded by legal formalities to take it for illegal purposes.

The attempted taking was, as stated in the notice, for "the protection of the water of Chase's pond." There is no testimony in this case showing the situation of the plaintiff's land with reference to the pond. But prior to the beginning of this action a suit in equity was begun by the plaintiff against the defendant, praying that it be en-

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joined from proceeding with its condemnation for the reason that the purpose was private; the very ground upon which this case rests. An answer and replication were filed, and a decree obtained, sustaining the bill and directing that the temporary injunction be made permanent.

This decree, although granted apparently by consent without actual hearing, estops the defendant from denying in the present case that the taking was for private purposes. Corey v. Independent Ice Co. 106 Me. 485, 76 Atl. 930; Wilson v. Lacroix, 111 Me. 324, 89 Atl. 69.

Judgment—consent—effect.

This brings us to the main issue. Did the filing by the defendant in the county commissioners' court of a notice of taking, stating that the defendant "has taken and hereby does take" the plaintiff's land, such act being ostensibly for a public and lawful purpose, but really for a private and unauthorized purpose, render the defendant liable in this action of tort?

A private individual, enjoying no special privileges, who, without malice, wrongfully asserts, and presses, by suit or otherwise, a claim to the property of another, provided he do not physically interfere with such property or its possession, is not, under the common law, guilty of tort.

Tort—wrongfully asserting title to property.

But a different and stricter rule should be applied to a corporation armed with the right of eminent domain.

Authority in some measure determines accountability. Responsibility is a corollary of power. Privilege and duty grow on the same stem.

The high standard demanded in the conduct of trustees, the rule of trespass ab initio applied in the case of public officers, and the extraordinary degree of care required of common carriers, are some of many illustrations of the broad application of this principle. The defendant was intrusted by the state with the power of taking private property by eminent domain. This power is an attribute of sovereignty. Its possession is a privilege of high import. While nothing in this case shows that it was so used by this defendant, it may be made an instrument of oppression. Its exercise should be sedulously guarded. Atonement should be made for its abuse.

While counsel have not cited, nor have we discovered, any authority directly in point, we hold that, when this defendant filed in the office of the county commissioners its notice of taking the plaintiff's land, stating therein that it "has taken and hereby does take" such land, professedly for public, but in fact for private, purposes, and also filed its petition for determination of damages, it committed an act tortious as to the plaintiff, notwithstanding it did not by any physical means interfere with the plaintiff's possession.

Eminent domain—wrongful exercise—liability.

In determining the amount of damage, the rule in this case, as in all cases, is that the plaintiff should be made whole. He should have actual, but not speculative, damages. The plaintiff claims that his damages were enhanced by reason of a contract that he had made to sell the lumber on the lot. The evidence does not satisfy us that his legal damages were affected by this circumstance. On the other hand, the weight of evidence is clearly opposed to the defendant's contention that the growth wholly offsets the loss.

Damages—rule for computing.

The plaintiff shows that the cost of operation increased considerably during the suspension. But it also appears that the market value of lumber increased in about the same proportion.

We find that the plaintiff was justified in suspending his lumbering operation. A corporation vested with the right of eminent domain

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having filed notice in proper form and in the proper office that it had taken his land, he rightly determined to submit until, by orderly legal procedure, the rights of the parties could be settled.

Eminent domain—right to suspend operations on property.

But on November 24, 1915, the Bowden Case was decided by the law court. We are not convinced that the continued suspension after this time was due to the defendant's acts.

From September 25, 1913, to November 24, 1915, the plaintiff suspended his lumbering operation, and was justified in so doing by reason of the defendant's attempted condemnation.

The plaintiff was deprived of the use of his land for a period of about two years and two months. He paid two years' taxes, which presumably would have been much less if he had stripped the land in 1914. He suffered some damages caused by sacrifice of his preparation for operating in that year.

Damages—wrongful exercise of right of eminent domain.

Upon all the evidence, without extending this opinion by further analysis or comment, we think that the plaintiff will be made whole if he is awarded damages in the sum of $600.

Judgment for the plaintiff for $600.

NOTE.

While a search has failed to disclose any instance other than the reported case (SIDELINKER v. YORK SHORE WATER CO. ante, 327), in which it has been sought to hold a corporation liable for an attempt to use the power of eminent domain for private purposes, the case is one of novelty in the application, rather than in the principle involved. It may be considered as an illustration of the principle, of diverse application, that one who wrongfully attempts to exercise an existing right is liable for the damages occasioned thereby. Here, although there was a right in the defendant to condemn property for public purposes, it exceeded such right when it attempted to exercise it for a private purpose. And since the existence of a right in one who interferes with the business of another must unite with good faith in its exercise in order to constitute justification, it is not enough that the corporation may have acted in good faith.

W. B. CRUMP, Plff. in Err.,
v.
JOHN R. GUYER et al.

Oklahoma Supreme Court—Feb. 29, 1916.

(— Okla. —, 157 Pac. 321.)

Attorney and client — lien — compromise of suit.

1. Where an attorney files a lien claim for his fee, as provided by statute, and the case is, without his knowledge or consent, compromised and dismissed by his client before a trial and judgment are had, he may sue the party who settled with his client for the amount of his fee, and on a hearing in that case present the facts essential to establish the merits of the case in which he was employed; and if his client should have prevailed in that action, then he is entitled to recover in his action the amount of his lien claim. But if his client had no rights, then his cause of action must fail.

[*See note on this question beginning on page* 337.]

Headnotes by BRETT, C.

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Constitutional law — vested rights.

2. A "vested right" is the power to do certain actions or possess certain things lawfully, and is substantially a property right, and may be created either by common law, by statute, or by contract. And when it has been once created, and has become absolute, it is protected from the invasion of the legislature by those provisions in the Constitution which apply to such rights. And a failure to exercise a vested right before the passage of a subsequent statute which seeks to devest it, in no way affects or lessens that right.

ERROR to the District Court for Garvin County to review a judgment in favor of plaintiffs in an action brought to enforce an attorneys' lien. *Reversed.*

The facts are stated in the Commissioner's opinion.

Mr. J. T. Wheeler, for plaintiff in error:

When Irene C. Stewart married in 1908, she acquired a right not possessed theretofore; to wit, the property right to sell her lands. This right was acquired by accepting the provisions and meeting the requirements of the law then in force. Such right became a valuable one,—a vested right,—which could not be taken away without due process of law.

Steinfeld v. Nielsen, 15 Ariz. 424, 139 Pac. 879; Marshall v. King, 24 Miss. 85; Calder v. Bull, 3 Dall. 386, 1 L. ed. 648; Gladney v. Snydor, 172 Mo. 318, 60 L.R.A. 880, 95 Am. St. Rep. 517, 72 S. W. 554; Reade v. deLea, 14 N. M. 464, 95 Pac. 131; Leete v. State Bank, 115 Mo. 184, 21 S. W. 788; Perry, Tr. § 787; Bruce v. Strickland, 81 N. C. 267; Gilmore v. Bright, 101 N. C. 382, 7 S. E. 751; Tufts v. Tufts, 8 Utah, 142, 16 L.R.A. 482, 30 Pac. 309; Chicago & W. I. R. Co. v. Englewood Connecting R. Co. 115 Ill. 375, 56 Am. Rep. 173, 4 N. E. 246; Wynehamer v. People, 13 N. Y. 378; Rigney v. Chicago, 102 Ill. 64; People v. Havnor, 149 N. Y. 195, 31 L.R.A. 689, 52 Am. St. Rep. 707, 43 N. E. 541; Lewis, Em. Dom. § 54; State v. Julow, 129 Mo. 163, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; State v. Goodwill, 33 W. Va. 179, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; People ex rel. Manhattan Sav. Inst. v. Otis, 90 N. Y. 48; 8 Cyc. 1801; 2 Kent, Com. 10; San José Ranch Co. v. San José Land & Water Co. 126 Cal. 322, 58 Pac. 824; Kalloch v. Superior Ct. 56 Cal. 229; Ahern v. Dubuque Lead & Level Min. Co. 48 Iowa, 140, 5 Mor. Min. Rep. 144; Ex parte Grace, 12 Iowa, 208, 79 Am. Dec. 529; Kansas P. R. Co. v. Dunmeyer, 19 Kan. 539; Garnett v. Jennings, 19 Ky. L. Rep. 1712, 44 S. W. 382; Jones v. Robbins, 8 Gray, 329; Crane v. Waldron, 133 Mich. 73, 94 N. W. 593; State ex rel. Warfield v. Becht, 23 Minn. 411; Beaupre v. Hoerr, 13 Minn. 366, Gil. 339; Baker v. Kelley, 11 Minn. 480, Gil. 358; Hulett v. Missouri, K. & T. R. Co. 145 Mo. 35, 46 S. W. 951; Jones v. Yore, 142 Mo. 38, 43 S. W. 384; Kansas City v. Duncan, 135 Mo. 571, 37 S. W. 513; Clark v. Mitchell, 64 Mo. 564; Conklin v. Cunningham, 7 N. M. 455, 38 Pac. 170; Happy v. Mosher, 48 N. Y. 313; People ex rel. MacDonald v. Leubischer, 34 App. Div. 577, 54 N. Y. Supp. 869; People v. Dunn, 157 N. Y. 528, 13 N. Y. Crim. Rep. 491, 43 L.R.A. 247, 52 N. E. 572; Re McDonald, 2 N. Y. Crim. Rep. 82; Ex parte Bushnell, 9 Ohio St. 77; Light v. Canadian County Bank, 2 Okla. 543, 37 Pac. 1075; Church v. South Kingstown, 22 R. I. 381, 53 L.R.A. 739, 48 Atl. 3; Harbison v. Knoxville Iron Co. 103 Tenn. 421, 76 Am. St. Rep. 682, 53 S. W. 955, 56 L.R.A. 316; Re McKee, 19 Utah, 281, 57 Pac. 23; Rowan v. State, 30 Wis. 129, 11 Am. Rep. 559; Burton v. Platter, 4 C. C. A. 95, 10 U. S. App. 657, 53 Fed. 901; Re Ah Lee, 6 Sawy. 410, 5 Fed. 899.

The right and power to contract with reference to real estate and any interest therein are expressly denied by statute to minors under eighteen years of age.

Webb v. Harris, 32 Okla. 491, 121 Pac. 1082, Ann. Cas. 1914A, 602; F. B. Collins Invest. Co. v. Beard, 46 Okla. 310, 148 Pac. 846.

Messrs. B. W. Patterson, Yerker E. Taylor, and John R. Guyer, for defendants in error:

All the right possessed by a feme covert to convey real estate or to contract with reference thereto is conferred by statute, and it is within the power of the legislature to pass laws either granting, restricting, or abridging such rights.

Todd v. Clapp, 118 Mass. 495; Steph-

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ens v. Cherokee Nation, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722; Charles River Bridge v. Warren Bridge, 11 Pet. 420, 9 L. ed. 773; Satterlee v. Matthewson, 2 Pet. 380, 7 L. ed. 458; Peck v. Walton, 26 Vt. 82; McFadden v. Blocker, 8 Ind. Terr. 224, 58 L.R.A. 894, 54 S. W. 873; David Adler & Sons Clothing Co. v. Corl, 155 Mo. 149, 55 S. W. 1017; Booth v. Illinois, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. Rep. 425.

The right to sell lands vested in Irene C. Stewart when she first became entitled thereto; and such being true, she acquired no additional right when she married.

Stohr v. San Francisco Musical Fund Soc. 82 Cal. 557, 22 Pac. 1125; Tuoloune Redemption Co. v. Sedgwick, 15 Cal. 515; 40 Cyc. 199.

The legislature intended the Act of 1909 to apply to rights existing at the time the act took effect, and has the authority to establish, change, limit, or extend the time within which such rights may be asserted.

Tuoloune Redemption Co. v. Sedgwick, 15 Cal. 515; Snider v. Brown, — Tenn. —, 48 S. W. 377; Daggs v. Orient Ins. Co. 136 Mo. 382, 35 L.R.A. 227, 38 S. W. 85; Tipton v. Smythe, 78 Ark. 392, 7 L.R.A.(N.S.) 714, 115 Am. St. Rep. 44, 94 S. W. 678, 8 Ann. Cas. 521; Terry v. Anderson, 95 U. S. 628, 24 L. ed. 365; Koshkonong v. Burton, 104 U. S. 668, 26 L. ed. 886; Vance v. Vance, 108 U. S. 514, 27 L. ed. 808, 2 Sup. Ct. Rep. 854; Cooley, Const. Lim. 7th ed. 523; 2 Tiedeman, State & Federal Control of Persons & Property, 645.

Messrs. Gray & McVay also for defendants in error.

Brett, C., filed the following opinion:

This action was brought to recover on an attorneys' lien. The material facts are that one Irene Stewart inherited a tract of real estate from her mother. She was a minor. On December 28, 1908, she married, and the Law of 1897 (Laws 1897, chap. 8, § 1), which is § 877, Wilson's Revised & Annotated Statutes of 1903, provided that "all male persons of the age of twenty-one years, and all females of the age of eighteen years, and all persons who have been legally married of whatever age, and all corporations to the extent authorized by law, may take title to, hold, mortgage, convey or make any contract relating to real estate or any interest therein."

Acting under the authority of this statute, on August 14, 1909, she, as a married woman, though a minor, conveyed this real estate to W. B. Crump, the plaintiff in error; but the Act of March 5, 1909, had at that time become operative, and that act limited the real estate that a married minor might convey to real estate "acquired after marriage." Sess. Laws 1909, p. 166. Irene Stewart, subsequent to the sale of this real estate, filed suit to cancel the deed and recover the property, solely on the ground that she was a minor at the time she executed the deed and conveyed same to Crump. She does not offer to return the amount of the purchase price, but pleads that she has not got it, and cannot return it. She employed John R. Guyer and Yerker E. Taylor, the defendants in error, plaintiffs below, to bring the action to cancel her deed, and contracted to give them half of the recovery as their fee for representing her in the suit to cancel the deed. They filed a lien claim as provided by statute. Later on Irene Stewart settled with Crump, in the absence of her attorneys, for a nominal sum, and dismissed the action. And the defendants in error, Guyer and Taylor, as plaintiffs below, sued Crump for $2,000, which was alleged to be one half of the reasonable value of the premises, and sought to impress a lien upon the real estate to secure the payment thereof. The defendant, Crump, answered, and, among other things, pleaded the validity of his deed from Irene Stewart; that she was a married woman at the time of the execution of the same, and by virtue of the Statutes of 1897 had authority to convey said real estate; also that no tender of the purchase price had been made; that at the time of executing the deed to him she represented herself to be of age; that she had the ap-

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pearance of a woman of eighteen years of age, and that he relied upon said representations as to her age; that no trial had ever been had in the action to cancel, and no judgment rendered in said cause, and that the plaintiffs were not entitled to recover, etc. The cause was tried largely upon an agreed statement of facts, in which it was agreed, among other things, that Irene Stewart was legally married December 28, 1908, and on August 14, 1909, she and her husband joined in a deed conveying the real estate to W. B. Crump for a consideration of $2,100, which was actually received, and that Crump had since said date been in possession of said premises; that at the time of executing the deed Irene Stewart was under the age of eighteen; that Irene Stewart entered into a written contract with her attorney, John R. Guyer, for half he recovered as his fee; that suit was filed, and a lien claimed for 50 per cent of the recovery; that Crump, after she attained her majority, procured a deed to the land from Irene Stewart for $165, during the pendency of this action, and without the knowledge or consent of her attorneys; that the reasonable value of the premises was $2,395.40, and the total rental value $159.50; that no fee had ever been paid the attorneys of Irene Stewart. The cause was tried to the court, and resulted in a judgment in favor of plaintiffs, the attorneys of Irene Stewart, for $1,494.20, and the defendant, Crump, appeals from this judgment.

There are several questions raised by this appeal; but the most vital question, as we view the case, is whether the deed from Irene Stewart to Crump was valid and binding or was voidable.

The statute creating an attorneys' lien is § 276, Snyder's Compiled Laws 1909, and § 277 provides that, in a suit to enforce this lien, "such attorney may present, upon the hearing, the facts essential to establish the merits of the cause in which he was employed," as in the trial of this action was done. And it is admitted that the right of the plaintiffs to recover in this action depends upon Irene Stewart's right to cancel the deed in the action in which the plaintiffs were employed. If in that action she was entitled to cancel the deed to Crump, and recover the property, there is no question but her attorneys were entitled to recover in this action for 50 per cent of the agreed value of the farm; but if she had no rights in that action, then her attorneys could recover nothing in this action. They must stand or fall in this suit with her right to cancel the deed in the suit they filed for her for that purpose. And this controversy, therefore, narrows itself down to the rights of Irene Stewart in the action to cancel the deed.

Attorney and client—lien—compromise of suit.

The plaintiff in error, defendant below, maintains: First, that when she married in December, 1908, the Statute of 1897 then and there conferred upon her the right to sell and convey this real estate, and that this right to sell and convey was a "vested right," which the subsequent act of the legislature could not destroy or impair. The defendants in error maintain that this was only a power granted her by the Act of 1897, and that the legislature had the right to, and did, take it away before she exercised it. If this was a "vested right" the authorities are both clear and strong to the effect that it could not be destroyed or impaired, except by "due process of law." Then the first question for us to determine is, Was the right to convey, conferred on Irene Stewart by the Act of 1897, a mere "statutory privilege" or a "vested right?" Words & Phrases, 2d Series, vol. 4, p. 1166, in defining vested rights, says: "Rights are 'vested' when the right of enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. Presbytery v. First Presby. Church, 80 N. J. L. 572, 78 Atl. 210."

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Again: "A 'vested right' may be considered as the power to do certain actions or to possess certain things lawfully. In its latter aspect it is substantially a right of property, and as such is protected by those provisions in the Constitution which apply to such rights."

In Gladney v. Sydnor, 172 Mo. 318, 60 L.R.A. 880, 95 Am. St. Rep. 517, 72 S. W. 554, the court says: "Vested rights may be created either by the common law, by statute, or by contract, and it makes no difference as to the method of their creation; they are entitled to the same protection."

It cannot be disputed that when Irene Stewart married, the statute then in force gave her the absolute right to sell and convey this property. And it is almost universally held that "the right to sell and convey is a property right," and one of the highest privileges and dearest rights connected with ownership. In fact it is the one right which gives the thing owned its greatest value. Rigney v. Chicago, 102 Ill. 64; People v. Havnor, 149 N. Y. 195, 31 L.R.A. 689, 52 Am. St. Rep. 707, 43 N. E. 541; Bruce v. Strickland, 81 N. C. 267. And Judge Story in Society for Propagation of the Gospel v. Wheeler, 2 Gall. 105, Fed. Cas. No. 13,156, says: "Upon principle, every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective."

Section 54, art. 5, of the Constitution of Oklahoma, among other things, provides that the repeal of a statute shall not "affect any accrued right." Under the Act of 1897 did not the right of Irene Stewart to sell and convey this land accrue upon her marriage? And was not that right under that statute as absolute as if she had attained her majority? We think so. Then, if that be true, there is no question that it was beyond the power of the legislature to impair or take that right away from her, after it had accrued, by repealing the statute by which the right did accrue and had been conferred. We think the doctrine announced by Judge Story in Society for Propagation of the Gospel v. Wheeler, supra, is sound, which is to the effect that upon principle every statute which takes away or impairs "vested rights" acquired under existing laws, imposes a new duty, or attaches a new disability, must be deemed retrospective. To hold otherwise would leave us at sea, and place it within the power of the legislature at will to disturb, and even destroy, by subsequent legislation, rights which had accrued under existing laws. The distinction, however, between "vested rights" and "statutory privileges" should at all times be borne in mind; for, as stated by Judge Cooley: "The citizen has no vested right in statutory privileges and exemptions. Among these may be mentioned exemptions from the performance of public duties upon juries, or in the militia, and the like; exemptions of property or person from assessment for the purposes of taxation; exemptions of property from being seized on attachment or execution, or for the payment of taxes; exemption from highway labor, and the like. All these rest upon reasons of public policy, and the laws are changed as the varying circumstances seem to require. The state demands the performance of military duty by those persons only who are within certain specified ages; but if, in the opinion of the legislature, the public exigencies should demand military service from all other persons capable of bearing arms, the privilege of exemption might be recalled, without violation of any constitutional principle. . . . So, a license to carry on a particular trade for a specified period may be recalled before the period has elapsed." Cooley, Const. Lim. 7th ed. p. 546.

But, a "vested right" is the power to perform certain actions or to pos-

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sess certain things lawfully, and is substantially a property right; and when it has been once conferred or becomes absolute by contract or existing laws, it is protected from invasion by the legislature, by those provisions in the Constitution which apply to such rights. In State v. Julow, 129 Mo. 163, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 S. W. 781, Justice Sherwood, in discussing this question, says that property is placed in the Constitution in the same category with liberty and life. And "where rights of property are admitted to exist, the legislature cannot say they shall exist no longer;" that if it were otherwise "the Constitution would then mean that no person shall be deprived of his property or rights unless the legislature shall pass a law to effectuate the wrong; and this would be throwing the restraint entirely away."

Constitutional law—vested rights.

And in Gladney v. Sydnor, supra, it is held that "a failure to exercise a vested right before the passage of a subsequent statute which seeks to devest it in no wise affects or lessens that right." Presbytery v. First Presby. Church, 80 N. J. L. 572, 78 Atl. 207; Graham v. Great Falls Water Power & Town-Site Co. 30 Mont. 393, 76 Pac. 808; Evans-Snider-Buel Co. v. McFadden, 58 L.R.A. 900, 44 C. C. A. 494, 105 Fed. 293; Downs v. Blount, 31 L.R.A. (N.S.) 1076, 95 C. C. A. 289, 170 Fed. 15; National Bank v. Jones, 18 Okla. 555, 12 L.R.A.(N.S.) 310, 91 Pac. 191, 11 Ann. Cas. 1041; Lohrstorfer v. Lohrstorfer, 140 Mich. 551, 70 L.R.A. 621, 104 N. W. 142; Marshall v. King, 24 Miss. 85.

We are therefore forced to the conclusion that the 1909 statute could not be retroactive and take away a right that had already accrued, but was only prospective; and consequently did not affect the accrued right of Irene Stewart to convey her real estate, since that right had accrued to her under an existing law, before the passage of the 1909 act. Even where a legislative act affects only forms of procedure and statutory privileges, the general rule, and the one adopted by this court, is that even those statutes are not retrospective, but must "be construed as having a prospective operation unless the purpose and intention of the legislature to give them a retrospective effect is expressly declared or is necessarily implied from the language used. In every case of doubt, the doubt must be resolved against the retrospective effect" Good v. Keel, 29 Okla. 325, 116 Pac. 777; Rolater v. Strain, 31 Okla. 58, 119 Pac. 992; Bell v. Bearman, 37 Okla. 645, 133 Pac. 188.

Since we have reached the conclusion that the 1909 statute was not and could not be retroactive, and therefore the deed of Irene Stewart to Crump was valid and binding, it inevitably follows that she could not have recovered in her suit to cancel that deed; therefore the defendants in error, plaintiffs below, cannot prevail in this suit. Having reached this conclusion, we deem it unnecessary to consider the other questions raised, but think for the reasons above stated the judgment should be reversed.

Per Curiam:
Adopted in whole.

Petition for rehearing denied May 16, 1916.

Second petition for rehearing denied.

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ANNOTATION.

Merits of client's cause of action or defense as affecting attorney's lien or claim for his compensation against adverse party, in case of compromise without former's consent.

The weight of authority is to the effect that where the case is compromised without the attorney's consent or knowledge, the latter's rights, as against the adverse party, depend entirely upon the merits of his client's case. In other words, if the claim or defense is groundless, he cannot recover; but otherwise, if he could have successfully prosecuted or defended the case. The following cases support this general rule: Gray v. Lawson (1867) 36 Ga. 629; Jones v. Morgan (1869) 39 Ga. 310, 99 Am. Dec. 458; Twiggs v. Chambers (1876) 56 Ga. 279; Coleman v. Ryan (1877) 58 Ga. 132; Rodgers v. Furse (1889) 83 Ga. 115, 9 S. E. 669; Swift v. Register (1895) 97 Ga. 446, 25 S. E. 315; Brown v. Georgia, C. & N. R. Co. (1897) 101 Ga. 80, 28 S. E. 634; Atlanta R. & Power Co. v. Owens (1904) 119 Ga. 833, 47 S. E. 213; Hall v. Lockerman (1907) 127 Ga. 537, 56 S. E. 759; Pickard v. Yencer (1880) 21 Hun (N. Y.) 403; McCabe v. Fogg (1880) 60 How. Pr. (N. Y.) 488; Deutsch v. Webb (1882) 10 Abb. N. C. (N. Y.) 393, note; Tullis v. Bushnell (1883) 65 How. Pr. (N. Y.) 465; Smith v. Baum (1884) 67 How. Pr. (N. Y.) 267; Whittaker v. New York & H. R. Co. (1886) 22 Jones & S. (N. Y.) 8; Gallison & H. Co. v. Rawak (1889) 24 N. Y. S. R. 318, 3 N. Y. Supp. 802; Casucci v. Allegany & K. R. Co. (1892) 65 Hun, 452, 29 Abb. N. C. 252, 20 N. Y. Supp. 343; Gulf, C. & S. F. R. Co. v. Williams (1915) 49 Okla. 126, 152 Pac. 395; Whitehead v. Spriggs (1916) — Okla. —, 158 Pac. 439; Culver v. Diamond (1917) — Okla. —, 167 Pac. 223; Allen v. Shepherd (1918) — Okla. —, 169 Pac. 1115; CRUMP v. GUYER (reported herewith) ante, 331; Smelker v. Chicago & N. W. R. Co. (1900) 106 Wis. 135, 81 N. W. 994.

Thus, in Oklahoma, under statutes which in effect provide that an attorney shall, upon notice, have a lien upon his client's cause of action or counterclaim which attaches to findings, judgments, and settlements made with the consent of the attorney, and the proceeds thereof, and which cannot be affected or destroyed by any settlement between the parties, made without the approval of the attorney; that it shall be lawful to contract for a stipulated or a contingent fee, and that the lien therefor cannot be affected by a compromise or settlement between the parties without notice to and consent of the attorney, but the adverse party shall be liable to such attorney for the fee due him or to become due him under his contract, which liability may be enforced by action; and that where the amount of the fee is not fixed by contract the lien shall be for an amount which it might be reasonably supposed would have been earned had he been allowed to complete his contract, and that upon the hearing the attorney may present the facts essential to establish the merits of the cause in which he is employed,—the well-established rule is as laid down in the reported case (CRUMP v. GUYER, ante, 331), that in case a cause of action is compromised without the knowledge or consent of a party's attorney, the attorney may sue the adverse party for the amount of his fee, and upon the trial present the facts essential to establish the merits of his client's cause, and that recovery depends upon such cause being a meritorious one, there being no enforceable lien if his client did not have a good cause of action. To the same effect are Allen v. Shepherd (1918) — Okla. —, 169 Pac. 1115; Culver v. Diamond (1917) — Okla. —, 167 Pac. 223; Whitehead v. Spriggs (1916) — Okla. —, 158 Pac. 439 (holding that, in the absence of evidence sustaining the merits of the client's cause of action, a demurrer to the evidence should be sustained); and Gulf, C. & S. F. R. Co. v. Williams (1915) 49 Okla. 126, 152 Pac. 395.

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And see also Herman Constr. Co. v. Wood (1912) 35 Okla. 103, 128 Pac. 309, wherein the pertinent provisions of the statute (Okla. Sess. Laws, 1909, chap. 4) are set out in full.

And in Georgia, under a statute providing that parties cannot, by settlement between themselves, defeat the attorney of any lien or claim under contract with his client of which the opposite party had notice prior to the consummation of such settlement, the rule is that where a settlement is made by the parties without the consent or against the consent of the plaintiff's attorney, the case should be sent to the jury on the merits as between the parties, where the defendant had notice of such attorney's contract rights, it being expressly held that whether the defendant in such a case shall pay the fees of the plaintiff's attorney must depend upon the recovery by the plaintiff in a trial upon the merits of the cause sued on. It was so held in Gray v. Lawson (1867) 36 Ga. 629, applying Georgia Rev. Code, § 1980, and Jones v. Morgan (1869) 39 Ga. 310, 99 Am. Dec. 458.

So, under the Georgia Act of 1873, as embraced in § 1989 of the Code, which declares that "attorneys at law shall have a lien upon suits, judgments, and decrees for money, and no persons shall be at liberty to satisfy said suit, judgment, or decree until the lien or claim of the attorney for his fees is fully satisfied, and attorneys at law shall have the same right and power over suits, judgments, and decrees to enforce their liens as their clients had, or may have, for the amount due thereon to them," it is held that an attorney's rights cannot be defeated by a compromise or a settlement between the parties, made without his knowledge or consent, and that such an attorney has a right to prosecute the suit in the name of the plaintiff and recover his fee, provided the plaintiff had a good case. Coleman v. Ryan (1877) 58 Ga. 132; Rodgers v. Furse (1889) 83 Ga. 115, 9 S. E. 669 (holding that where a judgment was set aside with plaintiff's consent, it must have been done subject to the right of his attorney for fees, who subsequently may proceed to establish same, in doing which he must establish the plaintiff's right to recover on the state of facts existing at the time the case was first disposed of, independently of the question of fees); Swift v. Register (1895) 97 Ga. 446, 25 S. E. 315 (holding that, in order for an attorney to recover a contingent fee in an action settled by the parties without his approval, it is absolutely indispensable that he should prove by competent evidence the right of the plaintiff to recover in the original case); Brown v. Georgia C. & N. R. Co. (1897) 101 Ga. 80, 28 S. E. 634 (holding that a claim for contingent fees is extinguished by the granting of a nonsuit). And under another provision of the same section of the Georgia statute, namely, that "upon all suits for the recovery of real or personal property and upon all judgments or decrees for the recovery of the same attorneys at law shall have a lien on the property recovered," it has been held that the attorney has a "lien on the suit which is perfect at once," and an inchoate lien on "the property" which is perfected by recovery, in consequence of which the attorney's right to recover depends upon the merits of the suit, which cannot be dismissed without the attorney's consent. Twiggs v. Chambers (1876) 56 Ga. 279. And under Georgia Civil Code, § 2814, ¶ 2, authorizing an attorney who has a lien upon a suit to prosecute it for the purpose of enforcing the payment of his fees, the court in Atlantic R. & Power Co. v. Owens (1904) 119 Ga. 833, 47 S. E. 213, held that where a suit has been settled by the parties without the knowledge or consent of the plaintiff's attorney, when the suit is prosecuted by the attorney there can be no recovery of fees unless the evidence is of such a character that a recovery in behalf of the client would be authorized if the suit were still pending for his benefit. And see Hall v. Lockerman (1907) 127 Ga. 537, 56 S. E. 759, wherein, in holding that attorneys have no right to enforce a judgment obtained by surprise, the court said: "The attorneys had no interest in the case except in that

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which the client could recover. The interest of the attorneys was wholly dependent upon a right of recovery by the client. If the client had no cause of action," he acquired none merely by employing an attorney to represent him, and attorneys' rights are no greater than those of their clients.

And in Pickard v. Yencer (1880) 21 Hun (N. Y.) 403, construing New York Code of Civil Procedure, § 66, as in effect before the Amendment of 1879, and under which an attorney was entitled to costs in case of a settlement made with a design of defrauding him, where a settlement and discontinuance of an action were set aside as in fraud of the attorney's lien for fees, it was held that the attorney could proceed with the suit in the name of his client, but that the defendant could not be held liable for costs, except upon a recovery of an amount sufficient to carry costs under the statutes. And under § 66 of the Code, as amended in 1879, which gives an attorney of record from the commencement of an action or service of a counterclaim a lien upon the client's cause of action or counterclaim which attaches to a verdict, report, decision, or judgment in his client's favor and the proceeds thereof, and which cannot be affected by any settlement between the parties before or after the judgment, — it has been held that it is no longer necessary to establish fraud or collusion, but that, in order to enforce a satisfaction of an attorney's lien in case of settlement before judgment, he must prosecute the action to a judgment in favor of his client. See McCabe v. Fogg (1880) 60 How. Pr. (N. Y.) 488; Deutsch v. Webb (1882) 10 Abb. N. C. (N. Y.) 393, note (holding that an attorney, after settlement without his consent, may proceed with the trial for the purpose of enforcing his lien, but that, if unsuccessful in proving the cause of action, he is personally answerable to the defendant for the trial fee and the disbursements of trial); Tullis v. Bushnell (1883) 65 How. Pr. (N. Y.) 465; Smith v. Baum (1884) 67 How. Pr. (N. Y.) 267 (holding that the existence of the plaintiff's cause of action is in issue, that the defendant is entitled to have such issue tried by a jury before he can be mulcted in costs, and that how far an amount paid in settlement may be taken as an admission of indebtedness must be determined at the trial); Whittaker v. New York & H. R. Co. (1886) 22 Jones & S. (N. Y.) 8 (holding that where a case was settled pending an appeal from a judgment in plaintiff's favor and without the consent of his attorney, the latter had a valid lien, enforceable against the adverse party, provided he could prosecute the litigation to a final judgment in favor of his client); Gallison & H. Co. v. Rawak (1889) 3 N. Y. Supp. 802 (holding that where the parties settled a suit before judgment, without the consent of the plaintiff's attorney, the latter could obtain permission to prosecute the action for the protection of his lien, which, under § 66 of the Code of Civil Procedure, was not affected by the settlement, and could recover upon proving that his client had a good cause of action at the time the suit was commenced); and Casucci v. Allegany & K. R. Co. (1892) 65 Hun, 452, 29 Abb. N. C. 252, 20 N. Y. Supp. 343 (expressly holding that where a settlement is so far set aside as to permit the plaintiff's attorney to prosecute the action and recover the amount of his lien, he must, in order to so recover, establish the liability of the defendant upon the merits of the questions in issue; and that the compromising of the claim by the defendant was not, under § 66 of the Code, an admission upon his part of liability to the plaintiff).

So, in Wisconsin, under a statute enacted in 1891 (Rev. Stat. 1898, § 2591A), which authorized one claiming a right of action in tort or for unliquidated damages to contract for an attorney to prosecute the same, and gave him a lien for fees, and provided that, after notice thereof to the adverse party, no adjustment or settlement should be valid as against the lien, it has been held that where a settlement has been made in violation of the rights of the plaintiff's attorney to a contingent fee, the procedure is not to bring an action in such at-

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torney's name, but by prosecuting the original action; and that in so doing it is necessary to establish the existence of the original demand with the same certainty as though the original party was still prosecuting it, since the recovery must be based upon the actual injuries shown. Smelker v. Chicago & N. W. R. Co. (1900) 106 Wis. 135, 81 N. W. 994.

But it has been held, under a statute giving an attorney a lien upon "money due his client in the hands of an adverse party," as is done by Iowa Code, § 215, subd. 3, that there is a valid and enforceable lien where the case is settled by the parties by an agreement for the payment of damages irrespective of the validity of the client's claim. Thus, in Barthell v. Chicago, M. & St. P. R. Co. (1908) 138 Iowa, 688, 116 N. W. 813, it was expressly held that in such a case the attorney did not need to prove that his client had a meritorious claim. And see Smith v. Chicago, R. I. & P. R. Co. (1881) 56 Iowa, 720, 10 N. W. 244, wherein it was held that where the parties to a personal injury action settled the same by the payment of damages before judgment, without the consent of the plaintiff's attorney, and in violation of his rights, such attorney could sue the defendant for the amount of his fee, the court saying that the lien exists in all actions where there is a money liability from the adverse party to the client, provided proper notice of the lien has been given.

And in Missouri, under a statute (Sess. Acts 1901, p. 46, § 2) providing that an attorney in any suit or action may sue for a contingent fee, that such agreement shall operate as a lien from the date of notice thereof upon the claim or cause of action and upon the proceeds of any settlement made without the attorney's consent, it has been held that where an action is settled before judgment, and without the attorney's consent, an action may be maintained by the latter against the adverse party, and that in such an action it is not necessary for the attorney to show that his client had a meritorious cause of action, it being said that the contention that it was necessary for the attorney to prove that his client's case was meritorious and such as entitled him to a verdict was incompatible with the text of the statute. Yonge v. St. Louis Transit Co. (1904) 109 Mo. App. 235, 84 S. W. 184. G. J. G.

C. A. BECKER et al., Plffs. in Err.,
v.
MRS. BEULAH FITCH.

Oklahoma Supreme Court — Aug. 14, 1917.

(— Okla. —, 167 Pac. 202.)

Gaming — recovery by stranger.

1. A third person whose money, without his consent or connivance, has been lost at gambling by another, may recover same in an action at law against the person or persons winning and receiving the same; and all persons concerned in conducting a system of gambling, whether as principals or agents, by which such money is so lost, may be made to respond in damages to the owner of the money to the extent of the amount so lost.

[*See note on this question beginning on page* 345.]

Same — what must be proved.

2. Before a third person can recover money lost by another at gambling, the evidence must show that the money belonged to such third person; that it came into the possession of another

Headnotes by STEWART, C.

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who wagered or bet the money and lost the same; that the person sued won the money, either as principal or as agent; and that the complaining party did not consent to or connive at the money being bet or wagered.

Appeal — error in admitting evidence — hearsay.

3. It is error for the trial court as a part of the case in chief of the plaintiff, in the trial of an action brought for money alleged to belong to plaintiff and to have been lost by another at gambling, to permit a witness for plaintiff, over the objection of the defendants, to testify that the person alleged to have bet and lost the money told the witness that at one time he had lost $20, and at another time $50, in a gambling transaction with the defendants, and, under the evidence in the instant case, such error is prejudicial.

Evidence — amount lost in gaming.

4. In an action for damages for money alleged to have been bet and lost by another, there should be some evidence of a definite amount lost; the jury ought not to be permitted to speculate as to the amount, but their verdict should represent an intelligent finding as to the amount, based upon legal and competent testimony in the case.

ERROR to the District Court for Oklahoma County to review a judgment in favor of plaintiff, and denying a motion for new trial, in an action brought to recover money alleged to belong to her, and to have been lost by her husband at gambling on defendants' premises. *Reversed.*

The facts are stated in the Commissioner's opinion.

Messrs. **Ames, Chambers, Lowe & Richardson** for plaintiffs in error.

Messrs. **George H. Giddings, E. J. Giddings,** and **J. T. Dortch** for defendants in error.

Stewart, C., filed the following opinion:

The parties will hereinafter be styled as they were in the court below, as plaintiff and defendant. The plaintiff sought to recover from the defendants the sum of $253, and interest, for money alleged to belong to the plaintiff, to come into the possession of plaintiff's husband Harry Fitch, and to be lost by her said husband in a turf exchange, or pool room, conducted by the defendants in Oklahoma City, by means of certain bets and wagers made by the said Harry Fitch on horse races, which bets, it is alleged, were made with the defendants in such place of business. The issues were joined and, upon trial, the jury returned a verdict in favor of the plaintiff and against the defendants for the sum sued for, and the court accordingly rendered judgment. Motion for a new trial was duly filed and overruled, and defendants duly appeal to this court.

There is no doubt as to the legal proposition that a third person whose money has been lost by another at gambling may recover the same in an action at law against the person or persons winning and receiving the same. **Gaming—recovery by strangers.** Those conducting a gambling institution, either as principals or as agents, where money of a third person is thus lost, are liable in such an action, to the extent of the money lost and received. Unquestionably, the transaction described in the petition, by means of which it is alleged the money was lost, is gambling. The petition states a cause of action.

It is contended by the defendants that they were entitled to an instruction to the effect that the conducting of an exchange upon which bets are made on foreign races was not a violation of the statutes of Oklahoma at the time named in the petition. It is not necessary for us to determine whether such business was, at the time, a violation of an express statute. It was contrary to good morals and sound public policy, and, if the allegations are supported by the evidence, the plaintiff is entitled to recover. There are, however, two questions presented in the brief of defendants,

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which we think worthy of serious consideration. One concerns the admission of hearsay testimony, and the other the sufficiency of the evidence to sustain the verdict of the jury.

The defendants demurred to the evidence offered by plaintiff. The demurrer was overruled with exceptions, and defendants rested their case. In addition to her own testimony, the plaintiff used as witnesses, Frank Owen and the defendants Keisel and Becker. The evidence may be summarized as follows:

The plaintiff testified that she and her husband for a number of years had been traveling from place to place, the business of her husband being that of preparing time-tables for railroad men, and incidentally procuring advertisements in connection with such time-tables; that they had been in Oklahoma City for a short time; that the plaintiff had something more than $260 of her own money, which she stated she had earned at dressmaking; that she furnished her husband at three separate times the following amounts: $50, $30, and $35—making a total of $115, which money was to be used by her husband in payment of doctor bills, printing, and other necessities; that shortly after furnishing her husband with this money her husband took from her trunk $140; that she did not miss the money at the time it was taken, and did not know that her husband had taken the money until she found out that he had been gambling. She gave no competent testimony showing that her husband took the $140, and, so far as the record shows, the statement that her husband took the money was merely her opinion, based upon no actual knowledge of the taking. Her testimony shows that she had no actual knowledge of his gambling; the only information she had coming from statements of her husband and others. She testified that on one occasion he came to their room in the hotel, sat down on a chair, and said: "I have lost all of my money;" that he threw down a lot of tickets, which tickets, over the objection of the defendants, were offered in evidence as Exhibits 1 to 39, inclusive. The court, on motion of the defendants, properly excluded the above statement of her husband in which he said that he had lost all of his money, as being hearsay. Two of the tickets introduced in evidence appear to be issued by a hotel, and have no connection with the matter in controversy. Exhibit 2, which is a fair sample of the form of the tickets urged to be material, reads as follows:

K. O. K. Brokerage & Com. Co.
C. A. Becker.
Oklahoma City, Okla.
B. Chilton (3).
$2\frac{1}{2}-\frac{1}{2}$.

Plaintiff testifies that, after the act of her husband in throwing down the tickets, she talked to the defendant Oates and told him that her husband had lost her money, and that her husband was not responsible more than half the time; that she asked Oates if he did not think he could give the money back, and that Oates refused to do so; that afterwards she talked to the defendant Keisel, and that he told her to talk to Becker; that Keisel said: "Well I guess that none of us are afraid of you. You do not need to think that any of us are running from you." She further testified that she asked Oates if he did not know Harry (meaning her husband) had lost some money there, and that Oates admitted that he knew him; that she further said to Oates; "You know that you and Mr. Keisel are running this place," and that Oates first said that Mr. Becker was running it, and she said: "Well, then, you are going to pay back this money of mine;" that Oates replied that they were not going to do anything at all, were not going to give back any money, and told her to go ahead and do what she could; that she told Oates the

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money was hers, and that Harry was not responsible all of the time, and Oates said that he did not see it that way, and for her to go ahead and do what she liked, they were not afraid of her. She further testified that Keisel arranged at one time to meet her at the Bristol Hotel and talk with her; that she waited two or three hours, and that Keisel did not appear; that she talked to Keisel over the telephone, and he said: "Well, if Mr. Fitch lost his money, he was over twenty-one years old, and was able to take care of himself," and that he was not going to give any money back lost by a grown-up man, and that he further said that, if anyone had lost any money and was twenty-one years old and had gambled their money away, he was not going to have anything to do with it. She testified that she did not consent to her husband using the money in "playing the ponies," or gambling; that at one time she asked Oates if he did not know that Harry had lost some money there, and he said: "Yes; he knew that."

The next witness introduced by the plaintiff was the defendant Keisel, who merely testified to the handwriting on the tickets introduced, and to some irrelevant matters concerning the ownership of the Bristol Hotel. He was not asked concerning any money bet or lost by Harry Fitch, and did not give testimony in such respect.

The plaintiff then introduced the deposition of Frank Owen, who testified that he was a cook, had been living in Oklahoma City, but was removing to Ardmore; that he knew Harry Fitch, had met him at the Stag Pool Hall, conducted by the defendants. He described the arrangements in the interior of the pool hall, and testified that a turf exchange was operated there for the purpose of betting on horse races. He explained, to some extent, how such bets were made and the way the business was conducted; said that he had made and won bets there; that he had seen Harry Fitch at one time put up his watch for $10 and bet on the races, and that tickets such as had been introduced in evidence were issued to those making the bets; that he had seen Fitch make bets about fifteen times, had seen him make three or four a day; that he had seen him there four days; that he did not know how much he had bet in those three or four days, except what Fitch told him that he lost. Over the objection of the defendants, the testimony of this witness was admitted by the trial court, to the effect that Fitch had told him that he had lost $20 one day and $50 another day; the defendants saving exceptions.

The next witness offered was the defendant Becker, who testified that the O. K. Brokerage & Commission Company sold pools on foreign races; that when they got returns on the foreign races they received a commission and they paid the bets of those who won; that Oates and Keisel were interested with him in the business, that he recognized Keisel's handwriting, and also that of Oates, on some of the tickets shown him, which had been introduced in evidence; that he had given Fitch at one time an advertisement to be placed in a book being prepared for the railroad men; that he had paid Fitch for the advertisement; that in the turf exchange conducted by defendants, on the presentation of a ticket by the holder, in case the holder won, the same was paid by defendants, but that tickets were not returned unless the holder won.

The foregoing is a substantial statement of the testimony in the most favorable light toward the plaintiff.

There is no competent evidence that Fitch ever received more than $115 of plaintiff's money. The fact that the plaintiff missed $140 from her trunk in a room at the hotel does not tend to prove her husband took the same. The plaintiff testifies she delivered to Fitch $115; hence, his receiving such sum may be considered as established by the

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evidence and, if there is proof that any of such amount was lost by him in the gambling institution conducted by the defendants, the plaintiff would be entitled to recover from defendants to the extent of the amount so lost. It has been suggested by counsel in one of the briefs, by way of surmise, that the figures in parentheses on each of the tickets introduced in evidence may represent bets made in each particular instance. The tickets on their face do not purport to show any money bet or lost, and no testimony was introduced explaining their meaning. Assuming that they were admissible in evidence in the first instance, and that the experience of counsel is sufficient to give weight to the surmise ventured, we find the total sum of the parenthetical numbers to be 105. If, then, the possession of the tickets by Fitch shows that the bets were lost, as claimed by counsel for plaintiff, Fitch lost only $105. In order for plaintiff to recover this amount, there should be evidence tending to show that the money lost belonged to plaintiff. We cannot speculate as to what the tickets represent. The courts do not take judicial notice of the meaning of signs and characters used by the gambling profession. The plaintiff called to the stand two of the defendants, who identified the tickets as those used in their business, but they were not asked to explain their meaning. Such proof should have been made in some manner. In order for the plaintiff to recover, it is necessary that there be some evidence to show that Fitch lost money belonging to the plaintiff, without her consent or connivance, by bets or wagers made on horse races in the turf exchange conducted by the defendants, and that the defendants received the money, either for themselves or their principal. There should also be evidence to show the amount lost.

Same—what must be proved.

Evidence—amount lost in gaming.

There is no competent evidence in the record showing that Harry Fitch ever bet or lost any definite or even approximate sum of money, except $10 of his own, for which he pawned his watch. Oates admitted that Fitch lost some money, but there is no competent testimony as to what amount or to whom the money belonged. In the absence of evidence to the contrary, the presumption is that Fitch lost his own money.

It is apparent that there is not sufficient evidence to sustain the verdict for the amount awarded, and there is slight, if any, evidence to support a verdict in any sum, but it will not be necessary to pass upon this question, as this case must be reversed and a new trial ordered, because of error in the admission of testimony. The witness Owen testified that Fitch told him that he had lost $20 at one time, and $50 at another. Proper exceptions were reserved by defendant to the action of the court in admitting this testimony. We cannot conceive upon what theory the court admitted this purely hearsay evidence. We may add here that the policy of this court to disregard errors not prejudicial is not intended as a grant of license to trial courts to trample under foot and wholly disregard established procedure and rules of evidence, meant for the protection of all citizens alike.

Appeal—error in admitting evidence—hearsay.

The duty rests upon trial courts to conduct trials in accordance with law, and not to experiment as to how many rules may be violated without committing prejudicial error. The example of the wayward schoolboy, who attempts to gauge with precision just what infractions of discipline will be indulged by the teacher without invoking the rod of chastisement, ought not to be followed by trial courts. The evidence is not only incompetent, that its admission, in connection with the weakness of plaintiff's proof, is pre-

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judicial. The undisputed evidence in this case shows that the defendants were engaged in an immoral and unlawful business, which should be suppressed. The law provides ample means to suppress the business and punish the culprits. We would not discharge our duty if we permitted any citizen, even a gambler, to be deprived of property except in a manner authorized by law.

The judgment of the trial court is reversed, with instructions to grant the defendants a new trial and proceed otherwise in a manner not inconsistent with this opinion.

Per Curiam:

Adopted in whole.

ANNOTATION.

Right of owner to recover his money gambled away by another without authority.

Cases of dealing in futures and with bucket shops are not included.

The owner may recover from the winner, money which has been lost in gambling by his agent, employee, or servant, without authority. Clarke v. Johnson (1774) Lofft, 756, 1 Cowp. pt. 1, p. 197, 98 Eng. Reprint, 903, 1041; Ramirez v. Main (1907) 11 Ariz. 43, 89 Pac. 508; Pierson v. Fuhrmann (1891) 1 Colo. App. 187, 27 Pac. 1015; Lacey v. Bentley (1907) 39 Colo. 449, 89 Pac. 789; McAllister v. Oberne (1891) 42 Ill. App. 287; Causidiere v. Beers (1865) 1 Abb. App. Dec. (N. Y.) 333; Conway v. Conway (1893) 4 Misc. 312, 24 N. Y. Supp. 261; Thompson v. Hynds (1897) 15 Utah, 389, 49 Pac. 293; Burnham v. Fisher (1853) 25 Vt. 514.

It will be seen that this principle is fully sustained in the reported case (BECKER v. FITCH, ante, 340), where a judgment for the plaintiff was reversed on other grounds.

Corner v. Pendleton (1855) 8 Md. 337, an action by employers to recover money alleged to have been gambled away by their clerk, failed for want of proof.

As a wife has a common-law right of action against the winner, when her husband gambles away her money without authority, the state in such case may not sue, under a statute providing that in case the loser of money does not sue to recover it of the winner in six months, then the state may sue for the benefit of the wife and minor children of the loser. Ervin v. State (1897) 150 Ind. 332, 48 N. E. 249.

A husband, having bet property of his wife, informed her that he had sold it, and she made a deed, which he deposited with the stakeholder. The wife, learning of the bet, demanded back the deed from the stakeholder, but he nevertheless delivered it, taking security from the winner, who immediately conveyed it to a bona fide purchaser. It was held that the winner and the stakeholder were both liable to the wife for the amount of her loss. Pollock v. Agner (1895) 54 Kan. 618, 38 Pac. 781.

Where one member of a firm, without authority, loses the property of the firm in a bet, all the partners may, by suit, recover its value of the winner. Cannon v. Chaney (1894) 8 Ohio C. C. 143, 4 Ohio C. D. 335.

Where a carrier, taking a package of money for transportation, gambled away the identical bills, an action for money had and received was sustained by the shipper against the winner. The court referred to the Massachusetts statute, enabling the loser to recover within three months, or any other person double that amount, without any limitation of time. Mason v. Waite (1822) 17 Mass. 560.

An employer's right of recovery from the winner of money lost by his clerk in gambling, without authority, includes money so lost, which was borrowed by the clerk on his employer's credit, he having authority to borrow on such credit. Burnham v. Fisher (1853) 25 Vt. 514.

The master may recover notes and cash of his, paid by his servant to

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the defendant for chances in a prohibited lottery. Clarke v. Johnson (1774) Lofft, 756, 1 Cowp. pt. 1, p. 197, 98 Eng. Reprint, 903, 1041.

A principal's action for money had and received, against his agent and the winner of the principal's money, lost by the agent at betting or gambling, without authority, lies at common law, and need not be brought under the statute. Conway v. Conway (1893) 4 Misc. 312, 24 N. Y. Supp. 261.

"One who receives the money of another from a third person, by winning it at a game of chance played with such third person, is liable to the owner in an action for money had and received, and the right of action does not rest upon the statute, but upon the common law." Smith v. Ray (1892) 89 Ga. 838, 16 S. E. 90.

The principal may recover his money, drawn by checks of his agent, who, without authority, gave them in payment of gambling losses or for gambling stakes. McAllister v. Oberne (1891) 42 Ill. App. 287.

In Western Nat. Bank v. State Bank (1902) 18 Colo. App. 128, 70 Pac. 439, where a wife gave her husband money to deposit for her, and he took a certificate of deposit for it in his own name, apparently without authority, and gambled it away, it was held that his indorsement of the certificate was a nullity, and the certificate remained her property, although, after she had demanded it of the keepers of the gambling house where it was lost, they sold it to an innocent purchaser for value.

In Murray v. Aull (1910) 47 Colo. 542, 107 Pac. 1068, 1120, where a wife deposited money with her husband for safe-keeping, and he deposited it in a bank in his own name, and subsequently, in settlement of his losses in a gambling game conducted by a third person in defendants' saloon, drew a check thereon to the order of the defendants, who cashed it and delivered the proceeds to the winner, knowing the purpose for which the check was given, it was held that she could recover the amount from them.

But a recovery was denied in Oberne v. Bunn (1891) 39 Ill. App. 122, where the plaintiffs, without knowledge of its consideration, paid a draft which their agent had drawn upon them to the order of defendant, in payment of gambling losses, the defendant being a mere accommodation payee and having paid the money which he collected on the draft to several persons designated by the agent, receiving no benefit therefrom himself, it not appearing that he knew that the draft was drawn on funds not belonging to the drawer, although he did know the purpose for which it was given. The court distinguished McAllister v. Oberne (Ill.) supra, upon the ground that in that case appellant had notice by the check that it was, in fact, drawn upon funds belonging to appellees, it having been drawn in their name.

It was held in Gilpin v. Daly (1890) 24 Abb. N. C. 216, 11 N. Y. Supp. 6, that the allegation in such an action is proper, that the money of the employer lost by its employee at games of chance was so lost at gambling houses belonging to the defendants.

It was held in The Carrie Converse v. Fritig (1875) 27 La. Ann. 117, that no cause of action was stated by a petition declaring upon an indebtedness, and alleging that a certain employee of the plaintiffs unlawfully took their money and went with it to the defendants' gambling house, where, by means of persuasions and inducements, and by plying him with liquor, they induced him to gamble and bet against a banking game in their house, called faro, and that, by unlawful devices and tricks, they got possession and control of this money. The court observed that the plaintiffs were not seeking to recover a specific piece of property, which they alleged to have been unlawfully taken from them and found in possession of defendants, but that the petition declared upon an indebtedness.

It was held in Grant v. Owens (1891) 55 Ark. 49, 17 S. W. 338, that a postmaster could not recover from a licensed dramshop keeper, money embezzled by the assistant postmaster and lost in play at the dramshop,

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under a statute which required a bond of an applicant for a dramshop license, conditioned that the applicant "pay to any person all such sums of money as may be lost at gaming in his said saloon or dramshop," and that any person "who may have lost any money or other valuable thing at gaming in said dramshop . . . may have an action on said bond against the principal and security for the recovery thereof." The court considered that the plaintiff lost the money by the embezzlement of the assistant postmaster, who, said the court, "bet and lost it at the gaming table on his own account, and not as the agent of the plaintiff. We have examined a number of cases deciding that a person who deposits money upon an illegal wager can recover it, and they seem to confine the right to the real depositor, and to hold that he alone can sue for the same and recover it."

It may be noted that in Babcock v. Briggs (1877) 52 Cal. 502, it was held that the facts stated in the complaint, in an action by merchants against the winner, to recover money lost at play by their clerk, did not justify an attachment under the California statute.

B. B. B.

W. E. SANDERSON et al., Plffs. in Err.,
v.
GEORGE C. TURNER and Wife.

Oklahoma Supreme Court—July 23, 1918.

(— Okla. —, 174 Pac. 763.)

Mortgage — reconveyance to mortgagor.

1. Where a grantor sells land encumbered by a mortgage subject to the mortgage, and the grantee assumes the payment of the mortgage, and the land is mediately or immediately reconveyed to the grantor, and in each transfer the amount secured by the mortgage is deducted from the consideration, there is an implied assumption of the indebtedness secured by the mortgage by each grantee, and the grantor, when the land is reconveyed to him, assumes the payment of said mortgage, and cannot recover from his grantee on his grantee's assumption of payment of said mortgage.

[*See note on this question beginning on page* 350.]

Same — assumption.

2. Where land is sold subject to mortgage, and the amount secured by the mortgage is deducted from the consideration, there is an implied liability on the part of the purchaser, in the absence of an express agreement, to assume the payment of the indebtedness secured by the mortgage.

Same — sale subject to — effect.

3. Where land encumbered by a mortgage is sold subject to the mortgage, the land itself is the primary fund out of which to satisfy the mortgage.

Headnotes by PRYOR, C.

ERROR to the District Court for Jackson County to review a judgment in favor of plaintiffs in an action brought to recover an amount which they had been compelled to pay out for the discharge of a mortgage on reconveyance to them of certain land, payment of the mortgage on which was alleged to have been assumed by defendants. *Reversed.*

The facts are stated in the Commissioner's opinion.

Messrs. Robinson & Whiteside, for plaintiffs in error:

The land being deeded to defendants subject to a mortgage, the land itself became the primary fund out of which the indebtedness should be paid.

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27 Cyc. 1342, 1343; McNaughton v. Burke, 63 Neb. 704, 89 N. W. 275; Frerking v. Thomas, 64 Neb. 193, 89 N. W. 1005; Lamka v. Donnelly, 163 Iowa, 255, 143 N. W. 869; Hadley v. Clark, 8 Idaho, 497, 69 Pac. 319; United States Bond & Mortg. Co. v. Keahey, — Okla. —, L.R.A.1917C, 829, 155 Pac. 557; Schryver v. Teller, 9 Paige, 173; Jumel v. Jumel, 7 Paige, 591; Forgy v. Merryman, 14 Neb. 516, 16 N. W. 836; Gayle v. Wilson, 30 Gratt. 173; Stebbins v. Hall, 29 Barb. 524; Howard v. Robbins, 67 App. Div. 245, 73 N. Y. Supp. 172; Harris v. Masterson, 91 Tex. 171, 41 S. W. 482; Bailey v. Block, 104 Tex. 101, 134 S. W. 323; Greer v. Orchard, 175 Mo. App. 494, 161 S. W. 875; Fuller v. Devolld, 144 Mo. App. 93, 128 S. W. 1011; Townsend v. Wilson, 155 Ill. App. 303; Lagrave v. Hellinger, 144 App. Div. 397, 129 N. Y. Supp. 291; Fitzgerald v. Flanagan, 155 Iowa, 217, 135 N. W. 738, Ann. Cas. 1914C, 1104.

When plaintiff purchased the land back, he deducted the amount from the purchase price and therefore had in his possession the funds out of which the debt should be discharged; and having discharged the debts from such funds, he suffered no damages for which the defendants would be liable for a breach of their covenant to assume and pay.

Gregory v. Arms, 48 Ind. App. 562, 96 N. E. 196.

The consideration recited in a deed is prima facie evidence of the value.

Humphreys v. Shellenberger, 89 Minn. 327, 94 N. W. 1083; 13 Cyc. 446, 735; Hoover v. Binkley, 66 Ark. 645, 51 S. W. 73; Southern Portland Land Co. v. Munger, 36 Or. 457, 54 Pac. 815, 60 Pac. 5; Dreutzer v. Lawrence, 58 Wis. 594, 17 N. W. 423.

Messrs. Guy P. Horton and P. K. Morrill for defendants in error.

Pryor, C., filed the following opinion:

On the 18th day of December, 1909, the defendant in error George C. Turner was the owner of 160 acres of land situated in Jackson county, which land was encumbered with a mortgage, in the sum of $2,500. On that date he conveyed 80 acres of said land to plaintiffs in error, W. E. Sanderson and Raymond H. Fox, for the consideration of $250, subject to the mortgage, which the grantees, W. E. Sanderson and Raymond H. Fox, agreed to assume. On the 6th day of March, 1911, Raymond H. Fox conveyed his undivided one-half interest to said 80 acres to W. F. Sampson, for a nominal sum, and subject to the mortgage. On the 12th day of February, 1912, Sanderson and Sampson conveyed the whole of the said 80 acres to E. C. Garrison, for a nominal sum, subject to said mortgage. Thereafter, on the 21st day of August, 1912, the said Garrison conveyed the said 80 acres to J. E. Lawson, for a nominal sum, subject to said mortgage. On the 20th day of December, 1913, J. E. Lawson conveyed said 80 acres of land to Geo. C. Turner, the defendant in error, for the nominal sum of $50, subject to the mortgage aforesaid. Thereafter the said Turner, the maker of said mortgage and the first owner of the said premises, paid off the indebtedness with interest. The said Turner brought this action against Sanderson and Fox to recover the sum for which said mortgage was given to secure, and interest, under the agreement of said Sanderson and Fox to assume the same. There was judgment in the trial court in favor of the plaintiff Turner and against the defendants, Sanderson and Fox, for the amount of said mortgage, and interest. From this judgment Sanderson and Fox appeal.

The only question presented for consideration on appeal is whether or not the defendants are liable, under the circumstances, to the plaintiff, under their agreement to assume said mortgage. The plaintiff Turner had to pay the same to save the premises from being foreclosed under said mortgage. The law is well settled that, where land which is encumbered is sold subject to the encumbrance, and the amount of the encumbrance is deducted from the consideration, there is an implied liability on the part of the purchaser, in the absence of an express agreement, to assume the payment of the en-

Mortgage—assumption.

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cumbrance. Thompson v. Thompson, 4 Ohio St. 333; May's Estate, 218 Pa. 64, 67 Atl. 120; Braman v. Dowse, 12 Cush. 227; Smith v. Truslow, 84 N. Y. 660; Siegel v. Borland, 191 Ill. 107, 60 N. E. 863; Bristol Sav. Bank v. Stiger, 86 Iowa, 344, 53 N. W. 265; 2 Jones, Mortg. 7th ed. § 749; Heid v. Vreeland, 30 N. J. Eq. 591. "There can be no doubt at this day that, where the purchaser of land encumbered by a mortgage agrees to pay a particular sum as purchase money, and, on the execution of the contract of purchase, the amount of the mortgage is deducted from the consideration, and the land conveyed subject to the mortgage, that the purchaser is bound to pay the mortgage debt, whether he agreed to do so by express words or not. This obligation results necessarily from the very nature of the transaction. Having accepted the land subject to the mortgage, and kept back enough of the vendor's money to pay it, it is only common honesty that he should be required either to pay the mortgage or stand primarily liable for it. His retention of the vendor's money for the payment of the mortgage imposes upon him the duty of protecting the vendor against the mortgage debt. This must be so even according to the lowest notions of justice; for it would seem to be almost intolerably unjust to permit him to keep back the vendor's money with the understanding that he would pay the vendor's debt, and still be free from all liability for a failure to apply the money according to his promise." Heid v. Vreeland, supra.

Where lands are conveyed in the manner of the lands in controversy, subject to the existing mortgage or encumbrance, the primary fund for the satisfaction of the encumbrance is the land itself. 27 Cyc. 1342; McNaughton v. Burke, 63 Neb. 704, 89 N. W. 275; Frerking v. Thomas, 64 Neb. 193, 89 N. W. 1005; Lamka v. Donnelly, 163 Iowa, 255, 143 N. W. 869; Hadley v. Clark, 8 Idaho, 497, 69 Pac. 319.

Same—sale subject to—effect.

Applying the foregoing principles to the case at bar, it is evident that it was the intention of the parties that the amount of the mortgage should be deducted from the consideration in each conveyance, and that the person ultimately becoming the owner of these lands free from the encumbrance should assume and pay off the encumbrance; that the assumption of this indebtedness passed from the grantor to his grantee in each instance. When the lands were finally reconveyed to Turner himself, they were still charged with the encumbrance, and the assumption of payment of the encumbrance was the consideration for the payment thereof. Certainly it was not the understanding or intention of the parties that any one of the grantees, including Turner himself, should receive these lands for a nominal sum free from the encumbrance, and leave the grantor with the responsibility of paying off the indebtedness. The principal consideration of each conveyance was the assumption of the encumbrance, and it would certainly neither be just nor equitable that Turner should receive these lands back free from encumbrance. Neither should the defendants pay the encumbrance, when they are receiving nothing. When Turner repurchased the land, he received it subject to the mortgage, and reassumed the payment of the same. The application of the foregoing rules in this instance clearly does justice and equity to all persons involved in the controversy.

Same—reconveyance to mortgagor.

The judgment of the trial court therefore should be reversed and remanded, with directions to enter judgment for the defendants, Sanderson and Fox.

Per Curiam:
Adopted in whole.

Petition for rehearing denied September 17, 1918.

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ANNOTATION.

Assumption of mortgage as affected by subsequent reacquisition of title by mortgagor or an intervening grantor.

Apparently the only other decision involving the question above stated is Ingram v. Ingram (1898) 172 Ill. 287, 50 N. E. 198, in which the difference in the circumstances involved appears to justify a different conclusion than is reached in SANDERSON v. TURNER, ante, 347. In the Illinois case it appeared that a son conveyed to his father, for value, a farm, subject to a mortgage which the father, as part of the consideration for the conveyance, assumed and agreed to pay. Subsequently the father reconveyed the farm to the son as a gift, reserving to himself, however, the coal underlying the property, together with the use and possession of the property conveyed for a period of five years and so long thereafter as he should live. The deed contained no reference to the mortgage. The evidence showed that at the time of the execution of the deed the father executed other deeds conveying to other children and grandchildren real estate with a like reservation in his favor; and that at such time he recognized the mortgage on the property as an indebtedness of his own. Upon this state of facts it was held that there was nothing to release the father from the liability which he incurred by the contract and assumption of the indebtedness existing by reason of the mortgage. E. S. O.

J. P. PARKER, Plff. in Err.,
v.
STATE OF FLORIDA.

Florida Supreme Court—May 24, 1918.

(— Fla. —; 78 So. 980.)

Indictment — larceny — ownership.

1. Where a wife's property has become the subject of larceny, the ownership thereof in an indictment for such larceny can be properly laid in either the husband or the wife, where they live together,—in her because of her legal ownership, and in him because of his special ownership as custodian.

[*See note on this question beginning on page* 352.]

Same — custodian — variance.

2. Where an indictment lays the ownership of stolen property in one who is its lawful custodian and entitled to its possession, the ownership is sufficiently alleged, and it is not a fatal variance if the proof shows that the legal title to the property was in someone other than the person in whose possession it was, and who had the care and management of it.

Headnotes by BROWNE, Ch. J.

ERROR to the Circuit Court for Alachua County to review a judgment convicting defendant of larceny of a cow. *Affirmed.*

The facts are stated in the opinion of the court.

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Mr. W. S. Broome for plaintiff in error.

Messrs. Van C. Swearingen, Attorney General, and C. O. Andrews, Assistant Attorney General, for the State:

If the property stolen belonged either to the wife or the husband, or both, the indictment alleging the owner as being the husband would be supported by proof that the property was not, strictly speaking, the husband's, but that of the wife.

Kennedy v. State, 31 Fla. 428, 12 So. 858; Leslie v. State, 35 Fla. 171, 17 So. 555; Com. v. Bowden, 14 Gray, 103; People v. St. Clair, 38 Cal. 137; Com. v. Thompson, 9 Gray, 108; Houston v. State, 38 Ga. 165; White v. State, 49 Ala. 344; 17 R. C. L. § 72, p. 67; 3 Bishop, New Crim. Proc. 2d ed. § 726; 2 Wharton, Crim. Law, 11th ed. § 1179, p. 1402.

Browne, Ch. J., delivered the opinion of the court:

The plaintiff in error was convicted in the circuit court of Alachua county for larceny of a cow, and seeks reversal here on writ of error.

The sole question presented by the assignments of error is an alleged variance between the allegation in the indictment and the proof of ownership of the cow.

The indictment alleges that the cow was "of the property, goods and chattels of L. J. Knight." On the trial Knight testified in chief that he owned the cow. On cross-examination he said: "The cow was mine. It was ours, my wife and mine, common property. My land is in my wife's name, but my personal property is not. The cow was mine."

The defendant testified that Mrs. Knight, the wife of the person whom the indictment alleged was the owner of the cow, told him the cow belonged to her, and that he would have to settle with her for it. One other witness testified that he heard Mrs. Knight say in the presence of her husband that the cow belonged to her.

Section 2589 of the General Statutes of 1906 provides that "the property of the wife shall remain in care and management of the husband, but he shall not charge for his care and management, nor shall the wife be entitled to sue her husband for the rent, hire, issues, proceeds or profits of her said property."

This statute makes the husband the lawful custodian of his wife's personal property.

In the case of Kennedy v. State, 31 Fla. 428, 12 So. 858, in passing upon the same question that is raised in this case, this court said: "In consequence of this, where the wife's property has become the subject of larceny, the ownership thereof in an indictment for such larceny can be properly laid in either the husband or the wife, where they live together,—in her because of her legal ownership, and in him because of his special ownership as custodian."

Indictment—larceny—ownership.

The rule is thus laid down in 17 R. C. L. § 72: "The exact state of the title of stolen property is of no particular concern of the thief, except that it must have been in someone else; hence evidence of possession is ordinarily sufficient proof of ownership; and this is true although the one in possession may have held the property as bailee, trustee, or otherwise, having only a special interest, and not a general ownership of the property. Therefore ownership is sufficiently proven where it is shown that the person alleged to be the owner had a special property in the stolen article, or that he held it in trust. As it is not necessary to show in detail the exact state of the title, general evidence of property is admissible, and is as sufficient in criminal as in civil cases."

In the case of State v. Tillett, 173 Ind. 133, 140 Am. St. Rep. 246, 89 N. E. 589, 20 Ann. Cas. 1262, it was said: "It is well settled: (1) That it is proper in a prosecution for larceny to describe the property as that of the real owner, or of the person in possession; (2) it may be alleged to be the property of one who is in possession as bailee, agent, trustee, executor, or administrator; (3) such bailee, agent, trustee, executor,

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or administrator may be alleged to be the owner thereof by name, without describing his trust character; that is, the property may be described as his individually; (4) evidence of possession is sufficient proof of ownership under such an allegation."

Where an indictment lays the ownership of stolen property in one who is its lawful custodian and entitled to its possession, the ownership is sufficiently alleged, and it is not a fatal variance if the proof shows that the legal title to the property was in someone other than the person in whose possession it was, and who had the care and management of it.

Same—custodian—variance.

We have discussed the assignments, on the theory of the plaintiff in error, but we do not think that the testimony established that Mrs. Knight was the owner of the cow. In the most favorable aspect for the defendant below there was a conflict in the testimony, and this it was the province of the jury to pass upon.

Finding no error, and the verdict being warranted and supported by the evidence, the judgment is affirmed.

Taylor, Whitfield, Ellis, and West, JJ., concur.

ANNOTATION.

Should ownership of property be laid in the husband or wife in an indictment for larceny.

I. At common law, 352.
II. Effect of married women's separate property acts, 352.
III. Rule where husband and wife are living apart, 354.
IV. Rule as to community property, 354.
V. Statutory regulation of allegations, 355.

I. At common law.

At common law, where the wife's legal entity became merged in her husband, and her property, on reduction to possession, became that of the husband, it was held that in an indictment for the larceny of such property, the ownership was properly laid in the husband. Ellis v. State (1884) 76 Ala. 90; Hughes v. Com. (1867) 17 Gratt. (Va.) 565, 94 Am. Dec. 498.

And in the following cases the ownership of the property alleged to have been stolen was held to be properly laid in the husband; State v. Pitts (1879) 12 S. C. 180, 32 Am. Rep. 508; Pratt v. State (1880) 35 Ohio St. 514, 35 Am. Rep. 617 (where wearing apparel of the wife had been stolen); Reg. v. Sallows (1846) 2 Cox, C. C. (Eng.) 63 (where a purse found by a married woman was stolen from her before she reached home); Rex v. Roberts (1839) 7 Car. & P. (Eng.) 486 (where a note was stolen which a married woman had received for property which she had sold for her father); United States v. Murphy (1836) 4 Cranch, C. C. 681, Fed. Cas. No. 15,838 (where goods were stolen from a millinery store carried on by a wife, not for her separate use).

II. Effect of married women's separate property acts.

Since the enactment of provisions empowering married women to acquire separate property it has been held in some cases that an indictment for larceny of her separate property must lay the ownership in her, and that it cannot be laid in the husband. Rollins v. State (1893) 98 Ala. 79, 13 So. 280 (decided since the adoption of Code 1886, § 2341); Johnson v. State (1893) — Ala. —, 13 So. 377, subsequent appeal in (1894) 100 Ala. 55, 14 So. 627 (where corn was stolen which was raised by the husband on land belonging to the wife); Stevens v. State (1873) 44 Ind. 469 (where wife's personalty was taken); Com. v. Martin (1853) 5 Clark (Pa.) 245 (wife's spectacles stolen).

And in Rex v. Murray [1906] 2 K. B. (Eng.) 385, 3 B. R. C. 775, 75 L. J.

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K. B. N. S. 593, 70 J. P. 295, 95 L. T. N. S. 295, 22 Times L. R. 596, 6 Ann. Cas. 161, an indictment for larceny of goods in which a wife had acquired a separate property under the Married Woman's Property Act was held invalid where it laid the property in the husband, and the court stated that the fact that the goods were in his house was not sufficient to justify laying the property in him.

And in State v. Pitts (1879) 12 S. C. 180, 32 Am. Rep. 508, it was held that, under the provisions of the Constitution authorizing married women to acquire separate property, a wife might acquire property from her husband, and that a conviction for larceny of her separate property could not be had under an indictment which laid ownership in the husband; it was held, however, that a separate property in the wife was not established by the fact that the wife had the use and enjoyment of clothing or other personal property, but that the question whether she had acquired such property was for the jury.

Notwithstanding the enactment of married women's property acts, empowering them to acquire separate property, where the husband and wife were living together, and the husband had possession of the property, allegations in indictments for larceny, laying the property in the husband, have been held valid.

This conclusion was reached in the Alabama cases decided before the passage of the Act of 1887, by which the rights and liabilities of husband and wife were defined, the courts holding that the husband, as trustee, had an interest in the wife's property. Robinson v. State (1887) 84 Ala. 434, 4 So. 774 (wife's separate property taken from husband's dwelling); Ellis v. State (1884) 76 Ala. 90 (animals in husband's possession in which the wife had a separate estate); Davis v. State (1850) 17 Ala. 415 (buggy which was wife's separate estate taken from husband's possession); Lavender v. State (1877) 60 Ala. 60 (hog, property of married woman living with her husband).

And it will be noticed that in the reported case (PARKER v. STATE, ante, 350) following the decision in Kennedy v. State (1893) 31 Fla. 428, 12 So. 858, it was held that the ownership of the wife's property could be laid either in the husband or wife, where they were living together; in her, because of her legal ownership, and in him, because of his special ownership as custodian.

And in Petre v. State (1871) 35 N. J. L. 64, it was held that when the property of the wife is, in the ordinary way, in the use of the husband and his family, such property, in an indictment for larceny, may be laid either in the husband or in the wife; and to the same effect are State v. Wincroft (1877) 76 N. C. 38, and State v. Matthews (1877) 76 N. C. 41.

And the ownership of wheat grown on land owned by a married woman and stolen from her barn has been held properly laid in her husband where he usually received, sold, and disposed of the proceeds of the farm for his own use, with her consent, and she did not claim any ownership over the property in question. State v. Jackson (1879) Houst. Crim. Rep. (Del.) 561.

And allegations in an indictment that a certain person was the owner of the property stolen were held sustained, in Thomas v. State (1906) 125 Ga. 286, 54 S. E. 182, by proof that such person was a married man, living in the house with his wife, although it appeared that the property taken was the wife's separate property.

And in Jackson v. State (1917) — Ga. App. —, 94 S. E. 55, an indictment laying the ownership of the property stolen in the husband was held not invalid because the ownership was not laid in the wife; and the evidence was held to sustain the allegation as to ownership, there being testimony that the wife owned the plantation from which the property was stolen, and also the property, but that her husband had charge of the place and property as her agent.

In State v. Hays (1863) 21 Ind. 288, it was held that the wearing apparel

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of a married woman, furnished by her husband as a marital duty, did not become her separate property, but remained his; and that the ownership should be laid as his in an indictment for its larceny.

And it has been held that the ownership of wearing apparel of a wife, furnished by her husband, or purchased with money furnished by him, was properly laid in the husband, as such property was not embraced within the terms of a statute providing that any personal property belonging to a woman at her marriage, or which might have come to her during coverture, should be her separate property, but that the act should not affect the title of any husband to any personal property reduced to his possession with the express assent of the wife, but that her personal property should not be deemed to have been reduced to possession by the husband by his use, occupancy, care, or protection thereof. Pratt v. State (1880) 35 Ohio St. 514, 35 Am. Rep. 617. It was held, however, that wearing apparel purchased by the wife with her separate money could not be laid as the property of the husband, and it was decided that the mere fact that the property was stolen from the family residence did not authorize finding that the property was in the husband, as charged.

In Com. v. Williams (1856) 7 Gray (Mass.) 337, Stat. 1855, chap. 304, enabling married women to acquire money and property in their own right, was held not to change the presumption that money in the possession of a married woman, in the absence of proof, is the property of the husband, and an indictment for stealing money from a married woman, which laid ownership in the husband, was sustained.

And in State v. Dredden (1898) 1 Marv. (Del.) 522, 41 Atl. 925, § 3, chap. 133, p. 798, of the Revised Code, was held not to empower a wife to hold personal property unless it was acquired from one other than her husband; and an indictment alleging that property stolen was that of the husband was held valid notwithstanding a claim that the wife was a joint owner.

III. Rule where husband and wife are living apart.

In the following cases, where the husband and wife were living apart, allegations, in indictments for larceny, of ownership in the wife of the property specified, were held valid: Le Cointe v. United States (1895) 7 App. D. C. 16 (property acquired by a married woman otherwise than through her husband); United States v. Parsons (1836) 4 Cranch, C. C. 726, Fed. Cas. No. 16,001 (goods belonging to husband, but in possession of wife, who was keeping house); Ware v. State (1877) 2 Tex. App. 547 (where community property was stolen from wife, who had been abandoned by husband).

But it has been held that money furnished by a husband to be expended for the maintenance of his wife, which he had undertaken to provide while she was living separate from him, might properly be laid in the husband. People v. McCarty (1887) 5 Utah, 280, 17 Pac. 734.

And in Com. v. Cullins (1804) 1 Mass. 116, although the husband had been absent six years, it was held that an indictment for larceny of goods from the wife must allege that they were his property.

And in Reg. v. Whitehead (1860) 1 Can. & P. (Eng.) 429, it was held that the ownership of property could not be laid in the wife, although her husband had been convicted of a felony and was in jail at the time property formerly belonging to him was taken.

IV. Rule as to community property.

It has been held that an indictment for the larceny of community property should allege ownership in the husband, and that no conviction could be had under an indictment laying ownership in the wife. Merriweather v. State (1876) 33 Tex. 790.

And in Wilson v. State (1877) 3 Tex. App. 206, where the ownership, in an indictment charging the larceny of a steer, was laid in a married woman, there was held error in excluding evi-

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dence that the steer was community property by reason of its being the increase of the wife's stock, there being testimony from which it might have been found that the steer was in existence prior to the adoption of the Constitution of 1869, which made the increase of a wife's stock her separate property, the court stating that, prior to that time, such increase was the community property of the husband and wife. It was further stated that if the indictment had alleged that the property belonged to the husband, and the proof had shown it to be either the separate property of the wife, or the community property of the husband and wife, the variance would not have been fatal, as, during the marriage, the husband has the entire management of the separate property of the wife.

And in Louisiana it has been held that since all property bought during the marriage by the wife is presumed to belong to the community, and since the husband is the head of the community, an indictment for the larceny of such property should allege ownership in the husband. State v. Gaffery (1857) 12 La. Ann. 265.

It was held, however, that the presumption that property bought by the wife during marriage was community property might be rebutted by showing that the wife was separate in property from her husband, or that the property was bought in her name with her funds, or that the husband had transferred the property to his wife, to replace her paraphernal effects sold by him.

In People v. Swalm (1889) 80 Cal. 46, 13 Am. St. Rep. 96, 22 Pac. 67, 8 Am. Crim. Rep. 477, it was held that property bought upon the husband's credit, which did not appear to have been paid for by the separate property of either husband or wife, was community property, the title to which was properly laid in the husband.

It has been held that an indictment for the larceny of community property, stolen from a wife while she was taking it to her husband, properly stated that the theft was from the wife. Miles v. State (1907) 51 Tex. Crim. Rep. 587, 103 S. W. 854.

See also the case of Ware v. State (1877) 2 Tex. App. 547, under preceding subdivision.

V. Statutory regulation of allegations.

In some states statutes have been enacted authorizing the ownership of property, in indictments for larceny, to be laid either in husband or wife.

Thus, under a statute providing that, in case of larceny of the personal property of a married woman, the ownership may be alleged to be in the husband or wife, an indictment may lay the ownership in the husband, where the property was under his management and control, although it was the wife's separate property. Alexander v. State (1886) 9 Tex. App. 48; Holmes v. State (1897) — Tex. Crim. Rep. —, 42 S. W. 979.

And under this statute, in an indictment for the larceny of a married woman's property, the ownership may be laid in her name. Hames v. State (1904) 46 Tex. Crim. Rep. 562, 81 S. W. 708.

And under this statute it was held that ownership of a ring, which was the separate property of a married woman, might properly be laid in her name, in an indictment for larceny, notwithstanding another statute providing that, during the marital relation, the wife's separate property should be under the sole management of her husband, and although the ring was, at the time it was taken, in her husband's collar box in their room. Kauffman v. State (1908) 53 Tex. Crim. Rep. 209, 109 S. W. 172.

And a conviction has been upheld under an indictment alleging ownership of the property stolen in the husband, in whose exclusive control and management it was, although the proof showed that it belonged to the wife, where a statute provided that it was not necessary, in order to constitute theft, that the possession and ownership of the property should be in the same person at the time of taking, and that possession of the person unlawfully deprived of property was constituted by the actual control, care,

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or management of it, whether the same was lawful or not. Burt v. State (1880) 7 Tex. App. 578.

And an information for larceny, alleging that the property was that of a certain woman, was held sufficient, although she was, at the time, a married woman, and the property was bought with the money of her husband, where a statute provided that "when an offense involves the commission of, or the attempt to commit, a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured or intended to be injured is not material." People v. Watson (1887) 72 Cal. 402, 14 Pac. 97.

And an indictment for larceny from the wife of money earned by the husband has been held valid, although it stated that the money was the property of the wife, where a statute provided that, "in the prosecution of offenses in relation to or affecting real or personal estate, it shall be sufficient, and shall not be deemed a variance if it is proved on the trial, that, at the time when the offense was committed, either the actual or constructive possession, or the general or special property in the whole or any part of such real or personal estate, was in the person or community alleged to be the owner thereof." Com. v. McLaughlin (1869) 103 Mass. 435.

In a case, however, where an indictment charged the larceny of wearing apparel which was the property of a married woman, the common-law rule requiring the laying of the ownership of property in the husband was held not changed by a statute similar to that involved in the preceding case, the court holding that the statute was not intended to dispense with the necessity of stating the name of the owner of the property stolen, nor to enable any person to be such owner who was not capable of being such at common law. Hughes v. Com. (1867) 17 Gratt. (Va.) 565, 94 Am. Dec. 489.

J. T. W.

J. B. GRAY, Plff. in Err.,
v.
W. A. WHITLA.

Oklahoma Supreme Court—July 30, 1918.

(— Okla. —, 174 Pac. 239.)

Landlord and tenant — fraudulent representations — estoppel.

1. Fraudulent representations by the landlord as to his ownership of the premises preclude him from relying on the estoppel of defendant to deny his title.

[*See note on this question beginning on page* 359.]

Same — ouster — attornment.

2. Where a lessee, to prevent being actually expelled from the demised premises, yields the possession thereof and attorns, in good faith, to one having a paramount title to his lessor, and a right to immediate possession, it is equivalent to an actual ouster.

Headnotes by Hooker, C.

ERROR to the District Court for Dewey County to review a judgment in favor of defendant in an action brought to recover possession of certain property. *Affirmed.*

The facts are stated in the Commissioner's opinion.

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Mr. Milton Clark, for plaintiff in error:

Defendant could not question the authority of plaintiff to lease the premises, under the well-settled rule of law that a tenant is estopped from denying the title of his landlord.

McDonald v. Stiles, 7 Okla. 327, 54 Pac. 487; Anderson v. Ferguson, 12 Okla. 307, 71 Pac. 225; Brown v. Hartshorn, 12 Okla. 121, 69 Pac. 1049; Hackney v. McKee, 12 Okla. 401, 75 Pac. 535; Olds v. Conger, 1 Okla. 232, 32 Pac. 337; Bilby v. Stuart, 39 Okla. 451, 135 Pac. 931; Hagar v. Wikoff, 2 Okla. 580, 39 Pac. 281; Blight v. Rochester, 7 Wheat. 535, 5 L. ed. 516; Lucas v. Brooks, 18 Wall. 436, 21 L. ed. 779; Shy v. Brockhouse, 7 Okla. 35, 54 Pac. 306; Pettigrew v. Mills, 36 Kan. 745, 14 Pac. 170; Oliver v. Gary, 42 Kan. 623, 22 Pac. 733; Wallbrecht v. Blush, 43 Colo. 329, 95 Pac. 927; Byington v. Sacramento Valley West Side Canal Co. 170 Cal. 124, 148 Pac. 791; Larney v. Aldridge, 31 Okla. 447, 122 Pac. 151; Purcell v. Barnett, 30 Okla. 605, 121 Pac. 231; Welchi v. Johnson, 27 Okla. 518, 112 Pac. 989; Fry v. Boman, 67 Kan. 531, 73 Pac. 61.

Mr. W. P. Hickok, for defendant in error:

If the relationship of landlord and tenant was induced by fraud, duress, misrepresentation, or mistake, the tenant is not estopped to deny what he would not have admitted in the absence of fraud or mistake.

24 Cyc. 940(b).

The estoppel is terminated by the eviction of the tenant by title paramount, or by acts amounting to an ouster, which authorizes the tenant to attorn to the holder of the paramount title as if actually evicted.

24 Cyc. 918 (c); Nashua Light, Heat & P. Co. v. Francestown Soapstone Co. 74 N. H. 511, 18 L.R.A.(N.S.) 396, 69 Atl. 883.

Evidence of title may be given as going to the right of possession.

24 Cyc. 1446 (b); Welchi v. Johnson, 27 Okla. 518, 112 Pac. 989; Oklahoma City v. Hill, 4 Okla. 521, 46 Pac. 568; Conaway v. Gore, 22 Kan. 216.

Hooker, C., filed the following opinion:

This action of forcible detainer was commenced in the justice's court of Dewey county, and an appeal taken from the judgment of that court to the district court, where trial was had, and judgment rendered against the plaintiff in error, to reverse which an appeal is had here. Upon the trial in the district court, the court made findings of fact and conclusions of law, the substantial part of which is as follows:

"(1) That plaintiff in error was in possession of the premises in controversy, and had been in possession of same for about two years when he leased the same to the defendant in error on the 1st day of May, 1916, for a period of four months at an agreed price of $4 per month.

"(2) That the estate of plaintiff in error's father claimed to be the owner of the house, and that plaintiff in error was placed in possession of the premises by the administrator of said estate.

"(3) That plaintiff in error himself was claiming an interest in the house as an heir of his father.

"(4) That one Alvin T. Gray was the owner of the premises, and held the legal title thereto under a warranty deed.

"(5) That neither plaintiff in error nor the administrator of his father's estate had any authority from the owner of said premises to enter upon the premises, or to lease the same, or to collect the rentals thereon.

"(6) That the defendant in error went into possession of the premises in controversy under his rental contract with plaintiff in error, and paid the rentals thereon for the full period of four months to plaintiff in error, and thereafter attorned to the said Alvin T. Gray without surrendering possession of the premises, but while still occupying same, and subsequently paid the rent thereof to the said Alvin T. Gray.

"(7) That, after taking possession of the premises under his rent contract with plaintiff in error, defendant in error was informed that plaintiff in error had no authority to lease said premises.

"(8) That, after taking possession of the premises under his rent

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contract with plaintiff in error, defendant in error discovered that the title to the premises was in Alvin T. Gray.

"(9) That defendant in error would not have rented the premises from plaintiff in error had he (defendant in error) known the true facts as to plaintiff in error's authority over said premises.

"(10) That the representations of plaintiff in error, made to defendant in error in leasing said premises to defendant in error, amounted to fraud on the rights of defendant in error by plaintiff in error.

"(11) That defendant in error, in order to avoid a double liability and eviction by the true owner from the premises, paid the rent to Alvin T. Gray after September 1, 1916."

It is asserted by the plaintiff in error that the trial court erred in the conclusions of law drawn from the facts as found by him to exist, for that, under the law as well established in this jurisdiction, a tenant is estopped to dispute the title of his landlord, and that, under the facts as found by the trial court, the tenant in this case is not relieved from the operation of estoppel. Many authorities are cited by the plaintiff in error to the effect that the tenant cannot deny the title of his landlord. This is the general rule, and the same is well established by the authorities of this jurisdiction; but there are many exceptions and qualifications to the rule, which are of as much importance as the rule itself, and must be observed in the administration of justice between the landlord and the tenant. In the findings of fact as made by the trial court, the court found that the representations of the plaintiff in error, made to the defendant in error in leasing said premises to the defendant in error, amounted to fraud on the rights of the defendant in error by plaintiff in error. It has been held that "fraudulent representations by the landlord as to his ownership of the premises preclude him from relying on the estoppel of the tenant to deny his title," citing Gleim v. Rise, 6 Watts, p. 44; Hammers v. Hanrick, 69 Tex. 412, 7 S. W. 345; Bryan v. Hanrick, — Tex. —, 8 S. W. 282. And in 24 Cyc. 940, it is said: "Inasmuch as the estoppel to deny title is based on an admission of title shown by the tenant in accepting or retaining possession as tenant, it follows that, if the relationship of landlord and tenant was induced by fraud, duress, misrepresentation, or mistake, the tenant is not estopped to deny what he would not have admitted in the absence of fraud or mistake."

Landlord and tenant—fraudulent representations—estoppel.

See authorities cited in the note.

In 16 R. C. L. p. 658, it is said: "The application of the principle that a tenant is estopped to deny his landlord's title is restricted to cases in which the lease has been fairly obtained, and a lease obtained through fraud and misrepresentation will not prevent the lessee from contesting the title of the lessor. This is a well-settled doctrine, resting on the most satisfactory grounds. The relation of landlord and tenant arises out of contract, and this, like other contracts, is vitiated by fraud, overreaching, or imposition. Therefore, if fraud is used to induce the tenant to accept the lease, no estoppel arises."

See authorities cited in note.

The court in his findings of fact said "that the defendant in error, in order to avoid a double liability and eviction by the true owner from the premises, paid the rent to Alvin T. Gray, after September 1, 1916."

In 16 R. C. L. p. 655, the view is expressed as follows: "And, according to the better view, where a lessee, to prevent being actually expelled from the demised premises, yields the possession thereof and attorns, in good faith, to one having a paramount title to his lessor, and a right to immediate possession, it is equivalent to an actual ouster."

Same—ouster—attornment.

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And in 24 Cyc. 1133, the author says: "However, since actual ouster is not necessary in order to constitute an eviction, if a lessee, to prevent being actually expelled from the demised premises, yields possession thereof, and attorns in good faith to one who has a title paramount to that of the lessee and his lessor, and also a right to immediate possession, this is equivalent to an actual ouster."

And in Taylor on Landlord & Tenant, vol. 2, p. 327, it is said: "And while the tenant cannot, after a voluntary attornment to a hostile or paramount title, set this up in defense when sued by the lessor, he may, if threatened with expulsion by the holder of such title, attorn thereto, without an actual expulsion from or surrender of the premises, or take a conveyance thereof, and plead this as a constructive eviction in answer to the lessor's action."

And in 24 Cyc. 947, the author says: "A tenant may dispute the title as against the original landlord, without surrender of possession, where it has been legally extinguished, or determined, so that it no longer exists, or where the tenant has been actually or constructively evicted."

The evidence in this case not being before us, we are unable to say whether the trial court was justified in making these findings, but, accepting these findings as true, we are of the opinion that he has drawn the correct conclusions of law therefrom, and that the judgment in favor of the defendant in error must be affirmed.

Per Curiam:
Adopted in whole.

ANNOTATION.

Fraud, misrepresentation, or mistake as affecting estoppel of tenant to deny landlord's title.

I. Fraud, 359.
II. Agreement in fraud of original landlord, 361.
III. Duress, 362.
IV. Mistake:
a. In general, 362.
IV.—continued.
b. When put in possession by landlord, 363.
c. Successors of landlord, 364.
V. Miscellaneous, 364.

I. Fraud.

One who has been induced by fraud to assume the position of tenant is not estopped to deny his landlord's title. Irwin v. Coleman (1901) 173 Ala. 175, 55 So. 492; Sandlin v. Anders (1914) 187 Ala. 473, 65 So. 376 (obiter); Shaw v. Lacy (1917) — Ala. —, 74 So. 933; Johnson v. Chely (1872) 43 Cal. 299; Simon Newman Co. v. Lassing (1903) 141 Cal. 174, 74 Pac. 761; Anderson v. Smith (1872) 68 Ill. 126; Young v. Heffernan (1896) 67 Ill. App. 354; Petterson v. Sweet (1883) 13 Ill. App. 255; Lively v. Ball (1841) 2 B. Mon. (Ky.) 53; Wiggin v. Wiggin (1878) 58 N. H. 235; Allaire v. Whitney (1841) 1 Hill (N. Y.) 484; McLaurin v. Williams (1918) 175 N. C. 291, 95 S. E. 559; Gleim v. Rise (1837) 6 Watts (Pa.) 44; Robins v. Kitchen (1839) 8 Watts (Pa.) 390; Hockenbury v. Snyder (1841) 2 Watts & S. (Pa.) 240; Baskin v. Seechrist (1847) 6 Pa. 147; Evans v. Bidwell (1874) 76 Pa. 497; Goldsmith v. Smith (1859) 3 Phila. (Pa.) 360; Givens v. Mullinax (1851) 4 Rich. L. (S. C.) 590, 55 Am. Dec. 706; Shultz v. Elliott (1850) 11 Humph. (Tenn.) 183; Allison v. Casey (1874) 4 Baxt. (Tenn.) 587; Gallagher v. Bennett (1873) 38 Tex. 291; Hillock v. Sutton (1893) 2 Ont. Rep. 548. The court seemed to hold the same principle applicable in Cross v. Freeman (1898) 19 Tex. Civ. App. 428, 47 S. W. 473.

"When a man is in the peaceable occupation of surveyed land, his possession is a right against all but the

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owner of a title to that land. If one who has no right comes and induces him in possession to become his tenant, it must be by some misrepresentation of fact or law, or both, or by some unfair combination between him and the tenant; and it will require little proof of fraud or threats of imbecility on one side, and some undue influence on the other, to dissolve this relation of landlord and tenant between them, and put him who was in possession into precisely the situation in which he was before he was induced to sign a lease." Hockenbury v. Snyder (1841) 2 Watts & S. (Pa.) 240.

One in possession is not estopped to invoke paramount title by an acknowledgment of title in a third person, obtained by stratagem or unconscientious and deceitful conduct. Givens v. Mullinax (1851) 4 Rich. L. (S. C.) 590, 55 Am. Dec. 706.

An ignorant person in possession, who is induced by one aware of her rights to pay him rent, is not estopped from showing her rights. Irwin v. Coleman (1901) 173 Ala. 175, 55 So. 492.

In unlawful detainer, a lease to a possessor claiming title does not estop the lessee from disputing the lessor's title, by showing that he was induced to sign the lease by false or fraudulent representations. Davidson v. Ellmaker (1890) 84 Cal. 21, 23 Pac. 1026.

In Miller v. M'Brier (1826) 14 Serg. & R. (Pa.) 382, it was stated that a tenant may impeach his landlord's title whenever he can show that he was induced to accept the lease by misrepresentation and fraud; but the court did not think the document in question was a lease.

Where one, in accepting a lease, does so under fraudulent representations that it covers certain property, and it only covers a part of it, and he leases the part not covered from the real owner, he is entitled to deduct this from the amount of the rent. Ailaire v. Whitney (1841) 1 Hill (N. Y.) 484.

It will be seen that it was held in the reported case (GRAY v. WHITLA, ante, 356) that one leasing and taking possession from a landlord may, in forcible detainer, deny the landlord's title, when his representations as to his right to lease the premises amounted to fraud on the tenant's rights.

In Gallagher v. Bennett (1873) 38 Tex. 291, it was held that it was error not to permit the tenant to compare a title purchased by her with that of the landlord, where the tenant claimed that there was fraud in the execution of the lease under which she entered, in that the landlord represented himself as having good title when he had not, and offered to show, in an action by the landlord for rent and possession, that, having been threatened with eviction by a third party, and the landlord being at the time insolvent, and unable to indemnify her if she continued to pay rent to him, she had the third party's title examined by her counsel, and purchased it.

On the other hand, it was held in Higgins v. Turner (1895) 61 Mo. 249, that, when the tenant was not in possession at the time the lease was given, he was estopped to show that the lease was unfairly or fraudulently obtained. (But it was also held that the tenant was wrongly prevented from showing that he had acquired, during the term of the lease, the landlord's title, by purchasing a tax title.)

It has been held, in one case, that an action for unlawful detainer cannot be defended on the grounds that there was a fraud exercised in obtaining the lease, and that the landlord pretended to have legal title when, in fact, he had no such title. Simons v. Marshall (1852) 3 G. Greene (Iowa) 502, where it does not affirmatively appear whether the tenant was put into possession by the landlord or not.

There is some difference of opinion in the cases as to what fraud will bar the estoppel.

Where a mortgagee, by actual or constructive fraud, acquires the mortgagor's title, and reduces him to the position of a tenant, such mortgagor is not prevented from seeking redemption against the fraudulent purpose because he has attorned to the mort-

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gagee. In such case, the tenancy itself is a fruit of the fraud, and cannot survive its annihilation. Shaw v. Lacy (1917) — Ala. —, 74 So. 933.

In Hall v. Benner (1830) 1 Penr. & W. (Pa.) 402, 21 Am. Dec. 394, where the purchaser at foreclosure sale, the day before he received the sheriff's deed, made a lease to the mortgagor, who was in possession, it was held that the tenant was not estopped to deny the landlord's title, as he had no title; but the real ground of the decision was that there was unfairness and suggestion of falsehood in procuring the lease. See also Brown v. Dysinger (1829) 1 Rawle (Pa.) 408, infra, "Duress."

In Jenckes v. Cook (1870) 9 R. I. 520, it was held that where one takes title to land under an agreement as to redemption with the real owner, and makes a lease to the real owner, the real owner may show the actual contract. The court stated that the lease was not set up as an estoppel.

On the other hand, it was held in Forgy v. Harvey (1898) 151 Ind. 507, 51 N. E. 1066, that the fraudulent omission from a lease to a former mortgagor of a redemption or purchase clause favorable to the tenant would not enable the tenant to resist an action for the recovery of land, on the ground that the lease was obtained by fraud while he was in possession.

In Simon Newman Co. v. Lassing (1903) 141 Cal. 174, 74 Pac. 761, it was held, in unlawful detainer, that the defendant might show that he made a deed to the plaintiff, as well as signed the lease in question, by reason of the fraudulent representations of the plaintiff.

But the contrary was held in Williams v. Waite (1891) 2 S. D. 210, 39 Am. St. Rep. 768, 49 N. W. 209, holding that, while the tenant might show, if he could, that the lease itself was procured through fraud and duress, evidence as to fraud and duress in procuring the deed would not affect the validity of the lease, but would simply be an impeachment of the landlord's title.

The fraud which will bar the estoppel must be a fraud practised upon the tenant, and to his prejudice, and not something to the prejudice of other persons. Smith v. McCurdy (1859) 3 Phila. (Pa.) 488.

Thus, a tenant who has obtained possession under a lease cannot show that the landlord obtained his possession by fraud and disseisin, the tenant having enjoyed the possession during the whole of the term. Boyer v. Smith (1856) 5 Watts (Pa.) 55, where there was no fraud in the lease itself.

So, in an action for rent, the tenant cannot counterclaim for making improvements because the lessor falsely represented himself to be the owner in fee, when there has been no eviction. Lynch v. Sauer (1896) 16 Misc. 1, 37 N. Y. Supp. 666.

In an action to try title to recover possession of a house and lot, it was held to be no error to sustain exceptions to the plea of the defendants that they had been induced to acknowledge tenancy by the false and fraudulent representations of the plaintiff that he was the owner of the property, when in fact he was not. The court stated that the defendants had not alleged that they had been deprived of the enjoyment of the property by any adverse claimant, and that the question of title was wholly immaterial. Lamb v. Beaumont Temperance Hall Co. (1893) 2 Tex. Civ. App. 289, 21 S. W. 713.

One in possession, having no title, who leased from a certain person and continued to hold under that person for the statutory period required to make a title by adverse possession, cannot object that he was induced to lease in the first place by fraud. South v. Marcum (1893) 15 Ky. L. Rep. 339, 22 S. W. 844.

The mere fact that the tenant has a better title than his landlord does not of itself raise the presumption that the lease was a fraud or accepted by mistake. Ward v. Philadelphia (1886) 8 Sadler (Pa.) 233, 6 Atl. 268.

II. Agreement in fraud of original landlord.

A tenant in possession under one landlord, who makes an agreement

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with another person to attorn to him, may afterwards, on an action of forcible entry and detainer by such other person, show that the agreement was corrupt, and for the purpose of unlawfully dispossessing the original landlord. Bryne v. Beeson (1843) 1 Dougl. (Mich.) 179.

So, where the jury found such an agreement, and the defendant in an action for the possession by the second landlord was the successor of the tenant. Payne v. Vandever (1856) 17 B. Mon. (Ky.) 14.

III. Duress.

Where a tenant has entered under a landlord and, while he is so in possession, a third party comes on the land with a gun and threatens to put him off unless he will take a lease from him, one claiming under the tenant may show these facts in defense of an action of ejectment by such third party. Hamilton v. Marsden (1818) 6 Binn. (Pa.) 45.

One who purchases land as agent or trustee for another in possession, and then by duress compels him to execute a lease, cannot claim that the lessee is estopped to deny his title. Brown v. Dysinger (1829) 1 Rawle (Pa.) 408.

Where the owner of land in possession is, by force and threats of another, made to give a deed and take a lease, he is not estopped to deny such other's title. Harvin v. Blackman (1901) 108 La. 426, 32 So. 452.

A person who was carried on land and left there may show this to prove that he was not the tenant of the person carrying him on the land. Foust v. Trice (1860) 53 N. C. (8 Jones, L.) 290.

IV. Mistake.

a. In general.

One already in possession, who acknowledges his tenancy to a landlord, is not estopped to show that he acknowledged such tenancy by a mistake as to title. Chettle v. Pound (1701) 1 Ld. Raym. 746, 91 Eng. Reprint, 1400 (debt for rent); Gregory v. Doidge (1826) 3 Bing. 474, 130 Eng. Reprint, 596, 11 J. B. Moore, 394, 4 L. J. C. P. 159 (replevin); Cornish v. Searell (1828) 8 Barn. & C. 471, 108 Eng. Reprint, 1118, 1 Moody & R. 703, 6 L. J. K. B. 254 (obiter); Rogers v. Pitcher (1815) 6 Taunt. 202, 128 Eng. Reprint, 1012, 1 Marsh. 541 (replevin); Doe ex dem. Shelton v. Carrol (1849) 16 Ala. 148 (ejectment); Cain v. Gimon (1860) 36 Ala. 168 (after lease expired); McDevitt v. Sullivan (1857) 8 Cal. 592; Pacific Mut. L. Ins. Co. v. Stroup (1883) 63 Cal. 150; Michigan C. R. Co. v. Bullard (1899) 120 Mich. 416, 79 N. W. 635; Shearer v. Winston (1857) 33 Miss. 149; Jackson ex dem. Viely v. Cuerden (1801) 2 Johns. Cas. (N. Y.) 353; Hammons v. McClure (1886) 85 Tenn. 65, 2 S. W. 37; Reg. v. Hall (1898) 6 Can. Exch. 145.

If R, in possession as tenant of A, pays rent to B, and B puts an end to the tenancy by notice to quit, and brings ejectment, R may defend that his term under A still continues. Accidental Death Ins. Co. v. Mackenzie (1861) 9 Week. Rep. (Eng.) 783, 5 L. T. N. S. 20, citing 1 Co. Litt. 47b.

Where a tenant was put in possession by a mortgagor, and afterwards paid rent to a second mortgagee, and thereafter paid rent to a first mortgagee, he was entitled to show that he paid rent to the second mortgagee under a mistake. Doe ex dem. Higginbotham v. Barton (1840) 11 Ad. & El. 307, 113 Eng. Reprint, 432, 3 Perry & D. 194, 9 L. J. Q. B. N. S. 57, 4 Jur. 432.

Where a debtor has a tenant in possession of the land upon which the creditor levies, and the tenant promises to pay rent to the creditor upon condition of his having obtained title to the land, the creditor, if the levy proves void, may not put out the tenant of the debtor upon the force of the acknowledgment of tenancy. Swift v. Dean (1839) 11 Vt. 323, 34 Am. Dec. 693.

On the other hand it was held that a school district, in an action brought against it by a landlord of debt for rent, cannot avoid its estoppel by showing that, when in possession, it signed the lease on the advice of its counsel, who would not have advised

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it to do so had he known all the facts about the title in favor of the ownership of the school district. School Dist. v. Long (1887) 7 Sadler (Pa.) 337, 10 Atl. 769.

An owner who acts freely, with knowledge of his rights, cannot escape the estoppel. Thus, where a tenant who was the owner of a building on the property, with the right to remove it, signed a lease with his landlord's successor inconsistent with such right, he could not claim that he did so under mistake of law and therefore was not estopped. Allen v. Migliavacca Realty Co. (1913) 74 Wash. 347, 133 Pac. 580, where the court said: "We have been cited to no authority, and a diligent search convinces us there is none, which holds that when one, knowing the facts and knowing his rights, waives his obvious remedy by a solemnly executed lease, under the mistaken supposition that he can invoke another remedy, will be relieved from the obligations and estoppels of his lease by reason of such mistake."

And it has been held that, in forcible entry and detainer, one in possession when he made the contract of tenancy is estopped to deny title, except in case of fraud. Locke v. Frasher (1884) 79 Va. 409; Mason v. Wolff (1870) 40 Cal. 246; Knowles v. Murphy (1895) 107 Cal. 107, 40 Pac. 111.

Some of the cases lay down the rule, generally, that a person who was in possession is not estopped, where there has been a mistake or misrepresentation (Meeker v. Kaelin (1909) 173 Fed. 216, where term had expired); or fraud, mistake, or ignorance (Blankenship v. Blackwell (1899) 124 Ala. 355, 82 Am. St. Rep. 175, 27 So. 551); or mistake or fraud (Smith v. Zwicker (1916) 136 Tenn. 77, 188 S. W. 595; Alderson v. Miller (1859) 15 Gratt. (Va.) 279).

A tenant is not estopped, when he has been induced to take a lease from a landlord by his fraud or misrepresentation, or under a misapprehension or mistake. Franklin v. Hurlbert (1882) 1 Tex. App. Civ. Cas. (White & W.) 466.

There are some cases which seem to proceed upon the theory that no estoppel arises against one already in possession, who acknowledges tenancy. This was held in the ejectment cases of Tewksbury v. Magraff (1867) 33 Cal. 237, and Franklin v. Merida (1868) 35 Cal. 558, 95 Am. Dec. 129. This doctrine has been applied in case of leases of water rights. Oneto v. Restano (1891) 89 Cal. 63, 26 Pac. 788; Strong v. Baldwin (1908) 154 Cal. 150, 129 Am. St. Rep. 149, 97 Pac. 178. (But this doctrine is not applicable to cases of forcible entry and detainer. See supra.)

In Fuller v. Sweet (1874) 30 Mich. 237, 18 Am. Rep. 122, it was held that it was competent for the court, where the tenant does not receive possession from the claimant, to authorize the claimant's title to be investigated, unless there is some other ground of estoppel. Followed in Lake Shore & M. S. R. Co. v. Johnson (1909) 157 Mich. 115, 121 N. W. 267.

A parol promise by one in possession, to pay rent to one out of possession who has neither title nor right of possession, is void for want of consideration. Clary v. O'Shea (1898) 72 Minn. 105, 71 Am. St. Rep. 465, 75 N. W. 115.

b. When put in possession by landlord.

By taking a lease and entering into possession, the tenant is not permitted to deny the landlord's title, unless he shows fraud in obtaining the lease, or a judgment showing that his landlord had no title. McDevitt v. Sullivan (1857) 8 Cal. 592.

Assuming that a tenant who is let into possession by the lessor can ever refuse to surrender the possession, on the ground that the lessor falsely represented himself to be the owner of the property, there can be no refusal of this kind unless it is found that the lessor, by fraud, induced the lessee to accept the lease. Camarillo v. Fenlon (1874) 49 Cal. 202.

A man who takes a lease from a landlord in ignorance of the fact that his wife owns the premises, or is entitled to the rent thereof, cannot dispute the landlord's title. Baker v.

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Nall (1875) 59 Mo. 265, where the landlord was a trustee for the wife.

But in Fenner v. Duplock (1824) 2 Bing. 10, 130 Eng. Reprint, 207, 9 J. B. Moore, 32, 2 L. J. C. P. 102, where a tenant, hearing that a third person claimed the land, refused to pay the rent to his landlord, but on distress did so, not knowing the precise nature of the claim, it was held that thereafter the tenant was not estopped from showing the nature of the claim, and that it was founded on the fact that the landlord's title had expired.

c. Successors of landlord.

Where the landlord under whom a tenant has entered dies, and the tenant, by mistake, pays rent to one who is not the rightful successor, this creates no estoppel. Jew v. Wood (1841) 3 Beav. 579, 49 Eng. Reprint, 228, Craig & Ph. 185, 41 Eng. Reprint, 461, 10 L. J. Ch. N. S. 261, 5 Jur. 954; Knight v. Cox (1856) 18 C. B. 645, 139 Eng. Reprint, 1523; Petterson v. Sweet (1883) 13 Ill. App. 255 (representations considered fraudulent).

But it has been held that the tenant cannot escape, except by showing that someone else has a better title. Carlton v. Bowcock (1884) 51 L. T. N. S. (Eng.) 659.

And that, having rented from a devisee, he cannot claim that the testator was incapable of making a will. Doe ex dem. Marlow v. Wiggins (1843) 4 Q. B. 367, 114 Eng. Reprint, 937, 3 Gale & D. 504, 12 L. J. Q. B. N. S. 177, 7 Jur. 529.

Where one, having entered under a landlord, is informed by him that he has sold the land to a certain person, and the tenant pays rent to such person, this will not estop the tenant from showing that the landlord had really conveyed the property elsewhere. Goldsmith v. Smith (1859) 3 Phila. (Pa.) 360.

It was similarly held, where the real parties in interest were a voluntary assignee, to whom the tenant had acknowledged, and an official assignee in bankruptcy. Doe ex dem. Plevin v. Brown (1837) 7 Ad. & El. 447, 112 Eng. Reprint, 538, 2 Nev. & P. 592, W. W. & D. 677, 8 L. J. Q. B. N. S. 49.

V. Miscellaneous.

It was held in Batten Pooll v. Kennedy [1907] 1 Ch. (Eng.) 256, 76 L. J. Ch. N. S. 162, that voluntary payments of so-called rent for an incorporeal hereditament create no estoppel, as rent cannot issue out of any incorporeal hereditament.

Where, in a lease, one of the boundaries is described as a joint alley used by the parties of the first and second parts jointly, the lessee is not estopped from showing that he claimed the exclusive right to use the alley after the term of the lease had expired, the court stating that the recital that the alley was a joint alley was wholly unnecessary to the lease, and did not operate as an estoppel. Barker v. Mobile Electric Co. (1911) 173 Ala. 28, 55 So. 364.

A payment of rent to the landlord, after his title has expired, does not estop the tenant from showing that such title has expired. Claridge v. Mackenzie (1842) 4 Mann. & G. 143, 134 Eng. Reprint, 59, 4 Scott, N. R. 796, 11 L. J. C. P. N. S. 72.

It may be noted that in Lakin v. Roberts (1893) 4 C. C. A. 438, 7 U. S. App. 539, 54 Fed. 461, affirming (1891) 53 Fed. 333, it was considered that the evidence as to tenancy was too vague to cause the enforcement of estoppel.

B. B. B.

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H. E. HAYES
v.
JOE NUTTER, Appt.

Kansas Supreme Court — May 6, 1916.

(98 Kan. 75, 157 Pac. 428.)

Evidence — proof of slander.

1. In an action for slander, the proof of the words spoken need not correspond in every particular with the words as charged. It is sufficient that the words charged are substantially proved by the evidence.

[*See note on this question beginning on page* 367.]

Appeal — refusal of instructions.

2. It is not error to refuse instructions which are fairly covered by those given.

Same — instruction for plaintiff.

3. In a slander case it is not error for the court to instruct the jury that they may find for the plaintiff if they find from the evidence that the defendant spoke the slanderous words, or words of substantially the same meaning.

Headnotes by MARSHALL, J.

APPEAL by defendant from a judgment of the District Court for Washington County in favor of plaintiff in an action brought to recover damages for an alleged slander. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **A. J. Freeborn** and **J. R. Hyland**, for appellant:

There was clearly a variance between the allegations and the proof which was fatal to the cause of action.

Berry v. Dryden, 7 Mo. 324; Tipton v. Kahle, 3 Watts, 90; 25 Cyc. 487, note 32; Irish-American Bank v. Bader, 59 Minn. 329, 61 N. W. 328; Crotty v. Morrissey, 40 Ill. 477; Kimball v. Page, 96 Me. 487, 52 Atl. 1010; Taylor v. Kneeland, 1 Dougl. (Mich.) 67; Smith v. Moore, 74 Vt. 81, 52 Atl. 320; Searcy v. Sudhoff, 84 Ill. App. 148; Crandall v. Greeves, 181 Mo. App. 235, 168 S. W. 235; Parson v. Henry, 177 Mo. App. 329, 164 S. W. 241; Burkhiser v. Lyons, — Tex. Civ. App. —, 167 S. W. 244.

Evidence of transactions long subsequent to and remote from the time of the alleged slander has no bearing on the question of malice, nor is it admissible to show the state of feelings between the plaintiff and defendant at the time of the alleged slander.

25 Cyc. 495.

Mr. **Edgar Bennett**, for appellee:

There was no variance between the petition and proof.

Russell v. Anthony, 21 Kan. 450, 30 Am. Rep. 436; Boldon v. Thompson, 60 Kan. 856.

Marshall, J., delivered the opinion of the court:

This is an action for slander. The plaintiff recovered judgment. The defendant appeals.

The plaintiff's petition sets out three causes of action. No evidence was introduced to support the second cause, and it was withdrawn from the consideration of the jury. The jury found in favor of the defendant on the third, and returned a verdict in favor of the plaintiff for $100 on the first cause of action.

The slanderous words set out in the first cause of action are: "He" (meaning the plaintiff) "has been stealing chickens." The evidence to support this charge was that the defendant had said of the plaintiff and another person that they had stolen his, the defendant's, chickens, and "the sons-of-bitches stole my chickens." The defendant urges that this is a variance between the peti-

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tion and the proof, and cites 25 Cyc. 484, where the author says: "As a general rule a failure on the part of plaintiff to prove the words strictly as alleged in the petition constitutes a variance, and apart from a statute to the contrary is fatal to his cause of action. In some states, however, the Code provides that the variance shall not be deemed material unless it has actually misled the adverse party. Moreover, it is very generally held that a failure to prove all the words alleged does not constitute a fatal variance, provided sufficient of the precise words alleged are proved so as to constitute a cause of action. It is a general rule that proof of similar or equivalent words is insufficient. On the other hand it is generally held that the proof need not correspond in every minute particular with the words as laid, provided the identity of the charge is substantially made out."

Evidence—proof of slander.

This does not support the defendant's contention. Section 134 of the Code of Civil Procedure provides that "no variance between the allegations in a pleading and the proof is to be deemed material, unless it have actually misled the adverse party, to his prejudice, in maintaining his action or defense upon the merits. Whenever it is alleged that a party has been so misled, that fact must be proved to the satisfaction of the court, and it must also be shown in what respect he has been misled, and thereupon the court may order the pleading to be amended, upon such terms as may be just."

The slight variation between the proof and the allegation of the petition could not mislead the defendant. The proof does not correspond in every particular with the words as charged, but the words charged are substantially proved by the evidence. In Ramsey v. Partridge, 86 Kan. 398, 121 Pac. 343, this court said: "Language substantially the same as charged, shown to have been spoken at the time and place charged, in the presence of only one of the two alleged persons, and language substantially the same as charged, shown to have been spoken at the place and in the presence and hearing of the persons alleged, and at or near the time alleged, sufficiently meets the allegations of the petition and is not subject to the charge of material variance." (Syl. ¶ 2.)

The briefs in that case disclose that the difference between the charge in the present case and the language proved to have been used is no greater than the difference between the language charged and that proved in Ramsey v. Partridge, supra.

In Cooper v. Seaverns, 97 Kan. 159, 155 Pac. 11, this court said: "The jury were instructed that recovery might be had if the language charged in the petition, or language of identical import or substantially the same, were uttered. Many decided cases hold that the identical words must be proved. To do this is to sacrifice substance to form. Words are important only as vehicles of meaning. If the very slander be established by proof of substantially the language charged, that is sufficient, and that is the thought conveyed to the jury by the words of the instruction." (p. 160.)

2. The defendant complains of the refusal of the court to give certain instructions requested by him. The reason given by the court for refusing them was that "same given in other words but none given as requested." An examination of the original instructions shows that the court's statement was correct, so far as the instructions now complained of are concerned. Each of these requested instructions was substantially given by the court. That is all that was necessary. Baugh v. Fist, 84 Kan. 740, 115 Pac. 551; Taylor v. Atchison Gravel, Sand & Rock Co. 90 Kan. 452, 454, 135 Pac. 576; Rogers v. Kansas Co-op. Ref. Co. 91 Kan. 351, 354, 137 Pac. 991.

Appeal—refusal of instructions.

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3. The defendant complains of the following instruction: "Therefore, if you find from the evidence, by a preponderance thereof, that the defendant spoke of and concerning the plaintiff, in the presence of third persons, the words alleged by the plaintiff or words of substantially the same meaning, unless you find from the evidence by a preponderance thereof, that the said words so spoken of and concerning the plaintiff were true, you will find for the plaintiff upon either or both of the causes of action; but if you find from the evidence, by a preponderance thereof, that the words spoken of and concerning the plaintiff by the defendant were true, or if the plaintiff failed to prove, by a preponderance of the evidence, that the defendant used of and concerning him the words charged, or words of substantially the same meaning, then you should find for the defendant."

His argument is that whether the words alleged and the words proved have substantially the same meaning is purely a question of law for the court, and that the instruction was misleading and incorrect for that reason. There was no error in this instruction. Ramsey v. Partridge and Cooper v. Seaverns, supra.

Same—instruction for plaintiff.

The judgment is affirmed.

ANNOTATION.

What constitutes variance between pleading and proof of defamatory words.

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I. Introductory.

That proof must correspond with the pleading is an elementary rule of legal procedure. This note discusses the application of that rule to the pleading and proof of defamatory words in an action for libel or slander.

Notwithstanding the relaxation of the ancient rule that, in actions for defamation, the precise words pleaded must be proved, it is still highly technical, and, as was said in the case of Wilborn v. Odell (1862) 29 Ill. 457, was no doubt introduced because of the disfavor with which actions for slander were regarded by the courts, and to discourage that species of litigation. It was said in Lewis v. McDaniel (1884) 82 Mo. 577, that many of the technicalities and niceties with which actions for slander, both as to pleading and proof, were formerly encumbered, arising in part from the anxiety of courts to discourage such actions, are not at this day approved.

While the holding of that case is substantially that of the modern authorities, it is nevertheless difficult to reconcile the adjudications in the applications of the rule. It was said in McBean v. Williams (1838) 5 U. C. Q. B. N. S. 689: "There are few points in our laws in which one finds it more difficult to come to a satisfactory con-

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clusion upon the authorities, than upon the sufficiency of the proof of words laid in an action of slander."

II. In general.

"It is difficult to lay down a general rule on the subject of variance in particular terms (and one in general terms would be of no use). It is almost impossible to mark out the dividing line between such a variance as is fatal and such as is not; for, like light and shade, they run into each other; and although it be easy to determine, 'this is light,' 'that is shade,' yet it is almost impossible to say, 'here the light ceases and the shade begins.' A general rule cannot be established, except by decisions in many particular cases." State v. Powers (1851) 34 N. C. (12 Ired. L.) 5. It may, however, be said that while it was formerly held that unless the plaintiff in an action of slander proved the identical words charged in the pleadings the variance was fatal to his action, this strictness has been long since relaxed, and it is now sufficient if the proof substantially agrees with the defamatory words alleged in the pleading.

United States.—Beardsley v. Tappan, Fed. Cas. No. 1,188a.

Alabama. — Commons v. Walters (1834) 1 Port. 377, 27 Am. Dec. 635; Teague v. Williams (1845) 7 Ala. 844; Lee v. Crumps (1906) 146 Ala. 655, 40 So. 609.

Arkansas. — Townsley v. Yentsch (1911) 98 Ark. 312, 135 S. W. 882; Waters v. Moore (1916) 122 Ark. 250, 182 S. W. 904.

California. — Fleet v. Tichenor (1909) 156 Cal. 343, 34 L.R.A.(N.S.) 323, 104 Pac. 458.

Delaware.—Nailor v. Ponder (1895) 1 Marv. 408, 41 Atl. 88.

Georgia.—Corker v. Sperling (1910) 8 Ga. App. 100, 68 S. E. 557.

Illinois.—McGregor v. Eakin (1878) 3 Ill. App. 340; Story v. Jones (1893) 52 Ill. App. 112; Thomas v. Fischer (1874) 71 Ill. 576.

Indiana.—Gray v. Elzroth (1894) 10 Ind. App. 587, 53 Am. St. Rep. 400, 37 N. E. 551.

Iowa.—McClintock v. Crick (1857) 4 Iowa, 453; Desmond v. Brown (1870) 29 Iowa, 53, 4 Am. Rep. 194; Emerson v. Miller (1902) 115 Iowa, 315, 88 N. W. 803.

Kansas. — Ramsey v. Partridge (1912) 86 Kan. 398, 121 Pac. 343; Cooper v. Seaverns (1916) 97 Kan. 159, 155 Pac. 11. And see the reported case (HAYES v. NUTTER, ante, 365).

Kentucky.—Barr v. Gaines, 3 Dana, 258; Lovejoy v. Cooksey (1897) 19 Ky. L. Rep. 87, 39 S. W. 514.

Louisiana. — Meyers v. Fusilier (1917) 141 La. 131, 74 So. 790.

Maryland.—Robinett v. Ruby (1859) 13 Md. 95.

Massachusetts.—Clark v. Munsell (1843) 6 Met. 373; Com. v. Harmon (1854) 2 Gray, 289; Doherty v. Brown (1857) 10 Gray, 250; Whiting v. Smith (1832) 13 Pick. 364.

Missouri. — Nicholson v. Rogers (1895) 129 Mo. 136, 31 S. W. 260; Parsons v. Henry (1914) 177 Mo. App. 329, 164 S. W. 241.

Ohio.—Scott v. Renforth (1832) Wright, 55; Stevens v. Handley (1832) Wright, 123; Wilson v. Runyon (1834) Wright, 651; Cheadle v. Buell (1833) 6 Ohio, 67.

Pennsylvania. — Tipton v. Kahle (1834) 3 Watts, 90; Kennedy v. Lowry (1808) 1 Binn. 393; Harter v. Whitebread (1909) 38 Pa. Super. Ct. 10.

South Carolina.—Hamilton v. Langley (1835) 1 McMull. L. 498; Finch v. Finch (1884) 21 S. C. 342; Zimmerman v. McMakin (1885) 22 S. C. 372, 53 Am. Rep. 720.

Vermont.—Posnett v. Marble (1889) 62 Vt. 481, 11 L.R.A. 162, 22 Am. St. Rep. 126, 20 Atl. 813.

Wisconsin. — Dufresne v. Weise (1879) 46 Wis. 290, 1 N. W. 59.

England. — Orpwood v. Barkes (1827) 4 Bing. 261, 130 Eng. Reprint, 767, 5 L. J. C. P. 167, 12 J. B. Moore, 492, 29 Revised Rep. 559.

Canada.—Hahn v. Gettel (1916) 33 West. L. R. 97, 9 West. Week. Rep. 686.

"It is now sufficient if the plaintiff proves that the defendant spoke words substantially the same as those stated in the declaration. . . . But, although it be allowed for the plaintiff to prove words which import the same thing in substance as those which the defendant is charged with having uttered, yet the witnesses must state

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(either positively, or as near as memory will allow) the words they heard used, and cannot be allowed to state the impression produced upon their minds by the whole of the conversation." Teague v. Williams (1845) 7 Ala. 844.

The word "substantial," as used in the approved instructions, refers to the offense charged rather than to the words used. Nicholson v. Rogers (1895) 129 Mo. 136, 31 S. W. 260.

"The rule is well settled that in an action for slander, the plaintiff must prove the use of substantially the same words as those alleged in the complaint, it not being sufficient to prove the use of substantially different words, though of similar import." Townsley v. Yentsch (1911) 98 Ark. 312, 135 S. W. 882.

"It is not necessary to prove the words literally. It is sufficient if those charged be substantially established." Lee v. Crump (1906) 146 Ala. 655, 40 So. 609.

"It was formerly holden that the plaintiff must prove the words precisely as laid; but that strictness is now laid aside, and it is sufficient for the plaintiff to prove the substance of them." Orpwood v. Barker (1827) 4 Bing. 261, 130 Eng. Reprint, 767.

"Substantial identity as to the charge and the proof is all that is usually attainable in actions based upon oral utterances." Corker v. Sperling (1910) 8 Ga. App. 100, 68 S. E. 557.

Proof of enough of the identical words charged to constitute substantially the imputation of the whole is sufficient. Story v. Jones (1893) 52 Ill. App. 112.

When it is said that the words proved must "substantially" correspond with those charged, "it is not meant that you can sustain the charge by proof of different words, although they mean the same thing; but you must prove enough of the same words as will make out the crime; and though you should prove more or less words than those alleged, yet, if those you do prove as they are alleged are sufficient to make the charge, you have then substantially proven the words charged." Parsons v. Henry (1914) 177 Mo. App. 329, 164 S. W. 241.

"Many decided cases hold that the identical words must be proved. To do this is to sacrifice substance to form. Words are important only as vehicles of meaning. If the very slander be established by proof of substantially the language charged, that is sufficient." Cooper v. Seaverns (1916) 97 Kan. 159, 155 Pac. 11.

The law in such case deals with the substance of the injurious charge rather than with the form or letter of it. Ordinarily, so long as the variance is not of substance, the defendant cannot be injured. Harter v. Whitebread (1909) 38 Pa. Super. Ct. 10.

It was said in Nailor v. Ponder (1895) 1 Marv. (Del.) 508, 41 Atl. 88: "It is not necessary to prove the precise words of the declaration, but it is sufficient to prove the substance of them. The proof must be that the words were spoken in the same manner."

"It is sufficient if the substantial slanderous words are laid and proved. Otherwise the consequence necessarily would be that if a conversation wherein slander was uttered continued for an hour, the whole must be distinctly expressed in the declaration and proved in evidence which would be idle and superfluous." Hersh v. Ringwalt (1802) 3 Yeates (Pa.) 508, 2 Am. Dec. 392.

"It is no doubt true that the slanderous words charged in a plaintiff's declaration must be substantially proved at the trial, but this rule is complied with where the words charged and the words proved, although not precisely the same, differ in no essential particular. . . . The words proved may be more or fewer than the words laid, but if the slanderous charge is substantially the same in both, it is an outgrown refinement to turn the plaintiff out of court on the ground of a variance." Kerr v. Atticks (1897) 20 Pa. Co. Ct. 233.

A variance in an action for defamation between the pleading and proof is fatal to a recovery, but a slight variation will not be material. Meyers v. Fusilier (1917) 141 La. 131, 74 So. 790.

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But see Vordenbaumen Lumber Co. v. Parkerson (1912) 129 La. 1080, 57 So. 524, wherein it was held that, as a general rule, the plaintiff is required to prove the words strictly as alleged.

An instruction to the jury in effect that they might find for plaintiff if the defendant falsely uttered words which, in the common acceptation, and under the circumstances used, amounted to a charge of larceny, has been held to be incorrect, since it failed to limit its application to words substantially the same as those set forth in the complaint. Townsley v. Yentsch (1911) 98 Ark. 312, 135 S. W. 882. On the other hand, a request to charge the jury that they must be satisfied that the defamatory words alleged in the complaint to have been used by the defendant have been proved exactly as alleged is properly refused. Finch v. Finch (1884) 21 S. C. 342.

Similarly, an instruction that in this class of cases strict proof of the words charged as slanderous is required is reversible error. McGregor v. Eakin (1878) 3 Ill. App. 340.

Whether a variance exists between the pleading and proof of defamatory words is a question exclusively for the determination of the court. Berry v. Dryden (1842) 7 Mo. 324. See to the same effect, Birch v. Benton (1858) 26 Mo. 153.

While the question whether the words were spoken is for the jury, the question of variance between the words spoken and those pleaded is for the court. Foster v. Small (1838) 3 Whart. (Pa.) 138. See to the same effect, Newstedt v. Meyer (1910) 155 Ill. App. 550; Eisfelder v. Klein (1883) 5 Ky. L. Rep. 138. But see Zimmerman v. McMakin (1885) 22 S. C. 372, 53 Am. Rep. 720, wherein it was held to be error for the court to instruct the jury, as a matter of law, that the words alleged in the complaint are not substantially the same as those proved, the court saying that whether the words are substantially proved and whether they convey the same imputation as those charged in the pleading are questions which should be left to the jury.

III. Proof of equivalent words.

a. Rule stated.

Though a substantial agreement between the pleading and the proof of defamatory words is sufficient, it is not enough to prove words of the same effect or import, or conveying the same idea; but the words must be substantially the same words; and it is not sufficient that they contain substantially the same charge, but in different phraseology, as equivalent words of defamation will not do.

Alabama. — Teague v. Williams (1845) 7 Ala. 844; Scott v. McKinnish (1849) 15 Ala. 662; Mohr v. Lemle (1881) 69 Ala. 180.

Arkansas. — Townsley v. Yentsch (1911) 98 Ark. 312, 135 S. W. 882; Laster v. Bragg (1913) 107 Ark. 74, 153 S. W. 1116.

California. — Haub v. Friermuth (1905) 1 Cal. App. 556, 82 Pac. 571; Fleet v. Tichenor, (1909) 156 Cal. 343, 34 L.R.A.(N.S.) 323, 104 Pac. 458.

Illinois. — Slocumb v. Kuykendall (1835) 2 Ill. 187, 27 Am. Dec. 764; Patterson v. Edwards (1845) 7 Ill. 720; Sanford v. Gaddis (1853) 15 Ill. 229; Norton v. Gordon (1854) 16 Ill. 38; Baker v. Young (1867) 44 Ill. 42, 92 Am. Dec. 149; Wallace v. Dixon (1876) 82 Ill. 202; Searcy v. Sudhoff (1899) 84 Ill. App. 148; Ransom v. McCurley (1892) 140 Ill. 626, 31 N. E. 119, affirming (1890) 38 Ill. App. 323; Schultz v. Sohrt (1915) 201 Ill. App. 74.

Kentucky.—Barr v. Gaines (1835) 3 Dana, 258; Taylor v. Moran (1862) 4 Met. 127; Sproul v. Reed (1880) 1 Ky. L. Rep. 407; Eisfelder v. Klein (1883) 5 Ky. L. Rep. 138; Pinkston v. Christerson (1887) 8 Ky. L. Rep. 789; Renaker v. Gregg (1912) 147 Ky. 368, 144 S. W. 89.

Maine.—Estes v. Estes (1883) 75 Me. 478; Kimball v. Page (1902) 96 Me. 487, 52 Atl. 1010.

Minnesota.—Irish-American Bank v. Bader (1894) 59 Minn. 329, 61 N. W. 328.

Mississippi. — Jones v. Edwards (1879) 57 Miss. 28.

Missouri.—Watson v. Musick (1828) 2 Mo. 29; Berry v. Dryden (1842) 7 Mo. 324; Pasley v. Kemp (1856) 22 Mo.

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409; Wood v. Hilbish (1886) 23 Mo. App. 389; Street v. Bushnell (1857) 24 Mo. 323; Birch v. Benton (1858) 26 Mo. 153; Baldwin v. Fries (1891) 46 Mo. App. 288; Bundy v. Hart (1870) 46 Mo. 460, 2 Am. Rep. 525; Clements v. Maloney (1874) 55 Mo. 352; Schmidt v. Bauer (1895) 60 Mo. App. 212; Coe v. Griggs (1882) 76 Mo. 619; Christal v. Craig (1883) 80 Mo. 367; Lewis v. McDaniel (1884) 82 Mo. 577; Noeninger v. Vogt (1886) 88 Mo. 589; Nicholson v. Rogers (1895) 129 Mo. 136, 31 S. W. 260; Hauser v. Steigers (1909) 137 Mo. App. 560, 119 S. W. 52; Kunz v. Hartwig (1910) 151 Mo. App. 94, 131 S. W. 721; Conran v. Fenn (1911) 159 Mo. App. 664, 140 S. W. 82; Parsons v. Henry (1914) 177 Mo. App. 329, 164 S. W. 241; Crandall v. Greeves (1914) 181 Mo. App. 235, 168 S. W. 264. Compare Estes v. Antrobus (1822) 1 Mo. 197, 13 Am. Dec. 496.

New York. — Olmstead v. Miller (1828) 1 Wend. 506; Fox v. Vanderbeck (1826) 5 Cow. 513; Bond v. Brewster (1890) 16 Daly, 82, 9 N. Y. Supp. 516; Enos v. Enos (1892) 135 N. Y. 609, 32 N. E. 123.

Oklahoma.—Smith v. Gillis (1915) 51 Okla. 134, 151 Pac. 869.

Pennsylvania. — Cooper v. Bruce (1833) 2 Watts, 109.

Tennessee.—Cohen v. Pinson (1910) 1 Tenn. C. C. A. 93; Beasley v. Hills (1910) 1 Tenn. C. C. A. 285; Hancock v. Stephens (1850) 11 Humph. 507; Roberts v. Lamb (1894) 93 Tenn. 343, 27 S. W. 668.

Texas.—Conlee v. State (1883) 14 Tex. App. 222; Berry v. State (1889) 27 Tex. App. 483, 11 S. W. 521; King v. Sassaman (1899) — Tex. Civ. App. —, 54 S. W. 304.

Vermont.—Dickey v. Andros (1859) 32 Vt. 55; Smith v. Hollister (1860) 32 Vt. 695; Smith v. Moore (1902) 74 Vt. 81, 52 Atl. 320; Kidder v. Bacon (1902) 74 Vt. 263, 52 Atl. 322.

England. — Armitage v. Dunster (1785) 4 Dougl. K. B. 291, 99 Eng. Reprint, 887.

Canada. — McBean v. Williams (1838) 5 U. C. Q. B. O. S. 689.

Proof of equivalent words, or words of the same import and meaning with those charged to have been spoken, though varying only in tense of the verb employed, will not suffice. The rule is not that the substance of the words alleged must be proved, but that the words alleged in the declaration, or enough of them to amount to a charge of the particular offense alleged to have been imputed, must be substantially proved. Although the words proved are equivalent to the words charged, or have the same meaning, or amount to a charge of precisely the same offense, yet, not being the same words, or substantially the same words, the variance will be fatal. Ransom v. McCurley (1892) 140 Ill. 626, 31 N. E. 119, affirming (1890) 38 Ill. App. 323.

It was said in Kunz v. Hartwig (1910) 151 Mo. App. 94, 131 S. W. 721: "The principles that govern the law of variance in cases of slander as between the words charged to have been spoken and the words proved are well settled in this state by numerous decisions. In the first instance it is generally the duty of the plaintiff to set out in his petition the very words used, and this is to be followed up at the trial by proving the slanderous words so charged. This rule has been uniformly interpreted to mean that if the words charged to have been spoken are proved, but with the addition of other words not varying the sense, then the variance is not material. It is not enough, however, that the words proved are of equivalent meaning. They must be substantially the same words as are laid in the petition. The cause of action is the venomous words containing the gall of the slandering tongue, and they must be strictly proven. Proof of words of the same or similar import will not suffice."

In stating the rule and the reason therefor, it was said in Slocumb v. Kuykendall (1834) 2 Ill. 187, 27 Am. Dec. 764: "It will not be doubted that the rule which heretofore required the plaintiff to prove the words to have been spoken precisely as laid has been relaxed, and that it will now be sufficient to prove the substance of them as charged; while, however, this rule is admitted to its fullest extent, we

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still understand that the proof of equivalent words will not be proving the substance of those charged to have been spoken. To prove words of similar import will not surely be proving the substance of those laid, but the proving of other and different words. . . . This rule should be adhered to. Further relaxation would be attended, in my opinion, with infinite mischief. The allegation and the proof should correspond; yet, if a party be charged with the speaking of one set of words, and the proof show another set, of an equivalent character, and that be admitted to be sufficient to sustain the cause of action, how is the party to be prepared to defend himself? If this latitude be indulged in, and proof of equivalent words be sufficient, how will the defendant be able to know what he must come prepared to meet? One set of words is charged, another is proved, and the party surprised and held answerable for what he might have rebutted or explained by testimony had he had reason to suppose such proof would have been offered. The introduction of such a course seems to me subversive of the first principles of the rules of evidence and ought not to prevail. Besides, the uncertainty of the memory of witnesses, and their understanding of the import of words, and the sense in which they may have understood them to have been used, would render a party accountable for their misapprehension very frequently, if they could be allowed to testify to the import of his expression."

A witness is not permitted to make out the plaintiff's case by proving words merely equivalent, in his estimation, to those which he heard the defendant use; but he must state the language that was employed, according to the best of his recollection, so that it may appear to the court whether the cause of action alleged is supported. Teague v. Williams (1845) 7 Ala. 844. See to the same effect, Rainy v. Bravo (1872) L. R. 4 P. C. (Eng.) 287, 27 L. T. N. S. 249, 20 Week. Rep. 873; Scott v. McKinnish (1849) 15 Ala. 662.

The complaint or declaration cannot be supported by proof of words differing from the words alleged, though of equivalent import. Mohr v. Lemle (1881) 69 Ala. 180.

Proof of the same charge against plaintiff in words substantially different from those alleged, even though of equivalent and similar import, is insufficient. Laster v. Bragg (1913) 107 Ark. 74, 153 S. W. 1116. See to the same effect, Enos v. Enos (1892) 135 N. Y. 609, 32 N. E. 123.

Equivalent words or words of similar import will be insufficient, nor will a cause of action be sustained by proof of words that might produce an impression similar to that which the words alleged would produce. The words shown to have been spoken by the defendant are to be construed by their own meaning and import, and not by any impression which the hearer may receive from them. Haub v. Friermuth (1905) 1 Cal. App. 556, 82 Pac. 571.

A failure to prove all the connected words, or the proof of the actionable words in a differently constructed sentence or other combination, without change of meaning, is not a material variance. Smith v. Gillis (1915) 51 Okla. 134, 151 Pac. 869.

Where the words recited in the pleading were sought to be proved by an alleged admission of defendant that he had uttered something entirely different in phraseology from what was charged in the complaint, the variance was held to be fatal. Bond v. Brewster (1890) 16 Daly, 82, 9 N. Y. Supp. 516.

The refusal of the court to give the following instruction has been held to be reversible error: "Though the words proved are equivalent to the words charged in the declaration, yet, not being the same in substance, and though the same idea is conveyed in the words charged and those proved, yet if they contain substantially the same charge, but in different phraseology, the plaintiff is not entitled to recover." Norton v. Gordon (1854) 16 Ill. 38.

And so an instruction to the jury, "that if they believe from the evidence that the defendant used the words

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toward the plaintiff charged in the declaration in this case, or substantially the words, then, under the pleadings in this case, they should find the defendant guilty," has been held to be error; and in the same case it was held to be error to refuse to instruct that "to entitle the plaintiff to recover in this suit, he must prove the speaking of the words alleged in the declaration; other words of like meaning, or equivalent words or expressions, will not suffice." Searcy v. Sudhoff (1899) 84 Ill. App. 148. See to the same effect, Wheeler v. Robb (1824) 1 Blackf. (Ind.) 330, 12 Am. Dec. 245; Clements v. Maloney (1874) 55 Mo. 352. Compare Estes v. Antrobus (1821) 1 Mo. 197, 13 Am. Dec. 496, wherein the words proved were in substance the same, or of similar import, as those pleaded, and it was held to be sufficient.

While it is not sufficient to prove equivalent words, it is sufficient if the proof shows words synonymous with and carrying the same specific idea as those alleged; as, for instance, where the words "set fire to" are alleged, and the proof shows the word "burnt." Fleet v. Tichenor (1909) 156 Cal. 343, 34 L.R.A.(N.S.) 323, 104 Pac. 458; citing Merrill v. Peaslee (1845) 17 N. H. 540.

It was said in Valley Dry Goods Co. v. Buford (1917) 114 Miss. 414, 75 So. 252: "In our state it has always been sufficient to allege the words or synonymous words which constitute the slander." See to the same effect, Fritz v. Williams (1894) — Miss. —, 16 So. 359; Bigner v. Hodges (1903) 82 Miss. 215, 33 So. 980. This, it has been said by the same court, is as far as the court has gone in relaxation of the rule requiring the precise words charged to be proved. Furr v. Speed (1896) 74 Miss. 423, 21 So. 562.

b. Effect of statute.

In some jurisdictions, statutory provisions have been enacted which in substance provide that variances are not to be deemed material unless they actually mislead the adverse party to his prejudice; and under the rule embodied in it, proof of similar words which, in their scope and meaning, make the same imputation as the words pleaded, is deemed sufficient. Grotius v. Ross (1900) 24 Ind. App. 543, 57 N. E. 46; Bower v. Deideker (1874) 38 Iowa, 418; Payson v. Macomber (1861) 3 Allen (Mass.) 69; Baldwin v. Soule (1856) 6 Gray (Mass.) 321; Robbins v. Fletcher (1869) 101 Mass. 115; Chace v. Sherman (1876) 119 Mass. 387; Robinson v. Van Auken (1906) 190 Mass. 161, 76 N. E. 601; Fowlie v. Cruse (1916) 52 Mont. 222, 157 Pac. 958; Pegram v. Stolz (1872) 67 N. C. 144; Hamilton v. Mance (1912) 159 N. C. 56, 74 S. E. 627, Ann. Cas. 1914A, 1253; Barnett v. Ward, (1880) 36 Ohio St. 107, 38 Am. Rep. 561; Schild v. Legler (1892) 82 Wis. 73, 51 N. W. 1099; Kloths v. Hess (1906) 126 Wis. 587, 106 N. W. 251; Brueshaber v. Hertling (1891) 78 Wis. 498, 47 N. W. 725. And see the reported case (HAYES v. NUTTER, ante, 865). Compare the following earlier cases, wherein it was held that proof of equivalent words is insufficient: Wheeler v. Robb (1823) 1 Blackf. (Ind.) 330, 12 Am. Dec. 245; Linville v. Earlywine (1837) 4 Blackf. (Ind.) 469; Gray v. Elzroth (1894) 10 Ind. App. 587, 53 Am. St. Rep. 400, 37 N. E. 551.

Thus it was said in Kloths v. Hess (1906) 126 Wis. 587, 106 N. W. 251: "Proof merely that the substance of the charge was made, but in different words, is not sufficient. Even this rule does not require, however, that every witness must quote the words of the complaint, but merely that the narrative related by the witness shall convince the jury that defendant used the words alleged against him in the complaint. The great weight of authorities, however, while recognizing that the gravamen of slander is the speaking of certain words, and not the mere making of a defamatory charge, support the more liberal and reasonable rule that proof of substantially the same words as those alleged will suffice; that mere insignificant changes in the form of expression, or the situation of an unambiguous pronoun for a substantive or for a proper name and the like, will not prevent a verdict for the plaintiff. . . . It would be dif-

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ficult to escape this more liberal view in this state under § 2669, Rev. Stat. 1898, declaring no variance material 'unless it shall actually mislead the adverse party to his prejudice.'"

So it was held in Grotius v. Ross (1900) 24 Ind. App. 543, 57 N. E. 46, that while there is a variance between the pleading and the proof, where the complaint fails to allege the speaking of the slanderous words in a foreign tongue, and the proof is that they were spoken in a foreign tongue, yet, under the statute (Horner's Rev. Stat. 1897, § 391), such variance will be immaterial unless the defendant has been actually misled by it to his prejudice. See to the same effect, Bower v. Deideker (1874) 38 Iowa, 418.

But, under the operation of such a statute, it is not competent to prove the charge alleged by words substantially different. Chace v. Sherman (1876) 119 Mass. 387. Under it, the proof must be that the defendant accused the plaintiff of the same offense stated, and in words substantially like those alleged, though they need not be exactly the same. Payson v. Macomber (1861) 3 Allen (Mass.) 69, wherein it was held that a charge against an unmarried woman, of now having a child, was substantially different from proof that she formerly had one and got rid of it. The court said: "The variance is that the declaration alleges a charge of a past transaction, viz., having had a child and got rid of it; and the deposition states a charge of an existing fact, viz., now having a child or a part of one. The evidence by which the two transactions would be proved would vary materially. . . . And it may be stated as a general rule that the evidence substantially varies from the count in slander when it proves a charge of an offense not identically the same with that alleged, though of the same species."

In Barnett v. Ward (1880) 36 Ohio St. 107, 38 Am. Rep. 561, the complaint alleged that defendant spoke of the plaintiff, an unmarried woman, as follows: "Angeline Ward (plaintiff) was sleeping with John Fox when her watch was stolen," which words were substantially laid in several counts in a variety of modes of expression. The proof in effect showed that defendant said that the way Fox found the watch was because he was in bed with plaintiff. The variance was held to be immaterial; as, under the statute, the allegation pleaded was substantially proved.

c. Illustrations.

1. Charge of immorality or unchastity.

In Olmstead v. Miller (1828) 1 Wend. (N. Y.) 506, the words charged that the plaintiff had sexual intercourse with three different persons, whose names were stated. The proof was that defendant had said that the plaintiff was a thief; that she was fond of men; that she was a very bad woman; that the three persons named in the declaration were in the habit of visiting frequently at her house, etc. The court said: "These words, although they may be said to be equivalent to the charge of having connection with P. B., within the rule heretofore established, they are not the same in substance. The same remark is applicable to the other charges. The same idea is conveyed in the words charged and those proved; but they are not substantially the same charge, but in different phraseology."

In Cooper v. Bruce (1833) 2 Watts (Pa.) 109, the declaration alleged that "Jacob Bruce [plaintiff] was guilty of buggery with a mare." The proof was that defendant said that "he [plaintiff] had acted with a mare,"—"he had been guilty with a mare,"—and that "he [defendant] could prove that Bruce was guilty of acting with a mare." The variance was material, since no one of the words was proved as laid, except the names of the plaintiff and the animal.

Proof that plaintiff was called a "whorish bitch" has been held not to be a material variation from an allegation that defendant used the words "public whore." Zimmerman v. McMakin (1885) 22 S. C. 372, 53 Am. Rep. 720.

Similarly, the allegation of a charge that the plaintiff a female, " has been counted a whore," and "is a whore," has been held not to vary materially

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from proof of the words that "she is a whorish bitch." Scott v. McKinnish (1849) 15 Ala. 662.

In Cohen v. Pinson (1910) 1 Tenn. C. C. A. 93, the complaint alleged the use of the words, "The damn bitch, she is trying to get something to f—;" the dash denoting a vulgar word indicative of sexual intercourse. The proof showed that instead of the word "trying," the words "plotting" or "triggering" were used, and there was also some doubt as to whether the defendant used the expression "damn bitch" or "whorish bitch." The variance was held not material.

Compare Williams v. Bryant (1842) 4 Ala. 44, wherein charging a woman with being a "whore" was held not to be supported by proof that defendant said that she was a "strumpet."

In Berry v. State (1889) 27 Tex. App. 483, 11 S. W. 521, the complaint averred that defendant slandered the plaintiff, an unmarried female, by saying that "she was in the family way, and that he believed her brother, Helm, was the father of the child." The proof was that he said "he had seen Isabella Helm at home, and if there was not something wrong with her, his eyes had fooled him; that he saw enough to convince him that there was something wrong with her, that if his eyes had not deceived him worse than they ever had before, she was in that condition," and further, that he said "it was reported that she was in the family way, and that it was reported that her brother Frank was the other party concerned." The variance was held to be fatal.

In Dickey v. Andros (1859) 32 Vt. 55, it was averred that defendant said: "I saw Dickey [plaintiff] here on Friday night. I saw him and heard him and can swear to it, and can prove it. He [plaintiff] was not here for any good design. I will break up the haunt if I can possibly do it," meaning that plaintiff came to a certain house and had carnal relations with one Mary Webster. The proof was that defendant said: "I saw him and heard him and can swear to it, and furthermore can prove it, if called on," and further, "I suppose he came there not out of any good design. I mean to break up the haunt if I can." The variance was held to be material.

There is a fatal variance between a pleading alleging that the defendant stated that he (defendant) had "carnal intercourse with her" and proof showing that the words used were that he had a "good time with her." Halsey v. State (1909) 57 Tex. Crim. Rep. 400, 136 Am. St. Rep. 986, 123 S. W. 596.

In Kidder v. Bacon (1902) 74 Vt. 263, 52 Atl. 822, the allegation in the first count was that the defendant said: "I discovered them in the very act of adultery." The proof was that the words used were that he said that he "see" or "saw" them in the very act. The allegation in the second count was, "I caught them in the very act, the act of adultery," and the proof was that defendant said that he "catched" them in the very act. The variance was held to be immaterial.

In Conlee v. State (1883) 14 Tex. App. 222, the charge was that defendant said that he had had carnal knowledge with the plaintiff. The proof was that defendant said: "She would have been a nice girl if he [defendant] had not done what he had done to her; and if I [meaning witness] did not believe it, meet him at the gin house that night and he would prove it." The variance was held to be fatal.

In Patterson v. Edwards (1845) 7 Ill. 720, the averment was that the defendant said: "Mrs. Edwards [meaning plaintiff's wife] has raised a family of children by a negro, and I can prove it." The proof was that he said: "Mrs. Edwards has had children by a negro;" also, "Mrs. Edwards has had children by a negro, and all her children are negroes." The variance was held to be material.

In Hamilton v. Nance (1912) 159 N. C. 56, 74 S. E. 627, Ann. Cas. 1914A, 1253, the complaint alleged that defendant said that the "news" was that the husband of the plaintiff "had" a venereal disease, naming it, and "has given it to his wife." The answer admitted that he said the "report" was that the husband of the plaintiff "has had" the disease named in the complaint, and "has given it to his wife."

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The variance was held to be immaterial.

In Bleitz v. Carton (1908) 49 Wash. 545, 95 Pac. 1099, it was alleged that defendant said of the plaintiff, "Bleitz is not a fit man to associate with decent people. He has another wife back east and a wife and child here. He has been in jail two or three years back East. I have the documents to prove all this." The proof was that the words used were: "He has a wife and child back East and is living with another woman here." The variance was held to be fatal, the court saying: "After a careful examination of numerous authorities, we have been unable to find any cases in which the general rule has been so far relaxed as to hold that an allegation of the speaking of words charging one crime or misdemeanor is sustained by proof of the speaking of words charging, or tending to charge, a different crime or misdemeanor, or that such a failure to prove the words alleged would not constitute a fatal variance. Respondent alleged the speaking of words which, in substance and effect, charged the crime of bigamy, such words being actionable per se although spoken. The words proven can, by no possible construction, be held to have charged respondent with bigamy. The variance was therefore fatal. One reason for requiring substantial proof of the words alleged is that the defendant may, if he so desires, have an opportunity to plead and prove justification by showing the truth of the words charged. Were it to be conceded that the appellant had actually said of and concerning the respondent in this action that he had a wife and child back East, and another wife and child here, thereby charging him with bigamy, it could not be seriously contended that he would establish the truth of such words under a plea of justification by showing that respondent, while having a wife back East, was living with another woman here. . . . In respondent's third cause of action it was alleged that, on April 9, 1906, the appellant did speak to one A. E. Croft of and concerning him the words: 'Bleitz is a bigamist. I threw it in his teeth and he did not deny it. He has two wives.' The only witness called to prove the speaking of these words was A. E. Croft, who testified that 'he [Carton] said that he [Bleitz] had a wife and family in the East, and that he was living here with another woman. He didn't state—he didn't call him a bigamist in so many words; that is, he didn't call Mr. Bleitz a bigamist that I can recollect.' This evidence was not only such a failure of proof as to constitute a variance, but it in effect amounted to a positive denial of the allegations of the third cause of action of the complaint."

In Stevens v. Handly (1832) Wright (Ohio) 123, the words charged were: "Stevens keeps a whore house, and Phebe is a whore—Ida has gone to Stevens's, and Stevens keeps a damned whore house; and Debby and Phebe were not able to stand the three tanyard blackguards; and Stevens's wife, and all the Delanys are whores." The proof was that the defendant said: "Stevens kept a damned whore house, and Phebe and Debby had taken on a new mode of making money by their arses. Phebe and Debby are not able to stand the three tanyard blackguards, and took Ida to stand John Lisle, and if it had not been for the fever sore on Phebe's leg, she would have had the other leg broke long before this time." The variance was held not to be material.

An allegation that defendant charged the plaintiff with having had sexual intercourse with a man is not variant from proof that defendant said that the plaintiff "was a whore." Clark v. Munsell (1843) 6 Met. (Mass.) 373, wherein it was said: "The fact that the defendant used words importing a higher grade of offense constitutes no sufficient objection, on the ground of variance, if the words used do in fact necessarily impute to the plaintiff the offense charged in the declaration; unless the case be one where, from the nature of the declaration, the precise, and not equivalent, words must be proved."

2. Charge of theft or larceny.

Proof of words charging deception and fraud is a variance from an al-

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legation of a charge of larceny. Perry v. Porter (1878) 124 Mass. 338.

An allegation that defendant said: "He [plaintiff] is discharged from the employ of this company for the misuse of checks" is a variance from proof that the words were spoken to the plaintiff and another and were as follows: "I have authority to discharge you both for misuse of checks." Comerford v. West End Street R. Co. (1895) 164 Mass. 13, 41 N. E. 59.

An allegation that defendant said: "You (meaning plaintiff) would steal, and you will steal," proof has been held to be variant from showing that the words used were, "a man that would do that would steal." Stees v. Kemble (1856) 27 Pa. 112.

A charge that the defendant accused the plaintiff of being a thief has been held to be supported by proof that defendant said that plaintiff stole certain articles. Sharp v. Bowlar (1898) 103 Ky. 282, 45 S. W. 90.

A charge that defendant said, "Hancock's wife is a great thief," etc., is not sustained by proof of the words, "Hancock's wife is a damned bad one," etc. Hancock v. Winters (1816) 2 Marsh. 502, 7 Taunt. 205, 129 Eng. Reprint, 82.

There is no material variance between an averment of the words, "he is the damnedest thief in the country and we are going to make an example of him," and proof of the words, "he was a damn thief and that he [defendant] would lose the rent to get to prosecute him." Laster v. Bragg (1913) 107 Ark. 74, 153 S. W. 1116.

In Christal v. Craig (1883) 80 Mo. 367, the averment was that the defendant said: "You (plaintiff) have took my pocketbook and money," etc. The proof was that he said: "You (plaintiff) have got $35 or $40 in your bucket you have stole from me. Yes, you have got it right there in your bucket." It was held that there was a material variance.

The words "you robbed the mail" are materially variant from the words, "I am not like you, running about the country with forged deeds and robbing the mail, as you did." McBean v. Williams (1838) 5 U. C. Q. B. O. S. 689.

In Barr v. Gaines (1835) 3 Dana (Ky.) 258, the words charged were: "He [plaintiff] stole John Thomas's hogs out of the pen built by Tandy Quesenbery. Robert Quesenbery told me so," and "He [plaintiff] stole hogs." It was held that the averment was supported by proof of a statement that the plaintiff "had stolen a hog out of Tandy Quesenbery's pen, and that he could prove it by Bob Quesenbery."

A declaration alleging the speaking of the words, "Mina stole the pin," has been held not to be sustained by proof of the words, "Mina stole the buckle." But in the same case a second count alleging that defendant charged the plaintiff "with the crime of larceny," without setting forth the language of the slander, was held to be supported by evidence that the defendant charged the plaintiff with the theft of a buckle or a pin. Kimball v. Page (1902) 96 Me. 487, 52 Atl. 1010.

An allegation that "he (plaintiff) had stolen, or might as well have stolen, said bale of cotton," and further, that "he [plaintiff] was a d—d rascal," is not supported by proof that defendant said that plaintiff "was a poor scamp, that he had taken his rent cotton and carried it off and sold it without leave, and that when the grand jury meet he would show him (plaintiff) whose cotton it was." Jones v. Edwards (1879) 57 Miss. 28.

A charge that defendant said "plaintiff had butchered and sold to his patrons in said village, a steer affected with a loathsome disease, and that said steer was diseased at the time it was butchered and had a running sore or cancer on its leg," may be amended at the trial by allowing the following words to be inserted in lieu thereof: "Jim Hedges (meaning plaintiff) has butchered a beef and sold it to the people that is not fit for use, because it had a running sore on its leg." The court said: "The words are practically synonymous." Pigner v. Hodges (1903) 82 Miss. 215, 33 So. 980.

An allegation that defendant said, "I [defendant] was summoned as a grand juror at last court, but I got the court to excuse me from serving, for

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if I had served, I would have been bound to have indicted [the plaintiff] for theft," is not sustained by proof that the words used were that if he (defendant) had served on the grand jury, he would have been bound to have indicted (the plaintiff). Street v. Bushnell (1857) 24 Mo. 328.

A charge that defendant said that plaintiff stole goods of A is materially variant from proof of defendant's saying that the plaintiff stole the goods of B. Johnston v. Tait (1813) 6 Binn. (Pa.) 121.

In Taylor v. Kneeland (1843) 1 Dougl. (Mich.) 67, the charge in the pleading was that the defendant said of the plaintiff: "Corruption is the order of the day. I do not believe Marlatt's resignation as postmaster and the petition for me ever reached Washington. Kneeland embezzled those papers," etc. It was held that the allegation was not sustained by proof that defendant said: "I have no doubt but that the papers were embezzled at Farmington."

In Watson v. Musick (1828) 2 Mo. 29, the charge was as follows: "You [meaning plaintiff] are a hog stealer; you stole two hogs from Murphy; the way you make your living is by using other men's property." The proof was that defendant said to the plaintiff that "Murphy said you stole two of his hogs, and I can prove he said it." It was held that there was a material variance.

In Fleet v. Tichenor (1909) 156 Cal. 343, 34 L.R.A.(N.S.) 323, 104 Pac. 458, the complaint alleged that defendant said: "Mrs. Fleet entered my house and stole some of my jewelry, and still has it." The proof showed that in a conversation with the witness, the defendant made certain statements from which, if believed, the inference must be drawn that the plaintiff had been in the house. It did not appear anywhere in the evidence that defendant said that Mrs. Fleet "stole" any of her jewelry, or that she used any word or words in that connection synonymous with "stole," and that her alleged taking of the jewelry was a stealing thereof was only an inference to be drawn from the statement in the course of the conversation of the various other specific facts. The court said: "This is not substantially proving the specific words alleged to have been spoken and for the speaking of which plaintiff claims damages. No case cited and none we have been able to find goes to the extent of holding that, where a recovery is sought for the speaking of certain specified slanderous words, the allegations of the complaint are sustained by proof of different words which do no more than establish a basis for an inference that the defendant intended to make against the plaintiff a charge similar to that embodied in the words alleged."

An allegation in the declaration that the words were that certain soap was stolen out of the defendant's yard by the plaintiff is not supported by proof that the defendant asserted that his soap had been taken out of his yard. Shepherd v. Bliss (1819) 2 Starkie (Eng.) 510.

In Renaker v. Gregg (1912) 147 Ky. 868, 144 S. W. 89, it was alleged that defendant published of the plaintiff the following words: "Joe Gregg stole a sheep from me out of my pasture, and put it over the fence out of my place and I caught it and put it back. There was wool on the fence where he put it over and there was salt on the ground. If I could make a witness out of that little boy of mine, I would make it warm for Gregg," etc. The proof showed that the defendant said: "Gregg 'took' a sheep out of his (defendant's) pasture and put it over the fence, and that there was salt on the ground and wool on the fence where he put the sheep over; and if he could make a witness out of his little boy he would make it warm for Gregg." It was held that a request by the defendant for a direction of a verdict in his favor, on the ground that there was a fatal variance between the pleading and proof, was erroneously denied. The court said: "There is, of course, a plain and well understood difference between the meaning of the words 'stole' and 'took.' In its ordinary use and by common acceptation the word

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'stole' imports a crime; and to say of a person that he 'stole' an article is to accuse him of theft and charge him with being a thief, and consequently with having committed the crime of larceny. And so it was not necessary to aver that Renaker intended to accuse or that those who heard Renaker utter the words charged in the petition understood him to accuse Gregg of the crime of larceny, because the words in their ordinary and usual meaning imported this charge and were per se actionable. Barr v. Gaines (1835) 3 Dana (Ky.) 258; Hume v. Arrasmith (1808) 1 Bibb (Ky.) 165. If the words charged in the petition had been, 'Joe Gregg "took" a sheep out of my pasture, and put it over the fence out of my place and I caught it and put it back; there was wool on the fence where he (meaning Gregg) put it over, and there was salt on the ground. If I could make a witness out of that little boy of mine, I would make it warm for Gregg,' it is very questionable if the action could have been maintained, even if the words were accompanied by averments charging that Renaker, in the use of this language, intended to and did mean to charge Gregg with 'stealing' a sheep and with the crime of larceny, and that the persons in whose presence and hearing he uttered the words understood him to so mean. Because these words do not necessarily or in their usual acceptation import the commission of larceny or any crime or any offense involving moral turpitude; as a person might get or take a sheep out of a pasture, and might put salt on the ground to catch it, and yet not be guilty of any wrongdoing. . . . It is also quite clear that a case for Gregg, entitling him to go to the jury, would have been made out by evidence that Renaker said, 'Joe Gregg has stolen one of my sheep,' or the evidence that Renaker said, 'Joe Gregg stole a sheep out of my lot,' or evidence that Renaker said, 'Joe Gregg stole one of my sheep,' as the variance between the language charged and the language proven would be immaterial. The actionable slanderous words charged would have been substantially proven although not in the precise words in which they were laid. And so, if there was evidence that Renaker said, 'Joe Gregg stole a sheep from me out of my pasture,' but there was no evidence that he said, 'and put it over the fence out of my place,' or that he said, 'I caught it and put it back,' or that he said, 'There was wool on the fence where he put it over,' or that he said, 'There was salt on the ground,' or that he said, 'If I could make a witness out of this little boy of mine I would make it warm for Gregg,' a case would be made out entitling Gregg to go to the jury, because the words that he charged but failed to prove were not essential to constitute his cause of action. In short, the cause of action set out by Gregg in his petition would be complete and sufficient if he had only averred that Renaker said, 'Joe Gregg stole a sheep from me out of my pasture.' This view is well expressed in Barr v. Gaines (Ky.) supra. In that case, Barr brought an action of slander against Gaines, and in his petition charged that Gaines said of him, 'He (meaning the plaintiff) stole John Thomas's hogs out of the pen built by Tandy Quisenberry; Robert Quisenberry told me so.' 'He (meaning the plaintiff) stole hogs.' The evidence was that Gaines, in a conversation of and concerning Barr, some short time previous to the bringing of the suit, said that 'Barr, the plaintiff, had stole a hog out of Tandy Quisenberry's pen, and that he could prove it by Bob Quisenberry.' The lower court instructed the jury to find as in the case of a nonsuit, upon the ground that the words spoken did not correspond with the words charged. In holding that this was error the court said: 'The only question to be settled is, Were the words charged in the declaration, or any specification of them, sufficiently sustained by the proof, to entitle the plaintiff to this action? We think they were. The ancient strictness in this action has been greatly relaxed. Anciently, it was necessary to prove the words precisely as laid. And words charged in the third person were not sustained by the proof of words spoken in the

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second person, or vice versa. But this technicality has been superseded in modern decisions by the more sensible doctrine that words are to be construed according to their common acceptation and obvious import . . . and if the substance of the words charged be proven, or a part only of the words charged, and that part be actionable, it is sufficient. . . . The substance of the charge laid in the declaration is that the defendant said of the plaintiff that he was guilty of hog stealing. And surely the proof that the defendant said that the plaintiff had stole a hog substantially supports the charge. It is the same species and grade of offense charged and proved.' . . . 'The well settled rule of pleading in actions of this sort is that the specific words in which the slander is conveyed must be set forth in the petition, and that it is not sufficient to state merely the effect of the words uttered, or that the defendant charged the plaintiff with the commission of a particular crime. . . . And the rule is that the words must be proved substantially as they are laid. It is not enough to prove words of the same effect or import or conveying the same idea. The words must be substantially the same words, and it is not sufficient that they contain substantially the same charge but in different phraseology. Equivalent words of slander will not do.' To the same effect is Barr v. Gaines; Hume v. Arrasmith (Ky.) supra. As the evidence for Gregg did not, under any authority that has come under our notice, support the averments of his petition, we must hold that the trial court erred in refusing to sustain the motion for a peremptory instruction."

In Trimble v. Moore (1831) 2 La. 577, the petition alleged that the defendant "in substance charged the plaintiff with having stolen $300 in money and notes, and having run away." The words proved were to the effect that "the plaintiff had taken from defendant's store to the amount of two or three hundred dollars in money and notes, and had run away with them." The variance was held not to be material. See to the same effect, Robinson v. Van Auken (1906) 190 Mass. 161, 76 N. E. 601.

In Tipton v. Kahle (1834) 3 Watts (Pa.) 90, it was held that a charge that defendant said of the plaintiff, "He is guilty of perjury," was not supported by proof that he said: "He swore me out of a sum of money."

An allegation that it was said of the plaintiff, who was county treasurer, that "there was a shortage in his accounts with the county, and his bondsmen had to make it good," is not materially variant from proof that the defendant said in effect that the plaintiff was short with the county in some public office, etc. Waters v. Moore (1916) 122 Ark. 250, 182 S. W. 904, wherein the court said: "The charge of official dishonesty is the essence of this allegation, and the proof on the part of appellee is that appellant stated that appellee had been short in some public office, and that his official bondsmen had to make good this shortage. Nor do we think that there was any variance between the proof and the allegations of the first count of the complaint, which count alleged that appellant had accused appellee of being short in his accounts as treasurer of Garland county, and that his bondsmen had to settle that shortage. It is true that the witness who undertook to name the office referred to by appellant was not positive whether the office stated was that of county clerk or county treasurer, but he did say that it was one office or the other, and the proof shows that appellee had held only the office of county treasurer, and had never held the office of county clerk."

In Cheadle v. Buell (1833) 6 Ohio, 67, the words charged were: "He (the plaintiff meaning) represented himself to Colonel Stone, of Point Harmar, to be a man by the name of Seely, whereby he obtained of said Stone a letter containing money, which he was to deliver to the owner; but instead of doing so, he broke open the letter and used the money himself." The proof was that defendant said that plaintiff went to Colonel Stone's, assumed the name of Seely, and by that means got a letter to Elliott, with

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$50 in it; broke open the letter, used the money, and afterward replaced it. The variance was held not to be material.

A contention that there was a variance between the pleading and proof, where the declaration alleged that defendant charged plaintiff with having stolen two turkeys from a "butcher shop," while the proof was from "a meat market," has been said to be too frivolous to need comment. Wiest v. Luyendyk (1889) 73 Mich. 661, 41 N. W. 839.

In Hewitt v. Morley (1896) 111 Mich. 187, 69 N. W. 245, the allegation was that defendant said " 'she (plaintiff meaning) is a thief.' 'She stole $5 from my hired man.' 'She stole money from my children.' 'She stole money from my wife,' " etc. The proof showed that defendant said "that they had missed $5 belonging to the hired man, and $2 from his wife's pocketbook, and some change belonging to the children, . . . and they felt confident Ida [plaintiff] had taken them." The variance was held to be immaterial.

Where the plaintiff was accused of larceny and the complaint alleged that defendant said of her that "the girl that hired with us has got it," and the words proved were, "the girl that lived with us has got it," the variance was held to be immaterial. Robinett v. Ruby (1859) 13 Md. 95.

Where the specific words as charged in the complaint were, "Mrs. Fleet [plaintiff] entered my house and stole some of my jewelry, and still has it," and nowhere in the evidence did it appear that the words "entered," "went into," or "was in" the house were used, the variance was held to be sufficient to prevent a recovery. Fleet v. Tichenor (1909) 156 Cal. 343, 34 L.R.A. (N.S.) 323, 104 Pac. 458, wherein it was said: "This is not substantially proving the specific words alleged to have been spoken and for the speaking of which plaintiff claims damages. No case cited and none we have been able to find goes to the extent of holding that where a recovery is sought for the speaking of certain specified slanderous words, the allegations of the complaint are sustained by proof of different words which do no more than establish a basis for an inference that the defendant intended to make against the plaintiff a charge similar to that embodied in the words alleged."

3. Charge of perjury.

Where a suit is brought for defamatory words uttered respecting a party's testimony in one court, it is insufficient to sustain the pleading, to prove that the words were spoken in reference to a different oath, or an oath administered by a different court. Phillips v. Beene (1849) 16 Ala. 720.

The rule of insufficiency of proof of equivalent words in actions for defamation was applied in the case of Sanford v. Gaddis (1853) 15 Ill. 228, wherein the complaint alleged that defendant said of plaintiff, in reference to testimony given by him as a witness in a judicial proceeding, "You swore false." The proof was that the words were used, "You have sworn false," which was held to be a variance. The court said: "In this case, the words proved, under the circumstances of the speaking, had the same meaning as those laid in the declaration, and equally imputed the crime of perjury. But they were not the same words. They were at most only equivalent words. They were not in themselves actionable. There was a clear variance between the words laid and those proved."

An averment in a declaration of a charge that the plaintiff wilfully and corruptly perjured herself in an examination before a justice of the peace is not sustained by proof of a charge that the plaintiff swore to two falsities before a justice, as the latter, technically speaking, imputes no crime. Robertson v. Lea (1827) 1 Stew. (Ala.) 141.

In Berry v. Dryden (1842) 7 Mo. 324, the charge was that the defendant said: "He (meaning the plaintiff) had sworn a lie in Kentucky, and that it was in him for he had sworn what he could prove to be a point blank lie this day before Squire Davis," etc. The proof showed that the words used were: "He had sworn off a just account before Squire Davis, and that he

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would or could prove it at the circuit court, by a witness; that he had been up for perjury in Kentucky and the record would show it." The variance was held to be fatal.

In Pinkston v. Christerson (1887) 8 Ky. L. Rep. 789, the allegation was that plaintiff, a justice of the peace, while presiding in the trial of an action, "had sold out to Thomas Brown on the bench." The proof showed that defendant said "that he could not help thinking about said trial; that they had acquitted Tom Brown; that John Christerson (plaintiff), had sold out, and he was going to tell him so to his face." It was held that the variance was not material.

In Fox v. Vanderbeck (1826) 5 Cow. (N. Y.) 573, the words alleged to have been spoken by defendant were as follows: "You are perjured and I will put you into state prison," and "he has sworn false and perjured himself, and I will put him into state prison," and also, "he swore to an absolute falsehood, and he perjured himself." The proof showed that defendant said that he thought he should prosecute the plaintiff for perjury. The justice before whom the plaintiff testified as a witness stated that defendant called on him for his minutes and said he wanted them to go to some lawyer, to prosecute the plaintiff. The variance was held to be fatal.

4. Miscellaneous charges.

In Birch v. Benton (1857) 26 Mo. 153, the words alleged were that the defendant said of the plaintiff that "he has whipped his wife; he has whipped her again since he denied it at Liberty; he knocked out three of her teeth; she had to fly to a neighbor's house, where she exhibited the blood or marks of his violence. He whipped his wife until the blood ran down to her heels . . . all for keeping his own negro wench." The proof by one witness was, that defendant said of plaintiff that he was "a man who had whipped his wife and caused her to fly to a neighbor's house with the marks of violence upon her; that his wife was a decent and intelligent lady and that the cause of the difficulty was on account of Birch preferring to sleep with a d—d old negro wench to his own wife." Another witness testified that defendant "very bitterly denounced Colonel Birch as the man who had whipped his wife for the accommodation of a negro woman; and said that he would not speak in the courthouse with him or notice him in any manner," etc. The variance was held to be fatal to a recovery.

In Haub v. Friermuth (1905) 1 Cal. App. 556, 82 Pac. 571, it was alleged that the defendant said of the plaintiff: "I have a man to prove that George Haub struck Richard Schwartz in front of his place of business; that he had two witnesses who tracked the blood stains from Haub's shop to the place where Schwartz fell unconscious, and that he had proof that Haub was guilty of the murder of Schwartz." The proof showed that the defendant said to one witness, "Mr. Haub might have killed him anyhow;" to another witness, "If you will follow up Haub pretty close you will find that this man's death came that way," and "he might have something to do with it." It was held to be not only a case of variance, but a failure of proof.

The charge that "he [plaintiff] had to leave Indiana for burning a barn" is not sustained by proof that defendant said, "I think my character is about as good as Bundy's [plaintiff]. I hadn't to leave Indiana for burning a barn." Bundy v. Hart (1870) 46 Mo. 460, 2 Am. Rep. 525.

In Merrill v. Peaslee (1845) 17 N. H. 540, the words charged were: "What will Merrill do next? Kimball has had his barn burned, and Hoit will have his burnt within a fortnight. We have persons about here bad enough to do this." The words proved were: "What do you suppose Merrill will do next? I suppose you have heard that Kimball has had his barn burnt. Hoit will have his burnt in a fortnight." It was held that there was not a material variance.

An allegation that the defendant spoke of and concerning the plaintiff the words "that he [plaintiff] forged that deed" is not supported by proof that it was the impression of the witness that the defendant "made the re-

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mark that it was a forgery." Conran v. Fenn (1911) 159 Mo. App. 664, 140 S. W. 82.

Where the averment was that the defendant imputed to the plaintiff "mismanagement or ignorance," proof that the words were "ignorance or inattention" was held to constitute a material variance. Brooks v. Blanshard (1833) 1 Cromp. & M. 779, 149 Eng. Reprint, 613, 3 Tyrw. 844, 2 L. J. Exch. N. S. 275.

IV. Omission of words.

a. Rule stated.

The failure on the part of the plaintiff to prove all the words alleged in his pleading does not constitute a material variance unless it takes all of them to constitute the cause of action.

United States.—Broughton v. McGrew (1889) 5 L.R.A. 406, 39 Fed. 672; Massee v. Williams (1913) 124 C. C. A. 624, 207 Fed. 222.

Alabama.—Chandler v. Holloway (1836) 4 Port. 17; Easley v. Moss (1846) 9 Ala. 266; Scott v. McKinnish (1849) 15 Ala. 662; Penry v. Dozier (1909) 161 Ala. 292, 49 So. 909.

Arkansas.—Laster v. Bragg (1913) 107 Ark. 74, 153 S. W. 116; Waters v. Moore (1916) 122 Ark. 250.

California. — Fleet v. Tichenor (1909) 156 Cal. 343, 34 L.R.A.(N.S.) 323, 104 Pac. 458.

Connecticut. — Nichols v. Hayes (1839) 13 Conn. 155.

Illinois. — Patterson v. Edwards (1845) 7 Ill. 720; Sanford v. Gaddis (1853) 15 Ill. 229; Wilborn v. Odell (1862) 29 Ill. 456; Harbison v. Shook (1866) 41 Ill. 141; Baker v. Young (1867) 44 Ill. 42, 92 Am. Dec. 149; Schmisseur v. Kreilich (1879) 92 Ill. 347; Ransom v. McCurley (1892) 140 Ill. 626, 31 N. E. 119, affirming (1890) 38 Ill. App. 323; Albin v. Parks (1878) 2 Ill. App. 576; Sword v. Martin (1887) 28 Ill. App. 304; Richards v. Baumgart (1894) 56 Ill. App. 422; Jack v. Kness (1901) 96 Ill. App. 336; Schofield v. Baldwin (1902) 102 Ill. App. 560; Ketchum v. Gilmer (1904) 115 Ill. App. 347; Comer v. McDonnell (1904) 117 Ill. App. 450; Newstedt v. Meyer (1910) 155 Ill. App. 550.

Indiana.—Wheeler v. Robb (1824) 1 Blackf. 330, 12 Am. Dec. 245; Creelman v. Marks (1844) 7 Blackf. 281; Iseley v. Lovejoy (1847) 8 Blackf. 462; Tucker v. Call (1873) 45 Ind. 31; McCallister v. Mount (1881) 73 Ind. 559.

Kentucky.—Mooris v. Curtis (1898) 20 Ky. L. Rep. 56, 45 S. W. 86; Nicholson v. Dunn (1899) 21 Ky. L. Rep. 643, 52 S. W. 935; Tharp v. Nolan (1905) 119 Ky. 870, 84 S. W. 1168; Renaker v. Gregg (1912) 147 Ky. 368, 144 S. W. 89.

Missouri.—Cooper v. Marlow (1832) 3 Mo. 188; Berry v. Dryden (1842) 7 Mo. 324; Birch v. Benton (1858) 26 Mo. 153; Coghill v. Chandler (1862) 33 Mo. 115; Pennington v. Weeks (1870) 46 Mo. 217; Lewis v. McDaniel (1884) 82 Mo. 577; Mix v. McCoy (1886) 22 Mo. App. 488; Casey v. Aubuchon (1887) 25 Mo. App. 91; Baldwin v. Fries (1891) 46 Mo. App. 288; Unterberger v. Scharff (1892) 51 Mo. App. 102; Hauser v. Steiger (1909) 137 Mo. App. 560, 119 S. W. 52; Kunz v. Hartwig (1910) 151 Mo. App. 94, 131 S. W. 721; Parsons v. Henry (1914) 177 Mo. App. 329, 164 S. W. 241.

New York. — Nestle v. Van Slyck (1842) 2 Hill, 282; Loomis v. Swick (1829) 3 Wend. 206; Purple v. Horton (1834) 13 Wend. 9, 27 Am. Dec. 167; Lewis v. Few (1809) 5 Johns. 1; Southwick v. Stevens (1813) 10 Johns. 443.

North Carolina.—James v. Clarke (1841) 23 N. C. (1 Ired. L.) 397.

Pennsylvania. — Foster v. Small (1838) 3 Whart. 138; Smith v. Stewart (1847) 5 Pa. 372; Boyajian v. Ohanian (1915) 60 Pa. Super. Ct. 614.

South Carolina. — Poppenheim v. Wilkes (1846) 1 Strobh. L. 275; Morgan v. Livingston (1845) 2 Rich. L. 573.

Tennessee. — Hancock v. Stephens (1850) 11 Humph. 507; Cohen v. Pinson (1910) 1 Tenn. C. C. A. 93; Beasley v. Hills (1910) 1 Tenn. C. C. A. 285; Roberts v. Lamb (1894) 93 Tenn. 343, 27 S. W. 668.

Texas.—Humbard v. State (1886) 21 Tex. App. 200.

Vermont.—Smith v. Hollister (1860) 32 Vt. 695; Smith v. Moore (1902) 74 Vt. 81, 52 Atl. 320.

England.—Rainy v. Bravo (1872) L. R. 4 P. C. (Eng.) 287, 27 L. T. N. S.

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249, 20 Week. Rep. 873; Orpwood v. Barkes (1827) 4 Bing. 261, 130 Eng. Reprint, 767, 5 L. J. C. P. 167, 12 J. B. Moore, 492, 29 Revised Rep. 559.

Canada. — Reilander v. Bengert (1908) 1 Sask. L. R. 259; Rutledge v. Astell (1908) 1 Sask. L. R. 389; Marsden v. Henderson (1863) 22 U. C. Q. B. 585.

"All the words need not be proved. Some of them may be omitted provided those proved are those containing the poison to the character and constitute the precise charge of the slander averred." Hauser v. Steiger (1909) 137 Mo. App. 560, 119 S. W. 52.

All the words charged need not be proved either substantially or at all. It is sufficient to prove the identical words which of themselves constitute the slanderous imputation. Pennington v. Meeks (1870) 46 Mo. 217.

It is not necessary to prove the whole of a continuous sentence as alleged, provided the meaning of the words proved is not varied by the omission of others. Schmisseur v. Kreilich (1879) 92 Ill. 347.

The ancient rule that, in actions for defamation, all the precise words alleged must be proved, has been somewhat relaxed. It is now and long has been the generally accepted rule that, where the defendant is charged with the speaking of certain specified slanderous words, it is sufficient to prove the substance of the precise words alleged; but by this is meant, according to the overwhelming weight of authority, not that it is sufficient to show the speaking of other words which would produce an impression similar to that which the words alleged would produce, but that the words alleged in the declaration, or enough of them to amount to a charge of the particular offense alleged to have been imputed, must be substantially proved. In other words, so many of the words alleged in the declaration "as constitute the sting of the charge," or as contain "the poison to the character, and constitute the precise charge of slander averred," must be substantially proved. Fleet v. Tichenor (1909) 156 Cal. 343, 34 L.R.A.(N.S.) 323, 104 Pac. 458.

In a conversation in which a person is slandered, a great deal may be said which does not vary the meaning of the offensive words, and therefore a variance between the declaration and proof as to the part of a statement which does not affect the sense will be immaterial; but the words that contain the poison to the character and impute the crime must be proved as laid; "and this seems to be what is meant by the cases when they say that the words proved must substantially correspond with those charged." Birch v. Benton (1858) 26 Mo. 153.

In an action for defamation, while the plaintiff will not be permitted to prove the substance of the words alleged, and is required to prove the precise words charged to have been spoken, it is not essential that he should prove all of them, if what he does prove are in themselves slanderous. Scott v. McKinnish (1849) 15 Ala. 662.

It was said in Rutledge v. Astell (1908) 1 Sask. L. R. 389: "It will be observed that the alleged slanderous words testified to by the witnesses are not exactly the words charged in the statement of claim. This, however, is not necessary. . . . It is not necessary to prove all the words alleged, if enough has been proved to establish that an offense of the character alleged in the statement of claim was imputed by the words."

See to the same effect, Reilander v. Bengert (1908) 1 Sask. L. R. 259.

b. Illustrations.

1. Charge of immorality or unchastity.

The charge that defendant said of plaintiff: "She is a whore"—"she is a regular whore," is sustained by proof of the words she "is a common whore" by one witness, and that she "is a regular whore" by another witness. Ketchum v. Gilmer (1904) 115 Ill. App. 347, wherein the court said: "We regard the law as clear that if the evidence showed defendant said plaintiff was a whore, this was sufficient to authorize a recovery, whether it was qualified by the word "regular" or "common," or qualified at all. . . . Where all the words alleged consti-

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tute one entire charge, they must all be proved; but it is not necessary to prove the whole of a continuous sentence as alleged, provided the meaning of the words proved is not varied by the omission of others."

An objection by the defendant on the ground of variance is untenable where the words charged were, "They go along on the sidewalk by our house and try to get Otho after them," and the words proved were: "They go along the sidewalk by our house and try to get Otho to go after them." Richards v. Baumgart (1894) 56 Ill. App. 422. And in the same case it was held that there was no variance between the words, "I have seen enough of what is going on in that house," and "I have seen enough going on in that house." The court said: "In one case the witness added the words 'to go,' which were not found in the declaration, but they did not alter the sense of the words charged, and in such a case the fact that fewer words were charged than spoken did not constitute a variance. . . . In the other case, the witness omitted the words 'of what is,' which were contained in the declaration, but there is no rule which requires a plaintiff to prove all the words alleged, if enough of such words are proved to constitute the charge. Torts are divisible, and in slander, a plaintiff may prove a part of his charge and recover, if there be enough proved to constitute the slander. . . . The words of the witness were the same as were charged in the declaration, and the omitted words did not change the meaning, inasmuch as to see anything going on in a house is to see what is going on there."

In Boyajian v. Ohanian (1915) 60 Pa. Super. Ct. 614, the averment was that the defendant charged the plaintiff with adulterous conduct, having said in effect that plaintiff had "connection" with a man who was not her husband. It was held that this was supported by proof of the words, with the variation that plaintiff "has done it" or had "free lunch."

In Nicholson v. Dunn (1899) 21 Ky. L. Rep. 643, 52 S. W. 935, the charge that the defendant said of the plaintiff, "I heard that Minnie Nicholson had a girl and boy," was held to be supported by proof of the words with the name omitted. The court said: "The rule that words must be proven substantially as laid relates to the slanderous words alone, and has no reference to the words which are used merely to designate the person of whom the slander is uttered."

But see Sword v. Martin (1887) 23 Ill. App. 304, wherein an averment that "John Binning knocked up Charles Martin's daughter (meaning plaintiff); she (plaintiff) has gone down below, to her grandmother's, to have a young one," was held not to be sustained by proof that the defendant said that "Johnnie Binning knocked up Charles Martin's girl," the court saying that there was nothing in the declaration to indicate that the words proved referred to the plaintiff.

2. Charge of theft or larceny.

In Orpwood v. Barkes (1827) 4 Bing. 261, 130 Eng. Reprint, 767, it was charged that the defendant said of the plaintiff to a third person from whom the plaintiff sought credit, "Ware hawk! you must take care of yourself there; mind what you are about," meaning that the plaintiff was in indigent circumstances, and incapable of paying his just debts. The words proved were, that the defendant said "Ware hawk! mind what you are about." The variance was held not to be material; the court saying, per Best, Ch. J.: "As I understand the rule, it is not necessary to prove all the words laid in the declaration, provided enough be proved to sustain an action for slander. And enough has been proved in the present case. 'Ware hawk,' under the circumstances in which it was spoken, is equivalent to 'Beware of a sharper;' and by the expression, 'mind what you are about,' the defendant clearly intended to injure the plaintiff's credit. If the words, 'take care of yourself,' had been necessary to render the rest intelligible, undoubtedly they ought to have been proved, but I am of the opinion they were by no means necessary."

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An allegation of the words, "He stole $200 from me when I was drunk," is supported by proof which showed that the same words were used, except the words, "when I was drunk." Crotty v. Morrissey (1866) 40 Ill. 477.

Proof that the defendant said that the plaintiff stole part of the money he collected in the Catholic church is a material variance from an allegation in the pleading that he stole a part of the money he collected in the Catholic church in Seneca. Ibid.

In Casey v. Aubuchon (1887) 25 Mo. App. 91, the allegation was of the speaking of the following words: "Casey stole $5 out of the drawer"— "Casey stole $5 out of my drawer"— "Casey has done me a dirty trick; I left him in my store, and when I came back the drawer was short $5." The proof showed the speaking of the words, except the sentence, "Casey stole $5 out of the drawer." The variance was held to be immaterial.

A charge of speaking the words, "He stole a large amount of money," is supported by proof of the words, "He stole money." Sanford v. Gaddis (1853) 15 Ill. 229.

An allegation in substance that defendant said of plaintiff that he killed defendant's hogs, that he could prove it, and that he (plaintiff) was the biggest thief on the creek, which he could prove by one Mitchell and his boys, has been held to be sustained by proof of the identical words, with the exception of the words, "that he could prove it by Mitchell and his boys," which, the court said, "may be treated as superfluous." Lewis v. McDaniel (1884) 82 Mo. 577.

The averment of the speaking of the words, "You stole my peas and I can prove it by John Hodges," is sustained by a proof of the words, "You stole my peas," without the additional words. James v. Clarke (1841) 23 N. C. (1 Ired. L.) 397.

There is no variance between the words pleaded, "I believe that you stole the knife," "You stole the knife and that is the way to tell it," and proof of the words, "I have said you stole the knife, and still say it." Iseley v. Lovejoy (1847) 8 Blackf. (Ind.) 462.

Allegations that the defendant said of the plaintiff that "he is a thief," and in another count that "he is a thief and had stolen a chicken," are supported by proof of either statement, and failure to prove the making of both statements is not a variance. Penry v. Dozier (1909) 161 Ala. 292, 49 So. 909.

In an action for slander for accusing the plaintiff of having stolen a check, a pleading alleging words stating that the check was drawn by a certain person is sustained by proof of words not naming the maker of the check. Zentzshel v. Richie (1908) 33 Ky. L. Rep. 657, 110 S. W. 832.

In Hancock v. Stephens (1850) 11 Humph. (Tenn.) 507, it was charged that the defendant said: "He (plaintiff) has been killing and taking my bottom hogs for two or three years, and he has marked my hogs in his mark and I have them at home in my pen; and he is the damndest hog rogue in the country; that it was not the first time he had stolen hogs." These words were proved except the last clause, "it was not the first time he had stolen hogs." The variance was held to be immaterial.

In Laster v. Bragg (1913) 107 Ark. 74, 153 S. W. 1116, the allegation in the complaint was that the defendant said of the plaintiff "that he is the damndest thief in the country, and we are going to make an example of him." The proof was that the words used by the defendant were "that he was a damn thief, and that he (defendant) would lose the rent to prosecute him." In concluding that the variance was immaterial it was said: "The plaintiff need not prove all the words laid, but he must prove enough of them to sustain the action. It is sufficient if the gravamen of the charge as laid is proved, and unless the additional words qualify the meaning of those proved so as to render the words proved not actionable, the proof is sufficient. It is necessary for the plaintiff to prove some of the words precisely as charged, but not all of them, if those proved are in them-

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selves slanderous; but he will not be permitted to prove the substance of them in lieu of the precise words.' Thus it will be seen the rule is, while it is not sufficient to prove words of a similar import merely, and it must be proved that the defendant used substantially the same words as charged, yet a variance in the mere form of expression is not material. The word 'thief' is the actionable one in the present case because, unexplained, it amounts to a charge that the plaintiff had been guilty of larceny, which is an infamous crime. Gaines v. Belding (1892) 56 Ark. 100, 19 S. W. 236. Hence, it will be seen that while the exact words charged in the complaint were not proved, the words proved are substantially proved as laid. Both the words charged and the words proved impute the crime of larceny. The meaning of the rule above announced seems to be that if the words charged to have been spoken are proved, but with the omission or addition of words not at all varying or affecting their sense, the variance will not be regarded as material. While it is not necessary under the rule to prove as laid, all the words which are alleged to have been spoken by the defendant, yet so much of them must be proved as is sufficient to sustain the cause of action. As we have already seen, the actionable word in the instant case is the word 'thief,' because it imputes the crime of larceny. The words accompanying it were merely descriptive, and in the application of the rule to the facts of this case we conclude that the slander proved substantially corresponded with the allegation of the complaint, and there was no variance."

In Hume v. Arrasmith (1808) 1 Bibb (Ky.) 165, 4 Am. Dec. 626, the words charged were, "John Hume (plaintiff) stole corn and I can prove it," etc. The proof was that the defendant had said that the plaintiff "had stolen corn and he (defendant) could prove it." It was held that the variance between the allegation and proof was immaterial.

It was held in Kuhlman v. Kiefer (1909) 147 Ill. App. 162, that a variance between an allegation of the words: "He is using the church money in building his houses," and proof of the words: Father Kuhlman was building houses with the church's money," was fatal to a recovery.

Proof that the defendant said of the plaintiff that "he is a thief" sustains an allegation in the pleading that the words were, "He is a bold thief." Coghill v. Chandler (1862) 33 Mo. 115.

3. Miscellaneous charges.

In Foster v. Small (1838) 3 Whart. Pa. 138, the words alleged were: "He is not a physician, but a twopenny bleeder." Those proved by one witness were: "If Dr. Foster is a twopenny physician, I am none; I am a regular graduate and no quack." Another witness testified that defendant said: "Dr. Foster is no regular bred physician; he has no diploma; he kills his patients and bleeds them to death." The variance was held to be material.

A charge that defendant in effect said of plaintiff, a physician, that he had introduced the disease of smallpox into the town with a view to his own emolument, and also had destroyed the life of defendant's brother by having intentionally exposed him to that disease, has been held to be supported by proof of the first charge, though the second was not proved. Purple v. Horton (1834) 13 Wend. (N. Y.) 9, 27 Am. Dec. 167.

In Rutledge v. Astell (1908) 1 Sask. L. R. 389, the charge that defendant published of the plaintiff the following words: "Don't buy any horses from that man; his horses are drugged and when you have them awhile they go down. . . . I wouldn't have anything to do with his horses; they are drugged; there is antimony in the drugs and it swells them, but when you work them they go down." The words proved were: "He drugged his horses, and when they were fed as an ordinary horse, they would go down. He would have nothing to do with his (plaintiff's) horses, that his horses were drugged, that they were blown up with antimony, and would all go to pieces; that he knew the mare and that she had been returned several times." The variance was held not to be material.

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In Smith v. Stewart (1847) 5 Pa. 372, it was alleged that the defendant said: "That man (plaintiff) was in the penitentiary in Ohio, and I can prove it"—"He is a convict and I can prove it." The proof was of the words with the exception of "I can prove it." The variance was held to be immaterial.

In Nichols v. Hayes (1839) 13 Conn. 155, the words alleged to have been spoken of plaintiff were: "He has been guilty of forgery"—"He has forged a receipt"—"He has altered a receipt." The proof was of the words excepting the last sentence, "He has altered a receipt." It was held that there was no material variance.

In Creelman v. Marks (1844) 7 Blackf. (Ind.) 281, an instruction that "a charge that Marks had signed my name to a note without my leave, and I call that forgery," is substantially the same as the charge, "Marks has committed forgery," was held to be erroneous, since the jury would understand from that instruction that the last-named words would be proved by evidence of the speaking of the first above named, which is not the law.

There is no variance between the pleading alleging that the defendant said: "Old Dykeman Shook did wickedly, wilfully, corruptly swear falsely," etc., and proof showing that the language used was, "Old man Shook," etc., without giving his Christian name. Harbison v. Shook (1866) 41 Ill. 141.

V. Addition of words.

a. General rule.

Proof of words in addition to those charged in a complaint for slander is not regarded as producing a material variance unless such words are in some way repugnant to or change the sense or effect of the words pleaded. Robinett v. McDonald (1884) 65 Cal. 611, 4 Pac. 651; Williams v. Miner (1847) 18 Conn. 464; Brown v. Hanson (1875) 53 Ga. 632; Sanford v. Gaddis (1853) 15 Ill. 229; Baker v. Young (1867) 44 Ill. 42, 92 Am. Dec. 149; Albin v. Parks (1878) 2 Ill. App. 576; M'Coombs v. Tuttle (1840) 5 Blackf. (Ind.) 431; Brown v. Barnes (1878) 39 Mich. 211, 33 Am. Rep. 375; Cooper v. Marlow (1832) 3 Mo. 188; Birch v. Benton (1858) 26 Mo. 153; Baldwin v. Fries (1891) 46 Mo. App. 288; Schmidt v. Bauer (1895) 60 Mo. App. 212; Noeninger v. Vogt (1885) 88 Mo. 589; Merrill v. Peaslee (1845) 17 N. H. 540; Edgerley v. Swain (1855) 32 N. H. 478; Smith v. Stewart (1847) 5 Pa. 372; Poppenheim v. Wilkes (1846) 1 Strobh. L. (S. C.) 275; McArthur v. State (1900) 41 Tex. Crim. Rep. 635, 57 S. W. 847; Patterson v. Frazer (1906) 100 Tex. 103, 94 S. W. 324, reversing (1906) — Tex. Civ. App. —, 93 S. W. 146.

"It is sufficient to prove the substance of the words laid; but the sense as well as the manner of speaking them must be the same as averred, and when actionable words are laid and proved, it will be no variance to prove more words than laid, provided the whole context of the words proved, considered together, agrees in sense with the words alleged." Cooper v. Marlow (1832) 3 Mo. 188.

Where the proof essentially corresponds, and in some particulars almost literally agrees, with the pleading, the fact that the testimony is more amplified than the pleadings will not be regarded as a material variance. Williams v. Miner (1847) 18 Conn. 464.

Where additional words are proved to have been spoken which vary the effect of the defamatory charge, the variance will be fatal notwithstanding the fact that the exact words alleged in the pleading are proved. Edgerley v. Swain (1855) 32 N. H. 478, wherein the charge alleged that the defendant said to the plaintiff in the presence of others, "You have had old John Tilton up here on top of you once; you are like an old boaring sow, and a bulling cow," thereby meaning that the plaintiff was guilty of adulterous behavior. The words proved were: "What do you harbor that whore's bird for? You are like a boaring sow or a bulling cow. You have got old John Tilton up here, and got him onto you, and now you have got Olive up here, and you may get her onto you, if you want to." The court, in illustrating the materiality of such varia-

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tions, said: "Although the plaintiff need not set out all the words spoken, he must set forth enough to show the sense and connection in which they were used. If he does not, although he prove the precise words laid, yet, if they appear to have been so spoken in connection with other words, or in reference to some particular topic of discussion, as to have been used in an essentially different sense from that imputed to them in the declaration, and which is indispensable to the maintenance of the action, there will be a fatal variance. If a plaintiff bring his action, charging a defendant with defamation in saying of him, 'You are a thief,' alleging that thereby the defendant intended to charge him with the crime of larceny, and to cause him to be suspected and prosecuted therefor, it is clear that these words are actionable of themselves, and the declaration would be good without any colloquium of the occasion, purpose, or intent with which they were spoken, if proved to have been spoken without any qualification, the natural import of the language used implying a charge of larceny. Robinson v. Keyser (1851) 22 N. H. 328. But if the plaintiff should prove that the conversation occurred in a controversy between the defendant and himself, in regard to the title of a farm which the defendant had claimed, and which he believed the plaintiff had in some way unjustly acquired the possession of, and that the words actually spoken were, 'You are a thief, for you have stolen my farm,' here would be a fatal variance between the words proved and those laid, although the precise words laid were proved to have been spoken. So, if the words laid were, 'You are a murderer,' these might justly be held actionable without a colloquium, as importing, in their natural and ordinary acceptation, a charge of homicide. But if the words proved were, 'You are a murderer, for you killed my dog,' it would hardly be contended that there would not be such a variance in the evidence as would defeat the action, notwithstanding the exact words declared on were proved to have been spoken. In the case before us, if the words set forth in the declaration are actionable of themselves, as containing in their natural and ordinary acceptation a charge of crime, it would seem to be on the ground that they import a charge of fornication; or, if the plaintiff, of whom they were spoken, were then a married woman, which does not appear, of adultery. The subsequent words laid would seem to strengthen the idea of something lascivious or lewd, if, as apparently intended to be set forth, they were used in connection with and as giving character to those which precede them. The whole idea of the words contained in the declaration is, that here was a vile, unprovoked, unjustifiable attack upon the plaintiff, charging her with a foul crime in the grossest language. If they are actionable of themselves, it is because they substantially charge the plaintiff with having had old John Tilton in adulterous intercourse with her once, like an unnaturally excited beast; and it is difficult to conceive of anything more slanderous than such a charge thus made against a woman. But the words proved, admitting, what is perhaps not entirely clear, that they are essentially the same as those charged, present an entirely different aspect. Aside from the vulgarity of the terms employed, they contain, first, a remonstrance, in an interrogative form, against the plaintiff's harboring an unworthy woman, by inquiry why she did it; then an allegation that she must be unnaturally excited or partially insane so to do; and, lastly, an attempt to convince her of the folly of her course, by suggesting to her the consequences of what she had already done was to get the maintenance of John Tilton, whom she had before harbored, charged upon her, and assuring her that if she chose to persist in her infatuation by harboring Olive as she had John, she might incur the responsibility of Olive's maintenance also. There does not seem to us, in the words proved, to be any charge of fornication or adultery necessarily or naturally implied. On the contrary, the only phrase employed from which such a charge could be possibly inferred is

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so used to indicate the relations of the plaintiff to each of the two persons, of opposite sexes, mentioned, that any presumption of such a charge having been intended by it would seem to be entirely rebutted. We are of opinion that there was a substantial variance between the words proved and those laid in the declaration."

In Poppenheim v. Wilkes (1846) 1 Strobh. L. (S. C.) 275, the words charged were "that Poppenheim was a very bad man, he was a calf thief, and the records of the court would prove it." The proof established the use of these words except that the additional words, "he has been indicted," were used before the words, "the records of the court would prove it," which was held to be an immaterial variance. The court said: "We recognize as sound the rule laid down in many of the books; if some of the words, being actionable, be proved, an omission to prove the remainder of the words laid in context with them, or a variance from the latter, will not be material, provided the words do not differ in sense from those alleged, considering the whole context. It has been contended here that there is a fatal variance between the evidence of the plaintiff and his allegation. It does not so appear to this court. It is not alleged that the records of the court were referred to as proving a conviction, but the substantial sense of the allegation is that the records of the court were appealed to as proving the plaintiff's guilt, which might have been the purpose of the speaker, whether the party had never been tried, or had in fact been acquitted. To say that the words in question as proved differ in sense from those preceding them is equivalent to saying that, by proclaiming that Poppenheim had been indicted for calf stealing, and the records of the court would prove it, Wilkes meant that he was not guilty of calf stealing; such, certainly, was the substantial charge, and whether he said the records of the court would prove that he had stolen a calf, or that the records of the court would prove that he had been indicted for stealing a calf, in either case, there is no conflict with those words imputing the offense, and clearly proved as laid. Suppose the plaintiff had offered no proof at all of the words with respect to which the variance exists; there can be no doubt that having proved, as he did on the trial below, the words which imputed the charge of calf stealing, he would have sustained his action, for he would have proved some that were actionable, and thus have brought himself within the rule of law before stated and not contested."

b. Application of rule.

An allegation that the defendant charged the plaintiff with the theft of a certain sum of money, which he said was taken from his coat pocket, has been held to be supported by proof of the words in various forms, with additional particulars, not altering the sense. Brown v. Barnes (1878) 39 Mich. 211, 33 Am. Rep. 375.

If the words charged are, "He is a thief," they are supported by proving the words, "He is a thief, for he stole money." But if the words alleged are, "He is a thief," and those proved are, "He is a thief, for he bought property and refused to pay the price," the variance is fatal, since the additional words so qualify those alleged as not to impute the crime of larceny. Sanford v. Gaddis (1853) 15 Ill. 229.

A charge that the defendant said the plaintiff "had perjured himself, that he swore a lie before the court of Madison," is supported by proof of those words, qualified by the additional words, "according to the church book." Brown v. Hanson (1875) 53 Ga. 632.

An averment in the pleading that the defendant said of the plaintiff, "He is a convict and I can prove it," is sustained by proof of the words with the addition, "if reports be true, he is," etc. In passing on the additional words the court said: "This language designates no individual, lights upon no one, describes nobody, and is in fact nothing but the mere ideal of irresponsibility, which the wicked conjure up to shelter them,

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whilst they inflict a wound." Smith v. Stewart (1847) 5 Pa. 372.

An allegation that the defendant said: "There has been a secret burial of a child at Hopwell, and there is no doubt about its being (plaintiff's)," is sustained by proof that he said: "There has been a secret burial of a child at Hopwell, and there is no doubt about its being (plaintiff's) child." Miller v. Nuckolls (1905) 77 Ark. 64, 4 L.R.A.(N.S.) 149, 113 Am. St. Rep. 122, 91 S. W. 759, 7 Ann. Cas. 110.

In Whiting v. Smith (1832) 13 Pick. (Mass.) 364, the first count in the declaration alleged that the defendant said: "She is a whore and unfit to keep school." In the second, the words were: "She is a bitch and whore, right from the hill in Boston." It was held that the material words in both counts were, "She is a whore;" and that the additional words in the first count, "and unfit to keep school," and in the second, "right from the hill in Boston," not being in themselves actionable, did not qualify or change the meaning of the actionable words and need not be proved.

Proof that the defendant said, "She (plaintiff) was a damned whore," is no variance from the words pleaded, "She is a whore." Thomas v. Fischer (1874) 71 Ill. 576.

In Baker v. Young (1867) 44 Ill. 42, 92 Am. Dec. 149, the words alleged were: "Gusta Young (plaintiff) was (or is) in the family way, and Rink and his wife took her to a Chicago doctor to have the child worked off." The proof was of the following words: "Augusta Young was (or is) in the family way by Tom Beal;" "Rink and his wife had taken her to Chicago to have it worked off, or to have the child worked off." The variance was held to be immaterial.

In Patterson v. Frazer (1906) 100 Tex. 103, 94 S. W. 324, reversing (1906) — Tex. Civ. App. —, 93 S. W. 146, the charge was that the defendant said of the plaintiff the following: "The Frazer girls need not be talking about Marie Stone, for at any time they want to, it can be proven that the child born in San Antonio is not Mrs. Durrell's child, but Ella Frazer is its mother." The proof was that defendant said "that the Frazer girls need not trouble to talk about Marie Stone's affairs, and that people said that Ella Frazer was the mother of a child Mrs. Durrell was raising in Alpine, Texas." The variance was held to be immaterial, the court saying: "The gist of the slander spoken by Mrs. Moore of Miss Frazer was that the latter, being an unmarried woman, had given birth to a child. The words proved embodied fully that charge, and the other words proved did not modify or qualify the slanderous charge. Courts have justly been very liberal in permitting the proof of words spoken which constitute slander, for the reason that it is almost impossible to reproduce by witnesses the exact words used. A substantial agreement between the allegation and the proof is all that the law requires."

In M'Coombs v. Tuttle (1840) 5 Blackf. (Ind.) 431, the declaration alleged defamatory matter in a letter as follows: "Mr. Enos Tuttle,—After my respects to you, I would just inform you that you are a grand liar and a grand rascal, and deserve to come to the whipping post or the gallows." At the trial, plaintiff offered in evidence a letter which contained in addition to the matter set out in the declaration the following sentence: "We can forgive you the cost, but mind you, I have the note yet and I will keep it until you pay the costs." The variance was held to be immaterial since the part omitted was not descriptive of the part pleaded, nor did it in any wise alter the sense or explain the meaning of it.

It was held in Robinett v. McDonald (1884) 65 Cal. 611, 4 Pac. 651, that there was no variance, the words alleged being, "A. committed forgery," and the proof being of the words, "A. and B. committed forgery."

VI. Defamation in foreign tongue.

In actions for libel or slander, where the defamatory words charged in the petition were written or spoken in a foreign language, the rule is that they must be set forth in the petition, together with a proper translation of them. If the pleading alleges the

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words as spoken in the English language, and the evidence shows that they were spoken in a foreign language, the variance is, in the absence of a statute, generally held to be fatal. Zenobio v. Axtell (1795) 6 T. R. 162, 101 Eng. Reprint, 489, 3 Revised Rep. 142, 9 Eng. Rul. Cas. 87; Schultz v. Sohrt (1915) 201 Ill. App. 74; Kerschaugher v. Slusser (1859) 12 Ind. 453; Whiting v. Smith (1832) 13 Pick. (Mass.) 364; Kunz v. Hartwig (1910) 151 Mo. App. 94, 131 S. W. 721; Wormouth v. Cramer (1829) 3 Wend. (N. Y.) 394; Stichtd v. State (1888) 25 Tex. App. 420, 8 Am. St. Rep. 444, 8 S. W. 477; Zeig v. Ort (1850) 3 Pinney (Wis.) 30.

There is a material variation between the pleading and proof, where the defamatory words are alleged in the English language, and the evidence shows that they were uttered in German. Stichtd v. State (1888) 25 Tex. App. 420, 8 Am. St. Rep. 444, 8 S. W. 477, wherein it appeared that the defendant was indicted for criminal slander. The information alleged that appellant, in the presence of divers persons, said that the prosecutrix "is nothing but a whore; she has done nothing since she came to Texas but lives as a whore with negroes," and the proof was that the statement was made in German. In reversing the conviction it was said: "A novel question is presented in the record. In the information the alleged slanderous words are set forth in the English language. On the trial, over the objections of the defendant, the state was permitted to prove slanderous words uttered by the defendant in the German language, said words, when interpreted, meaning substantially the same as the slanderous words set forth in the information. The question presented is: When oral slander is alleged to have been committed by the use of English language, can such slander committed by the use of the German language be proved, there being no allegation that the slander was uttered in the German language? We are of the opinion that the question must be answered in the negative. In a civil action for slander, the rule is that where the slanderous words were spoken in a foreign language they must be set forth, together with a translation into English. To set forth the foreign words alone will not be sufficient. And to allege a publication of English words, and prove a publication of words in another tongue, is a variance. Townsend, Slander, § 330. The reasons upon which the above stated rule is founded demand its application with equal if not of greater force in a criminal than in a civil prosecution for slander. In all criminal prosecutions the accused party has the right to be informed by the information, or the indictment, of the facts charged against him, so that he may prepare to meet them; and he can only be required on a trial to meet and to defend against the exact matter charged against him. The allegation and the proof must meet, and substantially correspond; otherwise the accused might be convicted of a different offense than that with which he is charged, and which he has not been informed he was called upon to meet. To charge a person with uttering slanderous words in the English language certainly does not inform him that he will be required to meet and defend against words uttered by him in a different language. We hold that the court erred in permitting the state to prove the words uttered by the defendant in the German language, and that the slander, as charged in the information, is materially variant from that proved."

In Wormouth v. Cramer (1829) 3 Wend. (N. Y.) 394, the defamatory words were set forth in the English language, and were proved to have been spoken in the German language. The court said: "The rule is that words proved must be proved as laid; that is, substantially so; and it is not enough to prove words of similar import. How can this rule be complied with when words are laid in one language and proved in another? This is emphatically proving words of similar import."

But see Grotius v. Ross (1900) 24 Ind. App. 543, 57 N. E. 46, and Bower v. Deideker (1874) 38 Iowa, 418, wherein such variance was held to be

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immaterial under a statute. In Stevens v. Kobayshi (1912) 20 Cal. App. 153, 128 Pac. 419, the action was for libel against publishers of a newspaper published in a foreign tongue, and the libelous matter as translated into English was alleged in the complaint to mean: "Now this woman used to be on Harrison street, a Chinese doctor's concubine," etc. Evidence was introduced that, in a part of the translation, the word "mistress" was used instead of "concubine." It was held that there was no material variance, as the foreign word was capable of either translation.

VII. Variance as to tense or person.

a. Variance held material.

Notwithstanding the relaxation of the ancient rule of strict proof, there are still numerous authorities which regard it as a material variance if the words proved to have been spoken are in a different tense or person from the words pleaded. Birch v. Simms (1809) 1 Cranch, C. C. 550, Fed Cas. No. 1,427; Rutherford v. Moore (1806) 1 Cranch, C. C. 388, Fed. Cas. No. 12,173; Sanford v. Gaddis (1853) 15 Ill. 228; Sword v. Martin (1887) 23 Ill. App. 304; Wilborn v. Odell (1862) 29 Ill. 456; Becker v. Schiller (1893) 49 Ill. App. 606; Kuhlman v. Kiefer (1909) 147 Ill. App. 162; Ransom v. McCurley (1892) 140 Ill. 626, 31 N. E. 119, affirming (1890) 38 Ill. App. 323; Kimball v. Page (1902) 96 Me. 487, 52 Atl. 1010; Wolf v. Rodifer (1802) 1 Harr. & J. (Md.) 409; McCarty v. Barrett (1867) 12 Minn. 494, Gil. 398; Cook v. Weatherby (1845) 5 Smedes & M. (Miss.) 333; Williams v. Harrison (1834) 3 Mo. 411; Bundy v. Hart (1870) 46 Mo. 460, 2 Am. Rep. 525; Schmidt v. Bauer (1895) 60 Mo. App. 212; Miller v. Miller (1811) 8 Johns. (N. Y.) 74; Foster v. Small (1838) 3 Whart. (Pa.) 138; M'Connell v. M'Coy (1821) 7 Serg. & R. (Pa.) 228. See also Newstedt v. Meyer (1910) 155 Ill. App. 550. Compare Tracy v. Harkins (1808) 1 Binn. (Pa.) 395, note; Tipton v. Kahle (1834) 3 Watts (Pa.) 90.

A difference between the tense of the verb laid and that proved will constitute a material variance. Ransom v. McCurley (1892) 140 Ill. 626, 31 N. E. 119, affirming (1890) 38 Ill. App. 323.

Proof of defamatory words spoken in the second person will not sustain a petition charging the speaking to have been in the third person. Bundy v. Hart (1870) 46 Mo. 460, 2 Am. Rep. 525. An allegation of the use of the words, "You burnt your buildings," has been held not to be sustained by proof that the defendant said, "You burnt them buildings." Estes v. Estes (1883) 75 Me. 478.

Slanderous words alleged to have been spoken of a person are not supported by proof of the words spoken to that person. Sword v. Martin (1887) 23 Ill. App. 304.

Similarly it was held in Becker v. Schiller (1893) 49 Ill. App. 606, that the allegation of defamatory words spoken in the third person will not be sustained by proof of the words spoken in the second person.

Where the proof was that the defendant said in German, "You are a whore," it was held to be a material variance from the words used in the pleading that the defendant said, "Mrs. Schiller is a whore."

In Birch v. Simms (1809) 1 Cranch, C. C. 550, Fed. Cas. No. 1,427, wherein the declaration alleged the use of the words, "he stole," and the proof was of the words, "you stole," the variance was held to be material.

While the propriety of this rule was questioned in the case of Wilborn v. Odell (1862) 29 Ill. 456, the court, citing Sanford v. Gaddis (1853) 15 Ill. 228, said: "Notwithstanding we may doubt the propriety of the adoption of the rule, and whilst we might, if the question was open, be inclined to establish a different one, yet the law has been too long and uniformly settled to be now disturbed. Its adoption was no doubt introduced because the action of slander has not been regarded with any great favor by the courts. And whilst it renders a recovery exceedingly difficult in many instances, and no doubt prevents recovery in many meritorious cases, yet, owing to the fact that the rule is unquestioned law, we are unable to alter or modify

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it, but must apply it as it is found." In the case just quoted, the pleading averred that defendant said of plaintiff, he "has been stealing my corn," which was held to be variant from proof of the words, he "had been stealing my corn."

"The very words need not be proved; but where they are in fact proved, they must, it seems, correspond with the very words laid; and hence, perhaps, it is, that words spoken in the second person are not legal equivalents for words of the very same import, spoken in the third." Foster v. Small (1838) 3 Whart. (Pa.) 138.

An averment that the defendant said of the plaintiff, "You did rob the town of St. Cloud,—you are a public robber," is not sustained by proof that these words were used in the third person. McCarty v. Barrett (1867) 12 Minn. 494, Gil. 398.

Proof of the words, "You are a thief, for you stole a plank, and I can prove it," has been held to constitute a variance from the words pleaded, "that he, the said Joseph, was a thief and had stolen one pine plank, and that the said John would prove it." Wolf v. Rodifer (1803) 1 Harr. & J. (Md.) 409.

Proof that defendant said, "You have sworn false," has been held to be a variance from the words pleaded, "You swore false." Sanford v. Gaddis (1853) 15 Ill. 229.

The averment that defendant said of plaintiff, an unmarried female, "She has gone down below to her grandmother's to have a young one," is a variance from the proof that the words used were, "She had gone down below to her grandmother's, he (defendant) supposed, to get rid of it." Sword v. Martin (1887) 23 Ill. App. 304.

In Missouri the courts seem to adhere to the rule as laid down by Chitty (vol. 1, p. 384) that slanderous words must be stated as they are uttered, and that proof of words in the third person will not support a count for words alleged to have been spoken in the second, and vice versa. Schmidt v. Bauer (1895) 60 Mo. App. 212.

Thus, the allegation in the pleading that "you stole two of my hogs" is not sustained by proof that the words used were, "he stole two of my hogs." Williams v. Harrison (1834) 3 Mo. 411.

In McConnell v. McCoy (1821) 7 Serg. & R. (Pa.) 223, the slanderous words were alleged in the complaint to have been spoken of the plaintiff, while the proof was that they were spoken to the plaintiff. In concluding that the variance was fatal the court said: "Words spoken to a man's face in passion are more excusable than if spoken deliberately behind his back; the latter is the course in which malignant slander is usually propagated. Slander to a man's face cannot be justified, but it seldom has the strong mark of deliberate malignancy that distinguishes backbiting. The case of Nelson v. Dixey (1736) Cas. t. Hardw. 305, 95 Eng. Reprint, 197, contains a dictum attributed to Lord Hardwicke, that words in the second person are supported by proof of words uttered in the third person; this was not the case in judgment, and of many sayings attributed to judges as obiter dicta, it might well be pronounced nunquam dicta; but whether respect is justly due to all that comes to us in the name of that distinguished judge, all that he is said to have said cannot be ranked as judicial decisions, nor control the judgment in the very point presented for decision. In Avarillo v. Rogers (1773) Bull. N. P. (Eng.) 5, Lord Mansfield recognized at Guildhall, the substantial distinction, and decided that the variance was fatal; this is the opinion of but one judge, but a very illustrious one, who was not disposed to entangle justice in nets of law, whose well-spent life was employed in separating substances from the unmeaning forms with which they had been mingled, and in breaking down senseless distinctions and technical subtleties; but it rests not on his opinion, for it has been recognized as the law in many instances, and many plaintiffs have been nonsuited for this variance. In New York, this is received as the acknowledged doctrine of the law. Miller v. Miller (1811) 8 Johns. (N. Y.) 74. It is true that in Tracy v. Harkins (1808) 1 Binn.

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(Pa.) 395, note, the court of common pleas for the city and county of Philadelphia decided differently; the reasons given for that decision by no means satisfy this court that there is no substantial difference between words spoken to or of a man, and they are of opinion this was not the old law, nor the law at any time; for they find that whenever the direct question has directly been presented, the substantial difference has been acknowledged and established. But there is another reason than the different malignancy of the two sets of words, which weighs with me. The object of all declarations is to give notice to the party of the charge, that he may come to the trial prepared to defend himself. But when a defendant finds that he is not charged with speaking slanderous words to the plaintiff, he may be conscious that he never held any conversation on the subject but with himself and to his face, and may securely repose in confidence that it is impossible for the plaintiff to make out his allegation, and would be surprised by a different charge, of which, had he been apprised by the declaration, recollecting the conversation and the persons present, he might come prepared to show the mistake and misrepresentations of the plaintiff's witnesses, might explain the occasion and manner of speaking the words, and by the antecedent and subsequent parts of the same sentence prove the sense was innocent, or the occasion justified, and might mitigate the damages by such evidence. I am, therefore, of opinion that the variance was fatal, the manner being different from the allegation, the slander more malignant, the defendent not apprised by the declaration, of the charge for which he was called on the trial to answer, so that he might defend, justify, or explain it." Compare, however, the case of Huffman v. Shumate (1817) 4 Bibb. (Ky.) 515, set out at length, infra, under VII. b.

b. Variance held immaterial.

In several jurisdictions the courts have adopted the more liberal construction to the effect that a variance of tense or person between pleading and proof is immaterial. Buscher v. Scully (1886) 107 Ind. 246, 5 N. E. 738, 8 N. E. 37; Dailey v. Gaines (1833) 1 Dana (Ky.) 529; Barr v. Gaines (1835) 3 Dana (Ky.) 258; Huffman v. Shumate (1817) 4 Bibb (Ky.) 515; Morris v. Curtis (1898) 20 Ky. L. Rep. 56, 45 S. W. 86; Pursell v. Archer (1824) Peck (Tenn.) 317; Kloths v. Hess (1906) 126 Wis. 587, 106 N. W. 251. Compare Culbertson v. Stanley (1841) 6 Blackf. (Ind.) 67.

Thus, in Huffman v. Shumate (1817) 4 Bibb. (Ky.) 515, the allegation in the pleading was the use of the words, "He (plaintiff) stole," etc., and the proof was that the defendant said, "You (plaintiff) stole," etc. The variance was held not to be material. The court said: "The old doctrine of requiring proof of the speaking of the words precisely as laid in the declaration has long since been exploded; and it is now held that proof of the substance of the words is sufficient. The substance of the charge is the imputation of theft; and whether that be conveyed in the second or third person, the crime is equally imputed, and the allusion sufficiently certain. We are aware of the decision of Lord Mansfield in the case of Avarillo v. Rogers (1773) Bull. & P. (Eng.) 5, and that the distinction there taken has been recognized in several elementary treatises of the doctrine of slander. This distinction is predicated on the supposed difference between words spoken in a passion, and words spoken deliberately; and from thence the inference that words spoken in the second person, as to one's face, are necessarily spoken in a passion; while those spoken in the third person, as behind the back, are the necessary result of deliberation and malice. It is impossible not to perceive upon the most superficial glance, that the distinction is improperly applied; that upon principle it does not exist; and that whether, from the particular circumstances of the case, words are spoken in a passion or deliberately, does not depend exclusively on the person in which they are spoken,—whether to a man's face or behind his back;

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nor does not form the criterion of their actionability. Words of slander are equally actionable whether they are spoken in the second or third person. It cannot be material in the definement of slander, whether the theft imputed was by charging you, the plaintiff, with the crime, or that he, the plaintiff meaning, was guilty of the same crime. The law treats the words in either case as actionable; the crime imputed is the same, and the person to whom imputed is the same; no uncertainty in the allusion; all alike to the hearers; the slander is complete as defined by law; the reference is certain as understood in pais. It is true the manner of uttering and dealing out slander may stamp it with different grades of stain and injury. But this exists in evidence; for it does not always happen that words of slander spoken to a man's face are less deliberate and malicious, or that those spoken in his absence are more the effect of malice and with a greater view to injure. The distinction, then, of Lord Mansfield, is unwarranted, and has been supplanted by the introduction of the principle that a substantial correspondence between the words as laid and the proof is sufficient. Nor is it material whether we view this decision as a departure from the more modern doctrine, and the better principle as introduced and settled, or as preceding the weight of authorities in relation to this point. The departure would be unwarranted, and cannot change the course of authorities; and the staleness of the decision has been superseded in principle by a different course of adjudication."

See to the same effect, Dailey v. Gaines (1833) 1 Dana (Ky.) 529, wherein it was said that "it cannot operate as a hardship upon a defendant to require him to go to trial prepared to justify what he has said, whether it be in the second or third person."

Mere insignificant changes in the form of expression, or the substitution of an ambiguous pronoun for a substantive or for a proper name, and the like, will not constitute a variance. Kloths v. Hess (1906) 126 Wis. 587, 106 N. W. 250.

A complaint charging that the words imputing a want of chastity were used in the past tense is sustained by proof showing that they were spoken in the present tense. Buscher v. Scully (1886) 107 Ind. 246, 5 N. E. 738, 8 N. E. 37. Compare Culbertson v. Stanley (1841) 6 Blackf. (Ind.) 67, wherein the contrary rule is upheld.

A charge that defendant said: "I will do my best to transport him, as he has been working for me some time and has been robbing me all the time," etc., has been held to be supported by proof that the words used were, "Dancaster (plaintiff) had worked for him and had been continually robbing him." Dancaster v. Hewson (1828) 2 Mann. & R. (Eng.) 176, 6 L. J. K. B. 311.

VIII. Variance between affirmative and interrogative statements.

It is generally held that an allegation in the pleading of slanderous words spoken affirmatively is a material variance from the proof that they were spoken by way of interrogation. Cook v. Stokes (1832) 1 Moody & R. (Eng.) 237; Barnes v. Holloway (1799) 8 T. R. 150, 101 Eng. Reprint, 1316; Nailor v. Ponder (1895) 1 Marv. (Del.) 408, 41 Atl. 88; Ransom v. McCurley (1892) 140 Ill. 626, 31 N. E. 119, affirming (1890) 38 Ill. App. 323; Sword v. Martin (1887) 23 Ill. App. 304; Walker v. Boyd (1885) 101 Ind. 396; Evarts v. Smith (1869) 19 Mich. 55; Irish-American Bank v. Bader (1894) 59 Minn. 329, 61 N. W. 328; Horton v. Reavis (1818) 6 N. C. (2 Murph.) 380; King v. Whitley (1860) 52 N. C. (7 Jones, L.) 529; Long v. Fleming (1837) 2 Miles (Pa.) 104; Beasley v. Hills (1910) 1 Tenn. C. C. A. 285; Wilson v. Nations (1833) 5 Yerg. (Tenn.) 211; Bleitz v. Carton (1908) 49 Wash. 545, 95 Pac. 1099. Compare Pennington v. Meeks (1870) 46 Mo. 217.

"Interrogative words proved will not support words alleged affirmatively. Words alleged to have been spoken to the plaintiff are not supported by words proved to have been spoken to a third person of the plaintiff; and where a positive and unconditional

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charge has been alleged in the declaration, it must be so proved, for if it appears from all the evidence in the case that the words charged were conditional, or in the alternative, such as that 'if he did it,' or 'I believe he did it, or knows who did it,' and the like, it will be a fatal variance and will entitle the defendant to a verdict." Nailor v. Ponder (1895) 1 Marv. (Del.) 408, 41 Atl. 88.

The allegation of a specific charge of perjury, made against the plaintiff, is not sustained by proof that the slanderous words were in the form of a conditional or hypothetical statement. Evarts v. Smith (1869) 19 Mich. 55, wherein the slanderous words charged were, "He (plaintiff) swore to a lie." The proof was that in a conversation with one Jones, referring to the testimony of the plaintiff, the defendant "charged said plaintiff with having sworn to a lie, if he, the said plaintiff, swore as said Jones alleged that he did swear"

In King v. Whitley (1860) 52 N. C. (7 Jones, L.) 529, the allegation in the pleading was that the defendant said of the plaintiff that "he is the man who swore to lies against us" in a legal proceeding. The proof was that the words were used interrogatively, viz.: "Is that not the fellow who swore a lie against us?" The court held the variance to be fatal, and said: "Whatever the parties may mean, the words must be proved as they are laid. There is a manifest distinction between the same idea conveyed by words spoken affirmatively, and put interrogatively. There are many cases reported in the books where variations between the words charged and those proved were decided to be immaterial. Thus, in Orpwood v. Barkes (1827) 4 Bing. 261, 130 Eng. Reprint, 767, 12 J. B. Moore, 492, 5 L. J. C. P. 167, 29 Revised Rep. 559, it was held that the words, 'Ware hawk there, mind what you are about,' would sustain a declaration alleging the words spoken to have been, 'Ware hawk, you must take care of yourself there; mind what you are about.' So, 'I will do my best to transport him, as he has been working for me some time, and has been robbing me all the while,' will be supported by proof of the words, 'He has worked for me some time, and has been continually robbing me.' Dancaster v. Hewson (1828) 2 Mann. & R. (Eng.) 176, 6 L. J. K. B. 311. Again, 'You stole one of my sheep' will be maintained by evidence, 'You stole my sheep and killed it.' Robinson v. Willis (1817) 2 Starkie (Eng.) 194. From these instances, it is manifestly difficult to say what is to be regarded as substantial proof of the words charged; and it is evident that Chief Justice Marshall, after an able review of many of the cases of both verbal and written slander, was fully justified in remarking that 'the person who looks into this subject will be surprised at finding how very unsatisfactory the cases are.' See Whitaker v. Freeman (1827) 12 N. C. (1 Dev. L.) 288. In this apparent uncertainty as to what is and what is not to be deemed a fatal variance between the words spoken and the words proved to have been spoken, we do not feel at liberty to set at naught the authority of a case adjudged by an able court and followed by all the text-writers on the subject of slander. Barnes v. Holloway (1799) 8 T. R. 150, 101 Eng. Reprint, 1316, seems to have settled the rule that words charged to have been spoken affirmatively will not be supported by proof of words spoken interrogatively. Such were the words as testified to by the defendant's witnesses, and his Honor committed an error in not permitting the jury to decide whether that was the form of expression used by the defendant, instead of that which was sworn to by the plaintiff's witnesses. For this error, the judgment must be reversed."

Compare Pegram v. Stoltz (1872) 67 N. C. 144, wherein the contrary rule was upheld by virtue of a statute passed subsequent to the ruling in King v. Whitley (1860) 52 N. C. (7 Jones, L.) 529, providing in effect that no variance is to be deemed material unless it misleads the adverse party to his prejudice.

In Sword v. Martin (1887) 23 Ill. App. 304, the averment was that the defendant said: "Johnnie Binning

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knocked up Charlie's Martin's daughter." The proof was that the defendant said: "Have you heard that Charles Martin's daughter was knocked up? I told him I had not heard it. He said it was so." It was held that the variance was material.

In Beasley v. Hills (1910) 1 Tenn. C. C. A. 285, the allegation was that the defendant said: "Mamie Hills (plaintiff's wife) has a baby; it is about a month or six weeks old," meaning thereby that she had given birth to a baby begotten prior to her marriage with plaintiff and at time when she was a maiden. The proof showed that the words were spoken interrogatively as follows: "She (defendant) asked me (witness) if I had heard of my new kinsfolks, and I said who, and she said, 'Haven't you heard about Fred Hills and Mamie Hills having a baby?' " Another witness testified thus: "Why, she (defendant) asked me if I had heard that Fred and Mamie Hills had a baby girl at their house, and I told her that I hadn't heard of it and she said that she had heard it." The variance was held to be fatal.

In Long v. Fleming (1837) 2 Miles (Pa.) 104, the averment was that the defendant said: "She, the plaintiff, was pregnant, and in my opinion very lusty"—"Elizabeth Long (plaintiff) is pregnant and gone with child seven months." The proof was that the defendant said to a witness: "Have you heard or do you know that Miss Long is pregnant by Dr. P.?" to which witness exclaimed, "Can it be so?" and he replied, "There is too much reason to believe it so," etc. It was held that the variance was material.

A charge that the defendant published of the plaintiff that "he cannot pay his laborers," by reason of which the plaintiff's credit was injured, has been held not to be supported by proof that the defendant asked a witness "if he had heard Barnes (plaintiff) could not pay his laborers?" Barnes v. Holloway (1799) 8 T. R. 150, 101 Eng. Reprint, 1316.

In Irish-American Bank v. Bader (1894) 59 Minn. 329, 61 N. W. 328, the proof was that the defendant said the following: "Have you got any money in the Irish-American Bank? If you have any there, you had better be getting it out." It was held that there was a material variance from a pleading which alleged that defendant said: "There is a run on the Irish-American Bank;" "the Irish-American Bank has suspended;" "the Irish-American Bank had but $13,000 in money last May;" "and it is no good any way;" "the Irish-American Bank closed its doors at 2 o'clock to-day." The court said: "While it is not necessary to prove the exact words charged, but will be sufficient to prove their substance, yet the words proved must be substantially the same. Proof of different words, although conveying the same general idea, is not sufficient. While the words charged and those proved in this case may both reflect upon the solvency of the defendant bank, yet they are not the same in substance."

An allegation containing a direct charge that the defendant uttered certain slanderous words is not sustained by proof that the defendant said there was such a report in the neighborhood, and expressed his difficulty in believing the report. Horton v. Reavis (1818) 2 Murph. (N. C.) 380.

An allegation of defamatory words in the form of an assertion of a positive fact is not supported by proof that the words were used with an assertion of the speaker's belief only of the fact. Cook v. Stokes (1832) 1 Moody & R. (Eng.) 237, wherein the words alleged were that defendant said: "I cannot answer for the cleanliness of her (plaintiff's) person, because she takes snuff;" and the proof showed that defendant said: "I cannot answer for the cleanliness of her person, because I understand (or I believe) she takes snuff."

Similarly it was said in Bleitz v. Carton (1908) 49 Wash. 545, 95 Pac. 1099: "Proof of slanderous words spoken in a conditional or hypothetical statement does not support an allegation of slanderous words pleaded as a positive or direct assertion." In the instant case the complaint charged the defendant with having said that

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"Bleitz is not a fit man to associate with decent people. He has another wife back East and a wife and child here," while the proof showed that the statement was preceded by the words, "If what Mr. Davis has told me is true, Bleitz is not a fit man," etc. It was held a material variance.

On the other hand, in Treat v. Browning (1822) 4 Conn. 408, 10 Am. Dec. 156, the declaration alleged that the defendant said of the plaintiff: "She (plaintiff) had a bastard child in the city of New York." The proof was that defendant said: "If she (defendant) had not been misinformed, the (plaintiff) had a child," etc. The variance was held not to be material.

So in Commons v. Walters (1835) 1 Port. (Ala.) 377, 27 Am. Dec. 635, the words charged were, "You are perjured." The proof was, "Are you not afraid, as you have perjured yourself?" It was held that there was not a material variance, since the latter fully embraced the former.

Similarly, in Pennington v. Meeks (1870) 46 Mo. 217, proof of the words, "Don't you think Jim Pennington (plaintiff), the damned old rascal, stole one of our hogs?" or "Have you heard about Pennington stealing one of my hogs?" was held not materially variant from a pleading which charged the use of the words, "He (plaintiff) stole my hog, and I can prove it," or "He stole one of our hogs."

An allegation that defendant said that the plaintiff stole, etc., has been held to be sustained by proof that the defendant said that he believed that the plaintiff stole, etc. Pitman v. Drown (1917) 176 Ky. 263, 195 S. W. 815.

So, in Beehler v. Steever (1837) 2 Whart. (Pa.) 313, it was held that an averment that the defendant said: "You are conspiring with others to cheat me," was supported by proof that he said: "I believe," etc.

L. S. B.

J. J. MILLER et al., Appts.,
v.
JOHN M. MAIER, Respt.

Minnesota Supreme Court — February 23, 1917.

(136 Minn. 231, 161 N. W. 513.)

Election — treating voters — effect.

1. A candidate for public office, who during his campaign by word of mouth solicits the vote of an elector who has the right to vote for him at such election, and at the same time dispenses intoxicating liquor to such elector, brings himself clearly within the terms and meaning of the statute; nor can a holding that such acts on the part of a candidate amount to mere hospitality, or that they are trivial and unimportant, be sustained. To so hold would destroy the purpose and effect of the statute.

[*See note on this question beginning on page* 402.]

Same — contest — withdrawal of name.

2. A proceeding to contest the election of a town officer charged with a violation of the Corrupt Practices Act, based upon a statutory petition, signed by twenty-five or more qualified electors, is a proceeding in which the public has such an interest that an elector who signed such petition may not withdraw his name therefrom, after the petition has been served and acted upon by the court.

Same — pleadings.

3. In such contest, the petition and notice of contest, under §§ 529 and 599,

Headnotes by QUINN, J.

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Gen. Stat. 1913, serve the purpose of a complaint in an ordinary civil action, and the proceeding is subject to the same rules of practice; and, where the petition contains all the averments necessary to give the court jurisdiction, the contestee must, in order to avail himself of the question of the legal capacity of the contestants to bring the contest, do so by demurrer or answer, otherwise he will be deemed to have waived the same.

APPEAL by contestants from a judgment of the District Court for Yellow Medicine County in favor of contestee in a proceeding to contest his election and right to the office of town supervisor because of alleged violation of the Corrupt Practices Act. *Reversed.*

The facts are stated in the opinion of the court.

Mr. O. A. Lende, for appellants:

The acts complained of come within the prohibitions of the Corrupt Practices Act, and respondent has violated the provisions thereof, and therefore becomes disqualified from holding said office.

Saari v. Gleason, 126 Minn. 378, 148 N. W. 293; Olson v. Billberg, 129 Minn. 160, 151 N. W. 550; State ex rel. Brady v. Bates, 102 Minn. 104, 112 N. W. 1026, 12 Ann. Cas. 105.

Messrs. **Tom Davis** and **Ernest A. Michel**, for respondent:

It was not shown that the contestants were legal voters. Therefore, no cause of action was proven, and on this ground the contest must fail. Sawyer v. Frankson, 134 Minn. 258, 159 N. W. 1.

Quinn, J., delivered the opinion of the court:

The respondent John M. Maier, a qualified voter of the town of Hammer in Yellow Medicine county, was a candidate for election to the office of town supervisor of that town at the annual election, held therein on March 14, 1916. At the close of the canvass of the votes respondent was declared elected to such office, and thereupon qualified and assumed the duties thereof.

To contest respondent's election and right to such office upon the ground of his having violated the provisions of the Corrupt Practices Act, twenty-seven qualified voters of said township, having the right to vote for town officers at such election, acting under §§ 599 and 529, Gen. Stat. 1913, signed a notice of appeal in due form, and also signed and verified a petition, specifying the grounds upon which the contest was made. Such notice and petition were on March 22, 1916, filed in the office of the clerk of the district court of that county, and on that day the same were duly served upon respondent. Thereafter such proceedings were had that on July 19, 1916, a trial of said appeal and contest was had before the district court, and the court made an order in favor of the contestee and dismissed the contest.

In its order the court finds: That for two weeks prior to such election contestee was an active and avowed candidate for the office of town supervisor; that upon one occasion, while he was so a candidate, he said to a qualified voter of the town: "I would like to have you vote for me, and I will give you a sack of oats;" that to another voter he furnished three drinks of whisky, and to another one or more drinks, but that the contestee in so doing was dispensing hospitality; that upon Election Day contestee furnished means of conveyance to voters in going to and from the place of election. While the findings of the court are silent as to the time and place, and as to what was said at the time of furnishing the liquor referred to, yet it appears from the undisputed testimony that at such time contestee solicited and asked the persons to which such liquor was furnished to vote for him. It also appears that the furnishing of the three drinks of liquor was on Election Day, and that he at that time asked the persons to whom such liquor was furnished to vote for him. General Statutes 1913, § 576, provides that no candidate in seeking an election to a public office shall directly or in-

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directly give or provide any meat or drink, or other entertainment or provision, clothing, liquor, cigars, or tobacco to any person, for the purpose or with the intent to influence such person to give or refrain from giving his vote at such election to or for any candidate, and § 579 provides that no person shall convey or furnish any vehicle for conveyance or bear any portion of any expense for conveying any voter to or from the polls.

It may be said that any candidate for a public office who, during his campaign, by word of mouth, solicits the vote of an elector who has the right to vote for him at such election, and at the same time dispenses intoxicating liquor to such elector, brings himself clearly within the terms and meaning of the statute; nor can a holding that such acts on the part of a candidate amount to mere hospitality, or that they are trivial and unimportant, be sustained. To so hold would destroy entirely the effect and value of the statute.

Election—treating voters—effect.

In election contests of this nature the law requires that the same shall be tried at a general or special term of the district court, holden in the county within thirty days from the canvass of the votes. There being no such term within the county the district court, upon application duly made, called a special term to be held at the county seat on March 31 for the trial of this contest.

On April 5, three of the electors who had signed and sworn to the petition made application to the court, through the attorneys for contestee, for leave to withdraw from the petition upon the ground that they did not, at the time of signing the same, fully understand the contents thereof. This application was properly denied by the court. Contests of this character based upon a statutory petition, signed and sworn to by a large number of electors for the purpose of setting a contest in motion, constitute the beginning of a very important litigation, in which the public has a deep interest, and men should not lightly be permitted to stultify themselves by saying that they did not know what they were doing when they signed an instrument of that gravity. Re Grim, 14 W. N. C. 303.

Same—contest—withdrawal of name.

The proceeding was in no legal sense under the control of the contestants, after the court had taken action therein by calling a special term of court.

The filing and serving of the petition, together with the notice, conferred upon the court power to act in the premises, and after jurisdiction is thus conferred and the court has acted thereon the jurisdiction cannot be defeated by any number of such petitioners subsequently withdrawing from the petition. Grinnell v. Adams, 34 Ohio St. 44.

The contest was not tried at the special term set for March 31, but such postponements were had that on July 19 the matter was heard, and on August 7 the court filed its decision, and on September 12 contestee moved the court to amend the findings by inserting therein that there was no evidence offered on the trial to show that other than three of the petitioners were voters of the town at the time of the election. In this regard the petition is clear and specific, it contains all the averments necessary to give the court jurisdiction and, if proven, to sustain the contest. It contains an allegation that each of the petitioners at the time of the election were residents and legal voters of the town and had the right to vote for town officers at such election. The question whether contestants were legal voters of the town at the time of the election, and whether they had the right to vote for town officers at such election, goes directly to the question of their legal capacity to sue, that is, to bring this contest. Contestee contends that under the showing made at the trial it does not appear that contestants were voters of the town at the time of the

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election, and therefore it does not appear that they had legal capacity to sue or bring this contest.

We do not concur in this contention. The petition and notice serve the purpose of a complaint in an ordinary civil action, and the proceeding is subject to the same rules of practice. The answer is a general denial. It is not sufficient after the trial and decision for contestee to say that it does not appear that contestants had the capacity to sue, or, its equivalent, to bring this contest. If contestee wished to raise this question, he should have done so by demurrer or answer, otherwise he is deemed to have waived the same. Gen. Stat. 1913, § 7755.

Same—pleadings.

The decision in the case of Sawyer v. Frankson, 134 Minn. 258, 159 N. W. 1, is not in point. There the petition did not show upon its face that the contestants had the right to vote for candidates for the nomination to the office in question, and the contestee served a notice of a motion to dismiss the petition, upon the ground that it did not appear that contestants had the capacity to bring the contest, and after hearing, it not being made to appear that the contestants did have the right to participate in the election for the nomination of a candidate for the office in question, the court dismissed the proceeding.

It follows that the judgment appealed from should be reversed, and the election of the contestee, John M. Maier, to the office of town supervisor of the town of Hammer, annulled. It is so ordered.

ANNOTATION.

Treating of voters by candidate for office as violation of corrupt practices or similar act.

I. Generally, 402.
II. What constitutes corrupt treating, 404.
III. Treating meeting of electors, 408.
IV. Treating on election day, 410.

I. Generally.

In the absence of a statutory provision specifically making the giving of a treat, regardless of the intention with which it is given, a corrupt practice, it is generally held that treating by a candidate, as customarily done in the daily intercourse of men, is not per se a violation of a Corrupt Practices Act, or a similar act, prohibiting the influencing of voters by the gift of refreshments, etc. Whether such treating becomes a violation of the statute depends on the intent with which it is done; if done with the intention to influence the vote of an elector it is a violation of the statute; otherwise, not; and this intent can be ascertained only from the facts and circumstances surrounding each particular case. Moonlight v. Bond (1876) 17 **Kan.** 351; Re Price (1906) 33 **Pa.** Co. Ct. 244; Umbel's Election (1911) 231 **Pa.** 94, 80 Atl. 541, reversing on other grounds (1910) 43 **Pa.** Super. Ct. 598; Hackett v. Larkin (1897) 27 **Can.** S. C. 241; Re Rockwood Election (1884) 2 **Manitoba** L. R. 129; Re Lisgar Election (1902) 14 **Manitoba** L. R. 310; Re East Middlesex Provincial Election (1903) 5 **Ont.** L. Rep. 644; Treleaven v. Gould (1884) 1 **Ont.** Elect. Rep. 1; Miles v. Roe (1884) 1 **Ont.** Elect. Rep. 41; Rhoder v. McKenzie (1883) 1 **Ont.** Elect. Rep. 250; McLennon v. Craig (1871) Hodg. **Ont.** Elect. Rep. 8; Beatty v. Currie (1871) Hodg. **Ont.** Elect. Rep. 47; Jarman v. Meredith (1875) Hodg. **Ont.** Elect. Rep. 214; Cameron v. McDougall (1875) Hodg. **Ont.** Elect. Rep. 376; Decow v. Wallace (1875) Hodg. **Ont.** Elect. Rep. 660; Blue v. Arkell (1879) Hodg. **Ont.** Elect. Rep. 769.

In the case of Re Price (1906) 16 **Pa.** Dist. R. 326, the rule was stated as follows: "Treating, as commonly understood, is the giving of food, drinks, or cigars, as a compliment or mark of good fellowship, and in company at the table, bar, or cigar counter. It has grown to such an extent in the United States as to make it an

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abuse and an evil. It may very properly be called an American custom. 'Nowhere in Europe is the senseless and wasteful American custom of treating known.' 6 Howells's Venetian Life, page 87. The origin of the custom may be ascribed to the marked generosity and good fellowship of the American people; but the notable increase of it may be ascribed to conventionalities. Men in some of the callings or occupations of life are more called upon than others, and especially landlords of hotels, and keepers of saloons. It would be rank discourtesy for one of this class to visit a hotel or saloon and not treat. It would be incorrect to say that he treated to get business. It would be more nearly expressing it, applying it to the general habit, that he did it because he did not want to be called mean. We cannot look upon this custom or habit, practised or complied with by a candidate, as per se a violation of the law. It might easily be so considered in countries where it is not a general custom, as here, because in such countries it would lack the reason and the impelling power. In the state of Pennsylvania it is more than a custom, as commonly understood. Treating is a conventionality. It is an outcome of general habit and demanded by society. Like all such matters, however, it is subject to a line of demarcation or qualification. The established custom does not demand that a man treat others to food, either at a table or elsewhere, nor that he treat a man or men either to drink or cigars in any other place than a hotel, saloon, or cigar store, nor except he casually meet a person or persons at such places. And as applied to a candidate, we hold that it would not be a violation of the Election Laws of this state for him to treat people that he met casually, during the course of his campaign, at a hotel bar, saloon, or a cigar store, if it were not premised by his calling attention to the fact of his being a candidate, or immediately followed by a declaration to that effect; but that it is a violation of such laws to send a keg of beer or a quantity of whisky to a person or persons during a campaign, to be given to voters; to carry around whisky while traveling about in the election district or districts, while soliciting votes, and treat voters thereto; to meet by appointment voters at a hotel, saloon, or other place, while a candidate, and treat to whisky, any other intoxicating liquor, or cigars."

It was said in Decow v. Wallace (1875) Hodg. Ont. Elect. Rep. 660; "It is not, however, the simple act of treating, but the intention with which that act is committed, which gives it the criminal character, and which subjects the candidate to the loss of the seat. It must be done corruptly, and for the purpose of corruptly influencing the voter." In this case, however, the court did not pass on the particular act of treating, the decision turning on a question of agency.

In Somerville v. Laflamme (1877) 2 Can. S. C. 216, wherein it appeared that the treating by agents of a candidate was no more than was customary, the court stated the rule as follows: "As to corrupt treating by persons alleged to be respondent's agents, though there appears to have been more or less drinking during the canvass and about the time of the election, much of it appears to be of the character which prevails through the country when a number of people meet for purposes other than elections, such as horse races, and other meetings where there is a good deal of talking and discussion going on, and in the interludes between conversations some man calls for liquor, a short time after another does the same, and, if the number of persons assembled is not too great, the habit, I apprehend, is to ask all who are near to join in drinking. If there are a great many people present they are apt to form into small knots, and so join in drinking. I do not think drinking under such circumstances can be called corrupt treating. There was not during this election, as far as I can understand, that profuse expenditure for drink that used to prevail, to the great injury of all concerned in it. From the perusal of the whole of the evidence, I do not think there can be any pretense that what would be called general treating prevailed at the elec-

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tion or during the canvass, and certainly none to the extent which would justify the setting aside the election on that ground."

In Beatty v. Currie (1871) Hodg. Ont. Elect. Rep. 47, it was held that treating, when done in compliance with a custom prevalent in the country, was not a corrupt practice unless it was shown that it was done with the intent to influence the election, it being said that if this was shown one glass of whisky might avoid an election.

In Moonlight v. Bond (1876) 17 Kan. 351, it was held that in the absence of any showing that the furnishing of drinks to voters was done with the intent to influence their votes, in violation of the statutory prohibition against a candidate's giving or offering any bribe or reward, in money, property, or thing of value for the purpose of procuring his election, the mere fact of treating was not a violation of the statute.

In Blue v. Arkell (1879) Hodg. Ont. Elect. Rep. 769, it was held that no inference that the act of treating an elector was corrupt could be drawn from the sole fact that an election was being held.

However, it has been held that general, extensive, and miscellaneous treating is, prima facie, a corrupt practice, and the burden of proof is on the candidate to show that it was innocently done. Re East Middlesex Provincial Election (1903) 5 Ont. L. Rep. 644.

While the great majority of cases support the general rule as stated, a contrary doctrine would seem to have been adopted in Texas. Whaley v. Thomason (1906) 41 Tex. Civ. App. 405, 93 S. W. 212. That case did not involve directly the treating by a candidate, being a contested local option election case. One of the grounds alleged by the contestants as invalidating the election was the use of cigars and whisky to influence voters. The court, in construing a statute making it a felony for any person to lend or contribute, or to offer or promise to lend or contribute or pay, any money or other valuable thing to any voter to induce him to vote for or against any person or any particular proposition submitted to voters, said: "If, as alleged, 'on the election day such money and whisky and cigars were freely used, wherever possible, in bribing and influencing voters to cast their votes against prohibition,' we see no reason why the sections of the Terrell Election Law above set out were not violated, although the petition seems to have termed these alleged acts 'irregularities.' To treat the voter on election day to cigars, liquors, or the like may seem a trivial matter, and votes so influenced would undoubtedly be very cheap, but such votes go as far as any others in determining the final result of the election. All such appeals to the appetite of the voter are at least contrary to the spirit of our Election Law, which was designed to purify the ballot in Texas and should be liberally construed and rigidly enforced. It will be observed that this law forbids the use of anything of value to even bring voters to the polls. A pure and untrammelled ballot is of far more importance to the people of Texas than the success or failure of any proposed local measure, however good or bad it may be."

II. What constitutes corrupt treating.

Whether the treating of voters is corrupt as being designed to influence them unduly seems to be a question of fact, to be determined on the circumstances of each case.

In the case of Re Price (1906) 16 Pa. Dist. R. 326, wherein a candidate admitted that he treated voters to cigars and whisky, the court, in holding that the evidence was insufficient to show that the treating was done with corrupt intent, said: "Wesley J. Price, the accountant, admitted he treated to whisky and cigars. Did he do it in furtherance of his nomination, or simply as a custom, not in excess of his ordinary custom, but as he was wont to do? He was a landlord of a hotel, of generous nature, and the finding is sustained by the evidence that he treated less than he was accustomed to do. There is no evidence that he did this as a means of furthering his election. He did not premise it with remarks of his candidacy, nor by

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solicitation of votes, but upon the contrary, whenever his candidacy happened to be mentioned, he expressly disavowed the treating as being done to influence voters. There was no large assemblage of voters at any time when he treated, nor any evidence of any appointment to meet him. We do not believe that the accountant treated any voter, believing that he would thereby secure his vote or his influence; nor do we believe that any voter accepted the treat with that idea."

In the case of Re Umbel's Election (1911) 231 Pa. 94, 80 Atl. 451, reversing on other grounds (1910) 43 Pa. Super. Ct. 598, the court, holding that the gift of a cigar by a candidate without any intent to influence a voter was not a violation of the Corrupt Practices Act, set out the facts and its ruling as follows: "We are not to be understood as holding that the influencing or attempting to influence voters by the gift of liquors or cigars is any less illegal than the attempt to influence them by the gift of money or other valuable thing. Under the testimony of the respondent, and the court's finding of fact based thereon, the item, 'Markle's drug store, for one box of cigars, $3,' was not an election expense within the meaning of the act, and need not have been included in his account. He was not estopped by the fact that he included it in his account from showing that the use of the cigars was but the common courtesy which men extend to friends, without any thought on his part or their part that the latter were to be influenced in their votes thereby."

In Rhoder v. McKenzie (1883) 1 Ont. Elect. Rep. 250, wherein it appeared that a candidate treated his friends of both political parties in the same manner in which he had been accustomed to do before the canvass, spending from 25 to 50 cents a day, it was held that such treating was not sufficient to come within the Corrupt Practices Act.

In Cameron v. McDougall (1875) Hodg. Ont. Elect. Rep. 376, the court, in holding that the evidence was insufficient to show that the treating was done with a corrupt intent, said: "The respondent is a farmer, and has for the last sixteen years followed the business of a drover. He says that it is the practice of drovers to go to taverns as the best places for meeting with farmers and hearing of cattle, and that he has always been in the habit of treating at taverns in the course of his business, and this is confirmed by the evidence of other witnesses. He states that when he became a candidate he canvassed personally through the riding, and went to the taverns as good places to meet with the electors; that on these occasions he sometimes treated; sometimes friends who were with him treated; and the treating was sometimes by others who were not friends; and the treating was general to all who might happen to be present. As to its extent, he says it was much less than was his habit in the course of his business; not more, he says, than one fifth as much. . . . If in this case the evidence led me to the conclusion that the respondent did what he did in order to make for himself a reputation for good fellowship and hospitality, and thereby to influence electors to vote for him, I should incline to think it a species of bribery which would avoid the election at common law; but, upon a careful consideration of the evidence, it does not lead me to that conclusion. There was nothing wrong, in the eye of the law, in the respondent making his canvass by meeting the electors at taverns, and he does not seem to have abused the occasions of so meeting them by seeking to obtain their votes by pampering their appetites for drink, or by other undue means."

In Re East Middlesex Provincial Election (1903) 5 Ont. L. Rep. 644, the court, in holding the treating shown in that case to be insufficient to amount to a corrupt practice within the meaning of the law, stated the facts and its ruling as follows: "The respondent is a physician with a large country practice, and therefore constantly on the road. He is also a horse fancier and, although an abstainer from liquor, a great consumer of cigars. It was not disputed that while on the road he was in the constant

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habit of treating. He seems to have asked his solicitor Vining whether he might continue that habit, and he was advised by him that there was no law against it, until the writ was issued, which is said to have been on the 22d April. The respondent, therefore, continued his usual habit until that date, after which he treated no more. The advice he received was unfortunate, for it has resulted in this tedious trial. We have already said that extensive and general or miscellaneous treating is only prima facie corrupt, and may in fact be perfectly innocent; and that a previous habit of treating is still an important consideration in determining whether it is corrupt or not, although not in itself sufficient. Here, the respondent had been in this habit, and simply continued it for a certain time; and there is not a single witness but one (Johnson) who says that on any occasion reference was made to the election."

In Gorham v. Boultbee (1871) Hodg. Ont. Elect. Rep. 62, it was held that for a candidate, after a long cold drive, to take a drink and treat others in a barroom, could not be said to be done with the intent to influence the voters.

In Buchner v. Currie (1875) Hodg. Ont. Elect. Rep. 187, wherein it appeared that a friend of the candidate treated an elector to a drink, and, not having the change to pay for it, received from the candidate, who was present, 25 cents, the court, in holding that such treating did not amount to a corrupt practice, said: "To hold such an amount of treating as is relied upon in this case, and given under the circumstances appearing in the evidence, to be corruptly given with the intent of influencing the election, would be well calculated, as it appears to me, to bring a most wholesome law into contempt."

In Jarman v. Meredith (1875) Hodg. Ont. Elect. Rep. 214, it was held that for a candidate to treat electors at a tavern during his canvass was not, per se, a treating with corrupt motives.

In Treleaven v. Gould (1884) 1 Ont. Elect. Rep. 1, wherein it appeared that a candidate during his canvass treated the people in a saloon, it was insisted that, since it appeared that it was not his habit to treat, he was guilty of a violation of the Corrupt Practices Act. Answering this contention, the court said: "I must confess that I do not attach much weight to that contention, even if it had been shown that the respondent abstained from treating generally to a much greater extent than has been shown here, and that treating during the election had been brought home to him much more clearly and extensively than has been done during this trial. I can understand that, as in the cases referred to, the treating might be of that profuse and general nature as to render it necessary to show that it was the ordinary practice of the party at all times, and thereby to negative the presumption which such profuse treating might raise, that it was done corruptly, with a view to influencing the election; but that is very different from a case in which it was shown that the candidate was not an habitual treater. It might be that the practice was very distasteful to him, and that his visits to a barroom on other occasions would be confined to those when he was settling his hotel bill, or giving directions as to the care of his horses, or other pure matters of business. It would be strange indeed if, under such circumstances, he were, in cold blood, to invite up to the bar every man, stranger though he might be, who happened then to be in the barroom; and yet, when going into a barroom pending an election, receiving the welcome of his friends, and amid the general excitement incident to such an occasion, he might hesitate, in view of the universal custom of the country, to render himself singular, and in the opinion of many churlish, in standing aloof and refusing to treat, and might therefore conform to this general custom without the slightest corrupt intention."

In Blue v. Arkell (1879) Hodg. Ont. Elect. Rep. 769, wherein it appeared that an agent, while canvassing, engaged in indiscriminate treating, which had been his custom for years, the court, holding that it did not appear that the treating was done with

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the intention of corruptly influencing any person with regard to the election, in violation of § 94 of the Dominion Election Act, stated the rule as follows: "To make this offense a corrupt practice there must be the corrupt giving for the purpose of corruptly influencing. Treating is not in itself illegal, and in considering whether it is a corrupt practice or not, it is, under the authorities, proper to look at the habits of the man accused of the offense, and endeavor to ascertain his intention in the treating complained of. It is not to be inferred that the act is corrupt simply because an election is going on. There is no doubt that with the agent Day treating was an ordinary act of everyday life. Whenever and wherever the occasion offered it was indulged in. . . . This man, who has been a candidate for various offices for the past twenty years, and has freely employed treating as an element in his canvass, becomes an agent of a candidate who no doubt uses him as a man whose influence, created by the use of liquor, will be sustained by the same means, the benefit of which will accrue to him in the election contest. This treating, if found in one not theretofore given to this vice, would have been sufficient to have avoided the election, but no doubt the respondent and his agent were informed of the decisions which sanctioned, under certain circumstances, a large amount of treating, and they acted on these cases, and I think are now entitled to shelter behind them."

In Miles v. Roe (1884) 1 Ont. Elect. Rep. 41, it was held that taking a small quantity of whisky to a blacksmith shop near a polling place, which was customarily used by the neighbors to warm themselves, there being no tavern in the neighborhood, and treating all who came regardless of whether they were voters, or, if they were, on which side they were, was not treating with an intent to influence an election.

But in Hackett v. Larkin (1897) 27 Can. S. C. 241, it was held that for an agent of a candidate to take an elector secretly into a barn and give him a drink of whisky, at the same time asking him to vote for the candidate he represented, was corrupt treating under the Corrupt Practices Act and avoided the election. The court in this case said: "This was not treating of a kind which may very well take place without offense against the Election Act, namely, where an agent in the course of ordinary hospitality furnishes liquor or accommodation to an elector. In my opinion, the only object Callaghan could have had was to influence O'Brien's vote and induce him to promise his support to the appellant." It was further held that, although the treating was trivial, unimportant, and limited in character, within the provision of the statute (§ 19, Act 1891) providing that if the offense were committed contrary to the order, and without the sanction or connivance, of the candidate, and was trivial, unimportant, or limited in character, it should be ineffectual to avoid the election, the candidate, having failed to prove that the treating was done without his knowledge and against his orders, could not claim the benefit of the provision.

In Hamm v. Bashford (1916) 9 Sask. L. R. 68, 26 D. L. R. 573, 33 West. L. R. 473, 9 West. Week. Rep. 1044, reversing (1915) 8 West. Week. Rep. 793, it was held that for a duly appointed agent of a candidate to keep a small quantity of liquor in a stable near a polling place, treating only a few persons, even if a corrupt practice, was "trivial, unimportant, and limited in character," and no ground for avoiding the election.

In McQueen v. Tucker (1895) 2 Ont. Elect. Rep. 16, wherein it appeared that a candidate who had not the previous habit of treating was shown to have done so in numerous cases, while actually canvassing the persons who were being treated and discussing the election with them, it was held that the treating was corrupt within the meaning of the statute (Ont. Rev. Stat. 1887, chap. 9, § 154) prohibiting corrupt treating.

And see the reported case (MILLER v. MAIER, ante, 399), wherein it is held that giving intoxicating liquor to a voter at the time he is solicited for his vote is a violation of the Minnesota statute, prohibiting the giving of li-

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quor, cigars, etc., to a voter, for the purpose of influencing his vote.

In Gibbs v. Wheeler (1879) Hodg. Ont. Elect. Rep. 785, it was held that for an agent, while actually canvassing a voter and urging him to vote for his candidate, to treat him four times to whisky, constituted a corrupt practice and was a violation of § 94 of the Dominion Election Act, prohibiting the treating of electors with the intent of influencing their votes. But it was held in the same case that it was not a corrupt practice for a scrutineer to take whisky into the polling place and treat the deputy returning officer, the poll clerk, and another person in the polling station, it not appearing that the treating was on account of the persons treated having voted or being about to vote.

In Leblanc v. Maloney (1903) 5 Terr. L. Rep. (Can.) 402, wherein it appeared that large quantities of whisky were provided by the respondent, through his agents, and freely distributed at the different polling places to any and all who might call for it, it was held that such a lavish use of whisky clearly showed a corrupt intention to influence the election, and it was accordingly held to be void.

Where it appeared that during the trips through the constituency the candidate carried with him, in a special compartment made in his sleigh, a keg of liquor, and distributed it liberally as he went along to the electors, it was held that he was clearly guilty of treating with the intention of influencing the election, and therefore in violation of the Manitoba Controverted Election Act, prohibiting treating with an intent to influence an election. Re Rockwood Election (1884) 2 Manitoba L. R. 129.

In Henderson v. Guillet (1885) 10 Can. S. C. 635, it was held that treating an elector both before and after voting, and giving him $2, amounted to corrupt practices sufficient to avoid the election.

III. Treating meeting of electors.

In Ontario it is provided by statute (§ 151, formerly § 61, of the Election Act of Ontario) that if a candidate or agent furnish drinks to a meeting assembled for the purpose of promoting said election it will avoid the election. Under this statute the question of intent is eliminated, and the only question which arises in cases alleged to be in violation thereof is whether the assemblage treated constituted such a meeting as is contemplated by the statute. Thus, in Moore v. McGowan (1876) Hodg. Ont. Elect. Rep. 231, it was held that for an agent of a candidate to take a jug of whisky to a meeting of electors, and give the persons present drinks, was a corrupt practice within the meaning of § 61 of the Election Law, which forbids the treating of meetings. To the same effect, see Holden v. Robertson (1879) Hodg. Ont. Elect. Rep. 539, wherein it appeared that an agent of a candidate furnished drink and entertainment to persons composing a meeting of electors, and while the meeting was in progress.

In Stratton v. O'Sullivan (1875) Hodg. Ont. Elect. Rep. 245, wherein it appeared that a meeting had been held for the promotion of an election, and that after the transaction of their business the persons attending it had gone generally together to a neighboring tavern on the invitation of an agent of the candidate, who bought and paid for drinks for them, it was held that there was a violation of the statute, prohibiting the treating of a meeting.

Likewise, in Paget v. Fauquier (1883) 1 Ont. Elect. Rep. 197, wherein it appeared that a number of electors gathered together in a room of a tavern elected a chairman and listened to speeches, and afterwards moved across the hall to the bar, where the candidate treated all present, it was held that there was a violation of the Election Act, which forbids any candidate treating a meeting of electors assembled for the purpose of promoting the election, previous to or during such election.

But in Shoemaker v. Lackner (1898) 2 Ont. Elect. Rep. 76, wherein it appeared that, after a meeting of electors was over, an agent of a candidate treated at the bar of the hotel where the meeting was held some of those who had been at the meeting, to-

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gether with others who were in the bar, it was not the treating of a meeting, within the meaning of the statute. But it was further held in this case that to treat a number of electors who were in the bar and waiting for the meeting to open, and afterwards to take them in a body to another hotel and treat them, was a treating of a meeting within the meaning of the act.

In Cunningham v. Hagar (1883) 1 Ont. Elect. Rep. 88, it was held not to be a treating of a meeting for an agent of a candidate to invite four or five of his friends into an adjoining room and treat them. In that case the court stated the rule as follows: "Without attempting to lay down any inflexible rule for the circumstances of each particular case as regards the extent of the treating, the question must, in my opinion, always be whether the entertainment has been furnished to the meeting, that is to say, to the general body of electors composing such meeting, whether before, during, or after the business of the meeting, and while, as a body, such electors remain together at the place of meeting, or elsewhere. . . . Or again, if there is continuous treating by an agent, of a few persons at a time, of those attending a meeting, so that, as it were, the meeting is treated in detachments, there would be no difficulty in holding that to be within the section. But where, as here, there is only the isolated case of four or five persons out of a large meeting retiring to another room during the meeting and treating each other, I think it impossible, upon the most liberal construction of the section, to say that there has been anything like a furnishing of entertainment to a meeting of electors."

In McCaskill v. Paxton (1875) Hodg. Ont. Elect. Rep. 304, it was held that where a meeting attended by both candidates and their supporters became disorderly and, in order to avoid a threatened general fight, an agent proposed that they go into the bar and have a drink, the treating under such circumstances was not a treating of a meeting.

In Cook v. Broder (1875) Hodg. Ont. Elect. Rep. 205, it was held that the treating of a number of electors more than one hour after a meeting had been held was not a treating of a meeting which the statute prohibited, nor could the buying of one drink for those present be said to constitute corrupt practice. However, it was further held in that case that the treating by an agent of the candidate while a meeting of a large number of electors was in progress was a treating of a meeting, within the meaning of the statute, and avoided the election.

In Ellah v. Monteith (1899) 2 Ont. Elect. Rep. 144, it appeared that a number of voters met at the house of a voter alleged to be an agent of the candidate, for the purpose of going over the voters' list in the interest of one of the candidates, and afterwards having a card party. During the card party meat and drink were supplied to all present by the owner of the house and his wife, but the drink, which consisted of a quarter keg of beer, was paid for by subscription according to a custom of the locality. It was held that this did not constitute a corrupt practice within the meaning of the act, as each person paid for his own drink, and the food was supplied by the master of house in his usual place of residence; nor could it be said that it was supplied to a meeting of electors, as at the time the food was served the meeting was over, so far as it related to the election, and it had become merely an ordinary social gathering.

An earlier statute (Act of 1868) governing the conduct of elections contained a provision that the treating of a meeting, in order to be corrupt, must have been done with the intent to promote the election, and cases arising under this statute were of course determined by the presence or absence of such intent. Under that act, in Gorham v. Boultbee (1871) Hodg. Ont. Elect. Rep. 62, it was held that the treating of a meeting was not a corrupt practice unless it was shown that the treating was done with the intent to influence the election corruptly. In McLennan v. Craig (1871) Hodg. Ont. Elect. Rep. 8, it was held, under the same act, that a representative who had not at the time decided to become a candidate for re-election,

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and who on two occasions, after addressing meetings of electors at which he gave an account of his actions as a member of the legislature, treated those who wanted it, was not guilty of treating with a corrupt intent. In Rennick v. Cameron (1871) Hodg. Ont. Elect. Rep. 70, it was held that for an agent of a candidate to treat electors after meetings would not avoid an election, where it appeared that the treating was not done with any corrupt intent to influence voters, but chiefly through the desire of the agent to be considered a good fellow. In that case it appeared that the largest expenditure in treating was $6 or $7.

IV. Treating on election day.

By another provision of the Ontario Election Act (§ 66) it is made a crime for anyone to sell or give to any person spirituous liquors on polling day, and under this statute it has been held that for an agent to give drinks on polling day subjected the candidate to the penalty of the statute. A violation of that statute is deemed to be a corrupt practice. Holden v. Robertson (1879) Hodg. Ont. Elect. Rep. 539.

In Cunningham v. Hagar (1883) 1 Ont. Elect. Rep. 88, wherein it appeared that an agent of a candidate treated on polling day, the court, holding this to be a violation of the statute, said: "It is made penal, on the part of anyone to whom that section applies, to give or sell liquor at any time during that day. Then comes in, however, the other provision that an offense against that section, committed within the polling hours, shall be a corrupt practice. Now, what is the proper construction, the proper force, to be given to that enactment of the legislature, that the offense within those particular hours shall be a corrupt practice? It seems to us that that is a declaration, a distinct declaration, that an act which is made penal at any time during the day, is, if committed within those hours, to be attributed to a purpose connected with the election. When it is said that it is a corrupt practice if committed between those hours, the legislature says, in other words, the act done within those hours is to be deemed conclusively a corrupt practice. If a corrupt practice, it must be a practice intended corruptly to influence the election, as that is the meaning of the words 'corrupt practice.' Therefore, in making that particular enactment, and giving that particular effect to the act done within polling hours, the legislature seems to have removed from the courts the duty of inquiring what was the intention with which the act was done, having attached to it the character of a corrupt practice, and necessarily therefore giving it the character of an act intended corruptly to influence the election. Treating it in this case as having that force, we have then the legislature declaring that Baulne, when he sold the liquor within those hours, did so for the purpose of influencing the election; and whether we would be satisfied that that was so, or whether we may be satisfied that he had no such intention, we must take it, as I apprehend, that the legislature has said that is to be deemed to be his intention."

In Christie v. Stock (1875) Hodg. Ont. Elect. Rep. 343, it was held that a candidate who goes into a hotel on polling day, and, after stating that he cannot treat, allows his agent to do so, and himself joins in the drinking, is guilty of a corrupt practice in violating the statute (§ 66 of the Election Law), prohibiting the opening of saloons on polling day.

In McRae v. Smith (1875) Hodg. Ont. Elect. Rep. 252, it was held that for an agent of a candidate to treat an elector on polling day was a violation of the statute, prohibiting any liquor to be sold or bought on polling day, and therefore it avoided the election.

But it has been held that for a committeeman to invite several of his friends to his house after the polling has been finished, and to serve them with refreshments, was not a violation of § 66 of the Controverted Elections Act, prohibiting the sale, purchase, or gift of liquors on polling day. Jarman v. Meredith (1875) Hodg. Ont. Elect. Rep. 214.

In Bedford v. Phelps (1883) 1 Ont. Elect. Rep. 128, it was held that the furnishing of meals and drink at a boarding house near a polling place,

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on a general invitation to those who had come to vote, was a violation of that provision of the statute prohibiting the treating of any person having voted or being about to vote. However, in that case it was held that the point could not prevail, for the reason that it had not been properly charged in the petition.

There are several cases from the same jurisdiction set out in full, supra, II., in which it appeared that the treating was actually done on election day; but the court apparently ignored that point, and rested its decision on the question of the intent with which the treat was given.

M. B.

A. ENKEMA, Respt.,
v.
JAMES R. McINTYRE et al., Appts.

Minnesota Supreme Court — March 9, 1917.

(136 Minn. 293, 161 N. W. 587.)

Specific performance — right of defaulting party.

1. Plaintiff, a vendee in an executory contract for the sale of land, refused to make payments as they matured, stating that he was informed that the title was doubtful. The vendor made a void attempt to cancel the contract by notice, and sold the land to another, and this one in turn sold to still another. Thereafter, and nearly a year after his refusal to pay, plaintiff vendee brings action against all the parties mentioned for specific performance. The court will not enforce specifically every written contract for sale of land. Delay until others have in good faith acquired rights in the land is usually a bar. Specific performance will not be decreed in favor of one who has himself once refused to perform.

[*See note on this question beginning on page* 416.]

Same — purchase with notice.

2. The last purchaser in this case had notice of plaintiff's contract, but his purchase was an honest transaction, induced or made possible by plaintiff's conduct, and his equities are superior to those of plaintiff.

Deed — consideration — assumption of mortgage.

3. The recital of consideration in the last purchaser's deed is no evidence that he paid any money, but he assumed a substantial mortgage to a third party. This constitutes a valuable consideration.

Vendor and purchaser — abandonment of conduct.

4. The statute forbidding a vendor to terminate a land contract without giving a prescribed notice does not prevent the vendee's abandonment of the contract.

Headnotes by HALLAM, J.

APPEAL by defendants from a judgment of the District Court for Mahnomen County in favor of plaintiff, and from an order denying a motion for new trial, in an action brought to enforce specific performance of a contract to convey land. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. **Edgerton & Dohs**, for appellants:

Plaintiff was never in possession of the land or any part thereof at any time, and, being in default, was not entitled to possession, and hence the cancelation proceedings were not objectionable, and operated as a matter of law to terminate all of plaintiff's rights under the contract.

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First State Bank v. Hayden, 121 Minn. 45, 140 N. W. 132; Washburn v. Cutter, 17 Minn. 361, Gil. 335; Bazille v. Murray, 40 Minn. 48, 4 N. W. 238; Sage v. Larson, 69 Minn. 122, 71 N. W. 923.

Plaintiff was bound to tender the amount due under his contract in order to give rise to a cause of action for specific performance.

Wyvell v. Jones, 37 Minn. 68, 33 N. W. 43; Sennett v. Shehan, 27 Minn. 328, 7 N. W. 266; St. Paul Division v. Brown, 9 Minn. 157, Gil. 144, 11 Minn. 356, Gil. 254; Lanz v. McLaughlin, 14 Minn. 72, Gil. 55; Bowen v. McCarthy, 85 Mich. 26, 48 N. W. 155; Libby v. Parry, 98 Minn. 366, 108 N. W. 299; Sanborn v. Nockin, 20 Minn. 178, Gil. 163; Blunt v. Egeland, 104 Minn. 351, 116 N. W. 653.

In order to entitle plaintiff to a decree of specific performance to convey land, it must appear that he has performed or been able, willing, and anxious to perform his part of the contract, and that the defendant has neglected or refused to perform his part of it.

Thaxter v. Sprague, 159 Mass. 397, 34 N. E. 541; Chilhowie Iron Co. v. Gardiner, 79 Va. 305; Evans v. Folsom, 5 Minn. 422, Gil. 342; McDermid v. McGregor, 21 Minn. 111; Selover v. Isle Harbor Land Co. 91 Minn. 451, 98 N. W. 344; Wester v. Flygare, 95 Minn. 214, 103 N. W. 1020; Russell v. Nester, 46 Mich. 290, 9 N. W. 420.

Specific performance rests in the discretion of the court, and if there be any improper conduct of any kind on the part of the party seeking specific performance, that relief will be denied him.

Dyer v. Duffy, 39 W. Va. 148, 24 L.R.A. 339, 19 S. E. 540; Durretts v. Hook, 8 Mo. 374; Powell v. Berry, 91 Va. 568, 22 S. E. 365; Gish v. Jamison, 96 Va. 312, 31 S. E. 521.

A purchaser is not entitled to specific performance after default in making payments which, by the terms of the contract, operated as a forfeiture without proof of a waiver.

Gill v. Bradley, 21 Minn. 15; McDermid v. McGregor, 21 Minn. 111; Frey v. Camp, 131 Iowa, 109, 107 N. W. 1106; Foot v. Bush, 100 Iowa, 522, 69 N. W. 874; Simpson v. Atkinson, 39 Minn. 238, 39 N. W. 323; Cathro v. Gray, 108 Mich. 429, 66 N. W. 346; Hammond v. Noble, 150 Mich. 269, 114 N. W. 58.

Plaintiff is estopped at this time to enforce his contract.

Purcell v. Thornton, 128 Minn. 255, 150 N. W. 899; Hunt v. Roosen, 87 Minn. 68, 91 N. W. 259; Caldwell v. Auger, 4 Minn. 217, Gil. 156, 77 Am. Dec. 515; Chaska County v. Carver County, 6 Minn. 204, Gil. 130; Pence v. Arbuckle, 22 Minn. 417; Hawkins v. Methodist Episcopal Church, 23 Minn. 256; Western Land Asso. v. Banks, 80 Minn. 317, 83 N. W. 192; Macomber v. Kinney, 114 Minn. 146, 128 N. W. 1001, 130 N. W. 851; Peninsular Stone Co. v. Osmun, 73 Mich. 570, 41 N. W. 693; Marquette County Sav. Bank v. Koivisto, 162 Mich. 554, 127 N. W. 680; Steffens v. Nelson, 94 Minn. 365, 102 N. W. 871; Jones v. Subera, 25 S. D. 223, 126 N. W. 253; Peters v. Canfield, 74 Mich. 498, 42 N. W. 125; Hohl v. Osborne, — Iowa, —, 92 N. W. 697; Bausman v. Faue, 45 Minn. 412, 48 N. W. 13; Diamond v. Manheim, 61 Minn. 178, 63 N. W. 495; Brown v. Union Depot Street R. & Transfer Co. 65 Minn. 508, 68 N. W. 107; Fried v. Stone, 14 Neb. 398, 15 N. W. 698.

The contract was abandoned by Enkema, the vendee, and he cannot thereafter enforce specific performance.

Mathwig v. Ostrand, 132 Minn. 347, 157 N. W. 589; Banks v. Burnam, 61 Mo. 76; Maxfield v. Terry, 4 Del. Ch. 618; Washington v. M'Gee, 7 T. B. Mon. 131; Tolson v. Tolson, 10 Mo. 736; Boyce v. M'Culloch, 3 Watts & S. 429, 39 Am. Dec. 35; England v. Jackson, 3 Humph. 584; Cuppy v. Allen, 176 Ill. 162, 52 N. E. 61; Lasher v. Loeffler, 190 Ill. 150, 60 N. E. 85; May v. Getty, 140 N. C. 310, 53 S. E. 75; Quarton v. American Law Book Co. 143 Iowa, 517, 32 L.R.A. (N.S.) 1, 121 N. W. 1009; Cox v. Raider, 138 Mich. 249, 101 N. W. 531; Schultz v. Hastings Lodge, 90 Neb. 454, 133 N. W. 846.

Messrs. McDowell & Fosseen, for respondent:

The findings of fact are amply sustained by the evidence.

Hicks v. Stone, 13 Minn. 434, Gil. 398.

Defendants are not good faith purchasers.

Bergstrom v. Johnson, 111 Minn. 247, 126 N. W. 899; United States v. Brannan, 133 C. C. A. 559, 217 Fed. 849; Teal v. Scandinavian-American Bank, 114 Minn. 435, 131 N. W. 486.

The contract could not be canceled without payment of the mortgage tax.

1 Cyc. 1125; Barber v. Robinson, 78

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Minn. 193, 80 N. W. 968; Murphy v. Doyle, 37 Minn. 113, 33 N. W. 220; Washburn v. Cutter, 17 Minn. 361, Gil. 335.

Plaintiff is entitled to a specific performance of the contract.

36 Cyc. 552; St. Paul Division v. Brown, 9 Minn. 157, Gil. 144.

Plaintiff is not estopped by conduct from claiming specific performance.

Page, Contr. 1707; 36 Cyc. 732; Gill v. Bradley, 21 Minn. 15; Minneapolis, St. P. & S. Ste. M. R. Co. v. Chisholm, 55 Minn. 374, 57 N. W. 63; McDermid v. McGregor, 21 Minn. 111; Hage v. Benner, 111 Minn. 365, 127 N. W. 3; First State Bank v. Hayden, 121 Minn. 45, 140 N. W. 132; International Realty Securities Corp. v. Vanderpoel, 127 Minn. 89, 148 N. W. 895.

Hallam, J., delivered the opinion of the court:

1. This is an action to enforce specific performance of a contract to convey 240 acres of land, brought by plaintiff, a vendee, against defendant McIntyre, the vendor, defendant Jester, a subsequent purchaser from the vendor, and defendant Van Dalen, a purchaser from Jester. The court found for plaintiff and ordered judgment for specific performance. The defendants appeal.

The contract between McIntyre and plaintiff was made October 15, 1913. The price was $6,960. Two hundred dollars was paid down; $800 was to be paid December 1, 1913; $1,230, December 1, 1914; $1,230, December 1, 1915; $3,500, November 15, 1919, in accordance with the terms of a mortgage on the land, which was to be extended to that date. All deferred payments were to bear interest, and plaintiff was to pay taxes subsequently levied or assessed. Time was of the essence; until default, plaintiff was to have possession of the premises. The land was unoccupied, except that about twenty acres had been broken. Plaintiff never took personal possession. On November 13, 1913, a partner of plaintiff rented the 80 on which there had been some cultivation to one Swenby, who cultivated this portion in 1914. He did not live on it. He came and planted and harvested the crop and left. In June, 1914, a banker in a near-by town leased the remaining land to one Erickson, who, in July, cut 16 tons of hay and stacked it on the land.

When the payment due December 1, 1913, matured, plaintiff did not pay. The reason why he did not pay at that time does not appear. On December 5, 1913, a decision of this court was filed which plaintiff thought threw doubt on the title to part of the land, which was "Indian land." "At the time of this decision" plaintiff turned the abstracts over to Mr. Powell, an attorney, an authority on Indian titles, and some six weeks later advised defendant Callahan, McIntyre's attorney, that Mr. Powell had expressed doubt as to the title, and he declined to proceed until he received a further report from Mr. Powell, which he would receive in "probably . . . a week or ten days." Further correspondence passed. On March 10, plaintiff wrote again, declining to proceed until he could "hear further from Mr. Powell," and indicating that Mr. Powell would give a "full opinion on the subject" between then and April 10. Plaintiff closed this letter with the statement: "Until we hear further from Mr. Powell, we do not deem it good business on our part to make further payments on any of these lands." Again on March 12 plaintiff wrote, stating that Mr. Powell would be back not later than "Saturday next" and would then "be in a position to look this matter up." In answer to this Callahan wrote, charging that the trouble was "financial, rather than legal." On March 19, plaintiff answered denying this, protesting his financial ability, and again stating: "We certainly would not consider it prudent to make further payments on this tract of land in face of the advice received from Mr. Powell." With this he dropped the correspondence.

McIntyre and his attorney, though protesting all the time, did wait until several weeks beyond the time asked by plaintiff, but plaintiff did

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nothing. On April 29, they caused to be served on plaintiff a notice, under Gen. Stat. 1913, § 8081, calculated to terminate the contract in thirty days after such service. Still plaintiff did nothing. The notice of termination was ineffective because the registration tax was not paid (First State Bank v. Hayden, 121 Minn. 45, 140 N. W. 132), but probably neither party knew the effect of this failure at that time. On June 27, 1914, the contract was recorded, and the registration tax paid, and on July 24, 1914, the notice and return of service thereof were filed. Plaintiff testified that he was advised by his attorney in the fall of 1914 that, by reason of a later decision in the case above referred to, this title was good. Still he did nothing. December 1, 1914, came and plaintiff evinced no disposition to make the payment due on that day. He paid no taxes as the contract required. The first symptom of a purpose to carry out his part of the contract was the commencement of this suit on February 25, 1915.

In the meantime, defendant McIntyre, supposing that the contract had been regularly canceled, conveyed the land by warranty deed on September 15, 1914, to defendant Jester, and Jester gave a mortgage of $6,720 to defendant Callahan. On October 22, 1914, Jester conveyed the land by warranty deed to defendant Van Dalen. By the terms of this deed Van Dalen assumed and agreed to pay the Callahan mortgage. The $3,500 encumbrance was paid and satisfied of record. The taxes were paid. Before Jester made his purchase he submitted an abstract of title to an attorney, and the attorney advised him with reference to the title. He was not permitted to testify what that advice was, but he bought. Before Van Dalen purchased he submitted the abstract to another attorney. This attorney advised Van Dalen that the title was good.

The question of law is whether, on this state of facts, the court properly decreed specific performance.

2. If competent parties enter into a written contract for the conveyance of land and one party refuses to perform, the other may, as a rule, enforce specific performance of the contract. If nothing more than that appears, specific performance is as much a matter of course as damages. Abbott v. Moldestad, 74 Minn. 293, 73 Am. St. Rep. 348, 77 N. W. 227. But the court will not enforce specific performance of every written contract to convey land. If the contract is unconscionable, or circumstances have arisen which render specific performance inequitable, relief will be denied. Buckley v. Patterson, 39 Minn. 250, 39 N. W. 490. "The situation involved should be considered from a practical, rather than a theoretical, viewpoint." First Nat. Bank v. Corporation Securities Co. 128 Minn. 341, 348, 150 N. W. 1084. Laches or delay on the part of the party asking performance, until others have in good faith acquired rights in the property, are usually a bar. Thompson v. Winter, 42 Minn. 121, 6 L.R.A. 236, 43 N. W. 796; Thaxter v. Sprague, 159 Mass. 397, 34 N. E. 541; Schultz v. Hastings Lodge, 90 Neb. 454, 133 N. W. 846; Chilhowie Iron Co. v. Gardiner, 79 Va. 305; Lasher v. Loeffler, 190 Ill. 150, 60 N. E. 85; Giltner v. Rayl, 93 Iowa, 16, 61 N. W. 225; 4 Pom. Eq. Jur. p. 2777, § 1408. Nor will specific performance be decreed in favor of one who has himself once refused to perform. Schultz v. Hastings Lodge, 90 Neb. 454, 133 N. W. 846; Thaxter v. Sprague, 159 Mass. 397, 34 N. E. 541; Chilhowie Iron Co. v. Gardiner, 79 Va. 305; Lasher v. Loeffler, 190 Ill. 150, 60 N. E. 85; Giltner v. Rayl, 93 Iowa, 16, 61 N. W. 225.

Specific performance—right of defaulting party.

3. If we apply these principles, specific performance must be denied. When performance was due from plaintiff, he refused to perform. He was not satisfied with his vendor's

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title. It was clear his vendor could do nothing to better his title. He waited until another who was willing to take the title accepted it and took a conveyance, and then, nearly a year after he had not merely neglected, but refused, to pay, he comes into court without so much as a prior intimation that he had changed his mind as to the title, and asks a restoration to all his former rights.

Defendant Van Dalen was charged with notice of plaintiff's contract. The contract was on record. He was not, therefore, a purchaser without notice. What rights he has are not by virtue of the Recording Acts. But this fact is not determinative of his rights. That he had notice of plaintiff's rights bars him of nothing, if plaintiff had given it out that he abandoned those rights. This may not be a case of technical estoppel. It is rather a question of superiority of equities. If Van Dalen's purchase was an honest transaction, and was induced or made possible by the conduct of plaintiff, his equities are superior. See McDermid v. McGregor, 21 Minn. 111; Simpson v. Atkinson, 39 Minn. 238, 39 N. W. 323; Oliver Min. Co. v. Clark, 65 Minn. 277, 68 N. W. 23. The evidence is undisputed that Van Dalen acted with honesty of purpose. He took legal advice before he bought, and was advised that the title he acquired was good. Had he inquired further he would have found that the last word from plaintiff was a refusal to pay, though payment was overdue.

Same—purchase with notice.

4. True, there is no evidence that Van Dalen paid any money to Jester. The acknowledgment of receipt of consideration in the deed is not evidence of this as against plaintiff (Ferris v. Boxell, 34 Minn. 262, 25 N. W. 592; Heartz v. Klinkhammer, 39 Minn. 488, 490, 49 N. W. 826; Cain v. Mead, 66 Minn. 195, 68 N. W. 840; United States v. Brannan, 133 C. C. A. 559, 217 Fed. 849; 2 Wigmore, Ev. p. 1821, § 1456; Ellison v. Albright, 41 Neb. 93, 29 L.R.A. 737, 59 N. W. 703), but he did assume a mortgage of $6,720 to one other than his vendor, and, after he purchased, the mortgages standing on the land were satisfied, and the taxes were paid. His assumption of this mortgage constituted him a purchaser for a valuable consideration. 39 Cyc. 1699; Drey v. Doyle, 99 Mo. 459, 12 S. W. 287; Citizens' Bank v. Shaw, 14 S. D. 197, 84 N. W. 779. Even if it can be said that he can be placed in statu quo, still we think that, in as much as he has completed his purchase, paid out money, and assumed obligations, his equities are greater than those of plaintiff, and that the court should not now aid plaintiff in devesting him of his title or rights. McDermid v. McGregor, 21 Minn. 111; Oliver Min. Co. v. Clark, 65 Minn. 277, 68 N. W. 23. Perhaps McIntyre could have resisted specific performance had no conveyance been made. Simpson v. Atkinson, 39 Minn. 238, 39 N. W. 323.

Deed—consideration—assumption of mortgage.

5. The statute, Gen. Stat. 1913, § 8081, did not permit plaintiff's vendor to terminate plaintiff's contract without his consent, except on a good notice given in accordance with the statute; but the statute did not stand in the way of plaintiff's abandonment of his contract. Mathwig v. Ostrand, 132 Minn. 346, 347, 157 N. W. 589. The statute was designed to protect those who would pay, but cannot; not to protect those who can pay, but will not. We do not hold that plaintiff's conduct was such an abandonment as constituted a rescission of the contract, so as to terminate his right to damages, if the title offered was bad. In fact, if he has any right to damages he may assert it in this action. Thompson v. Myrick, 24 Minn. 4; Murray v. Nickerson, 90 Minn. 197, 95 N. W. 898; Baumgartner v. Corliss, 115 Minn. 11, 131 N. W. 638. We do

Vendor and purchaser—abandonment of contract.

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hold that his conduct was such as to render it inequitable that he should be permitted to assert his right to specific performance after another has, acting honestly, assumed obligations and acquired rights in the land.

Order reversed.

ANNOTATION.

Right of party who has once refused to perform to have specific performance of contract.

I. Introductory, 416.
II. General rule, 416.
III. Application of rule, 417.
IV. Exception to rule, 421.

I. Introductory.

This note discusses the effect on the right of a party to specific performance of a contract of his previous refusal to perform, or of such neglect to perform as is considered by the court as tantamount to a refusal. It does not include the effect of a breach or abandonment, or of mere delay or laches, except in those few cases where they have been treated by the court as equivalent to a refusal to perform.

II. General rule.

Where a party to a contract refuses to perform it, or is guilty of such conduct as amounts to a refusal to perform, he is not thereafter entitled to enforce the specific performance of the contract.

United States.—McCabe v. Matthews (1895) 155 U. S. 550, 39 L. ed. 256, 15 Sup. Ct. Rep. 190.

Alabama.—Cooper v. Cooper (1918) — Ala. —, 78 So. 388.

Arizona. — Walton v. McKinney (1908) 11 Ariz. 385, 94 Pac. 1122.

California. — Conrad v. Lindley (1852) 2 Cal. 173; Brown v. Covillaud (1856) 6 Cal. 566.

Florida.—Pensacola Gas Co. v. Pensacola (1894) 33 Fla. 322, 14 So. 826.

Illinois.—Shortall v. Mitchell (1870) 57 Ill. 161; Roby v. Cossitt (1875) 78 Ill. 638; Lasher v. Loeffler (1901) 190 Ill. 150, 60 N. E. 85.

Iowa.—Davies v. Beadle (1873) 37 Iowa, 390; Giltner v. Rayl (1894) 93 Iowa, 16, 61 N. W. 225; Hambleton v. Jameson (1913) 162 Iowa, 186, 143 N. W. 1010.

Kansas.—Riley v. Allen (1905) 71 Kan. 625, 81 Pac. 186.

Kentucky.—M'Intire v. Johnson (1815) 4 Bibb, 48; Hyden v. Perkins (1907) 30 Ky. L. Rep. 583, 99 S. W. 290.

Maryland. — Carswell v. Walsh (1889) 70 Md. 504, 17 Atl. 335.

Massachusetts.—Thaxter v. Sprague (1893) 159 Mass. 397, 34 N. E. 541.

Michigan.—Green v. Reder (1917) 165 N. W. 807.

Minnesota.—ENKEMA v. MCINTYRE (reported herewith) ante, 411.

Mississippi. — Lewis v. Woods (1839) 4 How. 86, 34 Am. Dec. 110.

Nebraska. — Spier v. Schappel (1910) 86 Neb. 335, 125 N. W. 609; Schultz v. Hastings Lodge (1911) 90 Neb. 454, 133 N. W. 846.

New York.—Hatch v. Cobb (1820) 4 Johns. Ch. 559.

Pennsylvania. — Washabaugh v. Stauffer (1874) 81* Pa. 497; Russell v. Baughman (1880) 94 Pa. 400.

Utah.—Goldthwait v. Lynch (1893) 9 Utah, 186, 33 Pac. 699; Roberts v. Braffett (1907) 33 Utah, 51, 92 Pac. 789.

Virginia.—Chilhowie Iron Co. v. Gardiner (1884) 79 Va. 305; Ford v. Euker (1889) 86 Va. 75, 9 S. E. 500; Gish v. Jamison (1898) 96 Va. 312, 31 S. E. 521.

Washington.—Northwestern Lumber Co. v. Grays Harbor & P. S. R. Co. (1913) 208 Fed. 624; Voight v. Fidelity Invest. Co. (1908) 49 Wash. 612, 96 Pac. 162.

Canada. — Wallace v. Hesslein (1898) 29 Can. S. C. 171.

The reason for the rule is that one who asks a court of equity to compel the specific performance of a contract must show that he has performed, or has been able and willing to perform, all the essential terms of the contract devolving on him. The rule is based on the principle that he who seeks equity

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must do equity. Pensacola Gas Co. v. Pensacola (1894) 33 Fla. 322, 14 So. 826; Lasher v. Loeffler (1901) 190 Ill. 150, 60 N. E. 85; Giltner v. Rayl (1894) 93 Iowa, 16, 61 N. W. 225; Hambleton v. Jameson (1913) 162 Iowa, 186, 143 N. W. 1010; M'Intire v. Johnson (1815) 4 Bibb (Ky.) 48; Lewis v. Woods (1839) 4 How. (Miss.) 86, 34 Am. Dec. 110; Washabaugh v. Stauffer (1874) 81* Pa. 497; Russell v. Baughman (1880) 94 Pa. 400; Powell v. Berry (1852) 91 Va. 568, 22 S. E. 365; Wallace v. Hesslein (1898) 29 Can. S. C. 171. Thus, in Washabaugh v. Stauffer (1874) 81* Pa. 497, the court said: "A decree of specific performance is of grace, not of right, and is awarded only to the purchaser who is eager, prompt, and ready to perform." In Pensacola Gas Co. v. Pensacola (Fla.) supra, it was said: "The authorities are numerous and uniform in enforcing the rule that it is incumbent on a party who asks a court of chancery to compel the specific performance of a contract to show that he has performed, or has been ready and willing to perform, all the essential terms of the contract on his part. . . . This is upon the principle that he who seeks equity must do equity, and it requires of the complainant 'that he do all that is in his power to fulfil his part of the contract which he is seeking to enforce, according to its terms. He must do his full duty, or the court will not regard his prayer.'" In M'Intire v. Johnson (1815) 4 Bibb (Ky.) 48, it was said: In cases of an accident, design, or marked intention on the part of a complainant, subsequent to making the agreement, not to be bound by or perform his part of it, courts of equity have, upon the principle of the party asking relief having abandoned his right to a specific execution, refused their aid. In Hambleton v. Jameson (1913) 162 Iowa, 186, 143 N. W. 1010, it was held that a vendee, to be entitled to specific performance, must "be ready, willing, and able to perform his part of the agreement according to its terms, and if other equities arise, growing out of failure or neglect to perform, specific performance will not be decreed." In Wallace v. Hesslein (1898) 29 Can. S. C. 171, the court, in speaking of the conditions underlying an application for specific performance, said that these conditions "require a purchaser to be ready, prompt, and eager to complete." And in Giltner v. Rayl (1894) 93 Iowa, 16, 61 N. W. 225, the court said: "The rule, time and again announced by all the authorities, is that a party cannot call as a matter of right upon a court of equity to specifically enforce a contract; that its exercise rests in the sound discretion of the court, in view of the contract of the parties and the surrounding circumstances. A party demanding its exercise is bound to show that he himself has always been ready, willing, and eager to perform on his part." See to the same effect Russell v. Baughman (1880) 94 Pa. 400, wherein the court said: "When a party calls upon a court of equity to enforce specific performance he must show that he has himself been ready, prompt, and desirous of performing on his part. If he has been guilty of gross laches and unreasonable delay, if he has slept on his rights, and by conduct, long persisted in, conveyed the idea that he had abandoned them, he cannot, after there has been a material change of circumstances affecting the rights, interests, and obligations of the parties, move a chancellor to decree specific performance."

In Lewis v. Woods (1839) 4 How. (Miss.) 86, 34 Am. Dec. 110, it was said: "A party cannot be permitted to violate his contract and wait until he sees that his bargain will be profitable, and then invoke the aid of a court of chancery to have it executed." See to the same effect Roby v. Cossitt (1875) 78 Ill. 638; Spier v. Schappel (1910) 86 Neb. 335, 125 N. W. 609; Ford v. Euker (1889) 86 Va. 75, 9 S. E. 500.

III. Application of rule.

In Cooper v. Cooper (1918) — Ala. —, 78 So. 383, a decree of specific performance was denied to a vendee, where it appeared that without just cause or legal excuse he refused to comply with his part of the contract,

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before the sale was canceled by the vendors and the property resold by them.

In Carswell v. Walsh (1889) 70 Md. 504, 17 Atl. 335, specific performance was refused to a petitioner, where it appeared that in order to carry the contract into effect it was agreed that he should pay the cost of drawing, executing, and recording the necessary papers, but later he refused so to do.

In Pensacola Gas Co. v. Pensacola (1894) 33 Fla. 322, 14 So. 826, the court denied a decree of specific performance in favor of a municipality to enforce a contract with a gas company for the lighting of its streets, it appearing that the city had refused to pay for lights already furnished under the contract.

In M'Intire v. Johnson (1815) 4 Bibb (Ky.) 48, it appeared that one party to an agreement to divide land refused to comply with the terms of the agreement, and subsequently sold all the land. It was held that his assignees were not entitled to a decree for the specific performanc of the contract.

In Hatch v. Cobb (1820) 4 Johns. Ch. (N. Y.) 559, specific performance was denied to the vendee under a contract for the sale of land, where it appeared that he refused to complete the payment, whereupon the vendor, after giving notice of his intention, sold the land to another, although the vendee subsequently tendered the amount due on the contract.

In Hyden v. Perkins (1907) 30 Ky. L. Rep. 583, 99 S. W. 290, a decree of specific performance was refused to a vendee who requested the vendor to sell the land, as he did not intend to complete the purchase, and who was absent for several years, during which time the land was sold.

In Washabaugh v. Stauffer (1874) 81* Pa. 497, the court refused specific performance where it appeared that the vendee under a contract for the purchase of land notified the vendor that he could not pay the purchase price, and thereafter the vendor, without the vendee's consent, but with his knowledge, sold part of the land, and two years later the vendee tendered the purchase price and demanded specific performance.

In Wallace v. Hesslein (1898) 29 Can. S. C. 171, it was held that a vendee's statement that he was unable to perform the terms of his contract justified the court in refusing him a decree of specific performance.

In Voight v. Fidelity Invest. Co. (1908) 49 Wash. 612, 96 Pac. 162, specific performance was refused to a vendee, the court saying: "We think, when it was shown that the appellant had made no payments whatever which were provided for in the contract, had not paid the taxes which he had contracted to pay, and had quit the possession of the land, all for nearly three years, that the court was justified in concluding that there had been an actual abandonment of the contract on the part of the appellant, and in granting the nonsuit prayed for."

In Schultz v. Hastings Lodge (1911) 90 Neb. 454, 133 N. W. 846, it was held that equity would not enforce specific performance of a contract to lease real estate, where it appeared that the tenant's conduct and declarations led the owner to believe that the tenant had abandoned the contract, and the owner, acting on such conduct and declarations, leased the property to a third person, the court saying: "The return of the contract and the drafts of the lease to the defendant's counsel would lead the average man, with knowledge of the transaction, to conclude that Schultz did not intend to take the building."

Where a vendee allowed four years to elapse before he offered to perform a contract to purchase land, and in the meantime the vendor had sold to another person, the court considered that such refusal, on the part of the vendee, to perform, constituted a rescission of the contract, and refused specific performance. Ballard v. Walker (1802) 3 Johns. Cas. (N. Y.) 60.

In Lasher v. Loeffler (1901) 190 Ill. 150, 60 N. E. 85, it appeared that the contract under which a decree of spe-

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cific performance was asked provided for the exchange of real estate. Since the defendant's property was subject to a tax lien he requested the plaintiff to consult his attorney, who testified that the plaintiff stated that he could not wait until the termination of an action to remove the lien, and that the exchange could not be consummated, as he did not desire to tie up his property for so long a time. In an action brought about three years after the signing of the contract, it was held that the plaintiff had abandoned the contract, and he was denied specific performance thereof. The court said: "A party demanding that a court of chancery shall exercise its jurisdiction to enforce the specific performance of a contract must show he has himself always been ready, willing, and eager to perform the contract on his part, and he cannot have a decree for specific performance if it is made to appear he has consented to a rescission of the contract or has abandoned it."

In Shortall v. Mitchell (1870) 57 Ill. 161, a decree of specific performance was refused a vendee, where it appeared that he was unable to pay the first instalment on a contract for the purchase of land, although the time for payment was extended by agreement, at which time the entire purchase money was to be paid. It further appeared that after the expiration of the time for final payment the vendee claimed that there was a lien on the premises, which the court declared was of no weight, since he had repudiated the contract by his inability to pay before he discovered the existence of the alleged lien.

In Green v. Reder (1917) — Mich. —, 165 N. W. 807, the court declined to grant a decree of specific performance to vendees under an agreement to purchase land, based on conversations and letters with the owners, where it appeared that the vendees refused to complete the terms of purchase, returned the deeds, alleging an unfounded claim of defective title, and then brought an action for specific performance several years later.

In Northwestern Lumber Co. v Grays Harbor & P. S. R. Co. (1913) 208 Fed. 624, affirmed in (1915) 137 C. C. A. 365, 221 Fed. 807, it appeared that a railroad company agreed to purchase certain land from a lumber company, but the formal terms of the contract could not be settled, owing to the lumber company's insistence that the contract should contain a clause providing for a joint user bridge, to which the railroad company refused to assent. The lumber company demanded a return of the proposed contract, but in returning it the railroad company stated that it had no intention of waiving any of its rights under the original agreement to purchase the property. It further appeared that when the railroad company demanded a conveyance the vendor refused to deliver the deeds except on payment of an additional sum; and the court held that this demand for an additional payment constituted a breach of the original agreement, which barred the vendor from a right to specific performance of the contract.

In Thaxter v. Sprague (1893) 159 Mass. 397, 34 N. E. 541, it appeared that the parties entered into an agreement in April for the purchase and sale of a house and lot for $1,700, the sum of $50 being paid down, and $25 to be paid each month until the entire amount was paid, with interest and taxes. It was also stipulated that $200 was to be paid by July 10th, when the vendor was to execute a deed and take back a purchase money mortgage, and if the vendee did not call for a deed, or care to complete the transaction, the vendee was to be released from further payments, and the vendor was to accept the $200 as payment for a season's rent. It further appeared that the vendor waived the payment of $200 on July 10th, which the vendee paid in October, and then requested a deed to her father-in-law, with a purchase money mortgage to the vendor, and made no further payments. The vendor notified the vendee in February of the following year that unless the amount due was paid possession would be taken, and a statement of the amount due was sub-

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sequently given to the vendee, who failed to pay. In an action by the vendee for specific performance, the court denied the relief sought, saying: "We think it appears that there was a continuing breach of the contract by the plaintiff after October, and that there was no default on the part of the defendant. She has not only not offered to perform since then, but she has not shown that she was able to perform. In order to entitle her to a decree for specific performance, it must appear that she has performed, or been able and willing to perform, her part of the contract, and that the defendant has neglected or refused to perform her part of it."

In Conrad v. Lindley (1852) 2 Cal. 173, specific performance was refused to a vendee, where it appeared that he entered into possession of land under an agreement to purchase, and subsequently questioned the vendor's title and abandoned the contract, although he afterwards tendered the purchase price. The court said: "There was testimony before the jury, conflicting, it is true, which went to establish the fact that the plaintiff had abandoned the purchase, and claimed in his own right by a title adverse to the defendant. He was asking for the interposition of a court of equity, and it was incumbent upon him to establish that not only his possession, but all his conduct in relation to the purchase, was in good faith. In other words, to entitle him to relief, he was compelled to show that he came into court with clean hands."

In Hambleton v. Jameson (1913) 162 Iowa, 186, 143 N. W. 1010, it appeared that the vendees entered into a contract to purchase land from a vendor who had no title thereto, but merely a contract from the owner, which fact was known to the vendees, who refused to make the first payment on their contract until after the vendee had assigned his contract to a third person. It was held that the vendees were not entitled to a decree of specific performance.

In Giltner v. Rayl (1894) 93 Iowa, 16, 61 N. W. 225, it appeared that the parties entered into an oral contract for the purchase of a tract of land. Before the transaction was closed an alleged defect in the title was discovered, and the vendee refused to take title unless a certain quitclaim deed was procured by the vendor. It further appeared that the deed could not be obtained, and the vendee declined to take the land, and was tendered his deposit money. Later, and after the death of the person from whom the quitclaim was to be obtained, he demanded the fulfilment of the contract, the land in the meantime having increased in value. The court, in denying specific performance, said: "It appears to us, if we sustained the plaintiff's contention in this case, it must be on the theory that he was in position to disavow the contract if it proved detrimental, or accept and insist upon it if it proved beneficial. Equity will not tolerate any such position. Plaintiff ought to have relied and at all times insisted upon the performance of the contract by the defendant, and been ready to perform his part of it; or else he should have promptly disaffirmed and rejected it upon the discovery of the alleged defect. He could not keep the trade suspended indefinitely so as to avail himself of a rise in the value of the property, or relieve himself from loss, by rescinding in the event of its depreciation."

In McCabe v. Matthews (1895) 155 U. S. 550, 39 L. ed. 256, 15 Sup. Ct. Rep. 190, the court stated the facts and its conclusion as follows: "We have presented the case of one who, investing a dollar in a proposed purchase of lands, and doing nothing to assist his vendor in furnishing the property or performing the work necessary to be furnished and performed by such vendor to acquire the title to the lands, waits nine years after his contract has been entered into, nearly nine years after he had good reason to believe that such vendor repudiates all liability under the contract, nearly five years after notice has been given by such vendor of his acquisition of the title by filing the deed in the public records, two years after he receives actual notice of that fact, and

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then, without the tender of any money or other consideration, appeals to a court of equity to compel such vendor to deed to him an interest in land worth at the time of his contract only $150, and now $7,500. It seems to us to be a case of a purely speculative contract on the part of the plaintiff; doing nothing himself, he waits many years to see what the outcome of the purchase by defendant shall be. If such purchase proves a profitable investment, he will demand his share; if unprofitable, he will let it alone. Under those circumstances, the long delay is such laches as forbids a court of equity to interfere."

In Russell v. Baughman (1880) 94 Pa. 400, it appeared that the parties entered into a contract for the sale of certain mineral rights in consideration of the payment of $150. One fourth of the purchase money was to be paid on the 1st of May following, when the deed was to be executed, and the residue in three annual instalments thereafter. It further appeared that $20, part of the first instalment, was paid at the execution of the agreement, but nothing more was ever paid, nor was the deed demanded. The court, in refusing specific performance at the suit of the vendee, said: "After a lapse of nearly fifteen years, the defendant in error elected to consider the plaintiffs in error in the constructive possession, and brought this action of ejectment. In the meantime the lands had become of very great value, and the plaintiffs in error sought to revive equities which they had suffered to sleep for so many years. It was too late. The time to assert them had passed."

IV. Exception to rule.

It has been held that where a vendee, with a knowledge of defects in the vendor's title, refuses to accept a deed conveying the only title which the vendor is able to convey, and the title of the vendor is subsequently perfected, the vendee is entitled to a decree of specific performance.

Thus, is Saldutti v. Flynn (1906) 72 N. J. Eq. 157, 65 Atl. 246, it appeared that the vendor agreed to convey certain land free from encumbrances, the vendee having, at the time the contract was executed, paid part of the purchase price. The vendor tendered a deed which the vendee refused to accept, because it was not executed by the vendor's wife. It further appeared that there were negotiations between the parties, pending which the vendor and his wife conveyed the land to other persons. It was held that equity would enforce specific performance of the contract at the suit of the vendee against the vendor and his grantees, notwithstanding it appeared that the vendor's wife had not acknowledged the agreement of sale, and hence was not bound to convey, and that therefore the vendor had tendered by his deed all that the vendee could require. The court said: "A vendor is, in equity, a trustee for the vendee from the time of the execution of the agreement. . . . The failure of the vendee to perform the contract on his part strictly at the time fixed, if the vendor is ready to perform, does not in equity discharge the contract, unless by the contract itself, or circumstances proved in the case, time is made or has become of the essence of the contract, or the delay has made specific performance inequitable."

In Haffey v. Lynch (1894) 143 N. Y. 241, 38 N. E. 298, it appeared that a vendee under an agreement for the purchase of land partially performed by him had declined to accept a conveyance tendered by the vendor, because of a defect of title appearing after the execution of the agreement. On the trial the vendee offered to accept such a conveyance as the vendor could give, and to pay the full purchase price. In granting the vendee a decree of specific performance, the court said: "It is a general rule in equity that the specific performance of a contract to convey real estate will not be granted when the vendor, in consequence of a defect in his title, is unable to perform. In such cases specific performance is denied because the court cannot enforce its judgment, and because also it would be oppressive to the vendor. But if the defect in the title existed at the

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date of the contract, or was due to some fault or to some act of the vendor subsequent to the contract, the court will generally entertain an action for specific performance, and retain jurisdiction for the purpose of awarding damages for the breach of the contract; . . . and no case can be found prior to this where an equity court has denied specific performance because the vendor's title was defective at the commencement of the action, but valid and perfect at the time of the trial. In such a case why should not the vendor perform? He is able to, and the vendee is entitled to performance unless some other defense has intervened; and the court is able to enforce performance. Here the plaintiff was willing to take such a title as the defendant could convey at the trial. . . . Equity courts, in awarding relief, generally look at the conditions existing at the close of the trial of the action, and adapt their relief to those conditions. The plaintiff in an equity action as a general rule should not be turned out of court on account of any defense interposed to his action, if at the time of the trial the facts are such that if he then commenced his action he would be entitled to the equitable relief sought. If a vendor has no title, or a defective title, to land which he contracts to sell, and subsequently obtains a perfect title, he can be compelled by his vendee to perform his contract. Fry, Spec. Perf. 3d ed. 480. And why should the vendor not be compelled to perform if he perfects his title while the action for specific performance is pending? A perfect title by the vendor is no part of the vendee's cause of action, and he is just as much entitled to the equitable relief, and the equity court is just as competent to give it, whether the title of the vendor was perfected before or after the commencement of the action."

The rule laid down in the preceding case was followed in Walton v. McKinney (1908) 11 **Ariz.** 385, 94 Pac. 1122, wherein it appeared that a vendee had paid part of the purchase price under a contract which provided that the vendor was to give a good and sufficient warranty deed, accompanied by an abstract showing perfect title to the property, but the deed was refused by the vendee, owing to a defect in the title. The court held that the vendee was within his rights in refusing to accept a defective title, but could waive the defect and accept such title as the vendor could convey, and was entitled to specific performance therefor.

But it has been held that where a vendee, with full knowledge of the facts bearing on the title of his vendor, refuses to accept a deed conveying the only title the vendor is able to convey under an unilateral contract, and refuses to pay the purchase price, he rescinds the agreement; and is precluded from subsequently maintaining an action for specific performance, and for a conveyance of such title as the vendor may possess. Walton v. McKinney (Ariz.) supra; Riley v. Allen (1905) 71 **Kan.** 625, 81 Pac. 186; Goldthwait v. Lynch (1893) 9 **Utah,** 186, 33 Pac. 699. Thus, in Goldthwait v. Lynch (Utah) supra, it was held that, where a vendee refused the title which the vendor tendered, he could not maintain an action for specific performance, when the only title the vendor could give was the same title which he had refused to accept.

H. B.

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CHARLES H. WARNER et al., Plffs. in Err.,
v.
CHARLES W. FLACK et al.

Illinois Supreme Court—April 19, 1917.

(278 Ill. 303, 116 N. E. 197.)

Descent — right of heirs to set aside deed.

1. Heirs may maintain an action to set aside a deed procured by a stranger from their ancestor by fraud.

[*See note on this question beginning on page* 431.]

Attorney and client — purchase from client.

2. An attorney who purchases property from his client while the relation of attorney and client exists between them has the burden of showing the perfect fairness, adequacy, and equity of the transaction.

Abatement — death — equitable remedy.

3. Remedies administered in equity do not die with the party.

Cancelation — tender — compensation for services.

4. A tender of compensation for services the contract for which was against public policy is not a condition to cancelation for fraud of a deed into the consideration for which such services entered.

Deed — covenant — effect on wife.

5. A wife who joins in her husband's deed at a time when she has merely a possibility of being entitled to dower in the property is not bound by the covenant in the deed.

Pleading — title by descent.

6. In alleging title by descent, it is not necessary to allege the intestacy of the ancestor.

ERROR to the Circuit Court for McDonough County to review a decree sustaining a demurrer to a bill filed to set aside a deed alleged to have been fraudulently procured by defendants. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Millard R. Powers and **James L. Clark** for plaintiffs in error.

Messrs. Chiperfield & Chiperfield, for defendants in error:

The alleged cause of action to have the deed of John S. Warner set aside does not survive to the plaintiffs in error.

Herr v. Payson, 157 Ill. 252, 41 N. E. 732; Dyrenforth v. Palmer Pneumatic Tire Co. 240 Ill. 25, 88 N. E. 290; Rolfe v. Rich, 149 Ill. 436, 35 N. E. 352; North Chicago Street R. Co. v. Ackley, 171 Ill. 100, 44 L.R.A. 177, 49 N. E. 222; Pom. Eq. Jur. § 1275; Norton v. Tuttle, 60 Ill. 130; Illinois Land & Loan Co. v. Speyer, 138 Ill. 137, 27 N. E. 931; Berry v. Heiser, 271 Ill. 264, 111 N. E. 99; Marshall v. Means, 12 Ga. 61, 56 Am. Dec. 444; Gruber v. Baker, 20 Nev. 453, 9 L.R.A. 302, 23 Pac. 858; Selden v. Illinois Trust & Sav. Bank, 239 Ill. 67, 130 Am. St. Rep. 180, 87 N. E. 860.

There is no sufficient offer to do equity.

Elmore v. Johnson, 143 Ill. 513, 21 L.R.A. 366, 36 Am. St. Rep. 401, 32 N. E. 413; Ringen v. Ranes, 263 Ill. 11, 104 N. E. 1023; 2 R. C. L. § 120, p. 1036; Mitchell v. Mitchell, 263 Ill. 165, 104 N. E. 1037.

Mary A. Warner, one of the complainants, had no interest in the subject-matter of this suit, since her warranty deed passed any and all of her alleged after-acquired title.

Lake Erie & W. R. Co. v. Witham, 155 Ill. 514, 28 L.R.A. 612, 46 Am. St. Rep. 355, 40 N. E. 1014; Jones v. King, 25 Ill. 383; Grand Tower Min. Mfg. & Transp. Co. v. Gill, 111 Ill. 541; Burger v. Potter, 32 Ill. 71; Stookey v. Carter, 92 Ill. 129.

If the estate of John S. Warner was insolvent, and it was necessary to sell his alleged interest in the property in controversy to pay his debts, plain-

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tiffs in error would have no right, title, or interest in the subject-matter of this suit, but the administrator would be the proper party.

McDowell v. Cochran, 11 Ill. 31; Second Unitarian Soc. v. Woodbury, 14 Me. 281; Ball v. Ward, 73 N. J. Eq. 440, 68 Atl. 343.

Messrs. Charles W. Flack and John C. Lawyer, in propriis personis, also for defendants in error.

Dunn, J., delivered the opinion of the court:

The plaintiffs in error, Mary A. Warner, Charles H. Warner, and John C. Warner, filed a bill against the defendants in error, Charles W. Flack and John C. Lawyer, in the circuit court of McDonough county, to which the court sustained a demurrer, and the complainants sued out a writ of error to reverse the decree, which dismissed their bill for want of equity.

The bill alleged that Mary M. Harris, prior to November 1, 1910, was possessed of certain real estate in McDonough county, together with upwards of $50,000 in money, notes, and mortgages; that John S. Warner was her brother, the husband of the complainant Mary A. Warner, the father of the complainant Charles H. Warner, and the grandfather of the complainant John C. Warner, who was a son of a deceased son of John S. Warner; that, seeking to prevent his sister from disinheriting him, he employed the defendants, Flack and Lawyer, who were attorneys at law and partners, and entered into a written contract with them whereby they engaged to render all legal services necessary or that might be required in controlling or advising with Mrs. Harris, or in prosecuting any suit or suits for the appointment of a conservator, or the setting aside of the will or any other legal document, or prosecuting any legal proceeding that might be necessary to secure the rights and interests of the said John S. Warner in and to the property of the said Mary M. Harris, whether said proceeding might be taken before her death or after her death, the compensation of the defendants to be one third of whatever might be collected from the estate of Mrs. Harris; that the services so agreed to be rendered were continuous until after the death of Mrs. Harris, which occurred on September 7, 1915, and in part performance of their contract of employment the defendants procured from Mrs. Harris a trust deed conveying to James C. Hammond, trustee, her real estate, worth about $45,000, and money and securities amounting to about $51,000, to hold for the benefit of Mrs. Harris during her lifetime, and after her death for the use of certain other relatives, among them John S. Warner, whose proportion was to be one seventh, which was worth about $14,000. Afterward, and while said contract of employment was in full force, the defendants obtained from John S. Warner and his wife a warranty deed of all his interest in all of said real estate, and also an assignment of all his interest in and to all the real estate and personal property which he had acquired or might become entitled to under the said trust deed, the defendants taking the property in the proportion of one third to Lawyer and two thirds to Flack. This instrument also purported to convey to the defendants all property that John S. Warner might inherit from Mrs. Harris or become entitled to by virtue of his relationship to her, and constituted the defendants his attorneys, in his name, but for their sole benefit, to recover and receive all the lands and moneys that might become due and owing to the said John S. Warner from Mary M. Harris or James C. Hammond, the trustee in the said deed of trust, and any lands or money that John S. Warner might inherit from Mrs. Harris or become entitled to by virtue of his relationship to her.

While the consideration expressed in the said deed was $6,000 and in the said assignment was $10,000, the actual sum paid by the defendants was only $3,500 for both of

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said conveyances, the defendants well knowing that the one-seventh part of said estate was worth at least $14,000. The relation of attorneys and client then existed between the said defendants and John S. Warner, who was eighty-six years of age and was in a condition of mind to be easily influenced by his attorneys, and by reason of that relationship and the confidence reposed in said attorneys, and the inadequacy in the price paid him by the defendants, the said conveyances are fraudulent and void and should be set aside.

John S. Warner died on June 12, 1914, leaving the complainants, his widow and only heirs at law. After the death of Mrs. Harris the defendants filed their bill in the circuit court of McDonough county for the partition of her estate, claiming the entire interest of the said John S. Warner, and the complainants, who were not made parties to the suit, filed a petition to be allowed to intervene and be made defendants, but the court refused to grant the petition and rendered a final decree adjudging that the defendants and the other persons (except John S. Warner) who were mentioned in the trust deed as beneficiaries were the owners of said estate as tenants in common. The complainants offered to repay the $3,500 paid by the defendants to John S. Warner, and prayed that the deed and assignment from him to the defendants be decreed null and void, and that it be decreed that the defendants have no interest in the property of the estate of Mary M. Harris, deceased, but that all interest which would have passed to John S. Warner had he survived the said Mary M. Harris is now vested in the complainants.

The contract for services to be rendered for the purpose of controlling or advising Mrs. Harris so as to prevent her from disinheriting her brother, and to secure by such means his rights and interests in her property, was contrary to public policy. All such contracts are clearly void, for they tend to the deceit and injury of third persons, and encourage artifices and improper attempts to control the exercise of their free judgment in the disposition of their property. Story, Eq. Jur. § 265. No relief is asked in respect to this contract.

The procuring of the conveyances to the defendants from their client was an independent transaction, entered into after the trust deed had been obtained. The demurrer admits that during the existence of the relation of attorney and client the defendants purchased their client's property. In such case it is not necessary to show fraud or imposition on the client, but the burden is thrown upon the attorney of proving the perfect fairness, adequacy, and equity of the transaction, and upon his failure to make such proof, a court of equity will treat the case as one of constructive fraud. Mansfield v. Wallace, 217 Ill. 610, 75 N. E. 682; Willin v. Burdette, 172 Ill. 117, 49 N. E. 1000; Zeigler v. Hughes, 55 Ill. 288; Elmore v. Johnson, 143 Ill. 513, 21 L.R.A. 366, 36 Am. St. Rep. 401, 32 N. E. 413. The bill therefore showed a good cause of action in John S. Warner, in his lifetime, to set the conveyance aside.

Attorney and client—purchase from client.

The defendants in error insist that this cause of action did not survive to the heirs of John S. Warner. Under the common law most personal actions were held to abate. Statutes passed from time to time have increased the number which survive, so that in this state the case is reversed and most causes of action now survive, including all actions for fraud or deceit. The rule has no application to cases of equitable cognizance, for remedies administered in equity do not die with the person.

Abatement—death—equitable remedy.

The defendants in error argue that when they procured the deed from their client the title to the

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property passed to them; that the deed was not void but voidable only; that the right to have it set aside was personal to the grantor and could not be exercised by his heirs. Rickman v. Meier, 213 Ill. 507, 72 N. E. 1121, gives a complete answer to this contention. It is parallel in its facts to this case, the confidential relation existing in that case being that of parent and child. In regard to the same contention made here the court said: "The law is that where a deed or other conveyance has been procured by undue influence, if it be not ratified by the party making it after the undue influence has ceased to operate, it may be set aside after his death, at the suit of those who succeed to his rights. Bigelow, Fraud, p. 268; Walker v. Smith, 29 Beav. 394, 54 Am. Reprint, 680; Le Gendre v. Goodridge, 46 N. J. Eq. 419, 19 Atl. 543. Prentice v. Achorn, 2 Paige, 30; Lins v. Lenhardt, 127 Mo. 271, 29 S. W. 1025; Martin v. Bolton, 75 Ind. 295." Lewis v. McGrath, 191 Ill. 401, 61 N. E. 135, is another case essentially like the present. The deed was set aside at the suit of the grantor's heirs, and though their right to maintain the bill is not discussed in the opinion, the existence of such right was necessary to the relief granted. Again, in Ross v. Payson, 160 Ill. 349, 43 N. E. 399, conveyances of real estate by a client to his attorney were set aside at the suit of the heirs solely on the ground that the defendant had failed to establish the fairness, adequacy, and equity of the conveyances, though the evidence failed to show that the grantor was incapable of transacting ordinary business. It is true that these cases were decided upon evidence heard, and not upon the question of pleading, and that the bills alleged mental incompetency, but they were decided in each case, independently of the question of mental capacity, because of the failure of the defendant to show the fairness, adequacy, and equity of the transactions. If it was unnecessary to prove mental incapacity, it was unnecessary to allege it. The bill now under consideration alleges that the instruments in question were obtained by undue influence, for an inadequate consideration. This is sufficient to require answer and proof from the defendants.

Descent—right of heirs to set aside deed.

Assignability and heritability of rights are not always, though usually, coexistent. Rights may pass by descent which cannot be assigned, as the possibility of reverter after the expiration of a determinable fee (North v. Grahm, 235 Ill. 178, 18 L.R.A.(N.S.) 624, 126 Am. St. Rep. 189, 85 N. E. 267), or the right of re-entry for breach of condition subsequent (Golconda Northern R. Co. v. Gulf Lines Connecting R. Co. 265 Ill. 194, 106 N. E. 818, Ann Cas. 1916A, 833), though there is probably no case of a right which is assignable but will not pass by descent. Mr. Justice Story, in his Commentaries on Equity Jurisprudence (13th ed. § 1040g), says: So an assignment of bare right to file a bill in equity for a fraud committed upon the assignor will be held void as contrary to public policy and as savoring of the character of maintenance, of which we shall presently speak. So mere right of action for a tort is not, for the like reason, assignable. Indeed, it has been laid down as a general rule that where an equitable interest is assigned, in order to give the assignee a locus standi in judicio in a court of equity, the party assigning such right must have some substantial possession and some capability of personal enjoyment, and not a mere naked right to overset a legal instrument or to maintain a suit." To sustain this doctrine is cited the case of Prosser v. Edmonds, 1 Younge & C. Exch. 481, 160 Eng. Reprint, 196, the leading English case, in which Lord Abinger said: " 'But in a case where a party assigns his whole estate and afterwards makes an assignment, generally, of the same estate to another person, and the second assignee claims to set aside the first

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assignment as fraudulent and void, the assignor himself making no complaint of fraud whatever, it appears to me that the right of the second assignee to make such claim would be a question deserving of great consideration. My present impression is that such a claim could not be sustained in equity unless the party who made the assignment joined in the prayer to set it aside. In such a case a second assignment is merely that of a right to file a bill in equity for a fraud, and I should say that some authority is necessary to show that a man can assign to another a right to file a bill for a fraud committed upon himself'. . . . In the course of the argument it was urged that an equitable as well as a legal interest may be the subject of conveyance, and that the assignee of a chose in action may file a bill in equity to recover it, although he cannot proceed at law for that purpose. But where an equitable interest is assigned, it appears to me that in order to give the assignee a locus standi in a court of equity the party assigning that right must have some substantial possession,—some capability of personal enjoyment,—and not a mere naked right to overset a legal instrument. . . . In the present case it is impossible that the assignee can obtain any benefit from his security except through the medium of the court. He purchases nothing but a hostile right to bring parties into a court of equity as defendants to a bill filed for the purpose of obtaining the fruits of his purchase. . . . Robert Todd, when he assigned, was in possession of nothing but a mere naked right. He could obtain nothing without filing a bill. No case can be found which decides that such a right can be the subject of assignment, either at law or in equity."

In Dickinson v. Burrell, L. R. 1 Eq. 337, a conveyance of an interest in an estate was fraudulently procured from Dickinson by his solicitor to a third party, for the solicitor's benefit, for a very inadequate consideration. Dickinson, learning of the fraud, made another transfer of his interest in the estate to trustees for the benefit of himself and his children, reciting in the conveyance the facts and that he disputed the validity of the first conveyance. The trustees filed a bill to set aside the first conveyance upon the repayment of the consideration money and interest, and to establish the trust. The master of the rolls, in sustaining the bill, said: "The distinction is this: If James Dickinson had sold or conveyed the right to sue to set aside the indenture of December, 1860, without conveying the property or his interest in the property, which is the subject of that indenture, that would not have enabled the grantee, A B, to maintain this bill; but if A B bought the whole of the interest of James Dickinson in the property, then it would. The right of suit is a right incidental to the property conveyed." In regard to this distinction, we agree with what was said by the supreme court of California in the examination of this question in Whitney v. Kelley, 94 Cal. 146, 15 L.R.A. 813, 28 Am. St. Rep. 106, 29 Pac. 624: "It is difficult to appreciate the distinction thus attempted to be drawn in the two cases. The one is an assignment of a right to acquire property by setting aside a fraudulent conveyance of it, and the other a conveyance of the property, with an incidental right of setting aside the prior fraudulent conveyance." The distinction is too unsubstantial to be the basis of different equitable rights.

In McMahon v. Allen, 35 N. Y. 403, a debtor was induced by the fraud of his agent to convey his interest in his mother's estate and certain other property to the agent, to the prejudice of his creditors, for a very inadequate consideration and in ignorance of the fraud. He soon after made a general assignment of his property for the benefit of his creditors, with full power to sue for the same, and his assignees filed a bill to set aside the conveyance to the agent. The bill was sustained, the

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court citing and quoting at length from Dickinson v. Burrell, supra, as an accurate exposition of the law which should control the case under consideration.

In Traer v. Clews, 115 U. S. 528, 29 L. ed. 467, 6 Sup. Ct. Rep. 155, Clews was the owner of $50,000 stock in a construction company, on which dividends amounting to $10,500 were declared in 1873 and 1874. He was afterward adjudicated a bankrupt, and the stock, with dividends, passed to Tappan, his assignee in bankruptcy. The construction company went into voluntary liquidation and Traer was appointed one of the trustees to settle its affairs. Knowing of the existence of the dividends, of which Clews and Tappan were ignorant, Traer bought the stock of the assignee. Afterward the assignee sold to Clews all claims on account of the stock, and the latter brought suit in the state court of Iowa for the value of the stock and recovered a judgment for $15,000, which was affirmed by the supreme court of Iowa and the Supreme Court of the United States. The latter court cites the cases of Dickinson v. Burrell and McMahon v. Allen, supra, with others, and says: "Applying the rule established by these authorities, we are of opinion that, so far as the question under consideration is concerned, the assignment of Tappan to Clews was the transfer not merely of a naked right to bring suit, but of a valuable right of property, and was therefore valid and effectual."

In § 153 of Pomeroy on Remedies and Remedial Rights, among illustrations of personal rights which cannot be assigned, is mentioned the right of a grantor to avoid his conveyance on the ground of fraud. The saying of Lord Justice Turner in De Hoghton v. Money, L. R. 2 Ch. 164, 15 L. T. N. S. 403, 15 Week. Rep. 214, that "the right to complain of fraud is not a marketable commodity," is often quoted. The cases of Gruber v. Baker, 20 Nev. 453, 9 L.R.A. 302, 23 Pac. 858, Smith v. Harris, 43 Mo. 557, and Whitney v. Kelley, supra, follow Prosser v. Edmonds, 1 Younge & C. Ex. Ch. 481, 160 Eng. Reprint, 196, and there are many similar decisions. The textwriters generally state, and the cases have decided, the rule that a right of action for fraud cannot be assigned at law or in equity. The decisions were based on the ground, first, that such assignments are contrary to the policy of the law against maintenance or champerty; and second, that they are contrary to the prohibition of the common law against the conveyance or transfer of property in the adverse possession of another. This prohibition no longer exists, and an absolute conveyance of property, real or personal, is not within the reason of the first ground of objection. Therefore many decisions of the courts are now found which, in the application of the rule, or as an exception to it, hold that a conveyance of property in the adverse possession of a third person under a voidable title carries with it the incidental right of the grantor to maintain a suit in equity to set aside the voidable title. In addition to those cases which have already been referred to may be cited Gandy v. Fortner, 119 Ala. 303, 24 So. 425; Parker v. Simpson, 180 Mass. 334, 62 N. E. 401; Busiere v. Reilly, 189 Mass. 518, 75 N. E. 958; Coon v. Dennis, 111 Mich. 450, 69 N. W. 666; Houston v. National Mut. Bldg. & L. Asso. 80 Miss. 31, 92 Am. St. Rep. 565, 31 So. 540; Connecticut Mut. L. Ins. Co. v. Smith, 117 Mo. 261, 38 Am. St. Rep. 656, 22 S. W. 623; Weissenfels v. Cable, 208 Mo. 532, 106 S. W. 1028; Somervaill v. McDermott, 116 Wis. 504, 93 N. W. 553; Borchert v. Borchert, 132 Wis. 593, 113 N. W. 35; Wimpfheimer v. Perrine, 61 N. J. Eq. 126, 47 Atl. 769.

In this state the right to maintain a suit to set aside a title to land obtained fraudulently has been sustained in favor of either the heirs of the defrauded grantor or his assignee in the following cases: Whit-

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ney v. Roberts, 22 Ill. 381; Smith v. Wright, 49 Ill. 403; Ross v. Payson, 160 Ill. 349, 43 N. E. 399; Prince v. Dupuy, 163 Ill. 417, 45 N. E. 298; Lewis v. McGrath, 191 Ill. 401, 61 N. E. 135; Rickman v. Meier, 213 Ill. 507, 72 N. E. 1121. In some of these the right to maintain the suit was not questioned; in others it was expressly decided. In some the fraud was actual; in others constructive. There is no distinction between cases of actual fraud and those of constructive fraud. It would be a defect in the law if there were no remedy against an attorney who, having got his client's property unfairly by taking advantage of his confidence, had succeeded in retaining it by the same means until his client's death. An intending purchaser may not be required to disclose to the vendor all the facts and information he possesses in regard to the property proposed to be purchased, its value, surroundings, adaptation to certain uses, and the demand for it. His failure to disclose is not deemed fraud. Precisely the same failure to disclose on the part of an attorney dealing with his client is deemed fraud. It is no less fraudulent, either in law or morals, because it is called constructive fraud. Morally the attorney's fraud may be regarded as the baser, as the friend who treacherously betrays is baser than the enemy who overcomes in open contest. The law does not ordinarily impose the duty to disclose upon the stranger; it always does so on the attorney. The act in either case, constituting fraud, is the obtaining of the vendor's property by means which the law deems fraudulent. The law imposes upon the vendor the duty of proving the fraud committed by a stranger. Because of the advantages he possesses by reason of the confidential relation and the duties it places upon him, the law imposes upon the attorney the burden of proving that the transaction between him and his client was fair and equitable when the client claims that it was unfair and inequitable. The difference is, that in the one case the vendor must prove that the purchaser violated a duty imposed upon him by law, and in the other the attorney must prove that he performed every duty required of him by law. The rights of the parties in either case are not affected by the rule as to the burden of proof. If the defendants in error, by false representations, actually made and relied upon by John S. Warner, had procured the instruments in question, there is no doubt but that, under the uniform decisions of this court, his heirs could maintain a bill in equity to set them aside. There is no rule of law which protects attorneys who have committed frauds upon their clients from the same remedies on the part of the clients' heirs.

The defendants in error rely upon the cases of Norton v. Tuttle, 60 Ill. 130, and Illinois Land & Loan Co. v. Speyer, 138 Ill. 137, 27 N. E. 931, but neither of those cases is in point. In neither was there any conveyance to the complainant or any pretense of title to the subject-matter of the controversy in the complainant. In the first the holder of a power of attorney sought to control the litigation in opposition to the complainant, and in the latter, complainant's only interest in the property involved was an agreement for a conveyance to be made to it after and conditional upon its successful prosecution, at its own expense, of a suit to set aside an adverse title.

It is true that the instruments in question transferred the legal title to the defendants in error, and it may be argued as it was argued in many cases cited, that there was nothing left in the grantor for a subsequent conveyance to operate on or to descend to his heirs. The same argument might have been made in the cases in which this court has sustained suits by heirs to set aside conveyances obtained from their ancestors by fraud. A deed is no more void because obtained by the fraud of a stranger than if obtained by the fraud of an attorney or other person

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sustaining a fiduciary relation. The distinction between deeds which are void and those which are voidable is unimportant in this connection. The deed of a person who has never been adjudged a lunatic is not void, but is voidable if he was, in fact, mentally incompetent. Walton v. Malcolm, 264 Ill. 389, 106 N. E. 211, Ann. Cas. 1915D, 1021. It is unnecessary to cite the numerous cases in which heirs have been permitted to maintain suits to set aside instruments executed by their ancestors on the ground of their want of mental capacity. It is not a sufficient answer to a suit by heirs to set aside a deed that the deed is voidable only, and not void.

The cases which have been cited also dispose of the claim that the right to avoid the deed was personal and did not descend to the heirs. In those cases there was no act of the grantor repudiating the conveyances.

The defendants in error insist that the bill contains no sufficient offer to do equity. While the consideration expressed in the two instruments is $16,000, it is alleged that the actual amount paid for them was only $3,500, which the complainants offer to return. It is insisted they should also return the one third of the amount recovered from Mrs. Harris's estate, mentioned in the first agreement with John S. Warner, which the defendants in error were to receive for their compensation. This amount is not mentioned as a part of the consideration for the execution of the instruments in question, and we have already held that first agreement for the defendants in error's services to be contrary to public policy and void. It therefore imposed no liability upon John S. Warner, and the complainants were under no obligation to pay the amount mentioned in it as a condition to having the instruments in question canceled.

Cancelation—tender—compensation for services.

Defendants in error further object that Mary A. Warner has no interest in the subject-matter because she joined in the warranty deed and assignment, and whatever title accrued to her upon her husband's death passed to the defendants in error by virtue of the covenants of warranty contained in those instruments. She had not even an inchoate right of dower at the time those instruments were executed, but only a possibility of becoming entitled to dower and of inheriting personal property from her husband. A wife who joins in the conveyance of her husband's property under such circumstances is not liable upon the covenants contained in the deed. Center v. Elgin City Bkg. Co. 185 Ill. 534, 57 N. E. 439.

Deed—covenant—effect on wife.

John S. Warner had the right to repudiate these instruments in his lifetime, and that right was of such a character as to descend to his heirs. The bill stated a case which requires an answer from the defendants, but the defendants in error insist that it does not allege whether or not John S. Warner died intestate, and therefore fails to show any title in the complainants. In alleging title by descent it is not necessary to allege the intestacy of the ancestor. The law presumes it in the absence of allegation to the contrary. Title to land can be acquired by two modes only: descent and purchase,—the latter including every mode of acquisition known to the law except that by which an heir, on the death of an ancestor, becomes substituted in his place as owner by the act of the law. 2 Bl. Com. 241; 4 Kent, Com. 373; 3 Washb. Real Prop. § 1824. Property is presumed to descend to the heir and the burden of alleging and showing a title by purchase instead of descent is upon the person claiming the advantage of such title. An allegation that one acquired the title to land and afterward died, leaving heirs, is a sufficient allegation of the title of the heirs, and it

Pleading—title by descent.

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is no more necessary to allege that he died without having executed a will than that he died without having executed a conveyance of any other kind. In the absence of proof, the presumption is that a deceased person died intestate, and that his heirs become the owners of all his property. Schmidt v. Brown, 226 Ill. 590, 11 L.R.A.(N.S.) 457, 117 Am. St. Rep. 261, 80 N. E. 1071; Sielbeck v. Grothman, 248 Ill. 435, 94 N. E. 67, 21 Ann. Cas. 229. Testacy is an affirmative fact, the burden of proving which rests upon the party claiming some advantage by reason of it. "It is not for the heir to prove that no one else holds as devisee or grantee from his ancestors." Lyon v. Kain, 36 Ill. 362. Even though the deceased left a will, it will be presumed that his heirs took his land until the proof shows that the will was executed so as to pass real estate, and that its contents were inconsistent with the claim of the heirs. Stephenson v. Doe, 8 Blackf. 508, 46 Am. Dec. 489; Baxter v. Bradbury, 20 Me. 260, 37 Am. Dec. 49. In a bill by a widow to set aside a deed of her deceased husband in which she had joined during infancy, and which she had afterward disaffirmed, it was held that she was not required to allege that her husband died intestate and left no testamentary provision for her as his widow. McClanahan v. Williams, 136 Ind. 30, 35 N. E. 897. In a bill by heirs to set aside a deed of their ancestor procured by fraud, it is not necessary to allege that the ancestor died intestate. Murphy v. Crowley, 140 Cal. 141, 73 Pac. 820. It is unnecessary to allege a fact which the law presumes to exist. The contrary averment must be made if the fact is to be put in issue. The decree is reversed and the cause remanded, with directions to overrule the demurrer.

Petition for rehearing denied June 6, 1917.

ANNOTATION.

Does right of grantor to maintain a suit in equity to set aside his conveyance for cause survive to his heir?

I. In general, 431.
II. The general rule, 431.
III. Specific grounds of attack:
 a. On ground of infancy, 437.
 b. On ground of mental incompetency, 437.
 c. On ground of fraud, mistake, duress, or undue influence, 437.

I. In general.

For the most part this note proceeds upon the assumption that the right to attack the conveyance existed in the ancestor at the time of his death. However, the cases involving the right of the heir to attack a conveyance on the ground of his ancestor's mental incompetency to execute it are included regardless of the question whether or not the ancestor might have pleaded his own insanity, since a right to attack may exist in the grantor so as to survive to his heirs even though some fiction of law may have prevented his exercise of it. It will be seen that the scope assigned to the note excludes any consideration of the merits of the claim or contention upon which the right to avoid the contract is predicated; and also excludes conveyances in fraud of the ancestor's creditors. Cases like Tedder v. Tedder (S. C.) post, 438, involving a conveyance by the ancestor in fraud of his forced heirs, are likewise excluded.

It is, of course, to be understood that only the right of the heir as such is considered his right as a devisee or in any other capacity being beyond the scope of this note.

On the question of laches or limitation to bar suits by heirs or next of kin to set aside conveyance or transfer by ancestor, see note to Tedder v. Tedder, post, 438.

II. The general rule.

The right of a grantor to go into

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equity and seek to obtain the cancelation of the deed or other instrument of conveyance survives to his heirs.

Alabama.—Kennedy v. Marrast (1871) 46 Ala. 161; Waddell v. Lanier (1878) 62 Ala. 347; Sharp v. Robertson (1884) 76 Ala. 343; Walling v. Thomas (1901) 133 Ala. 426, 31 So. 982.

Arkansas.—Reaves v. Davidson (1917) 129 Ark. 88, 195 S. W. 19.

California.—Trubody v. Trubody (1902) 137 Cal. 172, 69 Pac. 968; Page v. Garver (1905) 146 Cal. 577, 80 Pac. 860.

Idaho.—Re Blackinton (1916) 29 Idaho, 310, 158 Pac. 492.

Illinois.—Illinois Land & Loan Co. v. Bonner (1874) 75 Ill. 315; Rickman v. Meier (1905) 213 Ill. 507, 72 N. E. 1121; WARNER v. FLACK (reported herewith) ante, 423.

Indiana.—Somers v. Pumphrey (1865) 24 Ind. 231; Schuff v. Ransom (1881) 79 Ind. 458; Physio-Medical College v. Wilkinson (1886) 108 Ind. 314, 9 N. E. 167; Gillenwaters v. Campbell (1895) 142 Ind. 529, 41 N. E. 1041.

Kentucky.—Breckenridge v. Ormsby (1829) 1 J. J. Marsh. 236, 19 Am. Dec. 71.

Maine.—Hovey v. Hobson (1866) 53 Me. 451, 89 Am. Dec. 705.

Maryland.—Evans v. Horan (1879) 52 Md. 602 (but see quotation from this case, infra).

Michigan.—Rogers v. Blackwell (1882) 49 Mich. 192, 13 N. W. 512; Hunt v. Rabitoay (1900) 125 Mich. 137, 84 Am. St. Rep. 563, 84 N. W. 59 (dictum).

Mississippi.—Harvey v. Briggs (1890) 68 Miss. 60, 10 L.R.A. 62, 8 So. 274.

Missouri.—Ferguson v. Bell (1852) 17 Mo. 347 (rule recognized but not applied); Harris v. Ross (1885) 86 Mo. 89, 56 Am. Rep. 411; McAnaw v. Tiffin (1898) 143 Mo. 667, 45 S. W. 656 (dictum).

Nebraska.—Rakes v. Brown (1892) 34 Neb. 304, 51 N. W. 848; Aldrich v. Steen (1904) 71 Neb. 33, 98 N. W. 445, 100 N. W. 311.

New Jersey.—Hall v. Otterson (1894) 52 N. J. Eq. 522, 28 Atl. 907, affirmed in (1895) 53 N. J. Eq. 695, 35 Atl. 1130; Foth v. Ellenberger (1900) — N. J. Eq. —, 47 Atl. 216.

New York.—Keenan v. Keenan (1890) 34 N. Y. S. R. 996, 12 N. Y. Supp. 747; O'Rourke v. Hall (1899) 38 App. Div. 534, 56 N. Y. Supp. 471.

Texas.—Veal v. Fortson (1882) 57 Tex. 482; Searcy v. Hunter (1891) 81 Tex. 644, 26 Am. St. Rep. 837, 17 S. W. 372.

Wisconsin.—Disch v. Timm (1898) 101 Wis. 179, 77 N. W. 196.

And the heirs of a grantor are proper parties to a suit by his widow to set aside the deed on the ground that there had been a total failure of consideration. Lane v. Lane (1899) 106 Ky. 530, 50 S. W. 857.

But it has been held that where the ancestor has been induced by fraud, etc., to take title to land in the name of another, and has never elected to treat the transaction as one creating a trust for his benefit, the heir has no standing to make the election, since no inheritable estate ever vested in the ancestor. Cooper v. Cockrum (1882) 87 Ind. 443.

And where a will of the ancestor, making the grantee in the deed the residuary legatee, has been admitted to probate, thus vesting title to the land in the grantee independently of the deed, the heirs of the grantor have no standing in equity to attack the deed. Sappingfield v. Sappingfield (1913) 67 Or. 156, 135 Pac. 333.

In Hall v. Hall (1917) 91 Conn. 514, 100 Atl. 441, it was held, contrary to the general rule, that the heir of the grantor has no standing in court to ask for the cancelation of a deed on the ground that it was obtained by fraud practised upon the grantor. However, the court apparently failed to distinguish between cases of this character and cases where the alleged fraud is perpetrated by the grantor. The court said: "It is well settled that the only persons who can maintain an action to set aside transfers of property on the ground of fraud, other than the grantor, or, after his death, his personal representatives, are those to whom the grantor owed a debt or duty which will be avoided or

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violated if the transfer is permitted to stand. Thus, in Ullrich v. Ullrich (1897) 68 **Conn.** 580, 37 Atl. 393, it was held that a wife had no standing in court to set aside a voluntary transfer of property made by her husband to his brother, after she had threatened to sue for divorce and alimony and to attach her husband's property; and in Harris v. Spencer (1898) 71 **Conn.** 233, 41 Atl. 773, it is said that a husband married since 1877, and therefore entitled to an interest in his wife's property after her death, has no legal interest sufficient to maintain a suit to set aside a voluntary transfer of the wife's property, made in her lifetime. So in this case, it matters not whether these transfers were procured by fraud, for it does not appear that the plaintiff's father owed him any debt or duty which might be avoided or violated thereby. The alleged fraud in procuring these transfers was a fraud practised upon the father, and not upon the plaintiff, and so the personal representatives of the deceased grantor are the only persons who can maintain an action to set these transfers aside."

The right of the heir to avoid the conveyance has also been recognized in cases in which the attack was made other than by a suit in equity for the direct purpose of avoiding the conveyance. The point, however, is not within the scope of the note, as it is not distinctive to the question as to the right of the heir as distinguished from the right of the ancestor. (See for example Harbison v. Lemon (1832) 3 Blackf. (**Ind.**) 51, 23 Am. Dec. 376; Northwestern Mut. F. Ins. Co. v. Blankenship (1883) 94 **Ind.** 535, 48 Am. Rep. 185; Wall v. Hill (1841) 1 B. Mon. (**Ky.**) 290, 36 Am. Dec. 578; Levering v. Heighe (1850) 2 **Md.** Ch. 81; Eaton v. Eaton (1874) 37 N. J. L. 108, 18 Am. Rep. 716; Brown v. Brown (1866) L. R. 2 Eq. (**Eng.**) 481, 14 L. T. N. S. 694; Whittingham's Case (1603) 8 Coke, 42b, 77 **Eng.** Reprint, 537).

But see Evans v. Horan (1879) 52 **Md.** 602, denying the right of the heir to attack in an action of ejectment.

In many cases the general rule as above stated was assumed, the court deciding the questions before it, the correctness of this rule not being questioned. Among such cases are the following (some other cases of this kind may be found cited in the note to Tedder v. Tedder, post, 438): McAllister v. McAllister (1914) 189 **Ala.** 220, 66 So. 462; Murphy v. Crowley (1903) 140 **Cal.** 141, 73 Pac. 820; Webb v. Janney (1896) 9 App. D. C. 41; Weigand v. Rutschke (1912) 253 **Ill.** 260, 97 N. E. 641; Parker v. Simpson (1902) 180 **Mass.** 334, 62 N. E. 401; Twist v. Babcock (1882) 48 **Mich.** 513, 12 N. W. 680; Snyder v. Snyder (1902) 131 **Mich.** 658, 92 N. W. 353; Foxworth v. Bullock (1870) 44 **Miss.** 457; Lins v. Lenhardt (1895) 127 **Mo.** 271, 29 S. W. 1025; Young v. Bilderback (1835) 3 N. J. Eq. 206 (fraudulent alteration); Groesbeck v. Groesbeck (1907) 49 **Or.** 113, 88 Pac. 870; Samuel v. Marshall (1832) 3 Leigh. (**Va.**) 567; Wigglesworth v. Steers (1807) 1 Hen. & M. (**Va.**) 70, 3 Am. Dec. 602 (drunkenness); McCalla v. Bane (1891) 45 **Fed.** 828; German Sav. & L. Soc. v. DeLashmutt (1895) 67 **Fed.** 399; Harding v. Handy (1826) 11 Wheat. (U. S.) 103, 6 L. ed. 429.

The reasons underlying this general rule, as well as a clear discussion of the early authorities thereon, are set out by the court in Breckenridge v. Ormsby (1829) 1 J. J. Marsh. (**Ky.**) 236, 19 Am. Dec. 71, supra, where, in discussing the question of who may attack the deeds of infants and lunatics, the court said: "The next question which occurs is, can the appellee (admitting the insanity) be permitted to take advantage of it? Privies in blood and in representation may avoid the voidable deeds of infants and lunatics. All the authorities, without any contrariety, concur in this. But whether purchasers have the same privilege has not been certainly ascertained by the same unvaried uniformity of opinion. Their right will depend on what is meant by the authorities which decide that privies in estate cannot avoid. The words, 'are voidable by himself, by his heirs, and by those who have his estate,' in the 12th section of Perkins, on the effect of deeds by infants, have received different constructions. Some judges

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have supposed that he meant by the words, 'who have his estate,' those who hold by purchase, in contradistinction to heirs. This was the opinion of the supreme court of New York, in the case of Jackson ex dem. Brayton v. Burchin (1817) 14 Johns. (N. Y.) 127. The only reason assigned by the court for this construction is that in Zouch ex dem. Abbot v. Parsons (1765) 3 Burr. (1794) 97 Eng. Reprint, 1103, and in Shepard's Touchstone, 233, the 12th section of Perkins is recognized as sound law.

"But Mansfield and Shepard have not said that the phrase, 'who have his estate,' means purchasers. They say nothing about this. They refer to Perkins to prove only that a deed passing by delivery is only voidable. And it is very evident that the expressions last quoted from that section are susceptible of other constructions than that given by the court of New York, as will appear not only by an analysis of the whole section, but the authorities, which would apparently establish another and different doctrine. Therefore, as the opinion in 14 Johns. seems to be founded on a misconception of Lord Mansfield and Shepard, and assign no other reason in its support than they had said what they never did say, it should not be regarded as entitled to much influence on this point. 1 Fonblanque, Eq. 50, 51, asserts that neither privies in estate nor by tenure can avoid the deeds of infants or lunatics, and he is supported in this opinion by Beverley's Case (1603) 4 Coke, 124, 76 Eng. Reprint, 1119, 16 Eng. Rul. Cas. 702; Whittingham's Case (1603) 8 Coke, 42b, 77 Eng. Reprint, 537; Newland, 19; Jacob's Law Dict. title, 'Infancy;' Highmore, Lunacy, 114; and other authorities. Jacob, after quoting the expressions from Perkins (those who have his estate), says: 'But privies in estate, such as the donor of an estate tail, etc., and privies in law, as the lord by escheat, shall not avoid,' etc.; and Highmore suggests that the right to avoid the deeds of persons non compos is founded on the Statute of 17 Edw. II., which declares that 'after the death of such idiots he (meaning purchaser) shall render it (the estate) to the right heirs, so that,' etc.

"None of these cases use the word purchaser. But in exemplifying their doctrine they mention as privies in estate, by tenure in law, only remaindermen, tenants, lords of escheat, and others of the same kind. The decision in Johnson, so far as it applies to a purchaser, may be reconciled with these apparently opposing authorities, and Perkins may mean purchasers in the language quoted. We think he does. The case cited from Johnson was one in which an infant who had made a deed to A, after he came to the age of twenty-one conveyed the same land to B, and the question was whether B could take advantage of the infancy. It was decided that he could; because, in the language of the court, Perkins, in the 12th section, laid it down that privies in estate had that right. Although the court may have erred in this construction of Perkins, and thus gave a reason for its opinion, which was too comprehensive, yet we concur in the opinion that the last purchaser might avoid, not because a privy in estate may avoid, but because a privy by contract or representation may, and such is a purchaser.

"None of the cases in which it has been held that privies in law and in estate cannot avoid the voidable deeds of infants and lunatics have mentioned, or by their terms include, a subsequent purchaser from the person laboring under the disability. And we are of the opinion that when they speak of privies who are not allowed to avoid, they do not mean such purchasers, but such persons as hold by privity of estate alone. Privies in estate strictly mean those only between whom there are certain rights and relations resulting from the estate held, and not from contract between them. Such a privity in estate or in law exists between a lessor and a sublessee, a vendor by deed of warranty, and a remote vendee or assignee, the lord by escheat, and the terretenant, etc. In such cases there is no right or obligation between these parties growing out of any contract between them. All their rights as be-

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tween themselves are created by the privity of estate. But it is not so between the lessor and his lessee, the vendor and his immediate vendee. The rights and obligations which subsist between these are produced by their contract principally. There is no privity of estate between lessee and assignee. Buckley v. Pirk (1710) 1 Salk. 317, 91 Eng. Reprint, 279. It is only where an interest in the same estate, without any contract between the parties, called privies in estate, constitutes them privies, that they can, with strict propriety and precision, be denominated privies in estate. And although there can be a privity of estate and of contract between the same parties, the authorities which maintain that 'privies in estate' cannot avoid the deeds of infants, etc., must mean those only whose privity is exclusively that of estate. Blackstone, in the second volume of his Commentaries, page 355, says privies to a fine are such as are any way related to the parties who levy the fine and claim under them by any right of blood, or the right of representation; such as are the heirs general of the cognizor, the issue in tail, since the Statute of Hen. VIII., the vendor, the devisee, and all others who must make title by the persons who levied the fine. For the act of the ancestor shall bind the heir, and the act of the principal, his substitute, or such as claim by any conveyance made by him subsequent to the fine levied. The same doctrine is affirmed in Case of Fines (1602) 3 Coke, 87, 76 Eng. Reprint, 835. And Blackstone says, in the same book, 2 Com. 291: 'Clearly the next heir, or other person interested, may, after the death of the idiot, or non compos, take an advantage of his incapacity and avoid the grant.' He means by 'other persons interested,' the personal representative, or anyone who has acquired a right to the estate from the idiot, or non compos, by contract after the deed sought to be avoided. Of this there can be no doubt. 'If a lessor grants his reversion, the grantee and lessee are privies in estate; privies in contract extend only to the persons of the lessor and lessee, and where the lessee assigns all his interest, here the lessor and lessee remain privy in contract, but not in estate, which is removed by assignment.' Jacob's Law Dict. title, 'Privies,' Walker's Case (1587) 3 Coke, 23, 76 Eng. Reprint, 679.

"It is evident to us, from these extracts, if there were no other reason for it, that when the cited books speak of 'privies in estate,' they do not mean to include as privies the vendor and his immediate vendee. And these authorities also show that a purchaser or devisee, holding his right from the infant or non compos, derived after the attainment of legal discretion, or restoration to sanity, may avoid a deed made for the same estate during disability. Without these authorities we should be of this opinion, and decide that the cases which have declared that privies in estate cannot avoid apply only to those between whom and the infant or lunatic there is only a privity of estate, and not a privity of contract. There is no reason why a purchaser from a person who had conveyed the same estate previously, and when an infant, shall not have as much right to avail himself of the disability as the heir or executor of the infant has. Indeed, there is plainly much reason for his having a stronger right. He has paid the value of the estate; they have given nothing. If he had not bought it, they might have reclaimed it from the purchaser from the infant; or the infant might have obtained a restitution himself. By his purchase after the removal of the disability, he has given the value of the estate to his vendor, and which inures to the benefit of his heirs and personal representatives; as they might have recovered the estate if he had not bought it, and have virtually done so by receiving from him its value, why should he not hold it? He certainly has as good right to it as if the heir, or his ancestor, had expressly avoided the deed made during infancy, and afterwards sold it to him. Besides, the deed to him conveys all the right that the vendor had. As the vendor had a right to avoid the former deed,

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certainly the vendee has acquired the same right. Why should not such a purchaser have equal rights with a second mortgagee, an assignee, or a creditor? Moreover, the last deed made after the infant was twenty-one avoids that made during infancy. An infant must, while an infant, avoid an act done in a court of record, but an act 'in pais' can only be avoided effectually after he is twenty-one; because, when he becomes twenty-one, he may confirm it, although before he may have attempted to avoid it. How is an infant to avoid a deed? Certainly, after he attains the age of twenty-one, he may, by an act expressing his assent, confirm; and, of course, an act done after twenty-one, of as much solemnity and dignity as the deed evincing his disaffirmance, will necessarily have the effect of avoiding it. And this is expressly so decided in the case cited from (1817) 14 Johns. (N. Y.) 127 [Jackson ex dem. Brayton v. Burchin].

"If, therefore, the deed made after the disability shall have been removed per se avoids one made to another before its removal, the vendee in the last deed can hold the estate conveyed to him by showing the fact that when the first was made a disability existed which rendered it voidable, and for which it has been avoided by a subsequent deed to him; and he must, therefore, hold the estate, unless the other can show a confirmation before the date of the last deed. This alone is decisive. And this, too, is positively asserted by Blackstone in one of the foregoing extracts. There is another consideration to prove that the vendor and his vendee are not considered as privies in estate, in the sense which that term is contended by some to have in the cases which affirm that privies in estate cannot avoid. Whenever a suit is brought on the mere privity of estate it is local. And it has never been intimated that a suit by the vendee against his vendor is local. It is undeniably transitory. It is a suit on the contract, and not on the privity of estate. But the same authorities show that suits by privies in estate are local. Therefore, the conclusion is inevitable that when they say that privies in estate cannot avoid the deeds of infants, etc., they mean only such as those mentioned by them; to wit, the lessee and grantee of the reversion, the donor and the remainderman, etc., etc., who acquire no right from the infant or non compos, do not represent him by contract, are not his substitutes, but hold and claim either by operation of law, or by the gift or grant, in which the infant or non compos has had no active or voluntary agency.

"The lord, by escheat, does not claim by any act or contract of the deceased holder. He does not derive title from him; nor does the remainderman, nor the grantee of the reversion, hold from the tenant of the particular estate or the lessee, by any contract with them, or in consequence of any act done by them. Between such parties there is no right excepting what results from mere privity of estate or of law, and therefore some are called privies in law, and some privies in estate. They are not privies in contract or in representation, as the purchaser is. And we have been unable to find any case which intimates that a subsequent purchaser may not take advantage of the infancy of his vendor, and, by pleading the disability, avoid the estate conveyed by the infant to another, when the vendor labored under a disability which rendered it voidable.

"Hence, we conclude that the apparent discrepancies in the authorities on the subject do not in fact exist, or may be easily reconciled; and therefore concur in the opinion in 14 Johns. that a purchaser may avoid the deed which his vendor might avoid; and that by conveying to him, the vendor for himself has avoided it. This opinion in 14 Johns. is, we have no doubt, sound law, although the reason for one branch of it is misconceived. But it may be said that lunatics cannot stultify themselves, and therefore cannot, like infants, avoid their deeds; and consequently that purchasers from them cannot avoid them. This is specious, but no more. Whether a person non compos may or may not plead his disability is in our opinion

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yet a 'questio vexata,' which, without any violation of our judicial duties, we might decide either way. The reason and equity of the case are on one side; the weight of more ancient authority on the other. But the hard and arbitrary interdiction enforced by some ancient dicta, and acquiesced in by some more modern cases, and in Kentucky, too, has been relaxed, where it originated, more and more, as light has been diffused; and the only question on this point would be, whether the doctrine is so inflexibly settled against the lunatic that 'nolens volens' we shall be bound to recognize it as the fixed law. This we shall not now decide because it is not necessary to do so in this case.

"Whether a non compos can avoid his own deed or not, his heirs and representatives may. And we see no reason why a bona fide purchaser from him may not. The equity and reason of the privilege apply to a purchaser as well as to an heir. Although the lunatic may not be permitted to benefit himself by disaffirming a deed made by him under mental disability, his subsequent deed to a purchaser, after a recovery of sanity, indicates his dissatisfaction with the former one; and although it may not, as in the case of infancy, avoid the first deed, it vests in another as much right to do it as the heir can possess. And the authority of one of the extracts from Blackstone seems decisive on this point. For the expression, 'heir or other person interested,' can mean nothing else than the heir or other person who shall have acquired from the non compos an interest in the estate conveyed."

III. Specific grounds of attack.

a. On ground of infancy.

The right of a minor to avoid his deed or instrument of conveyance, within a reasonable time after he attains his majority, survives to his heir in case of the grantor's death while yet a minor (Sharp v. Robertson (1884) 76 Ala. 343; Illinois Land & Loan Co. v. Bonner (1874) 75 Ill. 315; Harvey v. Briggs (1890) 68 Miss. 60, 10 L.R.A. 62, 8 So. 274; Harris v. Ross (1885) 86 Mo. 89, 56 Am. Rep. 411; O'Rourke v. Hall (1899) 38 App. Div. 534, 56 N. Y. Supp. 471; Veal v. Fortson (1882) 57 Tex. 482; Searcy v. Hunter (1891) 81 Tex. 644, 26 Am. St. Rep. 837, 17 S. W. 372; Brown v. Brown (1866) L. R. 2 Eq. (Eng.) 481, 14 L. T. N. S. 694; Beverley's Case (1603) 4 Coke, 123b, 76 Eng. Reprint, 1118, 16 Eng. Rul. Cas. 702); or before the expiration of a reasonable time for affirmance after he has attained his majority, if he has not expressly affirmed the contract (Gillenwaters v. Campbell (1895) 142 Ind. 529, 41 N. E. 1041).

But if the grantor, after attaining his majority, has expressly or impliedly ratified his contract, of course the heir is bound by his acts. Ferguson v. Bell (1852) 17 Mo. 347.

b. On ground of mental incompetency.

The heir of a grantor may attack the deed on the ground that the ancestor was of unsound mind or insane at the time he executed the instrument. Kennedy v. Marrast (1871) 46 Ala. 161; Reaves v. Davidson (1917) 129 Ark. 88, 195 S. W. 19; Somers v. Pumphrey (1865) 24 Ind. 231; Schuff v. Ranson (1881) 79 Ind. 458; Physio-Medical College v. Wilkinson (1886) 108 Ind. 315, 9 N. E. 167; Hovey v. Hobson (1866) 53 Me. 451, 89 Am. Dec. 705; Rogers v. Blackwell (1882) 49 Mich. 192, 13 N. W. 512.

c. On ground of fraud, mistake, duress, or undue influence.

The right to cancel a deed obtained from a grantor by mistake, fraud, duress, or undue influence descends to the heir if it exists in the ancestor unimpaired at the time of his death. Walling v. Thomas (1901) 133 Ala. 426, 31 So. 982; Trubody v. Trubody (1902) 137 Cal. 172, 69 Pac. 968; Page v. Garner (1905) 146 Cal. 577, 80 Pac. 860; Re Blackinton (1916) 29 Idaho, 310, 158 Pac. 492; Illinois Land & Loan Co. v. Bonner (1874) 75 Ill. 315; WARNER v. FLACK (reported herewith) ante, 423; Rickman v. Meier (1905) 213 Ill. 507, 72 N. E. 1121; Aldrich v. Steen (1904) 71 Neb. 33, 98 N. W. 445, 100 N. W. 311; Hall v. Otterson (1894)

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52 N. J. Eq. 522, 28 Atl. 907, affirmed in (1895) 53 N. J. Eq. 695, 35 Atl. 1130; Foth v. Ellenberger (1900) — N. J. Eq. —, 47 Atl. 216; Keenan v. Keenan (1890) 34 N. Y. S. R. 996, 12 N. Y. Supp. 747; Disch v. Timm (1898) 101 Wis. 179, 77 N. W. 196.

There are many other cases in which the right of the heir to attack the conveyance on this ground is assumed, if he has made out a case on the merits. But see **contra**: Hall v. Hall (1917) 91 Conn. 514, 100 Atl. 441 (see discussion of this case, supra).

The holding in King v. Boyd (1873) 4 Or. 326, indirectly supports the proposition here stated. A suit for the cancelation of a deed on the ground of mental incapacity and fraud was brought by the administrators of the grantor, and the suit was dismissed with the remark that the heirs were the proper parties to sue in such suit. J. W. M.

R. FURMAN TEDDER et al., Appts.,

v.

WILLIAM TEDDER, JR., et al., Respts.

(Two cases.)

South Carolina Supreme Court — November 4, 1917.

(108 S. C. 271, 94 S. E. 19.)

Limitation of actions — deed by ancestor — suit by heir.

1. The limitation period begins to run against a right of action by legitimate heirs to recover property conveyed by their ancestor to his bastard children, from the time of the ancestor's death, not from the time of the conveyance, under a statute providing that such deed shall be null and void, only in favor of legitimate children, in so far as it exceeds one fourth the value of the property.

[*See note on this question beginning on page* 447.]

Evidence — burden of proof — marriage.

2. Those asserting marriage between a white man and colored woman whose relations had an immoral inception have the burden of proof.

Same — sufficiency of evidence.

3. Marriage between a white man and a colored woman is not established by testimony that they lived in the same house as husband and wife.

Fraud — deed — intention.

4. A deed from father to son cannot be set aside on the ground that it was procured by fraud, if the evidence shows that the grantor did what he intended to do.

Cancelation — failure to pay mortgage.

5. A deed cannot be canceled because the grantee fails to fulfil his promise to pay off a mortgage which the grantor had placed upon the property.

Evidence — burden of proof — value for deed.

6. Bastard children who received a deed from their father to the detriment of his legitimate children have the burden of showing that they were purchasers for value, especially where the grantees looked after the business of the grantor.

APPEAL by plaintiffs from a decree of the Common Pleas Circuit Court for Darlington County in favor of defendants in consolidated actions brought to set aside certain deeds to land, alleged to have been fraudulently made. *Reversed in part.*

The facts are stated in the opinion of the court.

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Messrs. George W. Brown and F. A. Miller for appellants.

Messrs. Dargan & Dargan, for respondents:

Since the presumption is in favor of marriage, the fact that a man and woman have openly cohabited as husband and wife for a considerable length of time, holding each other out and treating each other as such by declarations, or conduct, and generally reputed to be such among those who come in contact with them, may give rise to a presumption that they had previously entered into an actual marriage, although there be no direct testimony to that effect.

26 Cyc. 872; Fryer v. Fryer, Rich. Eq. Cas. 99; Rutledge v. Tunno, 69 S. C. 404, 48 S. E. 297; James v. Mickey, 26 S. C. 273, 2 S. C. 130.

At the time of the alleged marriage, about 1870, there was no law in South Carolina making it illegal.

Kennington v. Catoe, 68 S. C. 475, 47 S. E. 719; Davis v. Whitlock, 90 S. C. 246, 73 S. E. 171, Ann. Cas. 1913D, 538.

The testimony fails to show bastardy of these defendants.

Williams v. Newton, 86 S. C. 248, 68 S. E. 693.

Declarations of William Tedder, Sr., after he had parted with his title, were properly excluded.

Renwick v. Renwick, 9 Rich. L. 50; 16 Cyc. 987; Hobbs v. Beard, 43 S. C. 372, 21 S. E. 305; Merck v. Merck, 83 S. C. 337, 137 Am. St. Rep. 815, 65 S. E. 347.

Mr. E. O. Woods also for respondents.

Gage, J., delivered the opinion of the court:

The cause is in equity to set aside sundry deeds to land, made in fraud of § 3454 of the Code of Laws. It involves some 300 acres of land situate near Society hill, and said to be of the present value of some $20,000. There are, in fact, two actions, but they were tried together, and they come so here. The plaintiffs in the two actions, except S. W. Tedder, are the confessed lawful children and grandchildren of William Tedder, Sr., by his wife Gemimah. The defendants in the two actions, except Carrigan, are children and grandchildren of William Tedder, Sr., by a woman called Adeline, confessedly of negro blood, and their legitimacy is denied and affirmed. William Tedder, Sr., died in 1905, the actions were begun the next year thereafter, and they have just reached this court. Gemimah, the confessed lawful wife of William, died in 1864 or 1865. Betwixt that period of time and 1870,—the exact period is not certainly fixed,—Adeline commenced to live with William, Sr., and their children were born after that period. Adeline had been a slave of Gemimah, and, as before stated, she was confessedly of mixed negro blood. Adeline died "about eighteen years ago," one of the witnesses said. Though the testimony does not fix in what calendar year the death occurred, it must have been about 1890, after twenty years' cohabitation with William. Betwixt the years 1888 and 1905, William, Sr., conveyed by deed the lands in issue, in sundry parcels, to his four sons, William, Jr., Samuel, James, and Gus. To several of William's children by Adeline he made no conveyance of any part of his land. The children by Gemimah got none. By the said conveyances William, Jr., got, in four parcels and by two deeds, 170 acres; Sam got 45 acres; James got 30 acres, and Gus got, in two parcels and by two deeds, 81 acres,—all told, 326 acres. The first action is brought under § 3454 of the Code of Laws; and the plaintiffs seek thereunder to vacate the said several deeds: (1) Because there was no consideration paid for them; and (2) because the aforementioned grantees are alleged to be the bastard children of William, Sr., by Adeline, and the conveyance to them was voidable under the statute, except to the extent of one fourth of the value of the property. The second action assails the aforementioned deeds by William, Sr., to William, Jr., upon the ground that they were obtained by the son from the father through the fraud, misrepresentation, and imposition of the son upon the father. The master, without discussion, found all the issues for the defendants in both cases, and recommended a dismissal of the complaints. The

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circuit court, in formal orders, confirmed the reports of the master.

There are fifteen exceptions by the plaintiffs in the first case, and five exceptions by the plaintiffs in the second case. These we shall not take up in order; but we shall mayhap compass all the determinative issues in the case. We think they are these, and we state them in dependent order, to wit: (1) Were William and Adeline husband and wife when their children were born? (2) Is the action against James and Gus barred by the Statute of Limitations? (3) Was the deed from William, Sr., to William, Jr., procured to be made by the fraud of the grantee? (4) Should the deeds be canceled for the nonperformance of the condition upon which they were given, to wit, the sons' promise to pay the Carrigan mortgage? (5) Did William, Jr., and Sam, pay a valuable consideration for the deeds they got? There are exceptions to the disallowance of testimony tendered by the plaintiff, but the issues they make are secondary, and we think not necessary to a right decision of the cause.

The dominating question in the case is the first stated. We are distinctly satisfied that upon that question the master and circuit judge have arrived at a wrong conclusion. We are mindful, too, of the law that the burden is upon the plaintiffs at the outstart to prove by a preponderance of the testimony that William and Adeline were not husband and wife. The counsel for the defendants have not asserted that there was a formal marriage in an instant of time; all they assert is that the circumstances prove that the marriage relationship existed in some time. One of the counsel cites seven such circumstances, to wit: "That William Tedder, Sr., held out Adeline as his wife to McMillan, and to Thomas H. Coker and T. H. Sompayrac; that he lived with her as his wife; that they enjoyed the same habitation and the same board; that they reared the same children together under the same name, and in the same household and as his family; that he treated Adeline as his wife, and she treated him as her husband; that the children were treated as members of the family as a unit; that they lived there many years as husband and wife, in sickness and health, until death parted them."

But most of these circumstances might surround an immoral cohabitation.

The difference between marriage and concubinage in the circumstances stated rests in the intent of the cohabiting parties; the physical and temporal accompaniments of the cohabitation may be the same in both cases, but the intent in the two cases is widely apart always. The intent in marriage is usually evidenced by a public and unequivocal declaration of the parties, but that is not necessary; the intent may exist, though never public and formally declared; nevertheless the intent must exist. The intent in marriage consists of living together, by agreement, of a man and woman as husband and wife, according to what we know to be the law of the land, and according to what we believe to be the law of God. The intent in concubinage consists in a man and woman living together in the contrary fashion. It is true that when the intent has not been formally and publicly declared, as it manifestly was not in the instant case, it may yet rest in circumstances. See Fryer v. Fryer, Rich. Eq. Cas. 98; Stringfellow v. Scott, Rich. Eq. Cas. 109, note; Lucken v. Wichman, 5 S. C. 413; Blackburn v. Crawford, 3 Wall. 195, 18 L. ed. 186; 2 Kent, Com. 14th ed. p. 120, note.

There are two circumstances which, when established by the testimony, shift to the defendants the burden of proving that William and Adeline were husband and wife. They are: (1) The negro blood of the woman; and (2) the immoral inception of the association. It may be, as the respondents contend, that the law of the state did not prohibit the marriage of a white man

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to a colored woman at the particular period of time when the cohabitation began. But though that be true, yet the presumption of fact was then, and is now, that a white man will not marry a colored woman. That is true because the common and unbroken practice of our society since the foundation of the state has been against such alliance. See Lloyd v. Rawl, 63 S. C. 244, 41 S. E. 312; Rutledge v. Tunno, 69 S. C. 406, 48 S. E. 297; 2 Kent, Com. 14th ed. p. 379, note. This presumption of fact, then, standing against a marriage, the burden is shifted on those who allege a marriage to prove it. But when all the testimony is in, upon the trial of an equity case, the somewhat technical question of the burden of proof fades away, and the issue turns upon the real question of the preponderance of the testimony, still giving due weight to the presumption.

Evidence—burden of proof—marriage.

Considering now the whole testimony on the one side and on the other side, we are satisfied that the circumstances prove that the relationship betwixt William and Adeline was immoral. The respondents say, and strongly rely on the circumstances, that the persons called themselves husband and wife, and that they cohabited as man and wife. "The parties might call each other husband and wife, as a sacrifice to decency, and treat each other as such; it being well known to themselves, and to everyone else, that they did not consider each other as standing in that relation." Harper, Chancellor, in Stringfellow v. Scott, Rich. Eq. Cas. 112, note.

The reputable witnesses of the neighborhood, who testified about the relationship of the parties, did so in restrained language.

Mr. Carrigan of Society hill, testified he had "heard it both ways;" that is, that William and Adeline were married, and that they were not married.

Mr. J. S. Coker testified that the general reputation or common rumor in the community, in regard to Adeline's children, was that they were illegitimate.

Mr. H. J. Coker testified that Adeline began to live with William shortly after the war, and "it was the general talk in the community that they lived together just like a man and wife."

Mr. T. H. Coker, Sr., testified that William made him a deed, and that Adeline renounced dower on it, and when the witness was asked who was present at the signing of the deed, he answered: "Old man William and Adeline Tedder, his wife, as they called her then. I don't know, I couldn't tell."

Mr. C. H. Powe testified that he "had known old man Tedder ever since he had known anybody; had heard of Adeline, but had never seen her; that it was a common report that she was living with Tedder."

On cross-examination by the defendants the witness testified as follows:

Q. When is the first time you remember of this woman, Adeline, living in the house with old man Tedder?

A. I never did see her; I only heard about it.

Q. It was a common report that she was living there with him, wasn't it?

A. Yes, sir.

Q. All the time?

A. Yes, sir.

Q. Continuously and notoriously?

A. Yes, sir.

Q. And that these children were living there?

A. I can't answer that. I only pass along the road. I suppose it was these defendants.

Q. Just like the family?

A. I suppose so.

Q. And as Mr. Coker says, living there just as husband and wife?

A. I suppose so.

James Moody once lived in the house with the old man, and Adeline did not then live there. After Moody moved out Adeline moved in, and lived there until her death.

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On the cross-examination by the defendants, the witness testified as follows;

Q. I understand you to say that she lived there right straight on until she died?

A. She did.

Q. You mean, then, that she continued to live in the house there with the old man, just as husband and wife would live, up to the time of her death?

A. Yes, sir.

A witness for the defendants named McMillan, and of questionable antecedents, testified that he once passed Tedder in a wagon with a colored woman whom he called his wife, and that Tedder pointed out the woman to verify it.

These are all the witnesses whom the defendants rely upon to prove marriage. The testimony is utterly insufficient to establish the fact.

There is no semblance of direct testimony to prove, and there is no serious assertion by the defendants, that in any instant of time William and Adeline agreed to be man and wife with the intent to be such. The whole trend of the testimony is, that in its inception the cohabitation was immoral, and there is not sufficient proof that it was ever changed. Cohabitation, begun and continued immorally, does not ripen into marriage by the mere lapse of time, like a trespass long continued may ripen into a right of possession. Had William and Adeline been husband and wife for the twenty years in which they lived together, in a community like that in which they resided, the fact of their marriage would have been known to the countryside. The first issue, therefore, must go against the defendants, and for a reversal of the judgment of the circuit court. The deeds, therefore, made to the offspring of this unlawful cohabitation, are voidable, except to the extent of one fourth of the value of the estate granted, unless the grantees paid for the same; and that is the issue we have set down to last consider.

Same—sufficiency of evidence.

The sons and grantees, Gus and James, seek to escape liability by force of the Statute of Limitations. They got their deeds many more than six years before the grantor, old William, died, and before action brought. They assert that the plaintiffs' action is, therefore, barred by the statute (Code, § 137).

Reliance is had upon Williams v. Halford, 73 S. C. 126, 53 S. E. 90. It is true that it was there expressly held: (1) That the circuit court in that case erred to hold that the lawful children had no cause of action until the grantor was dead: and (2) that the circuit court in that case also erred to hold that a vacation of the deed in the grantor's lifetime would operate to revest in the grantor three fourths of the estate so granted. This court also held in that case as follows: "If, also, it be true that the title of the illegitimate is good and perfect, subject only to this personal equity in favor of the lawful wife and children, it must follow that, if relief under the statute is obtained during the lifetime of the husband, he takes nothing thereby, since, so far as he is concerned, he has parted with his interest in the property."

But in the Williams-Halford Case the grantor was dead when the action was brought. The conclusion of the court was, therefore, not had upon the facts, and was, therefore, but a dictum, and two of the four judges did not concur in it. The case, therefore, has little, if any, authority. Nevertheless we should be and are slow to question a dictum, even in a well-considered judgment. We have given considerate attention to the preceding opinions of this court, cited at some length in Williams v. Halford, and upon which the opinion in that case professes to be founded; and there is nothing in them hostile to the settled conclusions we have reached and now announce.

The question at this issue is this: When did cause of action against Gus and James accrue to the plaintiffs,—at the instant of making of

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the deeds to Gus and James, or at the grantor's death? That depends upon a construction of § 3454 of the Code of Laws, for that statute creates the right of the plaintiffs. Using only such words of the statute as are relevant to the facts of this case, the statute runs as follows: "If any person . . . who shall have already begotten . . . any bastard child . . . the said person . . . having . . . lawful children of his own living, and shall . . . convey . . . by deed of gift, . . . for the use and benefit . . . of his bastard child . . . any larger . . . proportion of the real clear value of his estate . . . than one-fourth part thereof, *such deed of gift . . . shall be null and void*, only in favor of . . . legitimate children, for so much of the amount or value thereof, as *shall . . . exceed such one fourth.*" (The italics are supplied.)

The statute does not so expressly declare, but the necessary implication of it is, that for so much as one fourth of the property granted the deed shall be good to the bastard. The statute does expressly declare that the deed shall be void to the bastard for all over the value of one fourth of the property granted. But the statute does not declare, nor does it necessarily imply, that the three fourths shall, at the instant of the deed, vest in the lawful children. On the contrary, the statute declares that as to that three fourths the deed is voidable, that is to say, the same as if it had not been made for that three fourths. Manifestly, the parent had the right to convey one fourth to his bastard child, and keep the three fourths for himself. The case is not altered that the parent did convey one fourth to the bastard, and made a vain effort to convey away the three fourths, too. It is true that at the instant old William made the deeds to Gus and James he violated the law; but that fact did not give grievance (a cause of action) to the lawful children under the statute, because that fact did not impair their present right to have the land, for the statute gave them no such present right. The lawful child might have died before the parent, and in that event his inchoate action, so to speak, would have died with him; the deed of the whole to the bastard would be good. We conclude, therefore, that the plaintiffs' action against Gus and James is intact, and not barred by the Statute of Limitations, and in this respect the judgment below is wrong.

Limitation of actions—deed by ancestor—suit by heir.

The third issue, we are persuaded, was rightly decided, and the judgment thereabout must be affirmed. The deed from the old man to William was prepared by Mr. Sompayrac, and the two doctors who witnessed it were called to do so, not on the son's motion, but by Mr. Sompayrac's suggestion. One of them was the old man's family doctor. Dr. Carrigan testified that the old man signed the deed sitting in a chair, and that he was then rational. "There was no stupid condition of mind to cause him to not know what he was doing," are the witness's words. Dr. Barrentine testified that the old man was weak and emaciated, and had some fever at the signing, but he also said the old man's mental condition was clear. Indeed, the old man *intended to do* the thing the Bastardy Statute declares he could not lawfully do; the whole theory of the plaintiffs' case, under the Bastardy Statute, is that the old man intended to make the deed to his bastard children. We think, therefore, that there is no proof that the old man was unduly influenced to make the deed and that he was mentally incapable of making it; that it is the gravamen of the complaint. He did that which he intended to do, and which we have held as a violation of the law, if the deed was a gift.

Fraud—deed—intention.

We come now to the fourth question. It is doubtful if the complaint makes the question. But if A should

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convey to B a parcel of land, upon consideration of B's promise to lift a mortgage debt which A had aforetime put on it, then B's failure to pay would be no ground for A or his assigns to have the deed canceled. Lavender v. Daniel, 58 S. C. 125, 36 S. E. 546. If, therefore, old William made to his son a deed, and if a part of the consideration for it was the son's promise to pay off the mortgage debt the old man had made to Carrigan, then the failure of the son to do so would not be any ground to cancel the deed.

Cancelation—failure to pay mortgage.

On the fifth and last issue we are clearly persuaded that the decree below is contrary to the plain weight of the evidence. If the four sons who got deeds from old William were his children begotten in wedlock, then there was no necessity for them to claim as purchasers for a valuable consideration. On the other hand, the fact of their illegitimacy was a sufficient temptation and excuse for them to claim to be purchasers. The burden rested on the defendants to prove themselves purchasers, for two reasons. They are these: (1) The moral duty of the father was to provide for his legitimate children. When he failed to do that and conveyed all his land to his bastard children, the act thereby wore a badge of fraud, which the beneficiaries ought to remove. (2) The son William sustained a fiduciary relation to the father. The father was eighty-one years old when the deed of 1905 to William, Jr., was made. He was then very feeble and died within ninety days. The son lived in the same house with the father. The son William testified: "He seemed to look on me to see after his business in some respect. Some of it; not all."

Evidence—burden of proof—value of deed.

These circumstances cast upon the son the duty to prove the transaction to be a genuine one. Way v. Union Cent. L. Ins. Co. 61 S. C. 501, 39 S. E. 742. But, as before stated, these presumptions fade away and become of no consequence when the whole testimony is in. The son William got, by two deeds, four parcels, aggregating 170 acres, and for the expressed consideration of $2,100. The testimony tending to prove payment by William, Jr., is vague and unsatisfactory; it does not carry conviction; it suggests evasion, concealment, and deceit. Within the space of a page of the printed testimony of William, he swore on the cross-examination thirteen times that he did not remember incidents which ought, under the circumstances, to have been familiar to him. The testimony is full that the land he got was, at the time he got it, worth double what he claims to have paid for it. There is no testimony which is worth while to prove that William paid $1,600, expressed as the consideration for the 120 acres conveyed to him by the old man in 1905.

This is the witness's account of that transaction:

Q. Deed dated 11th of March, 1905, on 65 acres and 40 acres and 15 acres. I see this deed of March 11, 1905, is for $1,600, is it not?

A. Yes, sir.

Q. Did you pay that to him?

A. No, sir, I did not pay him. Let me explain.

Q. Did you pay him $1,600?

A. I paid it in this way. He owed me $300 and $412, what we counted it up to be for that mortgage.

Q. He owed you $300?

A. Yes, sir.

Q. For what?

A. He owed me $300 for labor. There was two years' work he owed me for, at $150 a year, myself and horse. I furnished the horse myself, and he furnished the feed for the horse and for me, too.

Q. Then you paid him $712 in this way? How about the balance of the $1,600?

A. Well, you see, there was a mortgage on this property, and he did not know how much the mort-

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gage was, and I was not able to find out how much it was. Anyway, we supposed the whole thing to be $1,600, including what he owed me and the mortgage, too.

Being called again, the witness further testified:

Q. I hand witness a deed of date 11th day of March, 1905, from William Tedder, Jr. Did you pay for this land, William?

A. Yes, sir.

(Deed introduced in evidence.)

Q. How did you pay, William, and what did you pay?

A. Sixteen hundred dollars was the understanding, but I had a right smart more to pay before I got through.

Q. What was your first payment to the old man?

A. Three hundred dollars.

Q. Next?

A. Next we estimated to be $412. That was the value of that mortgage, and he owed me that money at that time.

Q. He owed you that money at that time?

A. Yes, sir.

Q. And the balance you estimated to be about $900?

A. Yes, sir.

Q. How was that to be applied?

A. That was to make the $1,600.

Q. You estimated the mortgage debt to amount to $900?

A. Yes, sir.

Q. You bought the land subject to $900?

A. Yes, sir.

The testimony of William, Jr., about the 50-acre tract, and the payment for it, is equally unsatisfactory; about that he testified as follows:

Q. I hand witness deed dated February 13, 1903, for 50 acres of land. Did you pay him for that land?

A. Yes, sir.

Q. How?

A. I paid it in money.

Q. How many instalments?

A. Three.

Q. Did you get receipts?

A. I got two receipts.

Q. What became of them?

A. I don't know. I could not say what became of the receipts. I kept them until after I got title, and since, they have gotten lost.

Q. Have you made search for them?

A. Yes, sir; since this suit came up I have looked for them, but cannot find them. They must have gotten misplaced in some way.

Q. At the time you bought this land, was there a mortgage on it?

A. Yes, sir.

Q. Who was to pay it?

A. He was to pay it.

Q. Did he do it?

A. No, sir.

(Mortgage of William Tedder, Sr., to Albert Richardson, of date March 5, 1894.)

Q. Who did you pay that mortgage to?

A. Mr. George Dargan.

Q. And you paid $500 for that 50 acres of land?

A. Yes, sir.

About the possession and cultivation of that parcel the witness said:

Q. When did you come into possession of that 50 acres?

A. I was in possession of it when I bought it, 1901. I could not say I had possession of the whole thing. I had the privilege of it, but did not cultivate all.

Q. Why?

A. It was not surveyed. I just planted what I wanted.

Q. Who planted the other part?

A. The old man, I reckon, planted the other part. J. D. Tedder planted some. I planted on the side the 50 acres come on.

The tax returns of William from 1900 to 1905 show that he had practically no property in those years. There is no proof that he was a man of thrift.

The evidence of a bona fide promise to pay the Carrigan mortgage as part of the consideration is altogether unsatisfactory. Mr. Parrott testified that William, Jr., told him that he (William) was to take up the mortgage, and that was the consideration of the deed from old Wil-

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liam. William, Jr., admitted on the witness stand that when he saw Mr. Parrott he did not know the amount of the mortgage. And in his testimony before quoted he said he "was not able to find out how much it was." And the fact is, William never paid the Carrigan mortgage. The son Sam got 45 acres in 1902, for an expressed consideration of $450. Sam worked with the old man, and was fed and clothed by him. He does not pretend to have paid the father any money for the land; he testified he paid in labor.

On direct examination this is all the witness said about the payment:

Q. This is your deed, Sam (showing paper)? You have seen that before?

A. Sure. Yes, sir. That is mine.

Q. It says $450?

A. Yes, sir.

Q. Forty-five acres of land? Well, did you pay for that land?

A. Yes, sir; I paid for it.

The brevity of it is significant.

The cross-examination utterly discredited the witness; here is a sample of it, and it is much like the whole of it:

Q. When did you come into possession of that land?

A. I come into possession of it, a part of it—

Mr. Dargan: State when.

The witness: I come into possession of a part of it in about 1904.

Q. How much of it?

A. Well, a few acres.

Q. How many?

A. A few acres; as many as I wanted to tend.

Q. How many? I don't know how many you could tend.

A. Just a few acres.

Q. Tell me how many. I don't understand what you mean.

A. Well, about 6 or 8.

Q. In 1904, you came into possession of about 6 or 8 acres?

A. Yes, sir; as much as I wanted to tend.

Q. You didn't want to tend any of it, did you?

A. Well, it was mine.

Q. When was that you said you came into possession of this 6 or 8 acres; 1904?

A. Yes, sir.

Q. At that time how much did you owe on this land?

The Master: At that time how much did you owe on that land?

Q. At that time how much did you owe on this land?

A. You mean did I owe on it?

Q. Yes.

(No answer.)

Q. Well, I will wait on you.

(No answer.)

Mr. Dargan: Tell him how much owed.

The witness: Well, I owed about $150.

Q. And you were in possession of this 6 or 8 acres?

A. Something like that.

Q. It might have been more than $150, might it?

A. Well, I don't think so.

Q. Why did you say about? Why did you say about? You can't tell me.

A. Well, I can tell you.

Mr. Dargan: Well, tell him.

The witness: What did you say at first?

Q. What did I ask you?

A. I forget.

There is no other witness to prove payment by Sam, and his own testimony falls far short of such proof. But the respondents say: "The deeds themselves assert the consideration. William Tedder testified he paid a consideration for the deed."

The same circumstances accompany well-nigh every unlawful transaction; and if courts had to take the word of the written instruments and the testimony of accused parties as conclusive of the issues, wrong would never be disclosed. Men circumstanced like William and Sam ought to have been able to give a clear, particular, and convincing account of how they got well-nigh all the land the old man had, and to which they had no right as his children.

The conclusion we reach is that

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the deeds to William and Sam and to James and Gus are voidable to the extent of three fourths of the value of the land, and the decree below is reversed as to those matters, and that the decree is affirmed so far as the action to set aside the deed from William, Sr., to William, Jr., for a fraud upon the father.

Let the cause be remanded to carry out the views we have expressed.

ANNOTATION.

Statutes of Limitations or laches as bar to suit by heirs or next of kin to set aside conveyance or transfer by ancestor.

I. In general, 447.
II. Statute of Limitations, 447.
III. Laches, 448.

I. In general.

The question whether the right of the grantor to maintain a suit in equity to set aside his conveyance survives to the heir is considered in the note to Warner v. Flack, ante, 423.

The question of when the Statute of Limitations begins to run to bar a suit by the heirs or next of kin to cancel a conveyance by the ancestor depends, as it does in other cases, upon the question of when the right of action arose. In the reported case (TEDDER v. TEDDER, ante, 438), it was necessary for the court to determine this fundamental question by a construction of the statute giving the right of action, the court overruling the dictum found in Williams v. Halford (1905) 73 S. C. 126, 53 S. E. 90. In other cases the right of action may be dependent upon the question of the right of the ancestor, were he living, to maintain the suit. Warner v. Flack, supra. In this second class of cases the different circumstances of each particular case must be decisive of the question of when the right of action accrued. Perhaps in most cases the right of action arises at the time of the ancestor's death; but see Brown v. Brown (S. C.) infra, for a case in which a right arose prior to that time; and see Harris v. Ross (Mo.) infra, for a case in which the statute could not commence to run until long after the death of the ancestor. These cases serve as examples.

Cases in which complainants were claiming to be entitled to the property by virtue of the grantor's will are not cited herein.

II. Statute of Limitations.

The Statute of Limitations begins to run, against a suit by heirs to cancel their ancestor's deed, made in fraud of their rights, at the date of the ancestor's death. Reaves v. Davidson (1917) 129 Ark. 88, 195 S. W. 19; Moore v. Wartelle (1887) 39 La. Ann. 1067, 3 So. 384; Cox v. Von Ahlefeldt (1901) 105 La. 543, 30 So. 175. In this class of cases, the question of when the cause of action arose must be determined by construction of the statute that gives them the right to the property.

Where the heir seeks to set aside the deed of the ancestor on the ground of undue influence, and it is shown that the same influence continued over him until his death, except at times in which he was violently insane, the Statute of Limitations to bar the action commences to run at the time of his death. Aldrich v. Steen (1904) 71 Neb. 33, 98 N. W. 445, 100 N. W. 311.

In Murphy v. Crowley (1903) 140 Cal. 141, 73 Pac. 820, the decision turned upon the question of which of two Statutes of Limitation apply to the case, it being apparently conceded that, whichever one applies, limitation commences to run at the date of the grantor's death, it having been alleged that his disability and the undue influence continued to that time. The case is cited and followed in Page v. Garver (1905) 146 Cal. 577, 80 Pac. 860.

In Trubody v. Trubody (1902) 137 Cal. 172, 69 Pac. 968, it is intimated that the Statute of Limitations would not commence to run until the death of the grantor, where the suit was brought by the heirs to cancel a deed

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on the ground of undue influence over a person of weak mind, when it is not shown that the grantor had recovered or had been free from the undue influence.

Where an infant who has conveyed land dies before attaining her majority, the limitation statute barring the right of her heir does not start to run at the date of her death, if the heir has not attained her majority. Harris v. Ross (1885) 86 Mo. 89, 56 Am. Rep. 411.

And where a deed is absolute upon its face, but is in reality given as a mortgage to secure a debt, and the grantor dies before the debt is paid, the Statute of Limitations will not commence to run against the right of the heir to sue to have the deed reformed, so long as he is in ignorance of the true character of the deed, or is not put upon inquiry concerning it. Rice v. Ward (1899) 92 Tex. 704, 71 S. W. 844.

A right of action to cancel a deed for fraud arises to the grantor at the time he discovers the fraud, so that the Statute of Limitations runs against him and his heirs from the date of such discovery. Brown v. Brown (1895) 44 S. C. 378, 22 So. 412.

III. Laches.

The question of laches usually arises where there has been delay by heirs in bringing suit to cancel the ancestor's conveyance, for the reason that such suit is essentially an equitable proceeding. Where the Statute of Limitations does not bar the action, the question of a bar by laches depends upon the circumstances of each particular case, rather than upon the expiration of a definite number of years since the right of action arose. So, it has been held that a rescission will be refused—

—where there has been a delay in filing a bill for six years after the death of the ancestor, during which time the value of the land has been greatly increased by a railroad running through it, and improvements erected by the purchaser, and it further appears that the land had been sold by the ancestor's administrator, and some portions bought by the heirs, Dent v. Long (1889) 90 Ala. 172, 7 So. 640;

—where cancelation on the ground of fraud was sought forty-two years after the death of the ancestor, who executed the deed, some four years before his death, and no reason or excuse for the delay was given, Wilkes v. Phillips (1904) 120 Ga. 728, 48 S. E. 113;

—where the deed of the ancestor, which the heirs sought to cancel on the ground of his mental incapacity and insanity, was executed and recorded some three months before his death, one of the complainants being a witness to the deed, all of them being in a position to know his mental capacity, suit not being brought for seventeen years after his death, and no reason appearing why the plaintiff did not know, or by slightest diligence could not have known, of the substantial facts, so as to bring the suit within a reasonable time after the deed was executed, or after the grantor's death, James v. Hill (1913) 140 Ga. 739, 79 S. E. 782;

—where the attack by the heirs was on the ground of nondelivery, the consideration was services in caring for the aged grantor, and complainant permitted grantees to remain in possession in good faith during the period of administration, and until their claim for services against the estate would be barred, Vermilion County Children's Home v. Varner (1901) 192 Ill. 594, 61 N. E. 830;

—where a deed is given for services and support of vendor and his wife for life, the grantee has fully performed the services and furnished the support, and the attack upon the deed was made sixteen years after the grantor's death, but only one year after his widow's death, on the ground that the grantor was non compos mentis at the time he made the deed, Chase v. Chase (1897) 20 R. I. 202, 37 Atl. 80;

—where the grantee has acquired title by adverse possession, claiming under the deed that is attacked by the heirs of the grantor on the ground of mental incapacity, McCann v.

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Welch (1900) 106 Wis. 142, 81 N. W. 996;

—where the heirs, after the grantor's death, revived a suit which had been brought by him to avoid the deed on the ground of duress, some ten years after the execution of the deed, Carter v. Cough (1897) 28 C. C. A. 520, 52 U. S. App. 372, 84 Fed. 735;

—where suit was brought to impeach a mortgage for fraud forty years after its execution and thirty-three years after its foreclosure and the sale of land thereunder, after the original parties to the mortgage were all dead, and the mortgagor had never brought action during his lifetime, although he lived until five years prior to the time when this action was brought by his heirs, and the purchaser under the mortgage had been in open, notorious, and adverse possession all these years, De Roux v. Girard (1901) 50 C. C. A. 186, 112 Fed. 89.

On the other hand it has been held that there was no bar by laches, and relief has been granted:

—where plaintiffs delayed two years and eight months after the death of the ancestor before bringing a suit, but during this time continually asserted their claim to the land and made demands upon the defendant, who made promises of restitution from time to time, Walling v. Thomas (1901) 133 Ala. 426, 31 So. 982;

—where there is a delay of ten years in bringing suit after the death of the ancestor, but the delay has not worked to the disadvantage of the defendant, Reaves v. Davidson (1917) 129 Ark. 88, 195 S. W. 19;

—where about three years elapsed between the execution of the deed and the death of the grantor, suit was not brought by the heirs for eleven years after his death, and the grantee was in possession of the premises for over seven years, but his color of title was not made in good faith, and he could be compensated fully for all his expenditures, including improvements, etc., Ross v. Payson (1896) 160 Ill. 349, 43 N. E. 399;

—where the suit to cancel the deed was brought by the heirs within a short time after the death of the ancestor, although the deed had been executed by him many years before his death, since they had no right of action while he lived, Ring v. Lawless (1901) 190 Ill. 520, 60 N. E. 881;

—where suit was brought soon after the death of the ancestor, by the heirs, to have the deed canceled, although they knew of its execution and delivery for a long time before the ancestor's death, Hemphill v. Holford (1891) 88 Mich. 293, 50 N. W. 300;

—where the heirs who brought the suit are minors and sue by their guardians, although ten years have elapsed since the ancestor's death. Kroenung v. Goehri (1892) 112 Mo. 641, 20 S. W. 661. J. W. M.

CHARLES HERSEY NICHOLS, Plff. in Err.,
v.
JAMES A. ORR et al., Doing Business under the Name of Orr, Robinett, & Mason.

Colorado Supreme Court—July 2, 1917.

(— Colo. —, 166 Pac. 561.)

Attorney and client — agreement to share recovery — assignment.

1. An agreement between attorney and client that the former shall have a certain percentage of the amount of the claim, whether it be obtained by suit or compromise, does not constitute an assignment of an interest in a judgment recovered which will prevent a compromise by the client pending appeal.

[*See note on this question beginning on page* 454.]

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Contract — to control litigation — public policy.

2. An agreement which deprives a litigant of the right to control his case before its final determination is void as against public policy.

Attorney and client — lien for fees — right to compromise case.

3. The right of a litigant to compromise his case is not subject to the statutory lien of his attorneys for their fees, so as to defeat the exercise of it.

Definition — lien.

4. A lien is a charge upon property, which can be conveyed subject to the lien.

Same — assignment.

5. An assignment creates an interest in property which can be conveyed only by the assignee, who is a co-owner with the assignor of the property.

Attorney and client — right to settle case.

6. Until final determination of the litigation, the client may control the suit and settle the case, even against the wishes of his attorney.

Same — compromise — good faith.

7. A compromise by a client of his claim against the wishes of his attorney must be in good faith and without the purpose to defeat the attorney's claim for compensation for his services.

Contract — for attorneys' fees — construction.

8. A contract between attorney and client by which the attorney is to have a certain percentage of the amount of the claim, whether obtained by suit or compromise, does not entitle the attorney to recover from the opposite party more than the named percentage of the amount accepted by the client in compromise of a judgment which had been recovered for a greater amount.

Attorney and client — collusive settlement — evidence.

9. Fraud and collusion in the settlement of a cause of action pending appeal for less than the judgment recovered is not shown by the fact that it was in the absence of plaintiff's attorneys, who were by contract to receive one half of the sum recovered, and who had rejected an offer to compromise, if the negotiations were opened by their client, and their share of the amount received was tendered to them.

ERROR to the District Court for El Paso County to review a judgment in plaintiffs' favor in an action brought to recover one half of the amount of a judgment recovered by their client from defendant. *Modified and affirmed.*

The facts are stated in the opinion of the court.

Mr. W. E. Clark, for plaintiff in error:

The lien of the attorney attaches to the amount agreed upon in settlement.

Curtis v. Metropolitan Street R. Co. 118 Mo. App. 341, 94 S. W. 762; Fischer-Hansen v. Brooklyn Heights R. Co. 173 N. Y. 492, 66 N. E. 395, 13 Am. Neg. Rep. 396; Schriever v. Brooklyn Heights R. Co. 30 Misc. 147, 61 N. Y. Supp. 644, 890; Montezuma Valley Irrig. Dist. v. Longenbaugh, 54 Colo. 391, 131 Pac. 262.

Messrs. Orr, Robinett, & Mason for defendants in error.

Teller, J., delivered the opinion of the court:

The defendants in error were attorneys for one Katres in an action in which they obtained a judgment against the plaintiff in error in the sum of $4,250. They served upon the defendant in that suit, and upon his attorney, notice of an attorneys' lien claim, including a statement that their services were rendered under a written contract by which they were to receive one half of the amount of claim obtained by suit or compromise. The defendant brought the case to this court on error, and an application was made for a supersedeas, and a brief filed in support thereof. In the meantime there was some correspondence between the attorneys in which the attorneys for the plaintiff were informed that the defendant would pay $1,500, and no more, to plaintiff in settlement of the case. This offer was rejected by the attorneys. A few days after the docketing of the case in this court, Katres, the plain-

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tiff, appeared at the office of the attorney for defendant Nichols, and the case was settled. Thereupon a release was prepared, which plaintiff executed, by which he received $25, the amount of costs paid by him, doctor's bills and hospital bills to the amount of $250 were paid, and he received in addition the sum of $500. The release further provided that $750, one half of the agreed sum to be paid in settlement of the suit, should be paid to the attorneys for plaintiff.

Defendants in error refused to accept said sum. Later they caused the writ of error to be dismissed, upon the ground that the judgment had been settled. 57 Colo. 471, 140 Pac. 792. They then began an action against Nichols to recover one half of the amount of said judgment. Judgment was entered in their favor for $2,125; the court finding that the plaintiffs had, by virtue of said contract of employment, become equitable assignees of one half of the judgment as soon as it was rendered, and further, that the act of settlement by defendant, who had knowledge of said contract, "constituted collusion and fraud in law on the part of defendant as against the rights of the plaintiffs to a lien upon said judgment."

Error is alleged in said findings and judgment. The grounds urged for reversal are that, it being still uncertain what the result of the litigation would be, Katres had the right to settle the case, whether or not the attorneys consented to such action; that he did so settle it; and that the amount due to the attorneys under their contract with him was tendered to them.

Contract—to control litigation—public policy.

The law favors the settlement of litigation, and any agreement which deprives a litigant of the right to control his case, before it is finally determined, is void as against public policy. 6 C. J. 789, and cases cited. This right is not subject to the statutory lien of attorneys for their fees, so as to defeat the exercise of it. The most that an attorney can claim is to share in the proceeds of the settlement. Standidge v. Chicago R. Co. 254 Ill. 524, 40 L.R.A.(N.S.) 529, 98 N. E. 963, Ann. Cas. 1913C, 65.

Attorney and client—lien for fees—right to compromise case.

For the defendants in error it is contended that their contract of employment gave them an equitable interest in the judgment, as the trial court held.

The contract provided that they should receive for their services "50 per cent of the amount of said claim, whether the same be obtained by suit or compromise." It further provided that they might "compromise said claim for such an amount as shall be satisfactory to both parties hereto."

It will be observed that no attempt was made to limit a settlement to such an amount as might be satisfactory to the attorneys. In other words, the attorneys could not compromise the case without the consent of the client, but there was no such restriction on him in the attorneys' favor.

In support of the proposition that they were equitable assignees of a portion of the judgment, defendants in error cite several cases, only one of which, for reasons hereinafter appearing, need be considered. That one is Bell v. Lake County, 26 Colo. App. 192, 141 Pac. 861. That case involved the fee which the holder of a judgment had agreed to pay for its collection. The judgment debtor had notice of the contract by which the attorney was to have 20 per cent of the judgment for his services in collecting it. The judgment had been affirmed in this court. The parties were therefore dealing with a specific fund, a liquidated sum; and a contract to give a percentage of it might, if such were the fair import of its meaning, properly be held to constitute an equitable assignment of that percentage. We must assume that the contract there un-

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der consideration was of that character; but the statement in the opinion that a contract between client and attorney for payment out of a judgment "recovered or to be recovered" operates as a binding equitable assignment is too general and cannot be accepted. It is said in the opinion that such a contract creates a lien upon the specific fund, which contradicts the statement that it amounts to an assignment. A lien is a "charge upon" property; while an assignment creates an "interest in" property. In the one case, the property can be conveyed subject to the lien; in the other case, the portion assigned can be conveyed only by the assignee, who is a co-owner with the assignor.

Definition—lien.

Same—assignment.

Until there is a final determination of the litigation, the client is, as we have seen, able to control the suit and settle the case. That being so, his agreement that the attorney shall have a share of the fruits of the action cannot be held to amount to an assignment of such share. Thus to hold is to deprive the client of a right which, on grounds of public policy, he is not allowed to contract away. The law gives a lien "on" and not an interest "in" the demand in suit, or the judgment rendered therein. In Fillmore v. Wells, 10 Colo. 228, 3 Am. St. Rep. 567, 15 Pac. 343, this court said: "The attorney's lien, whether under the statute or at common law, is equitable in its nature. . . . It is not property in the thing, which gives a right of action at law. It is a charge upon the thing, which is protected in equity."

Attorney and client—right to settle case.

Same—agreement for share of recovery—assignment of claim.

In Boston & C. Smelting Co. v. Pless, 9 Colo. 112, 10 Pac. 652, this court said: "The statutory lien is a security of the benefit of which the attorney may or may not avail himself."

This is the holding in other jurisdictions. In Fischer-Hansen v. Brooklyn Heights R. Co. 173 N. Y. 492, 66 N. E. 395, 13 Am. Neg. Rep. 396, in discussing the Attorneys' Lien Law, the court said: "But did the legislature, in its effort to protect attorneys, intend to sacrifice the client by preventing him from making an honest settlement of his own cause of action? Did it intend to overturn the ancient and honored rule of law that settlements are to be encouraged, by giving the attorney power to insist that the litigation must continue until he consents that it should stop? Did it intend to so tie the hands of the client that he could not settle his own controversy without the permission of his attorney? A cause of action is not the property of the attorney, but of the client. The attorney owns no part of it, for a lien does not give a right to property, but a charge upon it. As it is merely incidental and for the purpose of security only, it would not be reasonable to hold that the legislature intended it should be the means of blocking an honest and genuine adjustment of controversies. We think the lien is subject to the right of the client to settle in good faith, without regard to the wish of the attorney, and we so held in the Peri Case, 152 N. Y. 521, 46 N. E. 849, where we declared that 'the existence of the lien does not permit the plaintiff's attorney to stand in the way of a settlement.' The right of the parties to thus settle is absolute, and the settlement determines the cause of action and liquidates the claim."

To the same effect are the following cases: Re A. B. Baxter & Co. 83 C. C. A. 106, 154 Fed. 22; Sutton v. Chicago R. Co. 258 Ill. 551, 101 N. E. 940; O'Connor v. St. Louis Transit Co. 198 Mo. 641, 115 Am. St. Rep. 495, 97 S. W. 150, 8 Ann. Cas. 703, —all of which hold that, in making settlement, the lien of the attorney must be taken into consideration, and his share of the sum received be given him. In the Illinois case above cited, the court said: "The

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Attorneys' Lien Act in no wise deprives a plaintiff of the complete control of his action. In case of a settlement the only right that an attorney with such a contract has is to insist that his lien attach to the amount agreed to be paid his client in the settlement."

Same—compromise—good faith.

Such settlement must, however, be made in good faith, and without purpose to defeat the attorney's claim.

It is urged that, because of the finding of fraud by the trial court, the case does not come under the authorities cited. Counsel rely on Desaman v. Butler Bros. 118 Minn. 198, 136 N. W. 747, Ann. Cas. 1913E, 642, to support the finding of collusion and fraud. In that case the plaintiff had recovered a judgment of $3,000, of which the attorney was, by contract, entitled to one half. While an appeal from that judgment was pending, the defendant, according to the court's statement, "sought out plaintiff, and sent him from Duluth to an attorney at Chicago, and, unknown to both this applicant and to defendant's attorney of record, settled by paying plaintiff $700, and obtained a stipulation dismissing the appeal and the case, without costs to either party."

In the case at bar it is undisputed that the plaintiff came from Colorado Springs to Denver, of his own volition, went to the office of the defendant's attorney, and announced that he wished to settle the case. One half of the sum to be paid in settlement was reserved for and subsequently tendered to the attorneys. This was in strict accord with their contract, which gave them one half of the amount of the claim, "whether obtained by suit or compromise." This language, considered in the light of the law which gives the client the right to compromise the claim, affords no basis for a claim of more than one half of such sum as Katres saw fit to accept. The only ground for complaint is that the settlement was made in the absence of the attorneys for plaintiff. Assuming, as we properly may, that the offer of $1,500 in settlement was rejected by defendants in error after consultation with their client, it follows that Katres knew that such sum, and no more, would be paid, and that his attorneys would not consent to its acceptance. Coming, as he did, to defendant's attorney without notice to his attorneys, indicates that he was willing to accept the offer of $1,500, and he did not think best to have his counsel present. Defendant's attorney also knew that Katres's attorneys would not approve the settlement; and, unless it be held that they had a right to be present so as to dissuade their client from accepting defendant's offer, no blame attaches to anyone for the settlement in the absence of the attorneys.

Contract—for attorneys' fees—construction.

The case of Curtis v. Metropolitan Street R. Co. 118 Mo. App. 341, 94 S. W. 762, presents somewhat similar features. The attorneys had perfected, by notice, a lien for one half the amount recovered by suit or compromise. A judgment was obtained for $1,000. While a motion for a new trial was pending, the defendant paid the plaintiff $200, secured written direction for the dismissal of the cause, and assumed the discharge of the attorneys' lien. The court rejected the contention, made also in this case, that on the entry of judgment the attorneys' fee became liquidated, and that the attorney became an equitable owner of one half of the judgment. It was pointed out that such a result followed only when the litigation had been finally closed, and the ability to collect the judgment in full was beyond question. The Missouri statute provides that the lien "cannot be affected by any settlement between the parties before or after judgment." The court said:

"In the statute before us we find no provision for the liquidation of the amount of the attorneys' fees

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by the mere rendition of the judgment that does not end the litigation. The statute preserves the lien, but the liquidation of a contingent fee does not occur until the final end of litigation, or until the making of an honest settlement by the parties. . . .

"But it is urged that the settlement was not honest, because plaintiff's attorneys were ignored. A settlement made by the parties for the purpose of defrauding the attorneys out of the whole or a part of their lien would be brushed aside and disregarded; but the statute does not, directly nor inferentially, abrogate the ancient rule, universally followed, that not only permits but encourages parties litigant to meet and adjust their differences, either with or without the presence and aid of their attorneys. A party, for various reasons, may prefer not to have his attorney present during the compromise negotiations, and may even prefer not to consult with him about them. He may think that the presence of an attorney would have a bad effect upon his adversary and thereby interfere with the success of the negotiations. Many attorneys are far abler in advocacy than in compromise. Or he may fear that his attorney might attempt to dissuade him from his purpose to settle, and succeed in turning him from a course which he desires to pursue.

"The relation of client and attorney is analogous to that of principal and agent; and, as the cause of action is the property of the client, and the right to dispose of it is exclusively his, he must be left free—so long as he acts within the bonds of good faith—to exercise his own judgment in the compromise of his demand and in determining when and for what purpose he will invoke the aid of his attorney."

It was accordingly held that the attorneys were entitled to recover $200 from the defendant in the original action. The court found there was no fraud in the settlement, the plaintiff receiving an amount satisfactory to her, and the lien of the attorney being recognized.

The case at bar is very different from the Desaman Case, in that the settlement was not initiated by the defendant; it was made by defendant's attorney of record at the instance of the plaintiff, and it recognized the lien of plaintiff's attorneys for one half of the amount paid. Under the facts disclosed by the record, we cannot say that Katres might not in good faith have preferred, as is suggested in the foregoing quotation, to conduct the negotiations himself without the aid of or interference by his counsel. The recitals in the release indicate that he was dissatisfied with the contract, and that he would not be disposed to depend further on his attorneys.

Attorney and client—collusive settlement—evidence.

We cannot agree that the settlement was fraudulent or collusive. The conclusions above stated are in accord with the views expressed in the case of Gooding v. Lyon, — Colo. —, 166 Pac. 564.

The plaintiffs are entitled to recover $750; but, since that sum was tendered them, they should pay the costs in both courts.

The judgment will be modified accordingly and affirmed.

ANNOTATION.

Agreement for contingent fee as assignment of interest in judgment.

Questions as to the attorney's lien on the judgment are, of course, beyond the scope of the note.

There is little direct authority on the question under annotation. The remark of the courts on this point in

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the cases hereinafter cited are in many cases incidental, and perhaps in some cases inadvertent. In fact, though the courts speak of the "interest" of the attorney in the judgment, or say that a contract for a contingent fee amounts to an assignment of the judgment when recovered, no case has been found other than the reported case (NICHOLS v. ORR, ante, 449) in which the court squarely recognizes and applies the distinction made in that case between an interest in, and a lien on, the judgment.

The view taken in the reported case (NICHOLS v. ORR), that the attorney has no interest in the judgment, is supported to some extent by Martinez v. Vives (1880) 32 La. Ann. 305; Gillette v. Murphy (1898) 7 Okla. 91, 54 Pac. 413; McRea v. Warehime (1908) 49 Wash. 194, 94 Pac. 924; Plummer v. Great Northern R. Co. (1910) 60 Wash. 214, 31 L.R.A.(N.S.) 1215, 110 Pac. 989.

In Martinez v. Vives (1880) 32 La. Ann. 305, supra, the court, though holding that attorneys recovering a judgment for their clients under an agreement that they should receive 10 per cent of the amount collected had such an interest in the judgment as entitled them to bring a suit to revive it, distinctly said that the agreement did not constitute a transfer of any part of the judgment itself.

In Gillette v. Murphy (1898) 7 Okla. 91, 54 Pac. 413, supra, the defendant agreed that his attorneys should have the proceeds of any judgment recovered by him on his counterclaim for their services; he had previously assigned portions of the claims set up as a counterclaim, and, in a controversy between the attorneys and the assignees, it was contended that the agreement with the attorneys gave them the right to any judgment recovered; but the court disposed of this contention by holding that such an agreement could not give them any interest in the subject-matter of the litigation.

In McRea v. Warehime (1908) 49 Wash. 194, 94 Pac. 924, supra, and Plummer v. Great Northern R. Co. (1910) 60 Wash. 214, 31 L.R.A.(N.S.) 1215, 110 Pac. 989, supra, the court, in discussing the right of a client to compromise an action notwithstanding an agreement for a contingent fee, says that, without an express stipulation to that effect, an agreement for a contingent fee will not act as an assignment, and that no interest in a future judgment exists without an assignment.

In a number of cases, however, it is held or asserted that a contract for a contingent fee amounts to an equitable assignment of the judgment. Hawk v. Ament (1888) 28 Ill. App. 390; Weeks v. Wayne Circuit Judges (1889) 73 Mich. 256, 41 N. W. 269; Grand Rapids & I. R. Co. v. Cheboygan Circuit Judge (1910) 161 Mich. 181, 137 Am. St. Rep. 495, 126 N. W. 56; Dreiband v. Candler (1911) 166 Mich. 49, 131 N. W. 129; Schubert v. Herzberg (1896) 65 Mo. App. 578; Bent v. Lipscomb (1898) 45 W. Va. 183, 72 Am. St. Rep. 815, 31 S. E. 907. And see also North Chicago Street R. Co. v. Ackley (1895) 58 Ill. App. 572, reversed in (1897) 171 Ill. 100, 44 L.R.A. 177, 49 N. E. 222, which is similar to those just cited except that the agreement contained an assignment of an interest in the cause of action, and an agreement to assign a similar interest in any verdict or judgment which might be had or recovered. The effect of the reversal of this case is referred to below.

In other cases, it is said that the attorneys become "equitable owners" of the specified interest in the judgment. Curtis v. Metropolitan Street R. Co. (1910) 118 Mo. App. 341, 94 S. W. 762; Texas C. R. Co. v. Andrews (1902) 28 Tex. Civ. App. 477, 67 S. W. 923 (where the agreement contained an assignment of the specified interest in the damages sustained); C. W. Hahl & Co. v. Hutcheson (1917) — Tex. Civ. App. —, 196 S. W. 262.

In other cases the court says or intimates that the attorney has an "equitable interest" in the judgment. Coughlin v. New York C. & H. R. R. Co. (1877) 71 N. Y. 443, 27 Am. Rep. 75; Ives v. Culton (1917) — Tex. Civ. App. —, 197 S. W. 619.

And as supporting the view that the attorney has an interest by way of equitable assignment or otherwise, see

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also Wright v. Wright (1877) 70 N. Y. 98; Patten v. Wilson (1859) 34 Pa. 299.

In Hawk v. Ament (1888) 28 Ill. App. 390, supra, the agreement was to give the attorney one half of whatever judgment might be recovered; pending an appeal, the client assigned the judgment, and the controversy was between the attorney and the assignee. The court, after saying that an attorney might, by agreement with the client, acquire an equitable lien in the judgment or subject-matter of the litigation, said that the agreement amounted to an equitable assignment. The assignee was held to have had notice of the attorney's rights, but it was apparently held that his rights would have been subordinate to the rights of the attorney, even though he had been an innocent purchaser.

In Weeks v. Wayne Circuit Judges (1889) 73 Mich. 256, 41 N. W. 269, supra, the agreement was that the attorneys were to be paid a reasonable compensation from the proceeds of the judgment; after judgment the defendant settled with the client, obtained a receipt in full, and had the suit dismissed; the attorneys applied for a mandamus for the vacation of the order discharging the suit, and the modification of the order setting aside the judgment, so as secure their rights and interests. The court granted the writ and held that the plaintiffs were entitled to such relief, saying: "The arrangement made by relators with Ayres to be reimbursed for moneys advanced by them, and for pay for their services in prosecuting the suit from the proceeds of the judgment which should be obtained in the case operated as an assignment of the judgment to relators to the extent of these claims, and until they had received their pay the plaintiff could give no valid discharge of the judgment. . . . It is true, courts as a rule look with favor upon a compromise and settlement made by the parties to a suit with the consent of all persons concerned, to prevent the vexation and expense of further litigation; but the rule only applies where the rights and interests of all the parties concerned, both legal and equitable, have all been respected and in good faith observed. Parties cannot assume that attorneys have no rights without inquiry."

In Grand Rapids & I. R. Co. v. Cheboygan Circuit Judge (1910) 161 Mich. 181, 137 Am. St. Rep. 495, 126 N. W. 56, supra, it was agreed that the attorneys in an action for personal injuries should have one half of whatever judgment or settlement they should obtain, and that they should have a lien on any judgment or money that might be obtained; after reversal of a judgment for the client, the defendant settled with the client, and the attorneys sought to proceed with the case for the purpose of determining the amount of their fee. In holding that they were entitled to do so, the court said: "We are of opinion that the agreement . . . is, upon its face, a valid agreement between the parties, and, if made in good faith, constituted a lien of 50 per cent upon any judgment that might be recovered, or upon any settlement that might be made of the plaintiff's claim in said cause, and operated as an assignment to said attorneys of any judgment or settlement to the extent of their said lien, and that the plaintiff could give no valid discharge of the claim to the defendant therein to the prejudice of the lien of said attorneys in said fund; provided defendant, relator here, had notice of such lien. . . . Of course we recognize the rule that in this state there would be no lien before judgment, except by special agreement."

In Dreiband v. Candler (1911) 166 Mich. 49, 131 N. W. 129, supra, the client agreed to pay the attorneys for their services one half of any sum recovered by suit or settlement; the case was settled with the client, and, in resisting the attorneys' motion to strike a stipulation for discontinuance from the files, the defendant attacked the validity of the agreement. In holding that the mere advancement of costs without any understanding or agreement to do so, did not invalidate the agreement, the court said that the theory upon which a lien followed a lawful agreement between attorney and client with respect to compensation was that the agreement amounted

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to an assignment of a portion of the judgment sought to be recovered or expected as the fruit of the litigation.

In Schubert v. Harzberg (1896) 65 Mo. App. 578, supra, the attorneys, before verdict was obtained, took a written assignment of whatever judgment might be rendered; an execution creditor of the client garnished the defendant, and the contest was between the attorney and the execution creditor. The garnishment was held superior to the written assignment, but the court held that the attorneys' agreement for a contingent fee of 40 per cent of the judgment recovered made them equitable assignees of that portion of the judgment, and entitled to preference over the execution creditor, whose rights subsequently attached. The court said: "But there is another feature of this case which, we think, must deprive plaintiff Schubert of his apparent preference to the judgment in dispute. When Botsford & Williams engaged to prosecute the action of Herzberg v. Spies, it was agreed that, for their compensation, they should have 40 per cent of the judgment which Herzberg might obtain. Having, then, performed the services and secured the judgment, are they not to be treated as equitable assignees of that portion of said judgment, and entitled to a preference over this execution creditor whose rights subsequently attached? This claim by the interpleaders finds ample support in the authorities. . . . In the textbook above cited, Judge Story says: 'To make an assignment valid at law, the thing which is the subject of it must have actual or potential existence at the time of the grant or assignment. But courts of equity will support assignments not only of choses in action, and of contingent interests and expectancies, but also of things which have no present actual or potential existence, but rest in mere possibility; not, indeed, as a present positive transfer, operative in præsenti, for that can only be a thing in esse, but as a present contract, to take effect and attach as soon as the thing comes in esse.' . . . We regard, then, the agreement entered into between these attorneys and their client, at the time they undertook the prosecution of his suit, as an equitable assignment of, or agreement to assign, a 40 per cent portion of the judgment subsequently obtained against Spies. As between them, it was unquestionably binding. And the law is well settled that this plaintiff (or execution creditor) stands in the shoes of the judgment debtor. In other words, Schubert has no greater rights in the judgment of Herzberg v. Spies than Herzberg had when Spies was served with notice of garnishment. And all equitable rights which Botsford & Williams had in the judgment to be rendered against Spies were as good and enforceable against Schubert, the execution plaintiff, as they were against Herzberg. Drake, Attachm. § 672."

In Bent v. Lipscomb (1898) 45 W. Va. 183, 72 Am. St. Rep. 815, 31 S. E. 907, supra, the client, by a written agreement, authorized the attorney to retain out of any recovery of money had by a verdict and judgment one-fourth value of such verdict and judgment as compensation for his services. Other attorneys associated with him in the action obtained an assignment of the judgment recovered, collected it, and paid the amount, after deducting their own fee, to the client. The attorney first mentioned sued them and was held entitled to recover. The court, besides saying that the attorney had a lien on the judgment, said that the writing in question was an assignment which did not destroy, but confirmed, the lien,—evidently meaning an assignment of the judgment.

In North Chicago Street R. Co. v. Ackley (1885) 58 Ill. App. 572, reversed in (1897) 171 Ill. 100, 44 L.R.A. 177, 49 N. E. 222, supra, the defendant settled with the client before trial, and the attorney sought to recover the agreed percentage of the amount of the settlement from the defendant. The appellate court held that the contract worked an equitable assignment of an interest in the judgment, when recovered, and that the defendant settled with the client at its own risk, saying: "Whatever may be the law with regard to the assignability of a right of action for a personal injury,

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concernihg which there are numerous authorities of great weight on both sides, there ought not to be much dispute that the assignment in this case of an interest in the right of action, which was to be prosecuted in her name, together with an agreement to assign a corresponding interest in the judgment which should be recovered in the future upon such right of action, worked an equitable assignment of the specified interest in that judgment the moment the judgment was perfected, upon the principle that in equity that which is agreed to be done will be considered as done. 1 Story, Eq. Jur. § 64g; Freeman, Judgm. 12th ed. § 425. 'An equitable assignment is such an assignment as gives the assignee a title which, though not cognizable at law, equity will recognize and protect;' and to support such an assignment there must be an actual appropriation of the fund, or of some designated part, proportion, or per cent of it. Story v. Hull (1892) 143 Ill. 506, 32 N. E. 265. We think there was here what was equivalent, in equity, to an assignment of a definite proportion of the judgment that was recovered, and that if the appellant had notice of such assignment, the payment of the whole judgment to Mary Butler was made at its risk." The supreme court, however, reversed the judgment on the ground that a cause of action for personal injuries was not assignable. This reversal, though not on the exact point under annotation, leaves the decision of the appellate court of doubtful authority.

In Curtis v. Metropolitan Street R. Co. (1910) 118 Mo. App. 341, 94 S. W. 762, supra, the client agreed to pay the attorneys for their services an amount equal to 50 per cent of the amount recovered by suit or compromise. After judgment, but while motions for a new trial and in arrest of judgment were pending, the client compromised for much less than the amount of the judgment. The statute gave the attorneys a lien on the cause of action, and provided that it should attach to a judgment in the client's favor. In a controversy over the amount of the attorneys' lien under the circumstances, it was contended that when the cause of action was merged in the judgment, the amount of the fee became liquidated, and that, under the contract, the attorneys became the equitable owners of one half of the judgment; and the court, while overruling this contention because the judgment had not become final, intimated that this would be true if the judgment, at the time of the settlement, was a finality.

In Texas C. R. Co. v. Andrews (1902) 28 Tex. Civ. App. 477, 67 S. W. 923, supra, the client agreed to give his attorneys 40 per cent of all damages recovered for personal injuries by suit or compromise, and assigned and transferred to them the 40 per cent interest in all damages sustained. He subsequently settled with the defendant, and the attorneys having obtained a verdict, the defendant moved for a new trial. It was held that the contract between the attorney and client was not only an assignment of a part of the cause of action declared on, but also gave the assignees the right to prosecute it to judgment in the name of the assignor; that the assignees, as owners of so much of the cause of action, would be entitled to 40 per cent of the judgment recovered; that it was not within the power of the client to satisfy or compromise more than 60 per cent of the judgment, the defendant knowing of the contract; and that, to the extent of the remaining 40 per cent, the judgment inured to the benefit of the attorneys, and this right the defendant and the client were bound to respect. And see also Bonner v. Green (1894) 6 Tex. Civ. App. 96, 24 S. W. 835, where, in holding that an attorney to whom an interest in a cause of action for personal injuries was assigned and transferred in consideration of services in a suit on such cause of action was not a necessary party, the court said that the judgment inured to his benefit in proportion to his interest in the cause of action, and that a compromise without his consent might not be binding upon him. It will be noted that in the two cases just cited there was an assignment in terms of an interest in the cause of action, and there is an intimation in American

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Cotton Co. v. Simmons (1905) 39 Tex. Civ. App. 189, 87 S. W. 842, that a contract for a contingent fee is not, in itself, such an assignment; but in C. W. Hahl & Co. v. Hutcheson, the agreement was merely to give the attorneys one half of any amount that might be recovered, and it was nevertheless held that it was the intention to give the attorneys one half of the judgment, and that they became the equitable owners of one half of the judgment, though the agreement contained no words of conveyance of an interest in the cause of action. There were three plaintiffs in the action, and the attorneys were held entitled to enforce their interest in the judgment by execution, notwithstanding a settlement by a person who had acquired the interests of two of the plaintiffs.

In Coughlin v. New York C. & H. R. R. Co. (1877) 71 N. Y. 443, 27 Am. Rep. 75, supra, it was held that attorneys taking a case on a contingent fee had no legal or equitable interest by way of assignment or lien on the cause of action which would affect a settlement before judgment, but Earl, J., after saying that there was not even an agreement by plaintiff to assign any portion of the claim to his attorneys, and that the agreement did not purport to give them any present interest in the cause of action, but that it was simply an executory agreement that the attorney should share in the damages recovered, the cause of action remaining intact in the plaintiff, added: "Still, the agreement to divide the recovery in such a case would attach itself to the judgment when recovered, and give the attorney an equitable interest therein."

In Ives v. Culton (1917) — Tex. Civ. App. —, 197 S. W. 619, supra, attorneys were employed to sue on notes under an agreement that they were to have the attorneys' fees specified in the notes, provided they could collect the full amount of the notes, with interest and attorneys' fees; after part payment of the judgment, the balance was assigned to one of the attorneys, who caused an execution sale of land to which a third person had an unrecorded deed. The attorney had notice of such unrecorded deed, but, as he did not have it in mind at the time, such notice was held not imputable to the client. Because of such notice it was, however, held that the judgment, to the extent of the attorney's interest under the contract with the client, was not a lien on the land.

Where an attachment defendant brought an action to recover property levied on under the attachment, on the ground that it was exempt, and agreed that his attorneys should have whatever costs might be recovered for their services, and subsequently, after a verdict in his favor, assigned the costs to the attorneys, it was held in Ladd v. Ferguson (1881) 9 Or. 180, that the assignment was not subject to the attachment creditor's right to set off the judgment for costs against the judgment recovered in the attachment suit.

And on the question under annotation, see also Terney v. Wilson (1883) 45 N. J. L. 282,—a case often cited, though it does not seem to have involved any agreement for a contingent fee, but merely an agreement that the attorney should have a lien on the judgment for the compensation due him.

As will be noted from the discussion of the case in the reported case (NICHOLS v. ORR, ante, 449), the question under annotation was not involved in Bell v. Lake County (1914) 26 Colo. App. 192, 141 Pac. 861, as in that case the attorney was employed to collect a judgment already recovered, by means of a mandamus proceeding, under an agreement that he should have a contingent fee equal to 20 per cent of the judgment; and, while the court of appeals says that a contract between attorney and client for the payment of the attorney out of a judgment recovered *or to be recovered* operates as a binding equitable assignment pro tanto, the supreme court in the reported case (NICHOLS v. ORR) repudiates this so far as it intimates that such an agreement with respect to a judgment to be recovered gives the attorney an interest in the judgment. A. McT.

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PAUL GOLDEN et al.
v.
DANIEL O'CONNELL, Impleaded, etc., Appt.

West Virginia Supreme Court of Appeals — May 25, 1915.

(76 W. Va. 282, 85 S. E. 533.)

Trust — collection of funds — default of trustee — burden of loss.

1. Funds collected for distribution by a trustee, pursuant to an agreement with lien creditors pending a suit by them, whereby he undertakes, with the assent of the debtor, to sell real estate, and out of the proceeds pay liens in the order of priority as theretofore ascertained by a commissioner authorized for the purpose, should be so applied when and as collected; and if not so applied the ensuing loss, if any, should be charged to the creditors injuriously affected, and not to the debtor, the trustee not being his agent, but the agent of the creditors.

[*See note on this question beginning on page* 463.]

Same — jurisdiction over trustee.

2. Except in so far as necessary to determine and apply the amounts in the hands of the trustee as so agreed, the trustee was not, though subsequently made a party to the suit, subject to the direction and control of the court having jurisdiction of the suit, the agreement being one in pais, merely by virtue of the reference for the ascertainment of liens on the debtor's real estate.

Principal and agent — collection by agent — effect.

3. Where one appoints an agent to act on his behalf in the receipt and disbursement of a fund, the transaction is complete, as to the debtor, when the fund reaches the hands of the agent; payment to him being the equivalent of the payment to the principal.

Headnotes by LYNCH, J.

APPEAL by defendant O'Connell from a decree of the Circuit Court for Greenbrier County in plaintiffs' favor in a suit to enforce a judgment lien against defendants' land. *Reversed.*

The facts are stated in the opinion of the court.

Mr. R. S. Turk, for appellant:

No intelligent or proper sale can be made without a survey of the lands.

Hull v. Hull, 35 W. Va. 166, 29 Am. St. Rep. 800, 13 S. E. 49.

Messrs. **John A. Preston** and **William Gordon Mathews** also for appellant.

Mr. **Andrew Price**, for appellees:

It is not error to fail to name the place of sale.

Long v. Perine, 41 W. Va. 314, 23 S. E. 611.

Any mistake committed by the officers of the court or gentlemen of the bar in the entry of a decree may be corrected on motion at a succeeding term.

Marr v. Miller, 1 Hen. & M. 204.

A survey of the lands before sale was not required.

Barger v. Buckland, 28 Gratt. 850.

Messrs. **L. M. McClintic** and **F. R. Hill** also for appellees.

Lynch, J., delivered the opinion of the court:

After this cause was remanded on the former appeal (69 W. Va. 374, 71 S. E. 384), the commissioner appointed, acting pursuant to the order of reference, reported, among other things, a fund of $4,080.28 in the hands of Nelson as trustee, under the agreement between defendant and some of his creditors whereby certain of his lands were to be

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sold, and the proceeds applied to the discharge of their liens. He also reported, as the first lien against defendant's property, a debt of $6,164.38 in favor of A. F. Mathews, who joined in the agreement mentioned. The court by its final decree, providing for a sale of defendant's property (other than that so sold by agreement) to satisfy the numerous liens adjudged against it, credited the trust fund on the Mathews debt as of January 12, 1912, three years or more after its receipt by the trustee.

The principal contention on the present appeal is that this was error; that the money so placed in the hands of Nelson should have been credited as of the date of its receipt by him. The agreement between defendant and his creditors was executed August 4, 1908. It authorized a sale by defendant of certain lots owned by him, and provided that the assenting creditors did thereby "appoint and constitute W. E. Nelson their true and lawful attorney, and empower him to execute in their names and under their seals a release of the lien to the purchaser of any lot or lots from the said land upon receipt from such purchaser of the proceeds of the price of said lot or lots, less the expenses and cost of sale, to be applied upon the liens on said land in their order and priority as reported in the suit."

In view of these express stipulations, the decree is manifestly erroneous. Nelson became the agent solely of the creditors, to receive and disburse for them the funds arising from the lot sales. He acted in that capacity for them alone. They, not defendant, appointed him, and conferred and defined his authority. Prior to the trust agreement the Mathews debt had been duly ascertained by a commissioner as the first lien against defendant's property. There was no exception at any time thereafter as to its validity. Its amount was in excess of the sum afterward coming into Nelson's hands. As to these amounts there is no controversy. By the concluding clause of the agreement the proceeds of the lot sales were to be "applied upon the liens on said land in their order and priority as reported in the suit." Properly interpreted, this meant that the fund derivable from sale of the land should be applied first to the Mathews debt, and the surplus, if any, to liens subsequent in priority. Hence there could be no doubt or dispute as to the particular debt to which such fund was properly applicable.

Trust—collection of funds—default of trustee—burden of loss.

In the absence of any fact constituting good cause for delay, and none appears in the record, it was the duty of Nelson to make application of the fund coming into his hands promptly upon its receipt. The court had not assumed or exercised any control over this money, or over his functions and duties as prescribed by the instrument of his appointment. Nor did defendant have any such control. The assent of the latter to sale of lots particularly described, and to the application of the proceeds therefrom to liens specific and certain, constituted, in effect, a lawful appropriation, pro tanto, of his property to payment of such claims in so far as the land so set apart should be sufficient for that purpose. Clearly, he was entitled to have these entire proceeds applied, upon their receipt by Nelson, to the principal and interest of the Mathews debt. Where one appoints a person as his agent to receive a sum of money agreed to be paid in satisfaction of a claim, the settlement is complete the moment the agent receives payment. Florida C. & P. R. Co. v. Ragan, 104 Ga. 353, 30 S. E. 745. Payment to the authorized agent of a creditor by the debtor is equivalent to payment to the creditor himself. Bicknell v. Buck, 58 Ind. 354. So, it has been held that when money intended for the payment of a note has

Same—jurisdiction over trustee.

Principal and agent—collection by agent—effect.

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reached the hands of an agent authorized to collect it the debt is paid. Boyd v. Pape, 2 Neb. (Unof.) 859, 90 N. W. 646; Stuart v. Stonebraker, 63 Neb. 554, 88 N. W. 653; Pochin v. Knoebel, 63 Neb. 768, 89 N. W. 264; Osborne v. Gatewood, — Tex. Civ. App. —, 74 S. W. 72.

Sufficient proof, however, is lacking for the correct determination of the time as of which the Nelson fund should be credited on the Mathews debt. The present record shows that in June, 1911, after the decision of the first appeal, the cause was referred to S. N. Pace as commissioner, with direction to ascertain the amount, status, and proper application of the fund. But in August, 1912, his report theretofore made was, upon exception and affidavit, rejected and excluded from the record, because of the prior relationship of the commissioner as counsel for certain of the creditors. It does not appear what his report was. The same order substituted as commissioner W. L. Kershner, who later reported the sum of $4,080.28 as held by Nelson, trustee. While it does appear from Nelson's testimony before Kershner in September, 1912, that the sales of lots from which this sum was derived took place on August 6, 7, and 8, 1908, that Nelson at the time of his examination had disbursed the entire fund, and as a witness was then requested, and promised, to file before the commissioner certain exhibits, specifically designated, showing an account of his collections and disbursements, these exhibits (which, it would seem, accompanied the Pace report) do not appear in the record; nor does the record in any wise show either the date of collection or of disbursement.

The decree is further erroneous in the omission of an adjudication of the deed of trust debt of Daniel Reiter, amounting to $2,796.66. The lien was reported as a valid one against defendant's property, and there was no exception to the commissioner's finding. Doubtless, the omission was due, as intimated in argument, to inadvertence of counsel in the draft of the final decree. The mistake should be corrected by the chancellor when the cause is remanded to him for further proceedings. The question raised as to costs may likewise be adjusted at that time in accordance with the equities then appearing.

We do not find merit in the other assignments. It is not suggested in what respect the bill was improperly amended by the addition of further parties, among whom were Nelson, trustee, and vendees in the lot sales who were still indebted on the notes given by them for deferred instalments of the purchase money. Nor was defendant prejudiced, as claimed, by the absence of direct proof of the will of A. F. Mathews, on whose debt the Nelson fund was credited. The objection goes merely to the authority of his executors to receive payment. Prior to the first appeal the court, on the suggestion of the death of A. F. Mathews, the creditor, ordered a revival and a scire facias against his personal representatives. No writ was issued. But the court, by subsequent order, reciting that his three executors (naming them) had appeared and proved their claims before the commissioner then acting, directed that the suit stand revived as to them. On that appeal it was assigned as error that no writ of scire facias was required to be issued; but this court did not pass upon that assignment. When the case was remanded, the executors were made parties to the amended bill, which alleged that they were lien creditors of defendant, and thus was cured the irregularity, if any, in the revival; and no issue as to their representative authority was ever thereafter raised, either by answer or plea, by exception to Commissioner Kershner's report, or otherwise. At no time during the protracted litigation was the debt questioned, either as to amount or validity. Hence, we cannot disturb the decree on this ground.

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The remaining question is whether the decree is erroneous in failing to designate a place for the sale directed to be made of defendant's property to satisfy the liens against it. The terms and mode of sale were fixed, commissioners therefor appointed, and newspaper advertisement directed. The statute (§ 1, chap. 132, Code [§ 4931]) does not require that the court shall fix the place of sale. That section provides that the court "may direct the sale to be [made] for cash, or on such credit and terms as it may deem best; and it may appoint a special commissioner to make such sale." The following section provides that "in the advertisement the commissioner shall state the time, terms and place of sale." The last provision would seem to leave the place of sale to the discretion of the commissioner, subject to review thereof as to the reasonableness of his requirement.

For the reasons assigned, we reverse the decree of December 11, 1912, and remand the cause, with directions to ascertain the date Nelson received the funds in his hands, and to apply them as of that date to the Mathews lien, and to correct the other errors herein designated.

ANNOTATION.

Who bears loss of funds held by third person, or deposited in court, awaiting outcome of litigation.

It seems that where a party, in obedience to an order of court, makes a deposit of money in court, a loss thereof must, as between the parties to the proceeding, be borne by him who is found to be entitled ultimately to the fund in court. Thus, in Gill v. Barbour (1885) 80 Va. 11, it appeared that in a chancery action a tract of land was sold under order of the court. On the death of intestate, the purchaser thereof, a portion of the purchase money was left unpaid. The land was thereafter sold in chancery for the payment of the debts of decedent, the purchaser thereof also becoming, by assignment, the owner of the other debts of deceased, except the lien due on the original purchase, the amount of which was thereafter fixed by the court's decree, and paid into court by the purchaser of the fee. The fund was lost by the failure of a bank. Holding that the loss fell on the lien holder, the court said: "He has not only paid this part of the purchase money, but he has paid the entire purchase money, in the manner approved by the court. The commissioners were directed to allow him credit for the debts he had become the owner of, and to collect of him the balance of the purchase money, accurately described and determined by a master's report in the cause; and a rule was awarded against him to show cause why the land should not be resold to pay this particular sum of money, and a decree was entered directing him to pay this sum, the balance of the purchase money, within sixty days. This sum was not only the purchase money, but all the purchase money with which the court could charge him or decree against him. He came into court, and paid the purchase money into court, and the court took charge of it and held it, for reasons which were doubtless deemed judicious, and dispensed a part of it, and proceeded to collect the residue, when the bank failed. The money was in the hands of the court, in effect, . . . and the decree of the circuit court, being in effect to require this purchaser to insure the money in the hands of the court, into which he has been compelled by its process to pay it, is erroneous, and should be reversed and annulled."

In Elkin v. Elkin (1899) 29 Misc. 513, 61 N. Y. Supp. 947, an application was made for an order requiring the payment to the petitioner, by the city chamberlain, of a sum deposited in this action to the credit of petitioner, which sum, together with sums from other funds, had been united in a loan.

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on a single mortgage, afterwards foreclosed, and the property bid in by the present chamberlain's predecessors, and it appeared that loss was likely to ensue. The motion was denied on the ground that to permit a present withdrawal of one fund before the loss should be determined might prove inequitable as to funds not so withdrawn, as "an equitable and beneficial distribution of this loss" would require that it should "fall pro rata upon all of the funds going to make up the aggregate investment."

A deposit in court by the consent of all parties, to await the outcome of litigation, has been said to be held at the risk of all. Mansfield v. First Nat. Bank (1893) 6 Wash. 603, 34 Pac. 143, wherein it was held that where the proceeds arising from a sale of property, for the recovery of the possession of which the action was originally brought, have been allowed to remain in the hands of an officer of the court by consent of all parties to the action, the risk incident to such holding, from the time of the deposit with the court, is the risk of all, and neither of them could thereafter be held responsible for its safe-keeping as against the other.

In the reported case (GOLDEN v. O'CONNELL, ante, 460), it is held that an agreement between the plaintiffs in a creditors' suit, and the defendant debtor, providing for the sale of certain property by defendant, and the application of the proceeds by a trustee named by the creditors, constitute the trustee the agent of the creditors, who must bear any loss arising out of the handling of fund.

But the loss of money negligently deposited by a party to an action, without an order of the court, or any subsequent recognition of it as a fund in court, must be borne by the party making the deposit. Hammer v. Kaufman (1865) 39 Ill. 87. In that case the complainant, in an action to redeem, deposited a sum of money with the clerk of the court, presumably for the purpose of a tender, but without any order of the court, or any form of recognition by the court or the defendants that the sum deposited was a fund in court; nor was any reference made to the deposit in the decree rendered, and the deposit was subsequently withdrawn. On a motion to reinstate the case, and for a rule requiring the clerk to pay over to the defendants the amount of tender, the court said: "As this money failed to become a fund in court, had the clerk by any means lost it, complainant would have been compelled to sustain the loss, and not the defendants."

In De Peyster v. Clarkson (1828) 2 Wend. (N. Y.) 78, on the taking of an account of a defendant executor by a master in chancery a balance was reported in favor of the complainants, to which report the complainants excepted, but the defendant acquiesced, and before the exceptions were heard, the complainants asked for an order that the sum so reported should be paid over to them or brought into court, without prejudice to their exceptions. "The order was granted that the sum reported, with the interest thereof, be brought into court, and invested to the credit of the cause. The money was brought in and invested in the public funds, and by a subsequent order, on the application of the complainants, the defendant was directed to pay to the complainants the amount thus brought into court, or, in default thereof, the assistant register was required to sell the stocks in which the same had been invested, and to pay the amount reported to the complainants. The defendant paid the amount deposited to the complainants, and presented his petition to the chancellor, stating that the stock in which the money deposited had been invested had been sold by the assistant register at a loss of $1,180.76, and praying that so much might be paid into court by the complainants, to abide the further order of the court. The petition was opposed by the complainants, on the ground that they were desirous to receive the money, instead of having the same paid into court; but that the defendant refused to pay it to them, unless they received the

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same in full satisfaction, and abandoned their exceptions; and that they advised the investment of the funds in stock of a particular kind, which, if complied with, would have yielded a profit, instead of producing a loss, but that the defendant refused to consent to any arrangement." In holding the executor responsible for loss in the sale of the stock, the court said: "The amount paid into court by the appellant, under the order of the 7th of June, 1824, was paid to the credit of the cause generally, and not in extinguishment or satisfaction of so much of the complainants' demand; it was strictly a deposit, not a payment, invested by order of the court, and retained under its control, to abide such disposition as the final merits of the cause should show to be just and equitable. The investment of it was the act of the court, not of the complainants; and the collateral evidence shows that the complainants were willing to receive it as a payment, to which the defendant objected, unless it was received as a payment in full, and the suit discharged. It also appears that the suggestions of the complainants as to the best mode of investing the stock were not attended to by the defendant; and that if the proposition had been conceded to no loss would have been sustained. If the investment had proved advantageous, the defendant would certainly have reaped the profit of it; and I perceive no principle of equity upon which he can be relieved from the loss, if any loss has been sustained."

H. D. M.

BOARD OF TRUSTEES OF LAWRENCE UNIVERSITY, Appt.,

v.

OUTAGAMIE COUNTY, Respt.

Wisconsin Supreme Court—June 4, 1912.

(150 Wis. 244, 136 N. W. 619.)

Tax — special exemption to university — constitutionality.

1. A special exemption from taxation of all real estate owned by a certain university is in conflict with a constitutional provision requiring uniformity of taxation, if, by general laws, real estate of such institutions to a certain amount is exempt when reserved for grounds of the institution.

[*See note on this question beginning on page* 471.]

Same — literary or scientific school,

2. An incorporated school is a scientific or a literary association within the meaning of a statute exempting from taxation all personal property owned by any religious, scientific, literary, or benevolent association, and real estate to a certain amount necessary for the location and convenience of buildings.

Constitutional law — when law unconstitutional.

3. A law ought not to be declared unconstitutional unless its repugnancy to the Constitution is clear and beyond reasonable doubt, and the court should be able to point out the particular part of the Constitution which is violated.

Tax — power to exempt from taxation.

4. Unless restrained by constitutional provisions the legislature has full power to exempt any person or corporation or class of property from taxation, according to its views of public policy or expediency.

Same — exemption — violation of constitutional requirement.

5. The constitutional requirement that the rule of taxation shall be uniform is violated where the exemption is arbitrary, and other persons of the same class owning property of the same general description are awarded exemptions of a larger amount.

Same — arbitrary exemptions.

6. The rule of uniformity in tax-

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ation required by the Constitution does not relate alone to the rate or percentage of taxation, and may be as effectually abrogated by arbitrary exemptions from taxation as by arbitrary impositions of unequal amounts.

Constitutional law — practical construction — effect.

7. Uninterrupted practice of the government, prevailing through a long series of years with the acquiescence of all departments, settles a constitutional interpretation in accordance with such long-continued practice.

Same — failure of judiciary to acquiesce — effect.

8. Failure of the judicial department to acquiesce destroys the effect of an alleged practical construction of a constitutional provision.

Statute — practical construction — when applicable.

9. To apply the doctrine of practical construction to a statute, the statutes so construed must be doubtful, ambiguous, or uncertain.

APPEAL by plaintiff from a judgment of the Circuit Court for Outagamie County disallowing its claim filed for the recovery of taxes paid by it under protest. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **Nash & Nash**, for appellant:

Unless restrained by constitutional provisions, the legislature of a state has full power to exempt any persons or corporations or classes of property from taxation, according to its views of public policy or expediency.

Cooley, Const. Lim. 3d ed. 127; 37 Cyc. 885; State ex rel. Atty. Gen. v. Winnebago Lake & F. River Pl. Road Co. 11 Wis. 35; Wisconsin C. R. Co. v. Taylor County, 52 Wis. 37, 8 N. W. 833; Jefferson Branch Bank v. Skelly, 1 Black, 436, 17 L. ed. 173; Nobles County v. Hamline University, 46 Minn. 316, 48 N. W. 1119; Hogg v. Mackay, 23 Or. 339, 19 L.R.A. 77, 37 Am. St. Rep. 682, 31 Pac. 779; Chicago Theological Seminary v. Illinois, 188 U. S. 662, 47 L. ed. 641, 23 Sup. Ct. Rep. 386; Northwestern University v. Illinois, 99 U. S. 309, 25 L. ed. 387; Home of the Friendless v. Rouse, 8 Wall. 430, 19 L. ed. 495; New Jersey v. Wilson, 7 Cranch, 164, 3 L. ed. 303; Minot v. Philadelphia, W. & B. R. Co. 18 Wall. 206, 21 L. ed. 888; St. Anna's Asylum v. New Orleans, 105 U. S. 362, 26 L. ed. 1128; Pratt Institute v. New York, 183 N. Y. 151, 75 N. E. 1119, 5 Ann. Cas. 198; Brown University v. Granger, 19 R. I. 704, 36 L.R.A. 847, 36 Atl. 720; Stahl v. Kansas Educational Asso. 54 Kan. 542, 38 Pac. 796; New Haven v. Sheffield Scientific School, 59 Conn. 163, 22 Atl. 156.

Messrs. **Francis J. Rooney** and **H. C. Sloan**, for respondent:

Section 1 of article 1 of the Constitution of Wisconsin requires all law to be free from arbitrary discrimination for or against any person or class of persons, not distinguishable from others, in respects germane to taxation.

Nunnemacher v. State, 129 Wis. 190, 9 L.R.A.(N.S.) 121, 108 N. W. 627, 9 Ann. Cas. 711; State ex rel. Kellogg v. Currens, 111 Wis. 431, 56 L.R.A. 252, 87 N. W. 561; Black v. State, 113 Wis. 205, 90 Am. St. Rep. 853, 89 N. W. 522; State ex rel. Zillmer v. Kreutzberg, 114 Wis. 530, 58 L.R.A. 748, 91 Am. St. Rep. 934, 90 N. W. 1098; State v. Whitcom, 122 Wis. 110, 99 N. W. 468.

The requirements of the uniformity rule have repeatedly been held to permit classification of subjects of taxation, provided uniformity in the class is maintained.

Milwaukee & M. R. Co. v. Waukesha County, 9 Wis. 431, note; Wisconsin C. R. Co. v. Taylor County, 52 Wis. 37, 8 N. W. 833; Kingsley v. Merrill, 122 Wis. 185, 67 L.R.A. 200, 99 N. W. 1044, 2 Ann. Cas. 748; Black v. State, 113 Wis. 205, 90 Am. St. Rep. 853, 89 N. W. 522.

Timlin, J., delivered the opinion of the court:

The plaintiff is an educational corporation created by the territorial legislature of Wisconsin in the year 1847. By chapter 116, Laws of Wisconsin for 1901, the plaintiff's charter was amended in several respects, and by § 8 of this act its board of trustees was authorized to "hold free of taxation any lands or other property acquired by dona-

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tion, bequest, or purchase and held expressly for educational purposes and for the endowment of the institution." At the time of the enactment of the statute last mentioned, there existed and was in force in this state § 1038, Stat. 1898, which related to property exempt from taxation, and among other things provided the following: "Personal property owned by any religious, scientific, literary or benevolent association, and the real property, if not leased or not otherwise used for pecuniary profit, necessary for the location and convenience of the buildings of such association and embracing the same, not exceeding ten acres; and the lands reserved for grounds of a chartered college or university, not exceeding forty acres." An incorporated school is a "scientific" or a "literary" association within the meaning of this statute. St. John's Military Academy v. Edwards, 143 Wis. 551, 139 Am. St. Rep. 1123, 128 N. W. 113.

Tax—literary or scientific school.

Notwithstanding the exemption provided by said chapter 116, and claiming that that part of the statute was unconstitutional, the taxing officers in 1908 assessed certain city real estate of the plaintiff for general taxes. The plaintiff paid these taxes under protest and brought this action in the regular way by appeal from the county board of supervisors to recover the sum so paid. The controlling question in the case is whether or not that part of the Act of 1901 above quoted is valid and constitutional.

It is conceded that a law ought not to be declared unconstitutional unless its repugnance to the Constitution is clear and beyond reasonable doubt, and the court should be able to point out the particular part of the Constitution which is violated.

Constitutional law—when law unconstitutional.

It is further conceded that, unless restrained by constitutional provisions, the state legislature has full power to exempt any person or corporation or class of property from taxation, according to its views of public policy or expediency. Cooley, Const. Lim. 3d ed. 127; Wisconsin C. R. Co. v. Taylor County, 52 Wis. 37, 8 N. W. 833.

Tax—power to exempt from taxation.

Section 1 of article 8 of the state Constitution reads: "The rule of taxation shall be uniform and taxes shall be levied upon such property as the legislature shall prescribe." This section has been the subject of much litigation and much discussion in this court. In Black v. State, 113 Wis. 205, 90 Am. St. Rep. 853, 89 N. W. 522, this court was confronted with a statute which imposed an inheritance tax upon estates of the value of $10,000 or upwards. Estates below this value were exempt. A fair summary of one of the points decided in that case may be found in the third paragraph of the syllabus, as follows: "Under § 1, art. 8, Const., providing that the rule of taxation shall be uniform, and under the equality in the protection of the laws guaranteed by § 1, art. 1, Const., and amendment 14 to the Federal Constitution, a classification of persons or property liable to or exempt from taxation does not violate the required rule of uniformity and equality, provided such classification be founded on real differences, affording rational grounds of distinction, and the exemption be reasonable in amount." The decision, it will be observed, does not put the invalidity of the statute solely or squarely upon its conflict with § 1, art. 8, Const., but recognizes such conflict and finds the statute avoided by this and other constitutional provisions.

In Battles v. Doll, 113 Wis. 357, 89 N. W. 187, a statute exempting villages from certain taxes was before this court for construction, and the court said, among other things: "This exemption has a just and equitable basis to rest upon, and will be sustained, unless the class of

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cities and villages to which it is made to apply is such as cannot be justified under a proper construction of the Constitution. From the very nature of things, any classification made must, to a greater or less extent, be arbitrary. The grounds upon which such classification must rest were stated in Johnson v. Milwaukee, 88 Wis. 383, 60 N. W. 270, and reaffirmed in Boyd v. Milwaukee, 92 Wis. 456, 66 N. W. 603, and Adams v. Beloit, 105 Wis. 363, 47 L.R.A. 441, 81 N. W. 869. We need not repeat what was said in those cases. The general doctrine is that the classification must be appropriate, and not artificial." These and other observations in that opinion plainly indicate that this court was then of the opinion that classification was essential to the validity of exemptions under some circumstances.

In State v. Whitcom, 122 Wis. 110, 99 N. W. 468, it was decided that exemptions from the provisions of a law requiring peddlers to obtain a tax license must be based on some legitimate classification, germane to the purpose of the law, or else the law is invalid. This because it denied the equal protection of the laws. Whether it was invalid under § 1, art. 8, was mooted but not decided. Legal classification was held to be a requisite, but the statute failed because of its conflict with other provisions of the Constitution. It is said, however, that the question whether or not such unclassified and arbitrary exemptions conflicted with § 1 of article 8 of the state Constitution was one not yet authoritatively decided.

In Chicago & N. W. R. Co. v. State, 128 Wis. 642, 643, 108 N. W. 581, the court said: "Under our Constitution, it must be remembered there is the amplest power on the part of the legislature to exempt an entire class of property from taxation, and to make such class very narrow, even excluding from the benefits accorded to the members thereof those owning property of the same general class, so long as the character of that owned by those of the subclass is so far different from that owned by others, as, within the boundaries of reason at least, to suggest necessity or propriety, having regard to the public good and the constitutional object to be attained, and limitations in respect thereto, of substantially different legislative treatment. Few cases that can be found have gone further on that line than Wisconsin C. R. Co. v. Taylor County, 52 Wis. 37, 8 N. W. 833. There, as we have seen, a very small subclass of real estate—a class so small as to be confined to one owner—was deemed sufficiently different from realty generally to warrant the legislature in exempting it from taxation. It is not likely, as we have before indicated, that this court will soon go further on that line than it did in that case." Here we have, I think, an express and authoritative recognition of the necessity for classification in making exemptions.

In State ex rel. Sanderson v. Mann, 76 Wis. 469, 45 N. W. 526, 46 N. W. 51, we find Mr. Justice Cassoday, who wrote the majority opinion in Wisconsin C. R. Co. v. Taylor County, supra, earnestly, almost vigorously, protesting against any interpretation of the opinion in the last-mentioned case which would authorize exemption except upon some principle of classification, or which would authorize arbitrary exemptions. This, as we understand it, expressly recognizes that classification is necessary, although the classification is a very liberal one.

Same—exemption—violation of constitutional requirement.

When we are presented with a case in which the exemption is arbitrary and in which other persons of the same class, owning property of the same general description, are awarded exemptions of a lesser amount, the situation is one in which the rule of uniformity is violated. It is impossible under the most liberal rule of classification to sustain it as a classification, because the class is

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already made, and the situation is one in which a different amount of exemptions is allowed to one person of the class than to others of the same class. For example, in § 1038, subd. 11, there is an exemption from taxation of wearing apparel, family portraits, etc., not exceeding in value $200, and kitchen and other household furniture not exceeding in value $200. Here the class is determined by description of the property exempted. The rule of uniformity would be destroyed by an additional provision that certain persons of the same class should have $800 exemptions of this class of property. So, where the class consists of the property of certain described persons as religious, scientific, literary, or benevolent associations, except one or more, naming them. The legislature had, by § 1038, for the purpose of providing exemptions, created a class consisting of chartered colleges or universities, and prescribed the exemptions for that class. Aside from the Act of 1901, the plaintiff is entitled to all the exemptions of that class found in § 1038. Plaintiff unquestionably belongs to the class entitled to these exemptions. There is, as we view it, by the Act of 1901, conferred upon the plaintiff arbitrarily, and not as a class, an additional exemption from taxation based on no distinctive feature of the person receiving the exemption or the property exempted. It is very plain that the rule of uniformity mentioned in the Constitution does not relate alone to the rate or percentage of taxation. It is equally obvious that the rule of uniformity may be as effectually abrogated by arbitrary exemptions from taxation as by arbitrary impositions of unequal amount. The words of the Constitution, while recognizing the power of the legislature to designate the property upon which taxes shall be laid, limit this power in some degree by the requirement that the rule of taxation shall be uniform. The section of the Constitution mentioned must stand in its full integrity, and the designation of property to be taxed is to be exercised in obedience to the command that the rule of taxation shall be uniform. The authorities hereinbefore cited sufficiently show that this court has endeavored in the past to adhere to this construction of the statute, recognizing, however, in the legislature a broader power of classification for the purpose of designating what property shall be taxed than is ordinarily possessed in relation to other subjects requiring classification.

Same—arbitrary exemptions.

The appellant cites numerous instances, from 1855 to 1911, in which the legislature of Wisconsin has, by private and local act or general statute, exempted from taxation certain described property of a designated corporation or association. It is thence argued that the Wisconsin legislature has from a very early day placed such construction upon § 1 of article 8 of the state Constitution as to permit it to exercise this power, notwithstanding that constitutional provision. The case of Dean v. Borchsenius, 30 Wis. 236, and other like cases, are invoked in support of the rule that the uninterrupted practice of the government, prevailing through a long series of years, and the acquiescence of all its departments, settle a constitutional interpretation in accordance with such long-continued practice. The principle, which we recognize, is not, however, controlling in the instant case: (1) Because, as it appears from the citations given, there was no such acquiescence on the part of the judicial department of the state; (2) few of the instances brought forward support the conclusion. The list starts out with the Private and Local Law of 1855 (chap. 82) incorporating the Hesperian Society of the University of Wisconsin, and exempting from taxation its per-

Constitutional law—practical construction—effect.

Same—failure of judiciary to acquiesce—effect.

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sonal property and the real estate actually occupied by it for the purposes for which it was incorporated. If there were no other members of that class, or if property used for the purposes of the Hesperian Society constituted a class, or, in other words, was unique and distinct in its uses or purposes from any other property in the state of Wisconsin, the act would be of undoubted validity and no precedent for the interpretation sought to be placed by appellant upon the section of the Constitution in question. Chapter 104 of the Private and Local Laws of 1855, which incorporates the Columbus Collegiate Institute and exempts from taxation its library, apparatus, cabinet, and lands not exceeding 10 acres, is next cited. This is not materially different from subd. 3 of § 1038, Stat. 1898, and is not entitled to the interpretative weight given it by the appellant. The same is true of chapter 516, Private and Local Laws of 1856; chapter 282, Private and Local Laws of 1867; chapter 334, Private and Local Laws of 1863; chapter 382, Private and Local Laws of 1870, etc. The considerations mentioned with reference to chapter 82, Private and Local Laws of 1855, also apply to the instances covered by chapter 203, Laws of 1861; chapter 441, Laws of 1865; chapter 68, Laws of 1866; chapter 59, Private and Local Laws of 1869; and chapter 324, Private and Local Laws of 1870. In the large list of acts mentioned there are instances in which the exemption is arbitrary. But, as we have seen, these instances occurred in the legislative branch of the government, while this court has been declaring the opposite rule. Many of the acts mentioned were passed at a time when the corporations or associations whose property was exempted were the first or only one of that kind existing in the state, and before the state legislature had by general act classified exemptions from taxation so as to bring such corporation or association into a class. Those instances cited which show a clear violation on the part of the legislature of § 1 of article 8 of the state Constitution, going to destroy the requirement of uniformity by arbitrary exemptions, prove too much. "The rule that practical construction of a law will be regarded by the court as controlling, after long acquiescence, is invoked. That rule is familiar, and that it may apply where a constitutional question is involved. Dean v. Borchsenius, supra. But it has no application to a legislative enactment which, in neither its literal sense nor its application to the subject it affects, is ambiguous. In such a case there is no room for the operation of the rule of practical construction, or any other. The act must be taken to mean what its language obviously indicates, regardless of the length of time that the contrary view has obtained. Travelers' Ins. Co. v. Fricke, 94 Wis. 258, 265, 68 N. W. 958." Milwaukee County v. Isenring, 109 Wis. 9, 27, 53 L.R.A. 635, 85 N. W. 131.

Turning to the case last mentioned in the above quotation, we find it there stated: "The doctrine of practical construction of a doubtful statute is well understood, and it has been recognized and acted upon by this court. Scanlan v. Childs, 33 Wis. 663; State ex rel. Hudd v. Timme, 54 Wis. 318, 11 N. W. 785. It is an absolute requisite, however, in the application of the doctrine, that the law so construed must be doubtful, ambiguous, or uncertain. It can have no force against plain language. 'A customary violation of the plain language of the law gives no authority for continuing such violation.' State ex rel. Raymer v. Cunningham, 82 Wis. 39, 50, 51 N. W. 1133; Sutherland, Stat. Constr. § 308; State ex rel. Weiss v. District Bd. 76 Wis. 177, 7 L.R.A. 330, 20 Am. St. Rep. 41, 44 N. W. 967." "Acquiescence for no length of time can legalize a clear usurpation of power, where the people have plainly expressed

Statute—practical construction—when applicable.

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their will in the Constitution and appointed judicial tribunals to enforce it." Cooley, Const. Lim. 7th ed. chap. 4, pp. 106, 107.

In the application of this section of the Constitution to some cases there may arise doubt or ambiguity. But I think not with reference to the case here before the court, where at and prior to the passage of the Exemption Law the class to which the corporation belongs, and in which it is included, is fixed by the legislature and provided with a definite exemption of property from taxation. The new statute giving this particular corporation, eo nomine, a further and additional exemption of the same general class of property plainly contravenes the rule of uniformity of taxation required by the Constitution, and is for that reason invalid. It follows that the judgment appealed from must be affirmed.

Tax—special exemption to university—constitutionality.

Marshall, J., took no part.

ANNOTATION.

Constitutionality of exemption of particular educational, religious, or charitable institution from taxation.

The power of the legislatures of the various states to grant exemptions from taxation is limited only by constitutional provisions. In the absence of some constitutional limitation, it seems clear that the legislature may make any exemptions it desires to make. Charters exempting educational, religious, or charitable institutions from taxation have been sustained in a number of instances; in some, without referring to any constitutional provisions; in others, under constitutional provisions hereinafter discussed. Home of the Friendless v. Rouse (1869) 8 Wall. (U. S.) 430, 19 L. ed. 495; Washington University v. Rouse (1869) 8 Wall. (U. S.) 430, 19 L. ed. 498; Northwestern University v. Illinois (1878) 99 U. S. 309, 25 L. ed. 387; St. Anna's Asylum v. Parker (1903) 109 La. 592, 33 So. 613; Nobles County v. Hamline University (1891) 46 Minn. 316, 48 N. W. 1119; St. Vincent's College v. Schaefer (1891) 104 Mo. 261, 16 S. W. 395 (charter exemption); University of the South v. Skidmore (1888) 87 Tenn. 155, 9 S. W. 892.

In Paving Dist. v. Sisters of Mercy (1908) 86 Ark. 109, 109 S. W. 1165, 15 Ann. Cas. 347, there is dictum to the effect that in an action involving a charter exemption, under the Arkansas Constitution of 1836 the legislature had authority to exempt property from taxation; and in Zable v. Louisville Baptist Orphans' Home (1891) 92 Ky. 89, 13 L.R.A. 668, 17 S. W. 212, there is dictum of like effect, stating with reference to an exemption claimed by an orphan asylum that, it being the duty of the state to care for its indigent orphans, if this service is rendered by another, the legislature may, without regard to the extent of the service, exempt property devoted to such use from taxation.

The legislature may confer upon a university, in the charter creating it, exemption from taxation of all its property, including property other than the university proper, and the necessary grounds for its proper use. Nobles County v. Hamline University (1891) 46 Minn. 316, 48 N. W. 1119. The exemption in the charter of a university of the "college estate" from taxation, which was construed to include land constituting a part of the endowment of the university, was treated as a valid exemption in Brown University v. Granger (1896) 19 R. I. 704, 36 L.R.A. 847, 36 Atl. 720, and held not to be repealed by a constitutional provision, subsequently enacted, that the burden of the state ought to be fairly distributed among its citizens. In Green Bay & M. Canal Co. v. Outagamie County (1890) 76 Wis. 587, 45 N. W. 536, a statute exempting all the real and personal property of "Turner" societies, incorporated under the laws of the state and used exclusively for educational

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purposes, was treated as valid, but there is no discussion. In Com. v. Hampton Normal & Agri. Institute (1907) 106 Va. 614, 56 S. E. 594, an exemption was contained in the charter of the institute in question, but it is stated that no charter or contractual right to exemption was conferred other than was conferred upon property of other educational institutions of the state, and upon this theory the exemption was sustained. It was held that certain property which was leased by the institute was subject to taxation, just as the property of a resident citizen, but that the leasing of this property did not render the entire property of the institute subject to taxation.

The validity of the exemption of a particular institution, granted in its charter, has been assumed in a few cases, and, so assuming, it has been held that such an exemption cannot be taken away. St. Anna's Asylum v. New Orleans (1882) 105 U. S. 362, 26 L. ed. 1128, reversing (1879) 31 La. Ann. 292; New Orleans v. Poydras Orphan Asylum (1881) 33 La. Ann. 850. Thus, business property belonging to an orphan asylum, the income from which was used to further the work of the asylum, was held exempt from taxation in St. Anna's Asylum v. New Orleans (U. S.) supra. This is on the theory as established by the United States Supreme Court in Home of the Friendless v. Rouse and Washington University v. Rouse (U. S.) supra, and quite generally adopted by other courts, that such a legislative exemption is a contract with the exempted institution; that the consideration for the contract consists in the objects for which the corporation was created. The court states: "There is no necessity of looking for the consideration for a legislative contract outside of the objects for which the corporation was created. These objects were deemed by the legislature to be beneficial to the community, and this benefit constitutes the consideration for the contract, and no other is required to support it." Such an exemption being a contract, subsequent constitutional limitations upon the power to exempt have been held to be prospective in operation, and not intended to impair the existing contract. State ex rel. Morris v. Westminster College (1903) 175 Mo. 52, 74 S. W. 990; State ex rel. Orr v. Westminster College (1903) 175 Mo. 62, 74 S. W. 1116. This, of course, presents a different question than the validity of the exemption, and attention is directed to it here only for the purpose of noting the distinction.

As stated above, the validity of any exemption by the legislature is dependent upon constitutional limitations. The exemption of such property is upheld in some of the foregoing cases without referring to any particular constitutional provisions. In St. Vincent's College v. Schaefer (1891) 104 Mo. 261, 16 S. W. 395, the court, in sustaining an exemption of the property of a college, states that such legislation was not then prohibited by any constitutional provision. In other cases constitutional provisions relating to taxation are considered, and held not to prevent the exemption.

Thus, it has been held that under a constitutional provision that "taxation shall be equal and uniform throughout the state, that all property on which taxes may be levied shall be taxed in proportion to its value, to be ascertained as directed by law, and that no one species of property shall be taxed higher than another species of equal value on which taxes shall be levied," the legislature may create a charitable institution and exempt all its property, while other charitable institutions are only exempted as to certain property, since the constitutional provisions above referred to apply only to the levying of taxes, and not to the exemption. St. Anna's Asylum v. Parker (1903) 109 La. 592, 33 So. 613.

A constitutional provision that "all lands liable to taxation, held by deed, grant, or entry, town lots, bank stock and such other property as the legislature may from time to time deem expedient, shall be taxable; all property shall be taxed according to its value, that value to be ascertained in such

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manner as the legislature shall direct, so that the same shall be equal and uniform throughout the state, no one species of property from which a tax shall be taxed higher than any other species of property of equal value," does not prevent the legislature from granting a special charter to a university, in which there is an exemption from taxation of 1,000 acres of land belonging to the university. University of the South v. Skidmore (1888) 87 Tenn. 155, 9 S. W. 892.

The legislature of a state may exempt property belonging to a university and leased by it, for the use and support of such institution, under a constitutional provision authorizing the exemption from taxation of "such . . . property as the general assembly may deem necessary for school . . . purposes." Northwestern University v. Illinois (1878) 99 U. S. 309, 25 L. ed. 387.

See Brown University v. Granger (1896) 19 R. I. 704, 36 L.R.A. 847, 36 Atl. 720, supra.

On the contrary, the power to exempt the property of a particular institution from taxation borne by others in the same class has been denied, under constitutional provisions similar to those construed above. Thus, it has been held that the legislature cannot constitutionally exempt certain property of a particular church under an organic law, the predominant object of which is to provide by a fixed enactment equality in taxation, and prevent as far as possible the burden of supporting the government from falling upon some individuals to the exclusion or exemption of others. It is stated that to exempt the property in question, while similar property of all other churches is taxable, would result in inequality rather than equality of taxation; that the exemption was not to a class, but to a particular organization, and could not be sustained. Baltimore v. Starr Methodist Protestant Church (1907) 106 Md. 281, 67 Atl. 261. It is further stated in Baltimore v. Starr Methodist Protestant Church (Md.) supra, that such an exemption is in conflict with a constitutional provision that no special law for any case for which provision has been made by an existing general law shall be passed by the legislature. The general law in this state provided for certain exemptions to religious bodies, and therefore no special law could be enacted making other exemption.

And see the reported case (LAWRENCE UNIVERSITY v. OUTAGAMIE COUNTY, ante, 465).

The view that a constitutional requirement of uniformity prohibits the exemption of the property of a particular institution is further supported by cases holding that such an exemption is annulled by the adoption of a constitutional provision requiring uniformity. A constitutional provision that property shall be assessed for taxes under general laws and by uniform rules, according to its true value, has been held to abrogate a special law granting an exemption to a particular institution from taxation, which did not constitute a contract between the institution and the state. State, Sisters of Charity, Prosecutor, v. Chatham Twp. (1888) 51 N. J. L. 89, 16 Atl. 225; Cooper v. Hospital v. Camden (1903) 68 N. J. L. 691, 54 Atl. 419.

In Mercantile Library Hall Co. v. Pittsburgh (1887) 9 Sadler (Pa.) 59, 11 Atl. 667, the property of a library association other than that used exclusively for library purposes, all of which property had been exempted by a supplement to the charter of the corporation from all except state taxes, was held subject to taxation upon the adoption of a constitutional amendment, providing that all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under the general laws, but the general assembly may, by general laws, exempt from taxation public property held for public purposes, actual places of religious worship and institutions of purely public charity. A further provision repealed all laws exempting property from taxation other than that enumerated. It is stated by the court that the property of the association, other than that used exclusively

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for its purposes, which included property rented for stores, a theater, and other sundry purposes, was not within the exemptions authorized by the Constitution, nor a statute enacted under the Constitution, which exempted from taxation "all hospitals, universities, colleges, seminaries, academies, associations and institutions of learning, benevolence or charity founded, endowed, and maintained by public or private charity." W. A. E.

GEORGE W. PRICHARD, Appt.,

v.

J. H. FULMER, JR., et al.

New Mexico Supreme Court — June 30, 1916.

(22 N. M. 134, 159 Pac. 39.)

Attorney — waiver of lien — purchase of property by client.

1. An attorney's lien upon a judgment recovered in a foreclosure suit is waived where he permits his client to purchase the property, ordered sold by the court, in satisfaction of the judgment, and the court, without objection on the attorney's part, confirms the sale and approves the deeds for the same to his client, and the attorney's lien upon the judgment does not follow the land when the title is perfected in his client.

[*See note on this question beginning on page* 483.]

Same — lien.

2. Under the common law an attorney had a right to a "general" or "retaining" lien, which attached to all papers, documents, and money that came into his hands professionally as an attorney, under which he was entitled to retain possession of such papers, documents, and money until the money due him for professional services was paid.

Same — charging lien.

3. The courts also recognize what is generally styled an attorney's "charging lien," which was the right of an attorney or solicitor to recover his fees and money expended on behalf of his client from a fund recovered by his efforts, and also the right to have the court interfere to prevent payment by the judgment debtor to the creditor, in fraud of his right to the same, and also to prevent or set aside assignments and settlements made in fraud of his rights.

Same — suit to enforce.

4. The court will not permit an attorney to assert his lien in an independent suit, as by its control of its process in the original suit it can and will afford him an ample remedy.

Headnotes by ROBERT, Ch. J.

APPEAL by plaintiff from a judgment of the District Court for Lincoln County sustaining a demurrer to the complaint in an action brought to enforce a lien for attorney's fees. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. G. B. Barber and Renehan & Wright, for appellant:

The court, in the mortgage foreclosure suit of J. H. Fulmer, Jr., had the power to decree an attorney's lien against the mortgaged property.

Mosely v. Norman, 74 Ala. 424; Andrews v. Morse, 12 Conn. 444, 31 Am. Dec. 752; Carter v. Davis, 8 Fla. 183; Jones v. Groover, 46 Ga. 568; Hunt v. McClanahan, 1 Heisk. 503; Fillmore v. Wells, 10 Colo. 228, 3 Am. St. Rep. 567, 15 Pac. 343; Porter v. Hanson, 36 Ark. 593; Wooten v. Denmark, 85 Ga. 579, 11 S. E. 861; Stockton Sav. & L. Soc. v. Donnelly, 60 Cal. 481; Gray v. Denhalter, 17 Utah, 312, 53 Pac. 976.

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Not only Fulmer, the president of the company, but all the officers, directors, and stockholders, had personal knowledge of the lien.

Hunt v. McClanahan, 1 Heisk. 503; Winchester v. Heiskell, 16 Lea. 556; Whittle v. Tarver, 75 Ga. 818.

A court retains power over its decrees until they are fully complied with.

Porter v. Hanson, 36 Ark. 593; Gray v. Denhalter, 17 Utah, 312, 53 Pac. 976.

There was no such laches as would bar plaintiff from the protection of the court in the enforcement of his lien under the court's decree.

Stone v. Hyde, 22 Me. 318; 16 Cyc. 153.

The remedy sought by plaintiff to enforce his lien was a proper one in a court of equity.

Fillmore v. Wells, 10 Colo. 228, 3 Am. St. Rep. 567, 15 Pac. 343; Lane v. Hallum, 38 Ark. 387; Porter v. Hanson, 36 Ark. 593; Gist v. Hanly, 33 Ark. 233; 4 Cyc. 1021.

Mr. **Lorin C. Collins**, for appellee:

Where a lien for attorneys' fees exists at common law, there are certain duties and obligations imposed upon the attorney asserting such lien; such as notice, the pendency of the suit, diligence, and the control of the res.

Welsh v. Hole, 1 Dougl. K. B. 238, 99 Eng. Reprint, 155; Weeks, Attys. § 379; Chapman v. Haw, 1 Taunt. 341, 127 Eng. Reprint, 865, 9 Revised Rep. 786; Graves v. Eades, 5 Taunt. 429, 128 Eng. Reprint, 755; Barker v. St. Quintin, 12 Mees. & W. 441, 152 Eng. Reprint, 1270, 1 Dowl. & L. 542, 13 L. J. Exch. N. S. 144; Hough v. Edwards, 1 Hurlst. & N. 171, 156 Eng. Reprint, 1164, 26 L. J. Exch. N. S. 54, 2 Jur. N. S. 814; Hawkins v. Loyless, 39 Ga. 5; Green v. Southern Exp. Co. 39 Ga. 20; Pinder v. Morris, 3 Caines, 165; People ex rel. Ulster County v. Hardenburgh, 8 Johns. 335; McDowell v. Second Ave. R. Co. 4 Bosw. 670; 2 Treaties, Attorneys at Law, p. 572; Frissell v. Haile, 18 Mo. 18; Celluloid Mfg. Co. v. Chandler, 27 Fed. 9; Manning v. Leighton, 65 Vt. 84, 24 L.R.A. 684, 26 Atl. 258; Marr v. Smith, 4 Barn. & Ald. 466, 106 Eng. Reprint, 1007.

Roberts, Ch. J., delivered the opinion of the court:

Appellant was employed by Jacob H. Fulmer, Jr., as attorney, to foreclose three certain mortgages on described real estate, executed to him by the Eagle Mining & Improvement Company to secure an indebtedness of $112,000, represented by promissory notes. Suit was filed pursuant to such employment in January, 1909, and on May 9, 1909, final decree was entered. This decree, after finding that the notes representing the indebtedness, secured by the mortgage, were past due and unpaid, and giving judgment for the amount due, further provided: "And it is further ordered and adjudged that the plaintiff have and recover of and from the said Eagle Mining & Improvement Company the further sum of 7 per centum on said amount as his reasonable attorneys' fees herein incurred in and about the bringing and prosecuting of this suit and the foreclosure of said mortgage, as provided for in the said notes, and that he have execution therefor in the sum of $7,906.10."

After making provision for the sale of the property and the payment first of the taxable costs, the decree provided: " . . . And out of the remainder pay the plaintiff the sum of $120,900.50, the amount of his total judgment herein, including attorneys' fees, together with the legal interest thereon, from the date of this decree to the date of sale."

The decree further made provisions for a deficiency judgment, in case the property failed to sell for an amount sufficient to satisfy the judgment. A commissioner was appointed by the court to sell the property, and he was by the court ordered to sell the property for cash, unless the mortgagee, Fulmer, should purchase it, in which event Fulmer was only required to pay cash for any amount which he might bid on the property in excess of the amount of the judgment and costs. Fulmer purchased the property at the sale for $35,000, and the commissioner executed to him a deed, which was approved by the court. No money was paid the commission-

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er, except the taxable costs and fees of such commissioner. Appellant was not paid his attorney's fee, and thereafter Fulmer conveyed the property so purchased by him to the Parsons Mining Company, of which he was president. The balance of the original judgment, amounting to something over $85,000, has never been satisfied, and is in the form of a deficiency judgment against the original makers of the notes.

On the 14th day of October, 1913, appellant filed his complaint in the trial court, wherein he set out the above facts, and alleged that Fulmer had agreed to pay him, as compensation for services rendered by him in foreclosing the said mortgage, the amount called for and stipulated therein to be paid, which was the amount allowed by the court and carried into the judgment; that he had an attorney's lien upon the judgment rendered in the original action for the sum of $7,909.10; that Fulmer had failed to pay to him any portion of the fee earned by him as aforesaid, and that there was due and owing to him the said sum, for which he was entitled to and did have a lien upon the property purchased by Fulmer at such sale and by him transferred to the Parsons Mining Company; that said Parsons Mining Company had full knowledge of all the facts, and knew that he had not been paid any portion of the fees earned by him in such foreclosure proceeding. Appellant prayed for judgment against Fulmer for the amount stated, and asked, in the event of nonpayment, that the sale of the real estate to Fulmer and to the Parsons Mining Company be set aside, and for a resale for the purpose of paying and discharging his lien.

The Parsons Mining Company demurred to the complaint on the ground that it failed to state facts sufficient to constitute a cause of action, and specifically upon several grounds, only one of which need be stated, for, if well taken, it disposes of this appeal. This was as follows: "(e) That the said plaintiff, by his failure to assert his alleged lien for attorney's fees at and before the sale was confirmed and deed executed and delivered to the said defendant Fulmer, waived his said alleged lien on said property, and by operation of law must be held to have elected to look solely to the said Fulmer for his compensation and waive his alleged lien on the property so sold and conveyed."

The trial court sustained the demurrer, and, appellant refusing to plead further, judgment was entered dismissing the complaint as to the Parsons Mining Company, from which judgment this appeal was taken.

The question presented is whether the trial court erred in sustaining the demurrer to the complaint, and this can be disposed of by a consideration of the ground of demurrer above stated, as we consider it decisive against appellant's right to the relief which he seeks. Before entering upon a discussion of the question it is advisable to briefly refer to the law upon the subject of attorneys' liens, in order to obtain a clear understanding of the point presented. In this jurisdiction we have no statute which gives or undertakes to give to attorneys a lien upon a judgment procured by their efforts for the value of their services or the agreed compensation. Most of the states do have such a statute, which in many states is very broad, and extends the lien to the proceeds of the judgment "in whosesoever hands they may come." The usual Code provision reads as follows: "From the commencement of an action, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, which attaches to a verdict, report, decision, or judgment in his client's favor and the proceeds thereof in whosesoever hands they may come, and cannot be affected by any settlement between the parties before or after judgment."

There being no statute here, in

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order to determine the rights of an attorney in this regard in this state, we are necessarily required to resort to the common law and to the practice prevailing in courts of equity in such cases. The English courts, at an early date, not easy of ascertainment from the reported cases, recognized the right of an attorney to retain papers or other property that might come into his possession, or money that he, in the course of his professional employment, had collected, until all his costs and charges against his client were paid. This right on the part of the attorney was known as a "general" or "retaining" lien, and was a common-law lien founded upon possession. This lien was enforced by the English courts as early as 1734. Jones, Liens, 3d ed. § 113. In the case of Weed Sewing Mach. Co. v. Boutelle, 56 Vt. 571, 48 Am. Rep. 821, the court said: "The former [referring to the retaining lien] attaches to all papers, documents, and money that come into his hands professionally as an attorney without any special contract in regard to the same. Having the possession, he has the right to retain them against his client, assignments, or attachments, until the general balance due him for legal services is paid. The client cannot discharge him and withdraw such papers or money from his hands without first paying the general balance due him for legal services, whether growing out of the special matters then in his hands or other legal matters. This right is said to have its origin partly in custom and partly to prevent circuity of action. Whart. Agency, §§ 623 to 625, and cases cited in the notes; Hutchinson v. Howard, 15 Vt. 544; Hurlbert v. Brigham, 56 Vt. 368; Ex parte Sterling, 16 Ves. Jr. 258, 33 Eng. Reprint, 982, 10 Revised Rep. 177; Dennett v. Cutts, 11 N. H. 163; Wright v. Cobleigh, 21 N. H. 339. Having possession of the thing to which the lien attaches, no notice is required to protect it against assignment by the client or attachment by trustee process by his creditors."

Attorney—lien.

The courts also recognized what is generally styled an attorney's "charging lien," although it has been frequently stated by the courts and law writers that, in a strict sense, there is no such thing as a lien upon a thing not in possession. In Barker v. St. Quintin, 12 Mees. & W. 441, 152 Eng. Reprint, 1270, Baron Parke said: "The lien which an attorney is said to have on a judgment [which Mr. Jones (Jones, Liens, § 155) says perhaps is an incorrect expression] is merely a claim to the equitable interference of the court to have that judgment held as a security for his debt."

Same—charging lien.

Without quibbling over the question as to whether this right on the part of the attorney is, strictly speaking, a "right to a lien" or the right to the equitable interference of a court of equity, as stated, we shall in this discussion refer to it as a "charging lien," because, as a practical matter, it is of no consequence. A very interesting discussion of the question will be found in Jones on Liens, 3d ed. §§ 155 et seq. The charging lien, as recognized by the courts, is the right of an attorney or solicitor to recover his fees and money expended on behalf of his client from a fund recovered by his efforts, and also the right to have the court interfere to prevent payment by the judgment debtor to the creditor in fraud of his right to the same, and also to prevent or set aside assignments or settlements made in fraud of his right. It does not usually attach until the recovery of judgment, and then does not prevent an honest settlement, nor a payment to his client until the attorney has notified the debtor of his intention to claim a lien. Weed Sewing Mach. Co. v. Boutelle, supra. In speaking of this lien, Mr. Jones says: "The time and manner of the origin of this lien are not shown by any reported case. Probably it had

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been the practice of judges to aid attorneys in securing their costs out of judgments obtained for their clients before the right to the lien had been formally adjudicated. It was doubtless recognized upon the ground of justice that the attorney had contributed by his labor and skill to the recovery of the judgment, and the court, wishing to protect its own officers, exercised its power to that end; or, as Lord Kenyon puts it: 'The party should not run away with the fruits of the cause without satisfying the legal demands of his attorney, by whose industry, and in many instances at whose expense, those fruits are obtained.'" 1 Jones, Liens, § 156.

In some of the American states, without an express statute upon the subject, the courts have refused to recognize the right of an attorney to a charging lien, upon the theory that, as the right in England was limited to the taxable costs, and the compensation of an attorney was taxed as costs in the case, while here the attorneys are not entitled to tax their fees as costs, but recovered them only from their client, upon quantum meruit or by special agreement, the rule can have no application. For list of the states so holding, see note to § 159, Jones, Liens. Other courts hold that the attorney is entitled to the lien, and give as a reason that the taxed costs of the attorney in England had no merit or justice superior to the claim of counsel in this country for a reasonable compensation; and therefore the lien should be here extended so as to secure such compensation. 1 Jones, Liens, § 167, says: "It is argued that the rule restricting the lien to the amount of the taxed costs arose from the fact that in England these costs are the only charges for which an action might be maintained, the services of barristers being in theory gratuitous, and their charges only an honorary obligation of quiddam honorarium; and consequently, where the payment of the fees and charges of an attorney may be legally enforced, as is the case in this country, the reason for the restriction fails, and the lien should cover fees other than the taxed costs, and should include the charges of counsel."

In the case of Wilkins v. Carmichael, 1 Dougl. K. B. 101, 99 Eng. Reprint, 72, which was a suit before Lord Mansfield, in which it was sought to establish a lien in favor of the captain against the ship for his wages, the counsel referred to the case of attorneys who cannot be compelled to deliver up their client's papers until their fees are paid. Lord Mansfield, interrupting the argument of counsel, observed that "the practice in that respect was not very ancient, but that it was established on general principles of justice, and that courts both of law and equity have now carried it so far that an attorney or solicitor may obtain an order to stop his client from receiving money recovered in a suit in which he has been employed for him till the bill is paid." 1 Jones, Liens, § 113.

In the case of Welsh v. Hole, 1 Dougl. K. B. 238, 99 Eng. Reprint, 155, Lord Mansfield said: "An attorney has a lien on the money recovered by his client for his bill of costs; if the money come to his hands, he may retain to the amount of his bill. He may stop it in transitu if he can lay hold of it. If he apply to the court, they will prevent its being paid over till his demand is satisfied. I am inclined to go still further, and to hold that, if the attorney give notice to the defendant not to pay till his bill should be discharged, a payment by the defendant after such notice would be in his own wrong, and like paying a debt which has been assigned after notice."

If the courts of England, "on general principles of justice," upon application of the attorney, would prevent money being paid over to a client until such attorney's bill of costs, which in truth and in fact was the indirect payment to the attorney of compensation for services rendered, had been paid, and, upon

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notice to the defendant not to pay the judgment until such bill of costs had been discharged, would compel satisfaction of the attorney's claim, we fail to see why the same principles would not here likewise apply to the fees and expenses of an attorney. In our opinion they should, and this conclusion is supported by many of the adjudicated cases. A very valuable note upon the subject will be found in 31 Am. Dec. 755, appended to the case of Andrews v. Morse, reported in the same volume at page 752. See also Ward v. Syme, 9 How. Pr. 16, for a very learned discussion of the subject.

Having considered the nature and right of an attorney to a lien upon the judgment which he recovers for his client, we will now turn to a consideration of the particular question presented by this appeal. Here the attorney gave no notice to the defendant Eagle Mining & Improvement Company that he intended to assert a lien against the judgment, and as there was no voluntary payment by the judgment debtor of the money called for therein, any question of notice to such judgment debtor is beside the question. The sole question presented is: Does the attorney's lien attach to money or property which the client receives in satisfaction of the judgment? Under the Code provisions, quoted herein and in force in many of the states, the question necessarily would be answered in the affirmative. In the case of Loofbourow v. Hicks, 24 Utah, 49, 55 L.R.A. 874, 66 Pac. 602, the court held that a lien for attorneys' fees allowed by a judgment foreclosing a real estate mortgage attaches to the land, and may be enforced against it after it has been bid in by the mortgagee or his assigns with notice, for an amount less than that due on the mortgage, which has been credited on the judgment.

Appellant cites and relies upon the following cases as sustaining the sufficiency of his complaint herein and his right to the relief which he seeks: Porter v. Hanson, 36 Ark. 593; Wooten v. Denmark, 85 Ga. 579, 11 S. E. 861; Stockton Sav. & L. Soc. v. Donnelly, 60 Cal. 481; Gray v. Denhalter, 17 Utah, 312, 53 Pac. 976. A review of these cases, however, will show that they do not sustain his right to enforce his lien against real estate purchased by his client in satisfaction of the judgment. The Arkansas case was based upon a statute, which gave the lien therein asserted. It is true the court said: "The object of the suit had not been to recover land, or establish title, but to recover money by foreclosure; and as the complainant had taken land by foreclosure in place of money, it would have been just and entirely in accordance with Hanger v. Fowler, 20 Ark. 667, to have transferred the lien to the land."

The court further said, however: "It is useless, however, at this day, to discuss the extent of an attorneys' lien, as the whole matter has been settled by the Code of Civil Practice since Hanger's Case, and no language could be plainer than that of the Code to give the lien here claimed."

The Hanger Case, referred to in the opinion, which was evidently decided before the Code provision was enacted, simply held, however, that an attorney could not assert a lien upon land recovered in a chancery suit for his fee; that to permit him to do so would be introductory of a new principle, and the extension of the doctrine of solicitors' lien beyond adjudged cases. As the later case was decided under a statute expressly giving the right claimed, the casual remark made by the court as to the rule before the statute was enacted certainly would be entitled to but little weight, and especially where no precedent is found supporting the same.

The Georgia case of Wooten v. Denmark, 85 Ga. 579, 11 S. E. 861, was likewise controlled by a statute, which provided: "Upon all suits for the recovery of real or personal property, and upon all judgments or decrees for the recovery of the same, attorneys at law shall have a

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lien on the property recovered, for their fees, superior," etc.

The court construed this statute as applying to land purchased by the client upon foreclosure proceedings in satisfaction of the judgment.

The case of Stockton Sav. & L. Soc. v. Donnelly involved simply the right of the attorney to recover his fee from a defendant in a foreclosure suit, where defendant had paid plaintiff the principal and interest due on the mortgage after the institution of the suit, at which time he had been informed by the plaintiff that he would be required to pay the attorney's fee. The statute in California provided that "in all cases of foreclosure of mortgage the attorneys' fee shall be fixed by the court in which the proceedings of foreclosure are had, any stipulation in said mortgage to the contrary notwithstanding." This case affords no support to appellant's contention.

The Utah case (Gray v. Denhalter) is likewise controlled by statute. In that case the court, after quoting the statute in question, said: "So likewise, as such party, he was liable to have the conditions of the decree and sale enforced against him at any time before the commissioner had made his report as directed in the decree, and the sale had been confirmed, and final disposition of the cause made."

In the case before us, however, the attorney seeks to go much further, and to have his fee declared a lien upon the real estate purchased by his client some four years after the confirmation of the sale and approval of the deed. That he cannot do this becomes apparent when we consider the origin of the lien and its nature and purpose. As heretofore shown, by quotations from the text-writers and cases, the lien originated in the desire on the part of the courts to protect attorneys against dishonest clients, who, utilizing the services of the attorney to establish and enable them to enforce their claims against their debtors, sought to evade payment for the services which enabled them to recover their demand. The court, having control of its own process, would not permit the client to have the benefit thereof without paying the attorney, because in equity and good conscience he should compensate the attorney, as, by his exertions and skill, he had made it possible for the client to invoke the aid of the court, and secure the process of such court to enforce his demand. The court, having control of its own process, saw to it that the client did not utilize it so as to defeat the attorney of his fee. Upon proper application by the attorney it would direct its officers to pay to the attorney the money to which he was entitled, or would withhold its process until he was compensated. In cases similar to the one under consideration, if the property had been sold to a third party, of course, the money would have been paid into the hands of the commissioner, and it could have ordered the amount of the attorney's fee paid direct to such attorney. Where the property was bid in by the creditor in satisfaction of the judgment, as in this instance, upon the attention of the court being called to the fact that the attorney had not been paid, the court would have withheld confirmation of the sale and approval of the deeds until he was paid; and, in the event of the failure to pay it, might, by proper order, have directed a resale of the property. Thus we see that the courts, by the control which they have over their own process, have ample power to protect the diligent attorney, and this they do, as stated, because the demands of equity and justice require it.

No case has been called to our attention, in the absence of statute, where the courts have permitted the attorney to assert his lien in an independent suit, such as is attempted in this case; and the reason is plain. The courts only give him a lien upon the judgment, or, perhaps more properly speaking, give him the right to

Same—suit to enforce.

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invoke the aid of the court, by the control which it exercises over its process and officers in the cause in which the judgment was rendered, in securing for him his just compensation. This willingness on the part of the court, in the cause in which the judgment was rendered, to afford him protection, gives to the diligent attorney an ample remedy by which he can enforce his just demands, thus affording to the diligent ample protection. One who has been dilatory, and has permitted the client to collect the judgment, without objection or protest, or seeking aid from the court, cannot invoke the aid of a court of equity; nor can he ask the court, after he has permitted it to confirm a sale of real estate to his client in satisfaction of the judgment, and approved a deed made by its commissioner, to set aside its acts in the premises. It is a well-known equity maxim that "equity aids the vigilant, not those who slumber on their rights." In 1 Jones on Liens, § 204a, the author, in speaking of attorneys' liens, says: "The lien does not exist after the client has accepted satisfaction of his judgment, and it does not attach to property received in satisfaction of it."

And at § 231 the same author says: "The attorney waives his lien by his acquiescence in a satisfaction of the judgment by the payment of money or the transfer of property to his client, and he cannot afterwards enforce his lien upon such money or property, but must look to his client alone for his compensation. An attorney's lien upon a judgment is waived by his procuring the transfer to his client of land attached in the suit in satisfaction of the judgment. His lien upon the judgment does not follow the land when the title is perfected in the client."

In the case of Stewart v. Flowers, 44 Miss. 513, 7 Am. Rep. 707, the plaintiff, an attorney, had rendered services to the defendant, who was plaintiff in a chancery suit, wherein he was successful and recovered the land sought. Afterwards Flowers sold the land to a third party, and Stewart sought the aid of a court of equity to compel Cotton, who had purchased the land from Flowers, and had not paid the purchase price, Flowers being joined in the suit as a defendant, to pay out of the unpaid purchase price the fees which he had earned. The supreme court, after a very exhaustive review of the authorities, both American and English, says: "In consideration, therefore, of the character of our institutions, and of the somewhat modified relation in this country of attorney and client, we do not think it advisable to extend the doctrine of implied liens, especially as it is not necessary to the profession; attorneys having it in their power to protect themselves by the exercise of ordinary prudence." The Mississippi court recognized the right of an attorney to a lien upon the judgment and to the interposition of the equitable powers of the court in aid of the attorney, but would not extend the lien to the real estate recovered.

The case of Goodrich v. McDonald, 112 N. Y. 157, 19 N. E. 649, is very like the present case. In that case Mrs. Graves, a daughter of the defendant, Mrs. McDonald, employed Milo Goodrich, as attorney, to prosecute an action for a money demand against William T. Porter. She recovered a judgment for something over $11,000. When the judgment debtor was ready to pay the judgment, he notified both the plaintiff and her attorney. The attorney consented that the money should be paid direct to his client. Mrs. Graves received the money and invested $6,000 of the proceeds in a bond and mortgage, which she later assigned to her mother, under a prior agreement that her mother was to receive a certain portion of the proceeds of the judgment. Mrs. Graves failed to pay her attorney, and he afterwards instituted suit in equity against the daughter and mother to subject the bond and mortgage, which the mother still retained, to the payment of his fee.

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The court, after an extended discussion of attorneys' liens, said: "The lien, as thus established, is not strictly like any other lien known to the law, because it may exist, although the attorney has not, and cannot in any proper sense have, possession of the judgment recovered. It is a peculiar lien, to be enforced by peculiar methods. It was a device invented by the courts for the protection of attorneys against the knavery of their clients, by disabling clients from receiving the fruits of recoveries without paying for the valuable services by which the recoveries were obtained. The lien was never enforced like other liens. If the fund recovered was in possession or under the control of the court, it would not allow the client to obtain it until he had paid his attorney, and in administering the fund it would see that the attorney was protected. If the thing recovered was in a judgment, and notice of the attorney's claim had been given, the court would not allow the judgment to be paid to the prejudice of the attorney. If paid after such notice, in disregard of his rights, the court would, upon motion, set aside a discharge of the judgment and allow the attorney to enforce the judgment by its process, so far as was needful for his protection. But after a very careful search we have been unable to find any case where an attorney has been permitted to enforce his lien upon a judgment for his services by an equitable action, or where he has been permitted to follow the proceeds of a judgment after payment of them to his client. His lien is upon the judgment, and the courts will enforce that through the control it has of the judgment and its own records, and by means of its own process, which may be employed to enforce the judgment. But after the money recovered has been paid to his client, he has no lien upon that, and much less a lien upon property purchased with that money and transferred to another. After such payment, unless he has protected his lien by notice to the judgment debtor, his lien is forever gone, and he must look to his client alone for his compensation. As said by Lord Ellenborough, in Wilson v. Kymer, 1 Maule & S. 157, 105 Eng. Reprint, 59, and repeated by Senator Verplanck in McFarland v. Wheeler, 26 Wend. 467: 'In a case of a lien we should be anxious to tread cautiously and on sure grounds before we extend it beyond the limits of decided cases.' There are not only no decided cases which sanction the maintenance of this action, but the drift of all the authorities is against the plaintiff's contention."

To the same effect see also Cowen v. Boone, 48 Iowa, 350, and Keehn v. Keehn, 115 Iowa, 467, 88 N. W. 957.

From the argument advanced and the authorities cited, we are, with some reluctance, forced to the conclusion that the lien which appellant had upon the judgment recovered for his client was waived where he permitted his client to purchase the property ordered sold by the court in satisfaction of the judgment, and the court, without objection on the attorney's part, confirms the sale and approves the deeds for the same to his client, and the attorney's lien upon the judgment did not follow the land when the title was perfected in his client. Hence the trial court properly sustained the demurrer to his complaint, and its judgment will be affirmed; and it is so ordered.

Same—waiver of lien—purchase of property by client.

Hanna and Parker, JJ., concur.

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ANNOTATION.

Attorney's lien on property purchased by client on sale under a judgment procured by attorney.

Treating the question discussed in the reported case (PRICHARD v. FULMER, ante, 474) as one of waiver, there is little authority to be found on the question, but the decision in that case is supported to some extent by Harton v. Amason (1916) 195 Ala. 594, 71 So. 180, and Cowen v. Boone (1878) 48 Iowa, 350.

In Cowen v. Boone (Iowa) supra, land was attached in an action by the client, and after judgment the title thereto was perfected in the client by the attorneys in some manner which, the court says, is not disclosed and is not material. It was held that by perfecting title in the client, without protecting themselves, the attorneys waived their lien, assuming that they had a lien on the attached land. The client had sold the land, taking a mortgage for the purchase price, and the question arose in a suit to foreclose the mortgage, to which the attorneys were made defendants as persons claiming a lien on the land. The court, after conceding, without deciding, that the lien given the attorneys by the statute carried with it the lien of the judgment or attachment, said: "Now defendants insist that their lien, as attorneys, attached to and continued to exist on the land after they had succeeded in perfecting the title thereto in their client. . . . Certainly, when the defendants perfected the title in their client without obtaining payment for their services, W. H. Marble [the defendant in the action in which the services were rendered by the attorneys] would not be bound to pay them. It must, we think, be true as between Boone, the plaintiff, and the defendants, that the latter should be deemed to have waived their lien. In fact, the lien was on the money due from the adverse party to the client of defendants. Now, suppose the latter had collected the money, and paid it over without satisfying the amount of the lien; certainly they would be deemed to have waived it, and the judgment debtor would be discharged. Now, conceding defendants' theory as to their lien to be true, this is precisely what they have done; for their claim is that the filing of their lien created a lien on the land in the hands of the judgment debtor, and the title to this land they 'have perfected' in their client, without protecting themselves. We are of the opinion that the judgment debtor, Boone, and the plaintiff, had the right to suppose the lien of defendants to have been satisfied or waived, and that the mortgage lien is superior to the lien of defendants, who, in fact, have no lien on the land."

In Harton v. Amason (Ala.) supra, a suit was settled by an agreement, approved by complainant's attorney, whereby land was to be conveyed to the complainant or to a trust company, as he should require; the land was so conveyed to the trust company. It was held that complainant's attorney had no lien thereon. After saying that no lien existed unless the statutory lien on suits extended to land, the title to which was vested or confirmed in the client upon the consideration, in whole or in part, of a dismissal of the suit by the consent of the client and the attorney, the court said that whatever might be the ultimate construction of the statute in that respect, it was quite clear that the agreement of the attorney to the dismissal by his client of the suit upon which he would rest his claim to a statutory lien extinguished the basis of any such lien that might once have existed upon the suit.

In Loofbourow v. Hicks (1901) 24 Utah, 49, 55 L.R.A. 874, 66 Pac. 602, in which, as subsequently shown, the attorneys' lien was upheld, the court said that the finding of the trial court that the plaintiffs (attorneys) had by laches and delay waived their right to have the sale vacated and set aside, and also had waived any lien in their favor on the property, was not based

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on any defense set up in the answer; that it was merely a legal conclusion, not within the issues raised by the answer, and was therefore nugatory, and could not be considered as supporting the judgment against the plaintiffs.

It should be observed that the decision in the reported case (PRICHARD v. FULMER, ante, 474) lies within a narrow compass, and that the opinion points out to the diligent attorney the means of protecting himself in case of the purchase of the property by the client; i. e., by an appeal to the court to withhold its confirmation of the sale and approval of the deed, or to direct a resale of the property unless the attorney's fees are provided for. In this conection see Gray v. Denhalter (1898) 17 Utah, 312, 53 Pac. 976, holding that where a decree of foreclosure fixed the amount of the attorney's fees, and one to whom the mortgage and secured debt had been assigned, pending the action, purchased the property, but refused to pay the attorney's fees, the attorney had a standing to ask the court to order a resale unless such fee was paid.

While the foregoing cases are the only ones which discuss this question as one of waiver, the cases discussing the question whether the lien attaches to property purchased by the client at a sale for the satisfaction of the judgment require consideration. It will be noted that in the reported case (PRICHARD v. FULMER), while the court states at its conclusion that the lien was *waived*, the question for determination, as stated by it, was whether the lien *attached* to money or property which the client received in satisfaction of the judgment, and most of its discussion is directed to this question. The court's argument that the lien did not attach to property purchased by the client was based on its view that the common-law rule was, as stated in 1 Jones on Liens, § 204a, that the lien did not exist after the client had accepted satisfaction of his judgment, and that it did not attach to property received in satisfaction of it. This statement of the rule does not seem to find much support in the cases cited by the author, but is apparently supported by the cases cited in the reported case (PRICHARD v. FULMER). And see also 6 C. J. p. 780.

If this is a correct statement of the common-law rule, it would seem to follow, as intimated by the court, that the common-law lien does not attach to property purchased by the client at a foreclosure sale. The statutory lien of an attorney is, however, generally held to apply to such property. Porter v. Hanson (1880) 36 Ark. 591; Wooten v. Denmark (1890) 85 Ga. 578, 11 S. E. 861; Reid v. Punch (1880) 2 Ky. L. Rep. 62; Skinner v. Busse (1902) 38 Misc. 265, 11 N. Y. Anno. Cas. 156, 77 N. Y. Supp. 560. And see Ison v. Bell (1885) 7 Ky. L. Rep. 589 (abstract), as to lien of attorney employed to collect judgments which were satisfied by the sale of land to the client.

The statute involved in Porter v. Hanson (Ark.) supra, probably gave the attorney a lien upon and interest in the judgment, and provided that property sold in pursuance of or to satisfy the judgment, and purchased by or on behalf of the party in whose favor the judgment was rendered, should be deemed held in trust for the holder of the lien until it was discharged. In a suit to foreclose a vendor's lien, the land was bid off by the plaintiff for less than the amount of the judgment, and subsequently conveyed to his heirs after his death. It was held that his attorneys had a lien on the land superior to the rights of persons claiming under an assignment or power of attorney from the client. The court said that the attorneys, by statute and by the principles of equity practice, had a lien on the fund thereby recovered; that as the complainant had taken land by foreclosure in place of money, it was in accordance with prior decisions to transfer the lien to the land, and that, moreover, the statute gave the lien in plain language.

Wooten v. Denmark (1890) 85 Ga. 578, 11 S. E. 861, supra, involved a purchase at an execution sale under a judgment foreclosing a mortgage.

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The judgment creditor paid no money, the price of the land being simply entered as a credit on the execution. The statute provided that upon all suits for the recovery of real or personal property, and upon all judgments or decrees for the recovery thereof, attorneys should have a lien on the property recovered, and it was held that the property so purchased was "property recovered." The court said: "Wooten could have compelled the sheriff to sell, for money, the whole land, or so much of it as would have paid off his fees. His lien attached to the judgment of foreclosure, the mortgage, and everything that was incident thereto. And when Walter purchased this land by means of the judgment recovered by Wooten, it was in effect a recovery by Wooten of the land itself. . . . The question is, What did Walter get as the result of Wooten's services? In this case he got the land upon which Wooten seeks to foreclose his lien. In our opinion this was property recovered by Wooten for his client, and falls not only within the spirit and equity of the statute, but also within its letter. . . . The rule to be deduced from the decisions construing laws similar to our own, which give attorneys' liens, is that the lien attaches to the fruits of the labor and skill of the attorney, whether realized by judgment or decree, or by virtue of an award, or in any other way, as long as they are the result of his exertions."

In Skinner v. Busse (1902) 38 Misc. 265, 11 N. Y. Anno. Cas. 156, 77 N. Y. Supp. 560, supra, it was held that, under the New York statute giving a lien on a judgment in the client's favor, and the proceeds thereof in whosesoever hands they may come, the attorneys for a mortgagee, whose executrix continued an action to foreclose the mortgage, and purchased the property at the foreclosure sale, had a lien on such property, "for that property in the defendant's hands is the proceeds of the judgment entered in the actions instituted by the mortgagee." It is, however, doubtful whether there was any controversy on this point, defendant's contentions being that the lien could not be enforced in an independent action, and that the attorneys, having sued on an express contract, could not recover on a quantum meruit.

Where an attorney was employed to collect a debt secured on a tract of land, for one fifth of the proceeds, whether land or money, and the land was sold under decree of the court to the client, who refused to recognize the attorney's rights, it was said in Smith v. Young (1871) 62 Ill. 210, that the attorney had an equitable lien on one fifth of the land. The court probably did not mean, however, that he had an ordinary attorney's lien, as in Illinois at that time an attorney had no lien other than the retaining lien, except by virtue of an express contract creating an equitable assignment. Cameron v. Boeger (1902) 200 Ill. 84, 93 Am. St. Rep. 165, 65 N. E. 690.

Where land was sold under a decree of foreclosure to one who purchased the decree from the mortgagee for less than the amount of the judgment, and who paid no money except the costs on account of the purchase of the land, it was held in Loofbourow v. Hicks (1901) 24 Utah, 49, 55 L.R.A. 874, 66 Pac. 602, that a lien for the attorney's fees allowed by the judgment of foreclosure attached to the land, and might be enforced against it, especially when the sale was brought about through the connivance or fraud of the purchaser, or those acting in his behalf.

Under a statute giving attorneys a privilege for the amount of their professional fees on all judgments obtained by them, it was held in Luneau v. Edwards (1887) 39 La. Ann. 876, 6 So. 24, as stated in the syllabus, that the privilege did not extend to land which the owner of the judgment might obtain or revendicate in execution or by virtue of the judgment. No purchase by the client appears to have been involved.

Where land purchased at an execution sale by the judgment creditor was redeemed, it was held that the judgment creditor's attorney had no lien on the land. Williams v. Bradley

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(1914) 187 Ala. 158, 65 So. 534. The court said that the office and effect of the lien was to assure the attorney's compensation for services rendered in the particular matter progressing to judgment; and that, in consequence, the lien was a charge alone upon the client's property in the judgment in the client's favor; that the subject-matter of the lien, viz., the judgment, became extinct when the judgment was paid in full, and, having become extinct, could not be the subject of a lien; and that "with this judgment extinguished in a perfectly lawful manner, by the levy upon and sale of defendant's property, certainly there could be no possible further liability against or exaction of the defendant in the judgment. No fraud of any character is charged or imputed to him. He was wholly acquitted when the judgment was satisfied. His redemption of the land from the purchaser at the execution sale is not shown to be affected with any mala fides."

In Coe v. East & W. R. Co. (1894) 65 Fed. 16, it was held (overruling the special master in this respect) that an attorney representing bondholders in a suit to foreclose a railroad mortgage and collateral litigation had no lien on the railroad property, which was purchased by one of his clients. The attorney had, however, been discharged before the property was sold free and clear of all encumbrances except receiver's certificates and obligations, and the court said that the attorney's lien was fixed and determined at the time he was discharged, and that it was difficult to see how any subsequent action of the client in purchasing the road could enlarge or defeat the lien; that even if the client had purchased the property as a bondholder, representing the bonds owned by him, the lien would not have been enlarged or extended to the property, except so far as the bonds were by such purchase merged into the railroad property, and that the client, in fact, purchased as any stranger might have done; that the property was sold free of encumbrances except receiver's certificates and obligations, and that thereby all lien of the bonds was devested as to the property and remitted to the fund derived from the sale. It would seem that the client must have paid the purchase price in cash, and not by surrendering his bonds, as the property did not sell for enough to leave any surplus to be applied on the bonds.

See also the following cases involving questions having some analogy to the question under annotation:

Morton v. Hallam (1889) 89 Ky. 165, 12 S. W. 187, involving the sale of a railroad to a reorganized company, in which the client, a judgment creditor of the company, received stock, the court holding that the stock was not subject to a lien as against a bone fide purchaser.

Perkins v. Perkins (1871) 9 Heisk. (Tenn.) 95, holding that attorneys had no claim against land purchased by a client at a judicial sale, until the sale was confirmed, as the land still belonged to the judgment debtor.

Cantrell v. Ford (1898) — Tenn. —, 46 S. W. 581, where it was claimed that an agreement between an attorney and client constituted a lien on land purchased by the client at a sale under a judgment; and the court said that this might be so, as between the parties, but that the agreement could be of no effect as against other creditors of the client, for want of registration.

Chapman v. Sneed (1856) 17 Tex. 428, where a note given the attorney by the client, providing that it should operate as a lien on a judgment recovered by the attorney, was given after the client's purchase of land at a sale to satisfy the judgment; but the court, in support of the judgment of the lower court, in favor of the attorney, indulged the presumption that the lien existed by agreement prior to the sale, and affirmed the judgment, giving the attorney a lien on the land.

Flanary v. Wade (1908) 102 Tex. 63, 113 S. W. 8, reversing (1908) — Tex. Civ. App. —, 108 S. W. 506, in which a client purchasing land at execution sale had agreed that his

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attorney should have one third of the recovery. He subsequently brought a suit of trespass to try title, and agreed with the same attorney that he should have one half of the client's interest. The suit was settled, and the controversy was over the attorney's claim under the second agreement, to one half of the land, which was denied.

Fitzgerald v. Irby (1901) 99 Va. 81, 37 S. E. 777, holding that amounts due an attorney under a contract for a percentage of the recovery should have been declared chargeable on land purchased by the client, as first liens thereon. This holding, however, seems to have been on the theory that the contract amounted to an equitable assignment of the fund recovered, and that equity would follow the fund, and enforce the owner's right against property in which it was invested.

A. McT.

EDITH M. STERN, Admrx., etc., of Philip H. Stern, Deceased, Respt.,
v.
INTERNATIONAL RAILWAY COMPANY et al., Appts.

New York Court of Appeals — March 6, 1917.

(220 N. Y. 284, 115 N. E. 759.)

Nuisance — poles in street.

1. Poles placed by a street railway company in a public highway to support its wires are a nuisance if the place chosen for them is dangerous and the danger so needless that the choice becomes unreasonable.

[*See note on this question beginning on page* 496.]

Highway — obstruction — poles.

2. Poles placed by a railway company in a city street, in the exercise of a statutory authority to use electricity as a motive power for its road, are not an unlawful obstruction if placed and maintained with due regard for the public safety.

Same — electric poles — statutory authority.

3. Statutory authority to place poles to support the wires of an electric railway company in a public street has the implied condition that they must be so located as to avoid unreasonable and unnecessary danger to travelers on the highway.

Street railways — location of poles in street.

4. A street car company having statutory authority to electrify its line may locate the necessary poles where it will in the highway, in the absence of express command by legislature or municipality, so long as it avoids unlawful and unnecessary danger to travelers on the highway.

Street railway — negligent location of poles — liability.

5. A street railway company is liable for injury to a traveler caused by negligently locating trolley poles in the center of the highway to the unreasonable menace of the traveling public, although it acts under the general authority of the legislature and with the passive acquiescence of municipal authorities.

Municipal corporation — failure to abate nuisance — liability.

6. Failure of a municipality to cause the removal of trolley poles placed in the center of a highway, and which reasonable care would reveal to be a menace to the traveling public, will render it liable for injury caused to a traveler by one of the poles.

Highway — changed modes of travel — effect on poles.

7. The jury may find that poles placed in the middle of a city street to support trolley wires are an unreasonable menace to travelers, in view of the changed methods of travel upon such streets, even though the place is a residence section, if business has gained a foothold there; especially if the city had, some time before, directed a change of the poles to the sidewalk on other portions of the same street.

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Municipal corporations — liability for defective poles.

8. A city cannot exonerate itself from liability for injury by a defect in the plan of the city streets, if the plan was not a true exercise of discretion, but mere passive acquiescence in a dangerous condition.

Highway — danger — failure to abate — liability.

9. Failure of a municipal corporation to abate dangers in a city street, which reasonable care would have revealed, will charge it with liability for injury to a traveler through such danger, whether the form of action be negligence or nuisance.

Municipal corporation — power to remove poles.

10. A municipal corporation may compel the removal from the center of a street of trolley poles which have become a menace to the traveling public although they were safe when first placed there.

(Collin, J., dissents in part.)

APPEAL by defendants from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of a Trial Term for Erie County in plaintiff's favor in an action brought to recover damages for the death of her husband, alleged to have been caused by defendants' negligence. *Affirmed.*

The facts sufficiently appear in the opinion of the court.

Messrs. **Norton, Penney, Spring, & Moore**, for appellant, Railway Company:

The consent of the local authorities to the construction and maintenance of a railroad and the structures to operate the same in the center of the streets, presumed under the Railroad Law to have been given to defendant railway company, became part of its indivisible franchise as if given directly by the legislature.

New York v. Bryan, 196 N. Y. 165, 89 N. E. 467; People v. Bleecker Street & F. Ferry R. Co. 140 App. Div. 611, 125 N. Y. Supp. 1045; Stillwater & M. Street R. Co. v. Boston & M. R. Co. 171 N. Y. 595, 59 L.R.A. 489, 64 N. E. 511; Brooklyn Heights R. Co. v. Brooklyn, 152 N. Y. 250, 46 N. E. 509; McCruden v. Rochester R. Co. 5 Misc. 59, 25 N. Y. Supp. 114, affirmed in 151 N. Y. 623, 45 N. E. 1133; People ex rel. New York v. New York R. Co. 217 N. Y. 310, 112 N. E. 49.

The location of the trolley poles in the center of Main street was within the statutory power and authority of the common council to adopt, and the presumption being that it did adopt such location lawfully, there could be no charge of nuisance founded upon such location.

People ex rel. New York v. New York R. Co. 217 N. Y. 310, 112 N. E. 51; McCruden v. Rochester R. Co. 5 Misc. 63, 25 N. Y. Supp. 114, 77 Hun, 609, 28 N. Y. Supp. 1135; Hollis v. Brooklyn Heights R. Co. 128 App. Div. 821, 113 N. Y. Supp. 4.

The defendant railway company was guilty of no negligence in the maintenance of its center pole line.

2 Abbott, Mun. Corp. § 829; Dill. Mun. Corp. 5th ed. § 1128; Lambert v. Westchester Electric R. Co. 191 N. Y. 253, 83 N. E. 977.

Under the charter of the city of Buffalo, the common council has the general control of the streets, and is specifically authorized to regulate the use of the same.

Buffalo v. Stevenson, 207 N. Y. 258, 100 N. E. 798; Orange County Traction Co. v. Newburgh, 86 Misc. 512, 149 N. Y. Supp. 1; Lansing v. Toolan, 37 Mich. 152; Maximilian v. New York, 62 N. Y. 160, 20 Am. Rep. 468; Urquhart v. Ogdensburg, 91 N. Y. 70, 43 Am. Rep. 655; Le Frois v. Monroe County, 162 N. Y. 563, 50 L.R.A. 206, 57 N. E. 185.

If the case was submitted to the jury on the theory of negligence of defendant railway company, then error was committed, because the court did not submit to the jury the question of the contributory negligence in defendant railway company's case.

Francis v. Gaffney, 211 N. Y. 47, 105 N. E. 96; Romeyn v. Sickles, 108 N. Y. 652, 15 N. E. 698; Day v. New Lots, 107 N. Y. 154, 13 N. E. 915; Lamphere v. Lang, 213 N. Y. 588, 108 N. E. 82.

Mr. **George E. Pierce**, with Mr. **William S. Rann**, for appellant city:

The construction and operation of the street railway in Main street was authorized, and was not a nuisance.

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Babbage v. Powers, 130 N. Y. 281, 14 L.R.A. 398, 29 N. E. 132; Jorgensen, v. Squires, 144 N. Y. 280, 39 N. E. 373; Hollis v. Brooklyn Heights R. Co. 128 App. Div. 821, 113 N. Y. Supp. 4.

The legislature having granted authority to operate a street railroad in Main street, and the local authorities and property owners having consented to the change of motive power and the location of the poles, the defendant city is not liable in an action for damages, arising by reason of such construction and operation of the railroad.

Urquhart v. Ogdensburg, 91 N. Y. 71, 43 Am. Rep. 655; Owen v. New York, 141 App. Div. 221, 126 N. Y. Supp. 38; Pitman v. New York, 141 App. Div. 672, 125 N. Y. Supp. 941; Gains v. New York, 156 App. Div. 792, 142 N. Y. Supp. 401, affirmed in 215 N. Y. 533, L.R.A.1917C, 203, 109 N. E. 594, Ann. Cas. 1916A, 259; Fitch v. New York, 23 Jones & S. 500, 2 N. Y. Supp. 700, affirmed in 119 N. Y. 608, 23 N. E. 1143.

The street was not defective or dangerous to legitimate and lawful travel.

Ring v. Cohoes, 77 N. Y. 83, 33 Am. Rep. 574; Francis v. Gaffey, 211 N. Y. 47, 105 N. E. 96; Gaines v. New York, 215 N. Y. 533, L.R.A.1917C, 203, 109 N. E. 594, Ann. Cas. 1916A, 259.

The street railway between Cold Springs and Scajaquada creek was lawfully built, and the city could not compel a change in the location or manner of construction.

People ex rel. New York v. New York R. Co. 217 N. Y. 310, 112 N. Y. 49; People ex rel. New York v. New York R. Co. supra; People ex rel. Olean v. Western New York & P. Traction Co. 214 N. Y. 528, 108 N. E. 847.

Mr. Clinton B. Gibbs, for appellant Windsor Motor Car Company:

There is not any evidence which upon any reasonable view will sustain the verdict that Fairman, the driver of the automobile, was engaged in the business of the defendant Windsor Motor Car Company at the time of the accident.

Salisbury v. Erie R. Co. 66 N. J. L. 233, 55 L.R.A. 578, 88 Am. St. Rep. 480, 50 Atl. 117, 10 Am. Neg. Rep. 584; Clark v. Buckmobile Co. 107 App. Div. 120, 94 N. Y. Supp. 771; Stewart v. Baruch, 103 App. Div. 577, 93 N. Y. Supp. 161; Douglass v. Hewson, 142 App. Div. 166, 127 N. Y. Supp. 220; Parsons v. Wisner, 113 N. Y. Supp. 922; Patterson v. Kates, 152 Fed. 481; Evers v. Krouse, 70 N. J. L. 653, 66 L.R.A. 592, 58 Atl. 181, 16 Am. Neg. Rep. 515; Lewis v. Amorous, 3 Ga. App. 50, 59 S. E. 338; Freibaum v. Brady, 143 App. Div. 220, 128 N. Y. Supp. 121.

There is not any evidence to support the verdict against the defendant motor car company.

Power v. Arnold Engineering Co. 142 App. Div. 401, 126 N. Y. Supp. 839.

The question of the relation of the master and servant between the defendant and Fairman, at the time of the accident, which was submitted by the trial court to the jury to be determined by it as a question of fact, should have been determined as a question of law.

Maher v. Benedict, 123 App. Div. 579, 108 N. Y. Supp. 228; Hull v. Littauer, 162 N. Y. 569, 57 N. E. 102; Molloy v. Whitehall Portland Cement Co. 116 App. Div. 839, 102 N. Y. Supp. 363.

The defendants were improperly united as parties defendant in the action.

Myers v. Lederer, 117 App. Div. 27, 101 N. Y. Supp. 1088; Logan v. Whitley, 129 App. Div. 670, 114 N. Y. Supp. 255; Siefken v. Erie R. Co. 57 Misc. 222, 107 N. Y. Supp. 1060.

Messrs. Sullivan, Bagley & Wechter, for respondent:

Upon the evidence the jury were fully warranted in finding as a matter of fact that the maintenance of the center poles in Main street by the appellant railway company was an unreasonable use of said street, and that these center poles were a dangerous and unnecessary obstruction to public traffic, and that the railway company was negligent in failing to remove them.

People ex rel. New York v. New York R. Co. 217 N. Y. 310, 112 N. E. 49; Potter v. Collis, 156 N. Y. 16, 50 N. E. 413; Wager v. Troy Union R. Co. 25 N. Y. 526; Re Rapid Transit R. Comrs. 197 N. Y. 81, 36 L.R.A.(N.S.) 647, 90 N. E. 456, 18 Ann. Cas. 366; Davis v. New York, 14 N. Y. 506, 67 Am. Dec. 186; Delaware, L. & W. R. Co. v. Buffalo, 158 N. Y. 266, 53 N. E. 44; People ex rel. New York v. New York R. Co. 217 N. Y. 310, 112 N. E. 49; Brooklyn Heights R. Co. v. Steers, 213 N. Y. 76, 106 N. E. 919, Ann. Cas. 1916C, 791; Lincoln Safe Deposit Co. v. New York, 210 N. Y. 38, L.R.A. 1915F, 1009, 103 N. E. 768; Powers v.

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Mechanicville, 163 App. Div. 138, 148 N. Y. Supp. 452; Bloss v. Oneida R. Co. 162 App. Div. 200, 147 N. Y. Supp. 728; Caruso v. Troy Gas Co. 153 App. Div. 431, 138 N. Y. Supp. 279, affirmed in 209 N. Y. 510, 102 N. E. 1100.

Although defendant had authority to place trolley poles somewhere in the street, it is still liable for injury that results from its use of the highway because it has not exercised its authority in a reasonable manner.

Brown v. Metropolitan Street R. Co. 60 App. Div. 185, 70 N. Y. Supp. 40, affirmed in 171 N. Y. 699, 64 N. E. 1119; Lambert v. Westchester Electric R. Co. 191 N. Y. 248, 83 N. E. 977; Brooklyn Heights R. Co. v. Steers, 213 N. Y. 76, 106 N. E. 919, Ann. Cas. 1916C, 791; Clifford v. Dam, 81 N. Y. 52; Powers v. Mechanicville, 163 App. Div. 138, 148 N. Y. Supp. 452; Bloss v. Oneida R. Co. 162 App. Div. 200, 147 N. Y. Supp. 728; Worster v. Forty-Second Street & G. Street Ferry R. Co. 50 N. Y. 205; Driggs v. Phillips, 103 N. Y. 77, 8 N. E. 514; St. Vincent Female Orphan Asylum v. Troy, 76 N. Y. 114, 32 Am. Rep. 286; People ex rel. Wooster v. Maher, 141 N. Y. 330, 36 N. E. 396; Deshong v. New York, 176 N. Y. 475, 68 N. E. 880; Delaware, L. & W. R. Co. v. Buffalo, 158 N. Y. 272, 53 N. E. 44.

The jury were fully authorized in finding that the city of Buffalo was negligent in failing to cause the removal of the center poles from Main street.

People ex rel. New York v. New York R. Co. 217 N. Y. 310, 112 N. E. 49; Bloss v. Oneida R. Co. 162 App. Div. 200, 147 N. Y. Supp. 728; Caruso v. Troy Gas Co. 153 App. Div. 431, 138 N. Y. Supp. 279, affirmed in 209 N. Y. 510, 102 N. E. 1100; Barrett v. Lake Ontario Beach Improv. Co. 174 N. Y. 316, 61 L.R.A. 829, 66 N. E. 968, 14 Am. Neg. Rep. 144; Cohen v. New York, 113 N. Y. 532, 4 L.R.A. 406, 10 Am. St. Rep. 506, 21 N. E. 700; Sweet v. Perkins, 196 N. Y. 486, 90 N. E. 50; Frank v. Warsaw, 198 N. Y. 463, 31 L.R.A.(N.S.) 676, 92 N. E. 17, 1 N. C. C. A. 917; New York v. Rice, 198 N. Y. 128, 28 L.R.A.(N.S.) 375, 91 N. E. 283; Berger v. Solvay, 156 App. Div. 440, 141 N. Y. Supp. 995; Wells v. Brooklyn, 9 App. Div. 61, 41 N. Y. Supp. 143, appeal dismissed in 158 N. Y. 699, 53 N. E. 1133, affirmed in 162 N. Y. 657, 57 N. E. 1128; Powers v. Mechanicville, 163 App. Div. 138, 148 N. Y. Supp. 452; Geneva v. Brush Electric Co. 50 Hun, 581, 3 N. Y. Supp. 595; Fisher v. Mt. Vernon, 41 App. Div. 293, 58 N. Y. Supp. 499, 6 Am. Neg. Rep. 356; Hayes v. Brooklyn Heights R. Co. 200 N. Y. 187, 93 N. E. 469; Ring v. Cohoes, 77 N. Y. 83, 33 Am. Rep. 574; Embler v. Wallkill, 57 Hun, 384, 10 N. Y. Supp. 797, affirmed in 132 N. Y. 222, 30 N. E. 404; Arey v. Newton, 148 Mass. 598, 12 Am. St. Rep. 604, 20 N. E. 327; Delaware, L. & W. R. Co. v. Buffalo, 158 N. Y. 266, 53 N. E. 44.

The findings of the jury that Fairman was prosecuting the business of the defendant motor car company, and acting within the scope of his authority in inviting the deceased and others for a ride in the Kline automobile on the evening of the accident, were amply supported by the evidence.

McCann v. Davidson, 145 App. Div. 522, 130 N. Y. Supp. 475; Ferris v. Sterling, 214 N. Y. 249, 108 N. E. 406, Ann. Cas. 1916D, 1161; Cosgrove v. Ogden, 49 N. Y. 255, 10 Am. Rep. 361; Peck v. New York C. & H. R. R. Co. 70 N. Y. 587; Higgins v. Watervliet Turnp. & R. Co. 46 N. Y. 23, 7 Am. Rep. 293; Rounds v. Delaware, L. & W. R. Co. 64 N. Y. 129, 21 Am. Rep. 597, 8 Am. Neg. Cas. 536; Ochsenbein v. Shapley, 85 N. Y. 214; Quinn v. Powers, 87 N. Y. 535, 41 Am. Rep. 392; Kastner v. Long Island R. Co. 76 App. Div. 323, 78 N. Y. Supp. 469; Mott v. Consumers Ice Co. 73 N. Y. 543; Burns v. Glens Falls, S. H. & Ft. E. Street R. Co. 4 App. Div. 426, 38 N. Y. Supp. 856; Collins v. Butler, 179 N. Y. 156, 71 N. E. 746, 17 Am. Neg. Rep. 106.

Deceased was not chargeable with the negligence of the person driving the car.

Fisher v. Mt. Vernon, 41 App. Div. 293, 58 N. Y. Supp. 499, 6 Am. Neg. Rep. 356.

Cardozo, J., delivered the opinion of the court:

The plaintiff, as administratrix of the estate of her husband, brings this action for the damages suffered through his death. She has obtained a judgment against three defendants, the International Railway Company, the city of Buffalo, and the Windsor Motor Car Company. Her husband met his death in an automobile collision. The car in which he was riding belonged to the Windsor Motor Car Company, and was driven by one Fairman, its

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salesman and general manager. There is evidence that Fairman was driving negligently. He attempted to pass a car ahead of him, but gave no warning of his approach. The car ahead moved out into his path to pass a heavy mail wagon in front of it. To avoid collision Fairman swung his own car sharply to the left, and it collided with a trolley pole in the center of the highway. Judgment has gone against the Windsor Motor Car Company on the ground that it is chargeable with the negligence of its servant. Judgment has gone against the International Railway Company and the city of Buffalo on the ground that the trolley poles were unreasonable and dangerous obstructions.

The collision occurred in Main street, near its intersection with Florida street, in the city of Buffalo. Main street in that neighborhood has a width of 100 feet. Each sidewalk is 25 feet wide, and there is a space of 50 feet from curb to curb. The tracks of the International Railway Company, the successor of the Buffalo Street Railway Company, run through the center of the street. Authority to lay them was granted by the legislature in 1866 (Laws 1866, chap. 479). At first, the cars were drawn by horses, but for many years the motive power has been electricity. A change of power was first authorized by the common council in 1889. The consent granted at that time affected that part of Main street between Cold Springs and Scajaquada creek, which includes the scene of this collision. The council did not prescribe the location of the poles, and the railway company placed them at the center of the street in the space between its double tracks. The poles stand at intervals of 125 feet. They are without the protection of curbstones or other guards. About the same time there was a like change of power in other streets and districts. A change was authorized in Niagara street in 1890. In that street the resolution of the common council imposes as a condition the use of center poles, unless the side-pole construction is preferred by the abutting owners. In 1891, a change was authorized in another section of Main street, a section between Michigan and Ohio streets, south of the Cold Springs district. There the council required the side-pole construction, unless the center poles were preferred by the abutting owners. By that time center poles had already been installed in the Cold Springs district, the scene of the collision, and they remained there without objection. The first suggestion of danger came in 1909. In December of that year a resolution was adopted by the council, requiring the railway company to remove the "center trolley poles now remaining in Main street between the Erie Railroad and city line, the same being dangerous to traffic in said street," and in February, 1912, a resolution similar in form required the removal of center poles between the New York Central belt line and the Erie Railroad. Those parts of Main street are south of the scene of the collision. They are given over almost exclusively to business. Main street where the collision occurred is chiefly a residence district. In that district no change of location of the poles has ever been ordered by the council, and none has been made. The trial judge told the jury that the railway company and the city were liable, if poles located in the center of the street were unreasonable and dangerous obstructions of the highway. Whether that ruling may be sustained is the first question to be determined.

The railway company had the right, with the consent of the common council and the property owners, to electrify its road (Laws 1884, chap. 252, § 12). The consent of the council was obtained. The consent of the property owners, after all these years of acquiescence, must be presumed (Railroad Law, § 171). The poles, if placed and maintained with due regard for the public safety, are not unlawful

Highway—obstruction—poles.

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obstructions. They are obstructions incidental to the exercise of a statutory right. The statute has not said, however, where the poles shall be located. The implied condition is, therefore, attached that they must be so located as to avoid unreasonable and unnecessary danger to travelers upon the highway (Cleveland v. Bangor Street R. Co. 86 Me. 232, 29 Atl. 1005; McKim v. Philadelphia, 217 Pa. 243, 19 L.R.A.(N.S.) 506, 66 Atl. 340; Lambert v. Westchester Electric R. Co. 191 N. Y. 248, 252, 83 N. E. 977; Hill v. New York, 139 N. Y. 495, 34 N. E. 1090; Delaware, L. & W. R. Co. v. Buffalo, 158 N. Y. 266, 53 N. E. 44; Morton v. New York, 140 N. Y. 207, 22 L.R.A. 241, 35 N. E. 490; Canandaigua v. Foster, 156 N. Y. 354, 359, 41 L.R.A. 554, 66 Am. St. Rep. 575, 50 N. E. 971, 4 Am. Neg. Rep. 441; Brown v. Metropolitan Street R. Co. 60 App. Div. 184, 186, 70 N. Y. Supp. 40, 171 N. Y. 699, 64 N. E. 1119; 21 Laws of England (Halsbury) title Nuisance, p. 5201). Subject to that condition the railway company, in the absence of express command by the municipal authorities, may place them where it will. In this part of Main street the city gave no command. The railway company was, therefore, free to make its own choice, if the choice was not unreasonable. Freedom of selection it had, but not freedom without limits. We do not mean to say that to make out a breach of duty, it is enough to show that there was an error of judgment (Seibert v. Missouri P. R. Co. 188 Mo. 657, 70 L.R.A. 72, 87 S. W. 995). The question is not whether some other place is better. The question is whether the place chosen is so dangerous and the danger so needless that the choice becomes unreasonable. If danger in that degree is present, both the railway company and the city are charged with liability. The railway company is liable because the poles are then a nuisance (Lambert v. Westchester Electric R. Co. 191 N. Y. 248, 252, 83 N. E. 977; Cleveland v. Bangor Street R. Co. supra). The city is liable because the nuisance is not abated (McKim v. Philadelphia, 217 Pa. 243, 19 L.R.A. (N.S.) 506, 66 Atl. 340; Ring v. Cohoes, 77 N. Y. 83, 88, 33 Am. Rep. 570).

Same—electric poles—statutory authority.

Street railways—location of poles in street.

Nuisance—poles in street.

Street railway—negligent location of poles—liability.

Municipal corporation—failure to abate nuisance—liability.

The question, therefore, is, whether there is any evidence that in April, 1912, when the accident occurred, the location of these poles was dangerous, and that the danger was unreasonable. When the road was first electrified in 1889, there were, comparatively speaking, but few trolley lines in this state. We may assume without deciding that the choice of center poles rather than side poles, even though unwise, was, in those conditions and at that time, an error of judgment and no more. But in the years that have followed conditions have changed. The use of trolleys has become almost universal; the center poles have been supplanted generally, though not everywhere, by side poles, placed upon the sidewalk; the automobile has changed the ancient modes of travel, and magnified the likelihood and dangers of collision. We think the jury had the right to find that with these changes the center poles have become a menace to the traveler. That they were a menace in other parts of Main street the common council had itself resolved. It announced that judgment on 1909, and again in 1912. In each year the railway company received the resolution, and obeyed it. We do not overlook the suggestion that there was a difference of conditions. Main street at the points of change was narrower, it is said, than at the

Highway—changed modes of travel—effect on poles.

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scene of the collision. Its width was 40 feet instead of 50. At the time of the resolutions, however, an order had been made to widen it. Evidently the center poles were still felt to be a source of danger. There was also a difference, it is said, in the character of the neighborhood. One section was devoted to business; the other in the main to residences. But even in the residence section business had gained a foothold. We think that conditions, even though not identical, were similar to such an extent as to make the change of some significance. But aside from any admission implied in the defendant's conduct, the very location of the poles gives room for conflicting inferences. Plainly, there was at least some risk of accident; plainly, the risk was needless, whatever its degree; plainly, therefore, the inference of fault may be drawn unless the risk was so remote or trifling that reasonable men in the exercise of reasonable care would not have striven to avoid it. In the light of all the circumstances, we think that question was for the jury. We have the express admission of the city, three years before the accident, that in another section of the same street the poles had become a danger to public traffic. We have the railway's submission to the order, which found its justification in the danger (Wigmore, Ev. § 282; Stevens v. Boston Elev. R. Co. 184 Mass. 476, 478, 69 N. E. 338, 15 Am. Neg. Rep. 338; Chicago & A. R. Co. v. Eaton, 194 Ill. 441, 88 Am. St. Rep. 161, 62 N. E. 784). We have the general disuse of center poles in other cities, except where grassplots or other spaces in the center of the street serve to subdivide the highway. And finally we have the growth in traffic during twenty years, the change in methods of locomotion, the added chances and dangers of collision, and the need, obvious without evidence, of freeing the space between curb and curb from obstructions which could be made, without risk, to serve their purpose elsewhere. We place our judgment not on any of the circumstances singly, but on all of them collectively. Their cumulative weight, we think, makes possible the inference that the center poles had become dangerous, and that the danger was unreasonable. That the city had no record on its claims department of any similar collision is not decisive. It was none the less alive to the danger. This is attested by the resolution of its common council. Whether claims had been made against the railway company, we do not know. It gave no evidence on the subject, and neither gains nor loses by its silence.

The defendants refer to cases in which a city planning an improvement has been held to be exonerated for errors of judgment in the plan (Urquhart v. Ogdensburg, 91 N. Y. 67, 43 Am. Rep. 655, 97 N. Y. 238; Owen v. New York, 141 App. Div. 217, 126 N. Y. Supp. 38; Pitman v. New York, 141 App. Div. 670, 125 N. Y. Supp. 941). A distinction has been drawn between affirmative approval, which will evidence a true exercise of discretion, and passive acquiescence, which may be merely a negligent omission to remedy an evil. The decision in Urquhart v. Ogdensburg, on its second hearing in this court, illustrates the distinction (97 N. Y. 238). Even in cases of express approval, the rule of exemption has been kept by later cases within narrow bounds (Ivory v. Deerpark, 116 N. Y. 476, 22 N. E. 1080; Fitzgerald v. Binghamton, 40 Hun, 332, 111 N. Y. 686, 19 N. E. 286; Nicholson v. Stillwater, 208 N. Y. 203, 101 N. E. 858; Corcoran v. New York, 188 N. Y. 131, 80 N. E. 660; Kiernan v. New York, 14 App. Div. 156, 43 N. Y. Supp, 538, 1 Am. Neg. Rep. 501, and cases there cited). We do not need to define them now. It is enough that the present case is not within them. These poles were not a municipal improvement. They were not planned and placed by the city. They were

Municipal corporations—liability for defective poles.

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planned and placed by the railway. If their location was dangerous, and the danger was needless, they violated the implied condition of the franchise, and were in the highway without right. They were no more a municipal improvement than defective rails or slots (Schild v. Central Park, N. & E. R. Co. 133 N. Y. 446, 28 Am. St. Rep. 658, 31 N. E. 327; Brown v. Metropolitan Street R. Co. 60 App. Div. 184, 70 N. Y. Supp. 40, 171 N. Y. 699, 64 N. E. 1119; Worster v. Forty-Second Street & G. Street Ferry R. Co. 50 N. Y. 203). The municipal improvement was the street, which had long ago been opened. While it remained open, the duty of the city was to see that it was kept clear of dangerous and unnecessary obstructions, which with reasonable care could be discovered and avoided. Error of judgment alone does not carry liability with it, for error of judgment alone is consistent with reasonable care. But failure to abate dangers which reasonable care would have revealed will charge the city with liability, and this whether the form of action be negligence or nuisance (Canandaigua v. Foster, 156 N. Y. 354, 41 L.R.A. 554, 66 Am. St. Rep. 575, 50 N. E. 971, 4 Am. Neg. Rep. 441; Uggla v. Brokaw, 117 App. Div. 586, 591, 102 N. Y. Supp. 857). "It cannot be held as a general proposition that a city may excuse itself from a charge of negligence as to the condition and care of its streets, merely by claiming that it acted judicially in determining to leave the street in a dangerous condition for public travel" (Williams, J., in Kiernan v. New York, 14 App. Div. 156, 159, 43 N. Y. Supp. 538, 1 Am. Neg. Rep. 501).

Highway—danger—failure to abate—liability.

Reliance is placed upon rulings that stepping-stones, hitching posts, hydrants, shade trees, and the like are legitimate obstructions (Robert v. Powell, 168 N. Y. 411, 55 L.R.A. 775, 85 Am. St. Rep. 775, 61 N. E. 699; Dubois v. Kingston, 102 N. Y. 219, 55 Am. Rep. 804, 6 N. E. 273; Wolff v. District of Columbia, 196 U. S. 152, 49 L. ed. 426, 25 Sup. Ct. Rep. 198, 1 Ann. Cas. 967, 17 Am. Neg. Rep. 439; Ring v. Cohoes, 77 N. Y. 83, 33 Am. Rep. 574; Dougherty v. Horseheads, 159 N. Y. 154, 53 N. E. 799, 6 Am. Neg. Rep. 348; Jordan v. New York, 44 App. Div. 149, 60 N. Y. Supp. 696, 165 N. Y. 657, 59 N. E. 1124; Wellington v. Gregson, 31 Kan. 99, 103, 47 Am. Rep. 482, 1 Pac. 253, approved in 159 N. Y. 154, at 161). In some cases, as Brewer, J., points out in Wellington v. Gregson, supra, the courts dealt with the question as one of fact for a jury (citing 2 Dill. Mun. Corp. § 1016). In other cases, exhibiting other conditions, they dealt with it as one of law. Always, however, the ruling was made, not absolutely, but relatively to particular conditions of location, of convenience, or of necessity. We had occasion in Lambert v. Westchester Electric R. Co. 191 N. Y. 248, 252, 83 N. E. 977) to emphasize that truth. There the cases that deal with stepping-stones and the like were cited to exempt a street railroad from liability for so placing one of its trolley poles as to imperil the use of the highway. We put aside the citations as inapplicable, and held that the defendant's franchise did not authorize it to place its poles where they would "unduly and unnecessarily interfere" with the public right of travel (191 N. Y. at 252). The point is made that, if the center poles were safe when first erected, the city could not compel them to be moved, though they later became dangerous. We are referred to our decision in People ex rel. New York v. New York R. Co. 217 N. Y. 310, 317, 112 N. E. 49, but we think it is inapplicable. There the attempt was made to compel a relocation of the tracks; and the location of the tracks was held to be of the substance of the franchise. The state might relocate them in the exercise of the police power, but not the municipality. Here the things to be moved are mere incidents or

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appurtenances; they do not affect the location of the right of way, and wherever they are placed, the franchise in its substance remains intact. This was recognized in People ex rel. New York v. New York R. Co. supra. Judge Collin said: "The rights of a railroad corporation upon the parts of the streets appropriated to its use must be so exercised that the free use of the streets, for the purposes and in the modes inherent in their creation, will not be unreasonably interfered with. It is a part of the regulative power of the local authorities to secure such result."

Municipal corporation—power to remove poles.

The appeal of the motor car company brings up the question whether Fairman, the driver of the car, was using it at the time of the accident in the business of his employer. As to that, enough was shown to make a question for the jury.

The judgment should be affirmed with costs.

Hiscock, Ch. J., and Chase, Hogan, and Crane, JJ., concur with Cardozo, J.

Collin, J., concurring in result:

The burden was upon the defendants railway company and city to show that the poles were in the traveled part of the street by virtue of legislative authority, directly or representatively given. Proof tending to so show was not produced. Authority was not expressly given. Authority to electrify was not in any measure authority to so appropriate the streets by placing the poles in them, because there was not proof that in 1884, or thereabouts, it was reasonably necessary, or within the legislative knowledge or intention, or within judicial notice, it was deemed reasonably necessary, that for the purpose of electrification the poles should be placed as they were. There is no proof that such placing could have been deemed reasonably essential to the electrification. Therefore, there was not given the authority, expressly or through necessary implication, to so place them. Acquiescence on the part of the state or municipal authorities did not constitute or operate as the authority. Under the power to electrify, in the absence of any consent or direction on the part of the state locating the poles, the railway company, irrespective of any statute or ordinance so providing, was bound, as a matter of law, to so place the poles that the use of the street by the public should not be unnecessarily impaired or rendered dangerous. Its duty was, not to do that within the street which was most advantageous to itself and its patrons, but, in so far as was practicable and consistent with its use of electricity as a motive power, to refrain from obstructing the street or affecting or interfering with the free, safe, and untrameled public passage and traffic. This follows necessarily from the nature and purposes of our public highways. The record presents no evidence, and we may take judicial notice that it is not the fact, that in 1889, or at any subsequent time, in the street railroad world or with engineers or men of common affairs, it was deemed impracticable or inconsistent with proper and effective electrification to place the poles without the part of the highway appropriated by the traveling public, and where, obviously and manifestly to common observation and intelligence, they would in a very substantial and important degree affect the ordinary and paramount use of the highway less than when placed within its traveled part. There was no evidence in the record tending to show that the appropriation of the street in part by the poles was authorized directly or through necessary implication. The appropriation was at all times without authority or right, and the poles were, as a matter of law, a public nuisance.

I dissent from that part of the opinion of Judge Cardozo which suggests that the original placing of the poles was a mere error of judgment on the part of the railway com-

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pany. The railway company had not the right, through any fact or rule of law, to render unsafe or inconvenient the use of the street for street purposes, except as actually required by practicable electrification. It is not in conformity with common sense or common knowledge to assume or presume that poles standing exactly and fully in the traveled part of the street affect its safety and utility no more than they would standing between the curbing and the sidewalk.

I dissent also from that part of the opinion of Judge Cardozo which suggests that in case the poles had been originally placed where they were, with authority and right, changing conditions might have converted them into nuisances or negligent obstructions, although the authority or right had been in no wise withdrawn or annulled. I think that if the state had expressly, or through necessary implication, authorized the poles to be placed as they were, the authority would have remained forceful and valid until the state, by some action, rescinded or annulled it.

I vote for affirmance, for the reasons stated.

Cuddeback, J., takes no part.

ANNOTATION.

Trolley poles in street as nuisance.

With respect to public.

While trolley poles erected in a public street do not constitute a nuisance per se, they must be so placed as not to impede unduly the use of the street by persons on foot or in vehicles, and, if negligently so placed or constructed as to cause an unnecessary obstruction to traffic, may constitute a nuisance. Cleveland v. Bangor Street R. Co. (1894) 86 Me. 232, 29 Atl. 1005; Lambert v. Westchester Electric R. Co. (1908) 191 N. Y. 248, 83 N. E. 977; affirming (1906) 115 App. Div. 78, 100 N. Y. Supp. 665; Lanigan v. Brooklyn Heights R. Co. (1908) 125 App. Div. 622, 110 N. Y. Supp. 30. And see the reported case (STERN v. INTERNATIONAL R. Co. ante, 487); McKim v. Philadelphia (1907) 217 Pa. 243, 19 L.R.A.(N.S.) 506, 66 Atl. 340.

In Lambert v. Westchester Electric R. Co. (1908) 191 N. Y. 248, 83 N. E. 977, affirming (1906) 115 App. Div. 78, 100 N. Y. Supp. 665, the court stated the facts as follows: "Plaintiff was a member of the volunteer fire department of said city. At the northwest corner of Fifth avenue and Third street therein was located a large brick building, containing three separate fire houses or apartments, each with a separate entrance on Fifth avenue. This accident happened in connection with a driveway leading from the fire patrol house, which was the most northerly of the three. This driveway was about 16½ feet long from the door to the curb. It was paved in the center for a width of 9 feet 7½ inches, but the surface adjacent to this pavement on the side towards the trolley pole hereinafter to be described was level, although not paved, and the street curb was cut down for purposes of ingress and egress, for a space considerably wider than the paved portion. Originally there had been what is described as a lattice-work pole, situate 4 feet 8½ inches southerly from the southerly edge of the paved way, and inside the street curb. Thereafter and before the accident a new pole was erected in the place of this original one, which came 10 inches nearer to the edge of the paved way. But while this pole was thus in the neighborhood of 4 feet from the paved way, it was less than a foot distant from the nearest line of the curb as it was cut down in connection with the driveway, as before stated. That is, a line drawn across the nearest edge of the curb as cut down, and at right angles to the street, would pass within less than a foot from this pole, and the space between this line and the paved driveway was level and open and could be used for the passage of fire apparatus.

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The accident happened in the evening in October. The plaintiff, as he was entitled to do, sought to get into the patrol wagon as it started for the fire. There were steps on the side of the wagon, which was between 5 and 6 feet in width, and he was attempting to enter by this way while it was in motion, being delayed somewhat by the fact that another fireman was on the steps ahead of him. As the driver turned into the street toward the pole, the wagon came so close to the latter that plaintiff was struck. The patrol wagon before this had collided with the original pole, which, it will be remembered, was further away from the driveway than the one standing at the time of the accident, and the defendant had received notice of the danger of collision between the wagon and the pole. Subsequent to the accident the pole was removed to some point on the other side of the driveway. It is proper to be added that as it stood at the time of the accident it was about midway between the driveway on which plaintiff was injured and the one leading to the adjoining fire house." Holding that the liability of the street railway company was for the jury, the court said: "In the first place, counsel for appellant makes an argument for exemption of his client, as matter of law, from liability, which seems to be based on the idea that this pole was subject to special considerations; that it was one of those structures necessarily located in the street and as long as it was not actually in the traveled portion of the street, or in the driveway leading to the street, there should be no liability for negligence, even though the collision did occur. Support for this argument is sought in a series of cases in which it has been held that the stepping-stone, or the hitching post, or the hydrant, or the tree under consideration in the particular case then being decided was not such a negligent structure as to carry liability in favor of one who had come in collision therewith. We do not think that these cases establish any peculiar principles applicable to the decision of this case. In each one of the cases referred to it was held that the object under discussion was properly in the street, and not a nuisance, and that under the particular conditions which surrounded its location such location was proper and not negligent. We do not understand that any one of these cases decided the principle that a tree, or hydrant, or a stepping-stone might not be so located as to furnish the basis for an action in favor of one injured thereby. In this case the defendant was authorized by the municipality to locate its trolley poles, and, therefore, they were not nuisances. But this permission did not and could not authorize the defendant to so locate its trolley poles that they would unduly and unnecessarily interfere with the use of the streets by the public, or with the use of proper ways of ingress and egress to and from the street by abutting owners. Therefore, in our judgment, the ordinary question is presented, whether the defendant did unlawfully and negligently locate its pole in such position, with reference to the driveway in question, that in the use to be expected of the latter, a collision reasonably might be apprehended. We think that the evidence upon this subject made that question one of fact for the jury, and that it cannot be said as matter of law that the defendant was not at fault."

In Hollis v. Brooklyn Heights R. Co. (1908) 128 App. Div. 821, 113 N. Y. Supp. 4, it was held that where a street railway company had equipped its road with an overhead trolley system more than one year prior to an injury to a pedestrian, caused by the breaking of a trolley wire, it would be presumed, under § 171 of the Railroad Law, that it was lawfully using the highway, and not maintaining a nuisance; and that to warrant a recovery the plaintiff must show negligence on the part of the company. See also People ex rel. New York v. New York R. Co. (1916) 217 N. Y. 310, 112 N. E. 49, affirming (1915) 171 App. Div. 910, 155 N. Y. Supp. 1133.

In Lanigan v. Brooklyn Heights R. Co. (1908) 125 App. Div. 622, 110 N. Y. Supp. 30, it appeared that the plain-

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tiff's intestate was killed while driving a truck, his death being caused by the rear wheel catching against a trolley pole used to support the defendant company's wires, which pole was situated about 6 inches in the street outside of the curb. It further appeared, however, that the pole was on the land of a ferry company, which had refused the railway company permission to move the pole inside the curb. In holding the railway company not liable for the accident, the court said: "The trolley pole had been in that place for many years, and it is entirely clear from the evidence that a pole at that place or near it was necessary for the proper maintenance of the trolley wires of the defendant's road in Kent avenue. . . . In view of the necessity of the pole at or near the place where it stood, in view of the fact that the defendant had, prior to the time of the accident, endeavored to obtain permission from the owner of the land to move the pole behind the curb, and in view of the fact that if the pole had been taken out and moved into the highway, where doubtless the defendant had a right to place it, there must have been even a greater obstruction to traffic, the defendant was not liable by reason of the location of the pole. . . . The measure of the defendant's duty was to exercise merely reasonable care; it was not required to exercise the highest degree of diligence to place the pole or replace it in a position of absolute safety. . . . It would seem that the plaintiff is pursuing the wrong party; the ferry company allowed the pole to remain where it was on its own property, and prevented its change into a safer place.

In Cleveland v. Bangor Street R. Co. (1894) 86 Me. 232, 29 Atl. 1005, it appeared that a street railway company, under the provisions of its charter and municipal ordinances, erected and maintained a trolley pole in a public highway about 18 inches from the curbstone. In an action to recover damages for personal injuries caused by the collision of a carriage with the pole, it was held that the company was liable in that it had erected the pole at a place which made it dangerous for public travel. The court said: "A careful examination of defendant's charter and the city ordinance discloses nothing which expressly or by implication relieves the company from liability for injuries caused by its negligence or want of care in erecting and maintaining its poles when licensed by the city council, but rather the contrary."

But in Hamilton Street R. Co. v. Weir (1915) 51 Can. S. C. 506, 25 D. L. R. 346, reversing (1914) 32 Ont. L. Rep. 578, 22 D. L. R. 155, 7 Ont. Week. N. 495, it was held that, where trolley poles were placed in the middle of a street under municipal authority, they did not constitute a nuisance for which the company was liable to one injured by the collision of an automobile with one of the poles, although the poles had been so placed more than twenty years prior to the accident. The court said: "The ground of the plaintiff's claim, which has been upheld in the provincial courts, is that they were injured as the result of an automobile in which they were traveling colliding with a trolley pole of the defendants, placed in the middle of the space between the double track, commonly called the devil strip, on King street, in the city of Hamilton. This, they allege, was an unlawful obstruction of a highway, amounting to a nuisance. The defendants maintain that they were obliged by the provisions of the statute under which their railway is constructed and operated to place and maintain the pole in question precisely where it was. There is no doubt that the pole was placed where a by-law of the municipality expressly required that it should be."

In McKim v. Philadelphia (1907) 217 Pa. 243, 19 L.R.A.(N.S.) 506, 66 Atl. 340, it was held that where a street railway company, having municipal authority to use a street, erected a trolley pole in the middle thereof, the municipality was liable for the death of the driver of a wagon caused by a collision on a dark night with the pole. The court said:

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"Conceding the right of the electric company to place its poles in the center of the street and that, by reason of municipal permission, they do not create a nuisance by being located there, yet there was a duty imposed upon the electric company to exercise the power conferred by the municipality in such manner and way as not unnecessarily to obstruct the highway or interfere with the purpose for which it was primarily constructed. Unless the intention is manifest, it will not be presumed that the legislature or its agent, the municipality, intended, when granting the right of the company to locate its poles in the middle of the street, to deprive the public of the right to use the street without danger and with safety to themselves. This is made more apparent by the fact that the city ordinance requires the poles to be located under the supervision, and subject to the approval, of the municipal officers. When an electric company invokes municipal action for its protection in occupying the streets of a city, it must appear that the company acted strictly in accordance with the authority conferred. In stating the English rule on the subject Chief Justice Cockburn, in Vaughan v. Taff Vale R. Co. (1860) 5 Hurlst. & N. 685, 157 Eng. Reprint, 1354, 1 Eng. Rul. Cas. 296, says: 'When the legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it was authorized, and every precaution has been observed to prevent injury, the sanction of the legislature carries with it this consequence, that if damages result from the use of such thing independently of negligence, the party using it is not responsible.' That rule, of course, is limited in this country by the constitutional provision that prohibits the legislature from taking private property for public use without just compensation. But aside from this limitation, the rule as stated by the learned chief justice is certainly sound in principle, and clearly indicates that the beneficiary of the authority granted is required to exercise the legislative grant without negligence, and with the necessary precaution to prevent injury to another. . . . It is the duty of the municipal authorities having control of the highways to keep that fact in view, and while permitting them to be used for other purposes, it should not be done in a manner which would prevent their use by the public, or would render them unsafe and dangerous. Seventy years ago the legislature of this state declared that the public highways should be constantly kept in repair and kept clear of all impediments to easy and convenient passing and traveling. This is the law of the commonwealth to-day, and includes the cities as well as the rural districts. The electric company was authorized by the ordinance to locate and operate its railway on Eleventh street, but there is nothing in the ordinance from which even an inference can be drawn that the use of Eleventh street by the company should exclude the public from it, or that the company was authorized to construct or operate its railway in a manner which would render the street unnecessarily dangerous. As it was the duty of the city to keep its streets clear of unnecessary impediments or obstructions, and reasonably safe for public use, we cannot assume or infer that the councils intended to hand over Eleventh street to the electric company with permission to erect and maintain obstructions on it in total disregard of the rights of the public. In view of this duty of the city, and of the unquestioned duty of the electric company to construct this line so as to maintain the street in a reasonably safe condition for use by the public, the question arises in this case, whether the electric company observed its duty in exercising the authority conferred by the city, or whether it negligently erected this pole or negligently maintained it so as to cause the accident which resulted in the death of the plaintiff's decedent. These were questions for the jury. If the pole, either in its original construction, or in the manner of its maintenance, was dangerous to the public in the use of the street by day

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or night, municipal consent would afford the company no protection. The city, likewise, would be culpable, and liable to any person injured by reason of its neglect to protect him against the unlawful use of the street. In daylight, of course, the pole could be seen and avoided, but at night, and especially when it is very dark, as on this occasion, and could not be seen, a jury certainly would be justified in finding that it was a dangerous obstruction. If, in the construction of its railway, it had been necessary to leave a hole in the street of equal dimensions with the base of the pole, it could not reasonably be pretended that municipal consent to construct the railway on the street would authorize such action on the part of the company, unless the public was, by some means, warned by day and night of the existence and location of the hole. The hole, however, would not be more dangerous than the base of the pole which caused McKim's death, and both would manifestly be a dangerous obstruction in the middle of a city street of a very dark night, with no signals or lights to indicate their location. The rule which requires the streets of a city to be kept clear of dangerous impediments applies to the nighttime as well as to the daytime, and demands of the municipality action which will maintain the safety of the street during the whole of the twenty-four hours. The fact that there was ample space between the pole and the curb for teams to pass and repass, as suggested by the appellee, does not alter the case. This pole stood nearly in the center of the street, where a traveler would presume there was safety, and where instinctively he would go of a dark night in order that he might have safe transit. This was a thickly populated community, and notwithstanding the width of the street, the city as well as the electric company should have expected the frequent use of every part of the street, both by night and day. Care under the circumstances, therefore, required the company, and on its default, the city, to give notice of the presence of the pole to those who might be using the street at night. It was a question for the company, subject to the approval of the city, to determine what was necessary for this purpose; the only obligation resting upon either of them was that they took reasonable precaution to accomplish the purpose intended. This might have been done by a light on the pole itself, or by lights in the immediate vicinity of the pole, or in other ways that could be suggested. The failure, however, to observe any precaution to protect people using the street during the night, became a question of negligence which should have ben submitted to the jury."

In the reported case (STERN v. INTERNATIONAL R. Co. ante, 487), it appeared that trolley poles were erected in the middle of a street, under municipal authority, in the year 1889, at which time they did not constitute a nuisance, but it is held that by reason of a great increase of traffic they had become a nuisance.

With respect to abutting owner.

The question whether the construction of an electric street railway line in a street imposes an additional servitude for which abutting owners are entitled to compensation is not within the scope of this discussion, though the cases holding that it does not impose such a servitude are, in an argumentative way, authority for the proposition that such a street railway and its incidental structures, such as trolley poles, do not constitute a nuisance. In the following cases, the matter was stated somewhat more specifically, the court holding that an electric street railway with its wires, poles, etc., was a proper and lawful purpose for which the occupation of a street might be authorized, and that the abutting owners had no right to prevent such a use or recover damages by reason thereof:

Kentucky.—Louisville Bagging Mfg. Co. v. Central Pass. R. Co. (1893) 95 Ky. 50, 44 Am. St. Rep. 203, 23 S. W. 592.

Maryland.—Poole v. Falls Road Electric R. Co. (1898) 88 Md. 533, 41 Atl. 1069.

Massachusetts.—Howe v. West End

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Street R. Co. (1896) 167 Mass. 46, 44 N. E. 386.

Michigan.—Grand Rapids & I. R. Co. v. Heisel (1878) 38 Mich. 62, 31 Am. Rep. 306; Potter v. Saginaw Union Street R. Co. (1890) 83 Mich. 285, 10 L.R.A. 176, 47 N. W. 217; Detroit City R. Co. v. Mills (1891) 85 Mich. 634, 48 N. W. 1007; Dean v. Ann Arbor Street R. Co. (1892) 93 Mich. 330, 53 N. W. 396.

New Jersey. — Halsey v. Rapid Transit Street R. Co. (1890) 47 N. J. Eq. 380, 20 Atl. 859; West Jersey R. Co. v. Camden, G. & W. R. Co. (1893) 52 N. J. Eq. 31, 29 Atl. 423; Ehret v. Camden & T. R. Co. (1900) 61 N. J. Eq. 171, 47 Atl. 562; State, Roebling, Prosecutrix, v. Trenton Pass. R. Co. (1896) 58 N. J. L. 666, 33 L.R.A. 129, 34 Atl. 1090; Budd v. Camden Horse R. Co. (1904) 70 N. J. L. 782, 59 Atl. 229.

Ohio.—Dietz v. C. & M. V. Traction Co. (1897) 6 Ohio S. & C. P. Dec. 513.

Pennsylvania.—Lockhart v. Craig Street R. Co. (1891) 139 Pa. 419, 21 Atl. 26; Com. ex rel. Dist. Atty. v. West Chester (1891) 9 Pa. Co. Ct. 542; Fox v. Catharine & B. Street R. Co. (1892) 12 Pa. Co. Ct. 180.

Rhode Island.—Taggart v. Newport Street R. Co. (1890) 16 R. I. 668, 7 L.R.A. 205, 19 Atl. 326.

Wisconsin.—La Crosse City R. Co. v. Higbee (1900) 107 Wis. 389, 51 L.R.A. 923, 83 N. W. 701; Linden Land Co. v. Milwaukee Electric R. & Light Co. (1900) 107 Wis. 493, 83 N. W. 851.

Thus, in State, Kennelly, Prosecutor, v. Jersey City (1894) 57 N. J. L. 293, 26 L.R.A. 281, 30 Atl. 531, the court said: "That easement includes the right to use the street for purposes of passage by the public, and therefore to employ any means directly conducive to that end which do not substantially interfere with the customary use of the street by any portion of the public, or with the recognized rights of abutting owners."

In Halsey v. Rapid Transit Street R. Co. (1890) 47 N. J. Eq. 380, 20 Atl. 859, it was said: "The court is bound to declare, as an established fact, that the poles and wires are, in the present state of the electric art, necessary to the successful operation of the defendant's railway by electricity. The poles and wires are to be used as helps to the public in exercising their right of passage over the street. They form part of the means by which a new power, to be used in the place of animal power, is to be supplied for the propulsion of the street cars, and they have been placed in the street to facilitate its use as a public way, and thus add to its utility and convenience. The whole matter may be summed up in a single sentence: The poles and wires have been placed in the street to aid the public in exercising their right of free passage over the street." See to the same effect, Paterson R. Co. v. Grundy (1893) 51 N. J. Eq. 213, 26 Atl. 788.

In Com. ex rel. Dist. Atty. v. West Chester (1891) 9 Pa. Co. Ct. 542, it was said: "The company has the power, however, to build the railroad and convey passengers by any power, other than steam. This authorizes, in our opinion, the use of electricity; and, in using electricity by overhead wire, the erection of poles appears to be necessary. They constitute a part of the system adopted by the company for the propulsion of their cars."

In Taggart v. Newport Street R. Co. (1890) 16 R. I. 668, 7 L.R.A. 205, 19 Atl. 326, the court said: "Telegraph and telephone poles and wires are not used to facilitate the use of the streets, where they are erected, for travel and transportation, or, if so, very indirectly so; whereas the poles and wires here in question are directly ancillary to the uses of the streets, as such, in that they communicate the power by which the street cars are propelled."

In Snyder v. Ft. Madison Street R. Co. (1898) 105 Iowa, 284, 41 L.R.A. 345, 75 N. W. 179, the court said: "It is said, however, that the erection of trolley poles, and the placing of wires upon them, is a permanent obstruction of the street for the benefit of the street railway, which necessarily interferes with the proper use of the street by others. That poles and wires might be so erected and arranged as to have that effect is undoubtedly true, but the mere fact that the spaces they

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occupy cannot be used for other purposes does not show an improper use of the street. They are designed to aid in the rapid, convenient, and economical transportation of persons from place to place, and thus to facilitate the use of the street by the public for whom it was intended."

In La Crosse City R. Co. v. Higbee (1900) 107 Wis. 389, 51 L.R.A. 923, 83 N. W. 701, the court said: "A street railway pole properly placed at the curb line of a street no more interferes with the access to or egress from property outside of the street line than a lamp-post, or hitching post, or shade tree, and no more interferes with the ordinary use of the street for public travel."

And in Grand Rapids & I. R. Co. v. Heisel (1878) 38 Mich. 62, 31 Am. Rep. 306, it was said: "It is enough that the use of the street for a city railway is a proper use, and therefore a lawful use; being such, it can give rights of action to no one. Such appear to be the conclusions of the courts."

It has been held specifically that the erection of trolley poles in front of an abutting owner's property does not constitute a nuisance, unless some particular or special injury results therefrom. Escott v. Newport Corp. [1904] 2 K. B. (Eng.) 369, 73 L. J. K. B. N. S. 693, 20 Times L. R. 158, 68 J. P. 135, 52 Week. Rep. 543, 90 L. T. N. S. 348, 2 L. G. R. 779; Snyder v. Ft. Madison Street R. Co. (Iowa) supra; State, Kennelly, Prosecutor, v. Jersey City (1894) 57 N. J. L. 293, 26 L.R.A. 281, 30 Atl. 531; Pelton v. East Cleveland R. Co. (1889) 10 Ohio Dec. Reprint, 545; Mt. Adams & E. P. Inclined R. Co. v. Winslow (1888) 2 Ohio C. D. 240; Gillette v. Chester & M. R. Co. (1889) 2 Pa. Dist. R. 450; Ogden City R. Co. v. Ogden City (1891) 7 Utah, 207, 26 Pac. 288.

Thus, in Mt. Adams & E. P. Inclined R. Co. v. Winslow (1888) 2 Ohio C. D. 240, the court, in referring to the erection of trolley poles on and along the margin of a sidewalk, said: "In this case, the tracks of the street railroad continue in the condition in which they have been for several years past —the only addition or change which has been made to adapt it to the use of electric motor being the poles and wires before referred to. If the structure of the plaintiff in the street, so long in use, is not an invasion of the rights of the defendants (though the same must, in the nature of things, be some obstruction to the highway; but largely compensated in a populous city by the advantages of this mode of travel), it is difficult to see why the mere placing of a pole of this size on the margin of the sidewalk at once and necessarily gives to the owner of the adjacent premises the right to prevent it, or to have it removed. The sidewalk is only a part of the highway, and is to be dealt with as such; and it seems to us that a structure erected thereon stands on the same principle as those in the center of the street. And why should the planting of the pole in this instance be held, on the evidence, to entail any special damages to the defendants? It is not objected that it is unsightly in appearance, or unsuited to the purpose for which it is used; all that is claimed is, that it impedes the access to defendants' premises, and that the electric system in use is unsafe. We have found as a fact that neither of these objections is well founded. The margin of the sidewalks in cities and villages for centuries past has been appropriated for the placing of shade trees, public lamp-posts, awnings, hitching posts, and similar structures, and when they are suitably placed, and at sufficient intervals, cannot, we think, be any material obstruction to the access to the premises adjacent thereto, or be said to impose new burdens upon the land, the right to impose which had not been acquired by the public."

In State, Kennelly, Prosecutor, v. Jersey City (1894) 57 N. J. L. 293, 26 L.R.A. 281, 30 Atl. 531, it was said: "The tracks, poles, and wires cause no greater detriment to adjoining property than do the tracks, sewers, pipes, posts, and trees which, indisputably, the public may authorize to be placed in the street."

In Snyder v. Ft. Madison Street R. Co. (1898) 105 Iowa, 284, 41 L.R.A.

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345, 75 N. W. 179, it appeared that the defendant company had erected a trolley pole 20 or more feet in height in front of the plaintiffs' premises. An action was brought to enjoin its maintenance on the ground that it constituted a nuisance, in that it obstructed the plaintiffs in the enjoyment of their homestead. The court, in denying the relief sought, said: "An abutting lot owner has no sufficient ground to complain of the erection and maintenance of street railway poles in the street in front of his premises, if they are properly placed, and this is true whether he owns the fee of the street or not. . . . We must not be understood as holding that a property owner may dictate the location of poles in front of his premises, nor that he may recover damages, however trivial, which may be caused by their location. The railway company has the right to so place its poles as to secure the best results for its railway, provided that it so places them as not to cause any unnecessary injury. The injurious consequences which it must guard against are those of a substantial character. The placing of poles in front of property is seldom desired by the property owner, and may, in some slight degree, interfere with the use of his property, as by obstructing the view from it; but for such injury alone he would rarely, if ever, be entitled to relief. The placing of a pole in a walk or roadway, however, or in front of and near to an important window, if the pole could as well be placed elsewhere, might afford ground for relief. But we cannot undertake to lay down general rules which would govern all cases. Each, of necessity, must be decided according to its own facts."

In Pelton v. East Cleveland R. Co. (1889) 10 Ohio Dec. Reprint, 545, it was said: "It is claimed further that these poles, or iron posts, and the wires, constitute an obstruction to abutting property; that they are unsightly and a burden upon the street. It is clear that they add nothing to the beauty of a street, but that they amount to a burden or obstruction seems to us more fancied than real. Certainly the proof does not justify such conclusion. One of these poles is no more of an obstruction than a lamp-post, or an electric light post."

In Gillette v. Chester & M. R. Co. (1889) 2 Pa. Dist. R. 450, wherein an injunction requested by abutting owners to prevent the construction of an electric railway was denied, the court, in referring to the proposed erection of trolley poles, said: "The poles must be of the safest and best material, and be planted as near the outer lines of the road as possible. They must be of sufficient height and so constructed as to be the least objectionable and dangerous. If the company, in any particular, should fail to observe the suggestions above made, on bringing the matter to the attention of the court, an injunction will issue."

But in State, Green, Prosecutor, v. Trenton (1891) 54 N. J. L. 92, 23 Atl. 28, it was held that an abutting owner who owns the fee to the middle of a street is entitled to a writ of certiorari to test the validity of a municipal ordinance, purporting to authorize a street railway company to place its trolley poles in the street in front of his premises. The court said: "Unless these poles are to be placed in their intended position by someone having authority to do so, they will constitute a nuisance. In as much as the prosecutrix owns the fee to the middle of the street, such an erection will also be a trespass. . . . The execution of the project which this ordinance professes to authorize involves a special injury to the prosecutrix, and she is not bound to await its accomplishment. She has the right to anticipate this injury by testing the legality of the ordinance which professes to confer the right to inflict it."

And in Barber v. Saginaw Union Street R. Co. (1890) 83 Mich. 299, 47 N. W. 219, a street railway company was enjoined and restrained from erecting and maintaining any trolley poles in the street in front of the owner's premises, without his consent being first obtained. In that case it appeared, however, that the defendant company removed the pole, prior to the final appeal. H. B.

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MOREAU RIVER STATE BANK, Appt.,
v.
A. M. JAPINGA
and
A. H. BROWN, Garnishee, Respt.

South Dakota Supreme Court—July 10, 1916.

(37 S. D. 404, 158 N. W. 786.)

Garnishment — contingent liability — further performance.

1. The liability of a purchaser of real estate to pay the price, which is contingent on delivery of the deed, is not subject to garnishment in a suit against the vendor.

[*See note on this question beginning on page* 506.]

Same — delivery of check — effect.

2. The delivery of a check in payment of a debt leaves no obligation on the part of the debtor which is subject to garnishment for an obligation of the creditor.

APPEAL by plaintiff from a judgment of the Circuit Court for Walworth County in favor of the garnishee, and from an order denying a new trial, in a proceeding to reach the amount of an indebtedness, through the purchase by him from defendant of certain real estate. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **Carpenter & Morrison** and **H. G. Fuller** for appellant.

Mr. **W. M. Potts**, for respondent:

While the indebtedness on the part of the garnishee is contingent, and it is uncertain whether he will ever be indebted to the defendant, there is no claim in favor of the latter which can be reached by garnishment.

14 Am. & Eng. Enc. Law, 765; 20 Cyc. 1007.

Under a contract of sale for cash and delivery neither the vendor nor the vendee can be charged as the garnishee of the other, since in such case the delivery and payment are to be concurrent acts.

20 Cyc. 995; Briggs v. McEwen, 77 Iowa, 303, 42 N. W. 303; National Revere Bank v. Bay State Shoe Fastening Co. 67 N. H. 371, 40 Atl. 255.

The garnishee defendant is not liable in any event, and the plaintiff cannot recover from him, unless the garnishee defendant could, at the date of service of the garnishee summons, in an action at law, recover the debt from the principal defendant.

14 Am. & Eng. Enc. Law, 835; Edwards v. Roepke, 74 Wis. 571, 43 N. W. 554; Foster v. Singer, 69 Wis. 392, 2 Am. St. Rep. 745, 34 N. W. 395; Vollmer v. Chicago & N. W. R. Co. 86 Wis. 305, 56 N. W. 919; Evans v. Rector, 107 Wis. 286, 83 N. W. 292; Smith v. Davis, 1 Wis. 447, 60 Am. Dec. 390; Bradley v. Byerley, 3 Kan. App. 357, 42 Pac. 930; Streeter v. Gleason, 120 Iowa, 703, 95 N. W. 242; Hitchcock v. Miller, 48 Mich. 603, 12 N. W. 871.

Whiting, J., delivered the opinion of the court:

Appeal from a judgment in favor of a garnishee and from an order denying a new trial.

It is the contention of appellant that respondent became indebted to the main defendant through the purchase from him of certain real estate, and that such indebtedness was reached by the garnishee process herein. The trial court found that the real estate deal was a cash transaction, in which full payment was made upon receipt of deed. Appellant concedes that, if this were true, there never arose any liability of the grantee to the grantor that could be reached by garnishee process.

But appellant contends that a contract for the sale of the real property was entered into several days prior to the service of the garnish-

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ment summons; that the deal was not consummated by a payment of the contract price until after service of such summons; and that, therefore, respondent became liable as garnishee to the amount unpaid on such contract at the time such summons was served. There is no merit in this contention because, if the trial court was in error in finding that this real estate deal was entered into and consummated at one time, and we do not think the court was in error in so holding, yet it is clear that there was no time prior to the delivery of the deed when there was any absolute liability existing from the grantee to the grantor; the grantee's liability, if any, was contingent upon the giving of the deed, and therefore was not subject to be reached by garnishment unless it continued after the deed was delivered. 20 Cyc. 1007; National Revere Bank v. Bay State Shoe Fastener Co. 67 N. H. 371, 40 Atl. 255; Briggs v. McEwen, 77 Iowa, 303, 42 N. W. 303.

Garnishment—contingent liability—further performance.

Appellant further contends that respondent was liable, owing to the following facts: Upon delivery to him of the deed to the real estate, respondent gave his grantor certain checks in payment therefor. The deed was delivered and these checks given on the same day that respondent made his disclosure denying indebtedness to the main defendant, and but a day or two before such disclosure was served on appellant. After the giving of these checks, the exact time not appearing, respondent discovered that he had overpaid his grantor, and stopped payment on one of the checks. Several days after service of respondent's disclosure, he gave to his grantor another check for the balance of the purchase price. Appellant contends that, prior to and at the time of the disclosure, there existed an indebtedness for the amount of this check. In this appellant is clearly in error. The delivery of a check in payment of property leaves no liability subject to be reached by garnishee process. As stated in Morse on Banks & Bkg. 3d ed. § 543:

Same—delivery of check—effect.

"A check is always so far payment, until dishonored, that after its delivery the drawer cannot be garnisheed as debtor of the payee in respect to the debt for which the check is given."

See also Larsen v. Allan Line S. S. Co. 45 Wash. 406, 9 L.R.A.(N.S.) 258, 122 Am. St. Rep. 926, 88 Pac. 753; National Park Bank v. Levy Bros. 17 R. I. 746, 19 L.R.A. 475, 24 Atl. 777, 12 R. C. L. 835. It is unnecessary for us to determine whether, after payment of the erroneous check had been stopped, there arose from the act of stopping such payment a liability from respondent to his grantor that would be subject to garnishment, because there was no evidence to show when such payment was stopped. Instead of there being a liability from respondent to his grantor subject to garnishment, there was in fact, up to the time when payment of the check was stopped, a liability from such grantor to respondent for the amount of the overpayment.

The judgment and order appealed from are affirmed.

McCoy, J., concurring specially:

Defendant was indebted to appellant. Appellant brought suit and caused garnishee proceedings to be issued and served on respondent. Defendant sold an interest in hotel to respondent for cash. Respondent, in paying the consideration for the hotel, overpaid defendant. Defendant subsequently paid back to respondent the amount of the overpayment. Was there anything in respondent's hands after the completion of the cash transaction, as it originally took place, that was the subject of garnishment? I think not, as the indebtedness was the other way; by the transaction of the overpayment defendant became indebted to respondent. If there had been a shortage in the payment of the consideration for the hotel that

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remained unpaid at the time of the return of the garnishee procedure, I am not so sure but what there might have been a debt owing from Brown to Japinga that would have been the subject of garnishment; but the amount of the overpayment by Brown to defendant could not be the subject of garnishment in favor of appellant. On this ground I am of the view that the judgment appealed from should be affirmed.

Smith, J., concurs.

Petition for rehearing denied, August 31, 1916.

ANNOTATION.

Money due only on further performance of contract by debtor as subject to garnishment.

I. Scope of note, 506.
II. In general, 506.
III. Building contract, 507.
IV. Contract for sale of land, 509.

I. Scope of note.

In discussing the right to garnish money which is not due until the debtor has further performed a contract, this note does not discuss the garnishment of wages or salary.

II. In general.

As a general proposition, money presently and unconditionally owing, but not payable until a future date, is subject to garnishment. See 12 R. C. L. title, Garnishment, p. 779. But where a further performance of a contract is necessary before money payable thereon becomes due, the payment is conditioned on the performance, and is not subject to garnishment until the condition has been fulfilled. See the cases cited throughout this note.

The rule rests on the view that "as a plaintiff can have no greater right against the garnishee than the defendant would have, and can occupy no better position with respect to the garnishee than the defendant could in a suit brought by him against the garnishee, it follows that, where a contract between the defendant and the garnishee had not been fully performed by defendant at the time of attachment by plaintiff, the garnishee is not chargeable." Johnson v. Healey (1913) 35 R. I. 192. See to the same effect, Strauss v. Chesapeake & O. R. Co. (1873) 7 W. Va. 368. The garnishee "is not to be placed in a position worse than that which he would occupy if the principal had sued him for the debt." Curtis v. Alvord (1878) 45 Conn. 569. "The true test is whether anything else has to be done by the judgment debtor as a condition precedent to payment." Heward Mill. Co. v. Barrett (1909) 2 Sask. L. R. 210. The rights are to be determined as of the time when the garnishment takes effect, and the fact that the contract is subsequently performed, and the money thereby becomes due absolutely, does not make the garnishment good. Williams v. Androscoggin & K. R. Co. (1853) 36 Me. 201, 58 Am. Dec. 742; Hopson v. Dinan (1882) 48 Mich. 612, 12 N. W. 875.

In Kiely v. Betrand (1887) 67 Mich. 332, 34 N. W. 674, it was held that a portion of the price under a logging contract, which was to be retained until the logs were afloat and all labor claims paid, was not subject to garnishment until the full performance of the contract.

In Wood v. Buxton (1871) 108 Mass. 102, the garnishees disclosed the following facts: "The defendant was employed by them as a boot bottomer, and took out work; that by the terms of their contract with him they were not to pay for the work until it was returned to their shop, and accepted by them; that a short time after the service of the writ the defendant returned work to the shop, and they accepted it, and paid him therefor; and that the work was completed before the service of the writ." It was held that there was no debt due at the time of the garnishment.

In Carter v. Webster & W. Paper

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Co. (1888) 65 N. H. 17, 17 Atl. 978, it appeared that under a logging contract the contractor was to be paid a certain sum for each thousand feet of lumber cut. The contractor was to be charged for teams and tools furnished to him. A settlement at the end of each season was provided for. It was held that until the settlement the sum which might to due to the contractor was not subject to garnishment.

An executory agreement to sell goods for cash does not create an indebtedness subject to garnishment. A garnishable debt exists only after the goods have been delivered. Furness v. Smith (1858) 30 Pa. 520.

In Johnson v. Healey (1913) 35 R. I. 192, 85 Atl. 938, it appeared that the alleged indebtedness arose out of the following contract: "Edward F. Healey on his part agrees to trim all dead and diseased wood from the chestnut trees in the forest reserve on Mr. Remington's estate, in the town of Warwick, also to cart, carry, and destroy all diseased wood cut from trees in pursuance of said work. He further agrees to put all of said trees in good condition, and to treat any and all trees for borers where it is deemed necessary, and to fall any dead trees now standing and to destroy the same. He further agrees to inspect all trees in the forest reserve in the different seasons of the year, and to report to Mr. Remington the condition of the trees, especially in regard to the chestnut tree fungi. Mr. Seth B. Remington on his part agrees to pay Edward F. Healey the sum of $1,150 for this work. Payments to be made during progress of said work to the extent of $650. The balance to be paid during the month of July, 1912." The garnishment was served in June, 1912, at which time the "great bulk of the work" under the contract had been done. It was held that there was no indebtedness subject to garnishment.

In Edwards v. Roepke (1889) 74 Wis. 571, 43 N. W. 554, the price payable under an uncompleted contract to construct a boiler was held not to be subject to garnishment, the court saying: "By the terms of the contract nothing more became due thereon until the new boiler and work thereon were fully completed, in good workmanlike order of the first class, with material and workmanship which should be acceptable to the inspector therein named. That, as found by the referee, did not occur until in November, 1885, some four months after the service of the garnishee process. At the time of such service there was no certainty as to whether it would ever occur or not. The right to such balance, therefore, had not at the time of such service become fixed and absolute as against the garnishees or in favor of Cumberlidge, and hence was not subject to garnishment."

In Bardon v. McCall (1900) 108 Wis. 181, 84 N. W. 168, it appeared that a contract was made for the sale of standing timber, the purchase price being about $1,700. At the time of the garnishment in question, timber worth about $500 had been cut and delivered. It was held that, the contract being entire, there was no indebtedness then existing.

In Curtis v. Alvord (Conn.) supra, the alleged indebtedness was based on a contract whereby the debtor agreed to obtain a patent for the garnishee for a stated sum, part to be paid in advance and the balance when the patent was issued. It was held that the latter payment was not subject to garnishment before the issuance of the patent had been procured.

In Russell v. Clingan (1857) 33 Miss. 535, an answer by a garnishee, stating that on the debtor's complying with a contract he would be indebted to the debtor in a certain sum, was held to admit "only the possibility of an indebtedness at a future period."

III. Building contract.

A part of the contract price fixed by a building contract, which is, by the terms of the contract, to be withheld until the building is completed and accepted, is not subject to garnishment until the work of the contractor is finished. Hopson v. Dinan (1882) 48 Mich. 612, 12 N. W. 875; Webber v. Bolte (1883) 51 Mich. 113, 16 N. W. 257; Simmons Hardware Co. v. Rose (1905) 140 Mich. 123, 103 N. W. 529;

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Gastonia v. McEntee-Peterson Engineering Co. (1902) 131 N. C. 359, 42 S. E. 857; Grimwood Co. v. Capitol Hill Bldg. & Constr. Co. (1906) 28 R. I. 32, 65 Atl. 304; Eikel v. Frelich (1881) 1 Tex. App. Civ. Cas. (White & W.) 628; Medley v. American Radiator Co. (1901) 27 Tex. Civ. App. 384, 66 S. W. 86; Mundt v. Shabow (1904) 120 Wis. 303, 97 N. W. 897.

"We can imagine no liability subject to more contingencies than the balance which may become due on an uncompleted building contract, entire in its nature." Medley v. American Radiator Co. (1901) 27 Tex. Civ. App. 384, 66 S. W. 86.

In Heward Mill Co. v. Barrett (1909) 2 Sask. L. R. 210, it appeared that the debtor had contracted to erect a building. By the contract 20 per cent of the price was to be withheld until the full completion of the contract. The debtor abandoned the contract before its completion; thereafter the creditor garnished the owner. It was held that there was no indebtedness subject to garnishment. See, to the same effect, American Forcite Powder Mfg. Co. v. Malone (1895) 166 Pa. 289, 31 Atl. 90; Strauss v. Chesapeake & O. R. Co. (1874) 7 W. Va. 368.

In Williams v. Androscoggin & K. R. Co. (1853) 36 Me. 201, 58 Am. Dec. 742, it appeared that, by the terms of a railroad grading contract, 75 per cent of the price was to be paid on estimates from time to time, and 25 per cent retained until the satisfactory completion of the contract. It was held that until the contract was completed the withheld 25 per cent was not subject to garnishment by a creditor of the contractor. See, to the same effect, Daily v. Jordan (1848) 2 Cush. (Mass.) 390.

In Hopson v. Dinan (1882) 48 Mich. 612, 12 N. W. 875, there was a garnishment by a creditor of a building contractor. It appeared that at the time of the garnishment the final instalment was unpaid. It further appeared that the building was unfinished, that the time limit for its completion had expired, and the owner was entitled to a stated sum per day as liquidated damages until its completion. It was held that the balance of the contract price was not subject to garnishment.

In Mundt v. Shabow (Wis.) supra, it was held that no indebtedness of the owner to the contractor existed before the completion of a building contract, it appearing that the owner agreed to pay all labor and material claims as they occurred, and the balance on the completion of the buildings.

In Cunningham Lumber Co. v. New York, N. H. & H. R. Co. (1905) 77 Conn. 628, 60 Atl. 107, it appeared that the debtor agreed to do certain construction work for a stated price, no time of payment being fixed by the contract. It was held that the price was not due so as to be subject to garnishment until the contract was completed, and that the fact that part payments had been made as a matter of favor did not alter the rule.

In Webber v. Bolte (1883) 51 Mich. 113, 16 N. W. 257, a statute making contingent claims subject to garnishment was held not to be applicable to a claim for the balance which would become due on the completion of a building contract. The court said: "The case may seem to be within the words of the statute, but it is not within its intent or reason. To permit garnishment upon such claims would be a most unwarrantable interference with the contracts of third parties, and must in many cases deprive them of substantial rights. It would be especially mischievous in the case of building contracts; for, in a very large proportion of all cases of such contracts, the means for their fulfilment must be obtained from payments on the estimates; and if these can be garnished in advance, performance would be rendered impossible. This would be a great hardship to the debtor, but it would be quite as much so to his employer, who might have his arrangements broken up and serious injury inflicted without, on his part, any fault whatever. No doubt the employer has a claim in such a case that the builder shall perform his contract; but the contingency on which money is to be payable is one depend-

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ing on the subsequent earning of money. It is, therefore, a contingency depending on the will and ability of the debtor to earn money; a will which it may generally be assumed will not be exerted, where earning is not to be followed by enjoyment. If there is a contingent claim here, so there is when a laborer hires out for a year, to be paid at the end of the year; and his creditor may garnish the claim as soon as the hiring takes place. It would be a safe assumption that very little labor would be done under the hiring, after the claim was garnished."

The creditor is not entitled to assert that the contract has been substantially performed when his debtor (principal defendant) makes no such claim and is still endeavoring to complete the performance. H. A. Grimwood Co. v. Capitol Hill Bldg. & Constr. Co. (1906) 28 R. I. 32, 65 Atl. 304, wherein the court said: "The question whether a contract has been substantially performed, or not, can only arise between the contractor and owner after the former has ceased to work and has claimed that his contract has been completed. But this does not authorize a creditor of the contractor to ascertain and determine for him the time when his work has been substantially completed, and then to bring suit for him, by way of trustee process, while the contractor is honestly trying to perform his contract, and is not claiming that his work is done. Such interference is not to be tolerated."

IV. Contract for sale of land.

Where the purchase price of land is not due until the deed is delivered, it is not subject to garnishment by a creditor of the vendor until the delivery of the deed. Streeter v. Gleason (1903) 120 Iowa, 703, 95 N. W. 242; Sarvi v. Brazier (1851) 1 Phila (Pa.) 214. And see the reported case (MOREAU RIVER STATE BANK v. JAPINGA, ante, 504).

In Becker v. Becker (1901) 112 Wis. 24, 87 N. W. 830, it was held that money deposited in a bank by a purchaser, to be paid over on the delivery of an approved deed, is not subject to garnishment by a creditor of the vendor.

In Cowell v. May (1901) 26 Mont. 163, 66 Pac. 843, it was held that the purchase money on a contract to sell land was not subject to garnishment while the deed was in escrow, to be delivered on the payment of the price and the satisfaction of a mortgage.

In Gross v. Mihm (1910) 3 Sask. L. R. 393, it appeared that the debtor agreed to sell certain land, and the vendee deposited a check for the price with a third person, to be held until he ascertained that the title was good. It was held that the vendee was subject to garnishment as a debtor of the vendor. C. M.

HARMON HILL, Alias, Appt.,
v.
STATE OF ALABAMA.

Alabama Supreme Court—June 30, 1915.

(194 Ala. 11, 69 So. 941.)

Homicide — defense of illegal business — duty to retreat.

1. The right to kill without retreating does not exist with respect to a place of unlawful business, such as an isolated illicit still.

[*See note on this question beginning on page* 518.]

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Appeal — refusal to exclude answer.

2. It is not error to refuse to exclude responsive answers where no objection was made before they were given.

Evidence — homicide — condition of body.

3. The condition of the body of deceased is properly described to the jury in a prosecution for homicide, to shed light on the corpus delicti.

Appeal — admission of evidence subsequently becoming immaterial.

4. Confession by accused cannot put the court in error in admitting evidence of the condition of the body of deceased to shed light on the corpus delicti before the confession was made.

Same — improper remark by prosecutor — repudiation by court.

5. A remark by the prosecutor in a murder case in the presence of the jury, "It is a horrible thing to relate," is not reversible error, if the court repudiates it and excludes it from consideration of the jury.

Evidence — conduct against interest.

6. The conduct before arrest of one accused of murder with reference to the investigation and the selection of the coroner's jury is admissible on his trial, as against interest.

Same — cross-examination — irrelevant testimony.

7. One failing to object to incompetent evidence cannot introduce irrelevant testimony on cross-examination on the subject.

Same — self-serving declarations.

8. One on trial for murder cannot testify as to his intention to give himself up, his reluctance to leave home under advice, or his telling of his crime, since they are merely self-serving acts and declarations.

Same — evidence of other crime.

9. That one was accused of illegally selling liquor is not admissible upon his trial for murder.

Same — evidence of conduct.

10. One who has described the appearance of a person accused of murder when he returned home at the time of the alleged offense cannot testify as to his conduct when so returning.

Same — reasons for hearing shots.

11. Upon trial for homicide a witness who has testified that he heard shots should not be permitted to give reasons why his attention was attracted to them.

Same — specific acts of character.

12. One who has testified as to the general good reputation of accused may be asked on cross-examination if he had not heard of special acts which tended to militate against such character.

Same — testing knowledge of witness.

13. One on trial for murder may test the knowledge of one who has testified to his general bad reputation by inquiries as to reputed acts before the commission of the crime.

Appeal — erroneous admission of evidence — curing.

14. Striking out testimony of specific acts elicited by the prosecution in support of general evidence of bad reputation of accused, and instructing the jury to disregard it, cures the error in admitting it.

Witness — impeachment — right of prosecution.

15. The state may impeach witnesses for accused as to truth and veracity.

Same — literal reproduction of conflicting declaration.

16. A literal reproduction of the conflicting declaration is not necessary to impeach a witness for which a proper predicate has been laid.

Evidence — rebuttal — limitation.

17. The testimony of a witness called in rebuttal must be limited to such matter.

Same — contradictory statements — weight.

18. Statements of accused contradictory of his testimony may be considered by the jury for their evidential weight, and are not limited merely to testing the weight of his testimony.

Trial — jury — possibility of retreating.

19. In a prosecution for murder the jury must determine whether or not, under all the circumstances, accused could have retreated without increasing his peril.

Homicide — self-defense — danger.

20. To justify the taking of life in self-defense one must have a reasonable and bona fide belief that his life is in danger.

Same — self-defense — duty to retreat.

21. Before one can take life in self-defense, he must retreat if it is rea-

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sonably apparent that he can do so without increasing his danger.

Criminal law — misleading instructions — ground of liability.

22. A requested instruction in a murder case that accused cannot be convicted because he failed to report his deed to the officers is properly refused as misleading.

Trial — instruction — refusal.

23. The use of the word "or" instead of "of" in an instruction that certain facts must be found before accused can be convicted of any degree or homicide justifies its refusal as meaningless.

Same — argumentative instruction — refusal.

24. Argumentative instructions are properly refused.

Same — absence of legal propositions.

25. One accused of murder has no right to an instruction that he has as much right to protect himself from an unprovoked attack at an illicit still as he would have had at a corn mill.

Homicide — duty to retreat.

26. One cannot take life merely because he is free from fault and honestly believes that his life is in danger, if under the circumstances it is his duty to retreat, and there is nothing to induce in his mind the reasonable belief that he cannot retreat without increasing his peril.

Trial — instructions singling out evidence.

27. A requested instruction is properly refused which singles out and gives undue prominence to a part of the evidence.

APPEAL by defendant from a judgment of the City Court of Gadsden convicting him of murder in the first degree and sentencing him to life imprisonment. *Affirmed.*

Will Tidwell, for whose death defendant was prosecuted, was killed on Thursday, but his body was not found till the following Sunday. A physician testified that his death was caused by a gunshot wound in the left breast. A witness testified that the defendant, on Friday morning, came to his house and told him that he was sorry, but that he had to do it, that he had got his man, whose name was Will Tidwell, and that his body was on the mountain covered with leaves.

From the testimony, it appeared that defendant, with other spectators, was present when the coroner's jury was impaneled, and chose the jury by calling out the names of those selected.

The charges requested by defendant, which were refused by the court, were as follows:

(B) Contradictory statements, if any, on the part of defendant, are not admissible for the purpose of showing the guilt of defendant, but are only admissible for, and should be considered by the jury only to determine, the weight they will give the testimony of defendant as a witness in the case.

(A) If, at the time of firing the fatal shot by defendant, defendant reasonably believed that he was in danger of suffering death or serious bodily harm at the hands of deceased, and defendant was without fault in bringing on a difficulty with deceased, or if the jury have a reasonable doubt from the evidence as to the above proposition, they will find defendant not guilty.

(C) If the jury believe from the evidence that deceased had knocked defendant down with a rifle, and it appeared to defendant that he was in danger of suffering serious bodily harm at the hands of deceased, or death, and defendant shot deceased, the jury must acquit defendant, provided they find from the evidence that defendant was free from fault in bringing on the difficulty, or if the jury have a reasonable doubt from the evidence as to whether or not defendant acted in self-defense as above defined.

(I) The defendant is a competent witness in this case, and you cannot capriciously disregard the statement of defendant, and if you believe that Tidwell made an unprovoked attack on Hill, calculated to impress the mind of a reasonable man that Hill's life was in danger,

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then he had a right to kill Tidwell to save himself, and the law will hold Hill harmless, and your verdict should be for defendant.

(E) You cannot convict defendant on the charge in this indictment for the reason that he let the body lie on the mountain from Thursday until Sunday without telling the officer.

(F) You cannot convict defendant because he said nothing to an officer about the killing.

(H) The burden is on the state to show by the evidence beyond all reasonable doubt that Hill, without excuse and unlawfully, killed Tidwell, before they can find defendant guilty of any degree or homicide charged in the indictment, and, if the jury have a reasonable doubt as to whether the shot was fired with malice, they cannot convict defendant of murder in either degree.

(J) The law gives defendant the same right to protect himself from death or great bodily harm, when an unprovoked attack is made on him at or near an illicit still, that he would have at or near a corn mill.

(G) If Will Tidwell went up to the still and, without fault on the part of Hill, grabbed a rifle and knocked Hill down, and then attempted to shoot him with said rifle, and thereby led defendant honestly to believe that his life was in danger, or that he was in danger of great bodily harm, he had the right to shoot Will Tidwell, and the law would hold him guiltless.

Messrs. W. J. Boykin and Culli & Martin for appellant.

Messrs. W. L. Martin, Attorney General, and W. H. Mitchell, Assistant Attorney General, for the State.

Thomas, J., delivered the opinion of the court:

Appellant was convicted of murder in the first degree, and sentenced to the penitentiary for life.

On the trial many questions were sought to be raised on the admission of evidence. To the testimony of witnesses Ed., Elsie, and T. H. Hatfield, and D. D. Depositer, the defendant did not object before answer. After answer, motion made to exclude cannot put the court in error for admitting testimony responsive to the question. Pope v. State, 168 Ala. 33, 53 So. 292; Downey v. State, 115 Ala. 108, 22 So. 479; Rutledge v. Rowland, 161 Ala. 114, 49 So. 461; Kramer v. Compton, 166 Ala. 216, 221, 52 So. 351; Sharp v. State, 193 Ala. 22, 69 So. 122. If objection had been seasonably made to the questions before answer in this case, the condition of the body of deceased was properly shown to the jury, on the questions: identity of the deceased, length of time the body had been concealed, and how it had been concealed, as shedding light on the corpus delicti. Sharp v. State, supra. At the time of the introduction of this testimony, the defendant had made no confession that he had killed the deceased, and its subsequent admission could not put the court in error.

Appeal—refusal to exclude answer.

Evidence—homicide—condition of body.

Appeal—admission of evidence subsequently becoming immaterial.

The remark of the solicitor in the hearing of the court and the jury, that "it is a horrible thing to relate, I know," was promptly repudiated by the court as "an improper remark;" the court adding that "the jury will not consider it." It is to be regretted that one clothed with the power of prosecution for the state should make improper remarks before the jury, yet the prompt and decisive reproof in this case, by the court, followed up by the exclusion of the offensive remark from the jury, was sufficient to render harmless the statement complained of.

Same—improper remark by prosecutor—repudiation by court.

The acts, declarations, and conduct of the accused, against interest, are always competent. At the coroner's inquest, before defendant

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was arrested, his conduct with reference to the investigation, as well as his selection of the coroner's jury, was a circumstance against interest, properly admitted for the consideration of the jury. There was no error in permitting witnesses Depositer and Hatfield to testify as to what defendant did in selecting the coroner's jury. 7 Mayfield's Dig. 312; Maddox v. State, 159 Ala. 53, 48 So. 689; Miller's Case, 107 Ala. 40, 19 So. 37; 4 Enc. Dig. (Ala.) p. 184, § 258; Blount's Case, 49 Ala. 381; McManus's Case, 36 Ala. 292; Reeves v. State, 96 Ala. 33, 11 So. 296; Pate v. State, 94 Ala. 14, 10 So. 665; Henry v. State, 79 Ala. 42; Armour's Case, 63 Ala. 173; Johnson v. State, 17 Ala. 623.

Evidence—conduct against interest.

The witness Mrs. Tidwell, the wife of the deceased, had testified of the conduct of the defendant shortly after she heard the two shots fired on the mountain in the direction of the still, and of his coming from that direction and going to his home; and, on cross-examination of the witness, stated she never said anything about this conduct of the defendant, for there was nobody else there to talk to, whereupon the defendant asked the question, "Nobody else?" and the witness answered: "I seen Mr. Hill's wife; I would walk up and down the road and cry, and she would walk up and down the road and sing." The defendant made no motion to exclude this statement of the witness, but asked the question: "When was it she would sing?" Witness answered: "During the time Mr. Hill was missing from home. I would walk up and down the road and cry and take on, and she would walk up and down the road and sing." Then the defendant asked the witness the question: "Don't you know Mrs. Hill was expecting to be confined at that time?" to which the witness replied: "She was in no worse shape than I was, if she was." Here the solicitor objected, and moved the court to exclude this evidence, and the court sustained the motion. There was no error of the trial court in sustaining the solicitor's objection and excluding this testimony. The answer of Mrs. Tidwell touching her conduct and that of Mrs. Hill, after the murder, would have been excluded on motion of the defendant. Defendant's failing to do this did not give him the right to proceed with a cross-examination introducing irrelevant testimony.

Same—cross-examination—irrelevant testimony.

The defendant, as a witness in his own behalf, was properly not permitted to testify that he came to Attalla "intending to give up." Likewise, the court properly refused to permit the defendant to testify that he and his mother were bothered, and that she advised him to leave home; or to permit the witness to testify that he did not want to leave home, or that he told other parties about it soon after the killing. All of this testimony tended to make evidence for the defendant.

Same—self-serving declarations.

The rules governing the introduction of testimony in criminal cases forbid the introduction in evidence of self-serving declarations and acts of the defendant, and the principle is sustained by a long line of authorities in this state. Oliver v. State, 17 Ala. 595, to Hill v. State, 156 Ala. 3, 46 So. 864; Williams v. State, 105 Ala. 96, 17 So. 86. The declarations sought to be introduced did not come within the rule of Goforth's Case, 183 Ala. 66, 63 So. 8.

The facts that the defendant had been "accused of selling liquor," and "that three indictments were pending against the defendant for running a still or selling liquor," were immaterial inquiries on his trial for murder. The court committed no error in sustaining objections to questions seeking to show these facts.

Same—evidence of other crime.

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The witness E. V. Hall testified for the defendant that he was at defendant's house on the day of the murder; that when defendant came he was bloody and dirty, and had a gash across his head about 1½ or 2 inches long. It would have been improper for the court to permit defendant to ask the questions, "What was he doing, was he crying or not, how about it?" and, "What did he, the defendant, do when he came to the house?" The witness had described the physical appearance of the defendant, the condition of his clothing, and the nature and character of the wound across his head when he returned to his home after the homicide.

Same—evidence of conduct.

There was no error in the refusal of the court, on motion of the solicitor, to permit witness Ramsey to give his reasons why his attention was attracted to the two shots. Witness had testified that he heard two shots; this was sufficient.

Same—reasons for hearing shots.

When a witness has testified to the general reputation or character of the defendant, it is competent, on cross-examination, to test witness's knowledge of this reputation or character, of which he did testify, by asking if he had not heard of specific acts of the defendant that tended to militate against his reputation or character.

Same—specific acts of character.

There was no error in permitting the witnesses Ramsey and Malone to testify, on cross-examination, that they had heard of previous acts of the defendant, tending to militate against his general reputation and good character in that neighborhood. Rutledge v. Rowland, 161 Ala. 114, 49 So. 461; White v. State, 111 Ala. 92, 21 So. 330; Lowery v. State, 98 Ala. 45, 13 So. 498; 7 Mayfield's Dig. 341. One Hatfield, as a witness, had testified to defendant's bad character, and, on cross-examination by the solicitor, was asked if he had not heard of certain specific acts of the defendant that tended to militate against the general character of the defendant; and, against the objection of the defendant, the witness was permitted to answer questions by the solicitor of the specific acts of which he had heard. It was competent for the defendant to test by cross-examination the knowledge of the witness of the general reputation or character to which the witness has testified. Such inquiries, however, should be confined to reputed acts before the commission of the homicide. The witness having answered, the court properly limited the testimony, and on motion of defendant excluded the irrelevant and incompetent testimony that on re-examination was brought out by the solicitor. Thus, as far as practicable, were removed any unfavorable impressions which such evidence may have made; and the court clearly and explicitly instructed the jury to disregard it altogether. Watson v. Adams, 187 Ala. 490, 65 So. 528, Ann. Cas. 1916E, 565; Smith v. State, 107 Ala. 144, 18 So. 306; Western U. Teleg. Co. v. Rowell, 166 Ala. 651, 51 So. 880; Jordan v. State, 79 Ala. 12; Carlisle v. Hunley, 15 Ala. 623.

Same—testing knowledge of witness.

Appeal—erroneous admission of evidence—curing.

Jim Sibert having testified as a witness for the defendant, the court properly permitted the state to impeach him as to truth and veracity. 1 Mayfield's Dig. 890.

Witness—impeachment—right of prosecution.

The predicate being laid for the impeachment of the witness Hill, it was permissible to allow Cleve Hawkins to testify that, at the time and place indicated in the predicate, he had a conversation with the defendant, in which the defendant told witness that he killed the deceased below the still, and dragged him 30 yards away, or words in substance to this effect.

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In response to the defendant's motion to exclude, the court inquired of the witness, "Did he say that, or about that in substance?" and upon the witness's reply, "Yes, sir," the court overruled the defendant's motion to exclude the answer of the witness.

In Southern R. Co. v. Williams, 113 Ala. 622, 21 So. 328, it was declared that the rule is not ironclad; that it does not require perfect precision as to either time, place, persons present, or the statement made. The predicate is sufficient when it is clear that the witness is not taken by surprise, and is afforded ample opportunity to make any explanation desired, and is sufficient to authorize proof of contradictory statements. 2 Brickell's Dig. 548. A proper predicate being laid for the introduction of the testimony, there was no error of the trial court in overruling defendant's objection and motion to exclude. Burton v. State, 115 Ala. 1, 22 So. 585; Southern R. Co. v. Williams, supra; 1 Greenl. Ev. § 462.

Same—literal reproduction of conflicting declaration.

There was no error in the ruling of the court on the solicitor's objection to defendant's questions to the witness Vann. The witness was introduced by the defendant in rebuttal, and after he gave the rebuttal testimony counsel for the defendant asked: "Did you state to Hill that he had better watch Tidwell, or something of that kind?" The court sustained the solicitor's objection to the question and declined to allow counsel for the defendant to make such proof. The testimony was not in rebuttal, and was no more than the advice of the witness to the defendant. The court, however, allowed the witness to state that he told the defendant that the deceased was a dangerous and bloodthirsty man.

Evidence—rebuttal—limitation.

The vice of refused charge B is that it sought to instruct the jury that the contradictory statements on the part of the defendant were admissible only to determine the weight to be given defendant's testimony. The charge was misleading in that the statements themselves, which are said to be contradictory, may carry evidential weight with the jury as to the facts disclosed by them.

Same—contradictory statements—weight.

The court properly refused charges A, C, and I, requested by the defendant, for that the duty to retreat was ignored by these charges. It was a question for the jury, under all the circumstances, to determine whether or not the defendant could retreat without increasing his peril. Miller v. State, 107 Ala. 40, 19 So. 37; Abernathy v. State, 129 Ala. 85, 29 So. 844; Suell v. Derricott, 161 Ala. 268, 23 L.R.A.(N.S.) 996, 49 So. 895, 18 Ann. Cas. 636; Carter v. State, 82 Ala. 13, 2 So. 766; Evans v. State, 109 Ala. 11, 19 So. 535. Charge C pretermits a reasonable or bona fide belief by the defendant that his life was in danger. The apprehension of danger must be bona fide and reasonable. Beasley v. State, 181 Ala. 28, 61 So. 259. The defendant has proceeded on the idea that there was no duty of retreat by him, because the homicide occurred at the illicit distillery on the mountain, set up and maintained by the defendant and the deceased. Such a place of unlawful business will not be held to be a place of business from which those engaged are not required to retreat. The case relied on by appellant (Stevens v. State, 138 Ala. 71, 35 So. 122) is not authority to the contrary.

Trial—jury—possibility of retreating.

Homicide—self-defense—danger.

Same—defense of illegal business—duty to retreat.

In the case of People v. Rector, 19 Wend. 569, 591, where the defendant kept a bawdyhouse in the city of Albany, the question of the right of defense to one's castle was con-

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sidered; and Mr. Justice Cowan said that it was proper to observe that after the prisoner had given notice to the deceased and his companions to depart his house was, in respect to them, a mere private one; and that in the eye of the law it was entitled to the same measure of protection as the house in Meade's Case; and that any further assault, therefore, or any apprehended assault, might be repelled upon the same principles controlling in that case. Meade's Case, 1 Lewin, C. C. 184. Meade's Case is recited at large in Roscoe's Crim. Ev. Phila. ed. 1836, 644, 645, s. c. 18th ed. pp. 805, 806. Meade was in his dwelling at the nighttime, repelling a hostile attack by a band of smugglers and boatmen to whom he had become obnoxious for giving information on them to excise officials.

Mr. Wharton (Homicide, 2d ed. § 547), discussing the defense of dwellings, says: "In 1873 the doctrine of Meade's Case was affirmed, it being expressly declared that the use of deadly weapons is permissible to avert an impending apparent felonious assault on the defendant or his household. State v. Patterson, 45 Vt. 308, 12 Am. Rep. 200."

The Vermont case thus cited by Mr. Wharton was where the defendant was living with his wife, mother, and sisters in a tenement house.

In Pond v. People, 8 Mich. 167, Mr. Justice Campbell, for the court, says: "A man is not, however, obliged to retreat if assaulted in his dwelling, but may use such means as are absolutely necessary to repel the assailant from his house, or to prevent his forcible entry, even to the taking of life. But here, as in the other cases, he must not take life if he can otherwise arrest or repel the assailant. 2 Bishop, Crim. Law, § 569; 3 Greenl. Ev. 117; 1 Hawk. P. C. B. chap. 28, § 23. Where the assault or breaking is felonious, the homicide becomes justifiable, and not merely excusable."

In Storey v. State, 71 Ala. 337, Mr. Justice Somerville cites the authorities above referred to, as supporting the statement that "where one is attacked in his own dwelling house, he is never required to retreat. His house is his castle, and the law allows him to protect its sanctity from every unlawful invasion."

In Jones v. State, 76 Ala. 8, 16, the killing was in defendant's barroom, of which the deceased had charge, or in which he had an interest at the time of the killing; and it was declared an admitted doctrine of our criminal jurisprudence that, when a man is attacked in his own house, he is not required to retreat further. The reason of the rule is said to be that the law regards a man's house as his castle, or, as was anciently said, his tutissimum refugium, and, having retired thus far, he is not compelled to yield further to his assailing antagonist. Brinkley's Case, 89 Ala. 34, 18 Am. St. Rep. 87, 3 So. 22; Hutcheson v. State, 170 Ala. 29, 54 So. 119.

The question was again considered in Suell v. Derricott, 161 Ala. 259, 273, 23 L.R.A.(N.S.) 996, 49 So. 895, 18 Ann. Cas. 636, where Mr. Justice Mayfield restated the rule as being that a man's house is his castle for purposes of defense only; and, as has been said by this court, it cannot be turned into an arsenal of offense. While one's house formerly meant his home, his dwelling, the rule has also been extended to one's place of business or his place of refuge; consequently, a man's place of business must be regarded pro hac vice his dwelling. He has the same right to defend it against intrusion, and is under no more necessity of retreating from the one than from the other; his duty to defend one is the same as it is to defend the other.

In Watts v. State, 177 Ala. 24, 32, 59 So. 273, the doctrine of retreat in one's dwelling was again stated: "Had the evidence showed that defendant went into this room and was there attacked by his wife, the case might be different and it may

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be that a due regard for the sacredness of human life would require a qualification of the principle announced in Jones v. State, and Hutcheson v. State, supra, to the extent that those occupying separate rooms under a common roof should be held to the duty of retreating each to his own quarters, . . . rather than to stand there and kill, if such retreat might reasonably avoid the necessity of killing, and offer safety to the one assailed."

The evidence showed that the husband and wife had taken separate rooms of the same house as dwelling places.

In Walsch v. Call, 32 Wis. 159, 161, the court was construing a statute of exemption of the stock "in trade or business;" and the expression was held not to embrace the stock in trade for carrying on the business of selling intoxicating liquors, contrary to law. In the Walsch Case the familiar principle was applied that the credit sales of an unlawful business cannot be collected by law, for the reason that the law will not permit its machinery to be used in aid of an outlawed business. Melchoir v. McCarty, 31 Wis. 252, 11 Am. Rep. 605. If the person so engaged in an unlawful business would not be protected in his illegal credit sales, it will not be held that if, while operating or conducting this unlawful business, he is attacked (this illegal business place not being his dwelling house), he has the same right to stand and defend that he would have in his dwelling house or house used in the conduct of a lawful business. The unlawful business house or place, and its keeper or maintainer, are for the time not protected by the special right of defense of the castle.

By the reason of the rule in each case, of defense of the castle or place of business, the right to stand and defend against unlawful invasion must be held to attach to a place that at the time is a dwelling house or house where the owner conducts a lawful trade or business. The fundamental principle of all the cases on this subject is the right of "the castle," and the rule is not extended to the protection or defense of a house where the then occupant has no legal right to be. Thus, such unlawful occupant has no higher or more special right of defense than that extended to him in a public thoroughfare, or in his wood or field.

Refused charge D was embraced in given charges 14, 18, 19, and 25. The law requires retreat if it is reasonably apparent that it can be done without increasing the danger. The charges seek to erroneously declare the rule of retreat to be inability to retreat with safety.

Same—self-defense—duty to retreat.

Charges E, F, and H, requested by the defendant, were misleading. The refusal of charge H may be further justified on the use of the word "or" instead of "of," as rendering the charge meaningless or likely to be misunderstood by the jury. Todd's Case, 13 Ala. App. 301, 69 So. 325.

Criminal law—misleading instructions—ground of liability.

Trial—instruction—refusal.

Charge J was properly refused, as being argumentative, and as stating no proposition of law on which the defendant had the right to request the court to instruct the jury.

Same—argumentative instruction—refusal.

Absence of legal propositions.

The defendant had the benefit of a proper instruction in given charge 5, which charged that the fact that defendant was engaged in the operation of a still should not be considered by the jury for any purpose in ascertaining his guilt or innocence.

There was no error in the refusal of charge G. It predicates the right of the defendant to kill the deceased on freedom from fault, and on defendant's honest belief that his life was in danger, or that he was in danger of grievous bodily harm. This is an incorrect statement of the rule. A man has not the right

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to take life on the ground alone that he honestly believes his life is in danger, or on the ground that he was free from fault in provoking the difficulty. Either fact may be true, yet the circumstances may be such that it is the duty of the assailed to retreat, and within his power to do so without increasing his peril. The circumstances at the time of the homicide must not only be such as to induce the reasonable belief, or belief in the mind of a reasonable man, that there is imminent peril to life or limb and that retreat cannot be resorted to without increasing the peril, but must actually induce this reasonable belief in the mind of the slayer.

Homicide—duty to retreat.

The court has several times stated the conditions of apparent necessity which will excuse, under the doctrine of self-defense, in homicide cases; and these are: (1) That the defendant must have entertained an honest or bona fide belief in the existence of necessity; and (2) the circumstances surrounding him, at the moment of the fatal shot or the delivery of the blow that caused the death of the deceased, must have been such as to impress a reasonable man, under the same circumstances, with the belief of his imminent peril and of the existence of an urgent necessity to take the life of his assailant as the only apparent alternative of saving his own life, or himself from grievous bodily harm. Jones v. State, 76 Ala. 17; Storey v. State, 71 Ala. 329; Matthews v. State, 192 Ala. 1, 68 So. 334; Carroll v. State, 12 Ala. App. 69, 68 So. 530. Refused charge G fails to state the rule, and moreover singles out and gives undue prominence to a part of the evidence. It was properly refused. The defendant, however, in given charges 19 and 26, had the benefit of the instruction sought in charge G.

Trial—instructions singling out evidence.

The judgment is affirmed.

Anderson, Ch. J., and **Mayfield** and **Somerville**, JJ., concur.

Petition for rehearing denied, November 18, 1915.

ANNOTATION.

Duty to retreat to wall as affected by illegal character of premises on which homicide occurs.

The reported case (HILL v. STATE, ante, 509, holds that, while the rule that a man may defend himself without retreating when attacked in his dwelling house ordinarily extends to his place of business, it does not include a place used for the conduct of an unlawful business. Apparently, no other case has passed on that precise question. A different result has been reached in two cases where an unlawful business was carried on in a dwelling house.

In Russell v. State (1911) 61 Fla. 50, 54 So. 360, it appeared that the keeper of a house of prostitution shot and killed a man who had forced his way into the house against her protest, and who was threatening her with bodily injury. The court, holding that the fact that she was engaged in an immoral business did not deprive her of the right to defend herself in her home without retreating, stated the rule in an official syllabus as follows: "A person's dwelling house is a castle of defense for himself and those rightfully in his house, and when another attacks or invades one's dwelling in a threatening manner, under such circumstances that the owner has reason to believe, and does believe, that he is in danger of losing his life or suffering great bodily harm, he is not obliged to retreat, but may stand his ground, and meet any attack made upon him with such force as, under all the circumstances, he has reason to believe, and does believe, is necessary to save his life or protect

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himself from great bodily harm; and this rule is applicable to all persons, without regard to their moral conduct in other respects."

In a somewhat similar case, State v. Kennade (1894) 121 Mo. 405, 26 S. W. 347, although it appeared that the prostitute, and not the intruder, was killed while attempting to prevent his forcible entrance into her house, her right to defend against such entrance despite the nature of her calling was recognized, the court saying: "She had a right to defend her domicil against an armed and turbulent intruder. . . . Such a right could suffer no diminution because in her humble dwelling her mode of life was not patterned after the prohibitory precepts of the Decalogue."

The rule deducible from the reported case (HILL v. STATE) and the two cases cited would seem to be that the right of a person to defend himself, without retreating, exists in all cases where the attack is made in his dwelling house, whether or not an unlawful business is conducted there; but this right extends to a place of business only when the business conducted at such place is a lawful one.

M. B.

ALEXANDER STEWART, Respt.,
v.
HERBERT A. NEWBURY et al., Doing Business as Newbury Manufacturing Company, Appts.

New York Court of Appeals—March 27, 1917.

(220 N. Y. 379, 115 N. E. 984.)

Building contract — time for payment — contract silent.

1. In the absence of agreement as to payment for work under a building contract no payment can be demanded until the work is substantially performed.

[*See note on this question beginning on page* 522.]

Appeal — error in instructions — prejudice.

2. Error in instructions as to one theory of a case cannot be regarded as harmless, if it is impossible to determine upon which of two theories the jury based its verdict.

APPEAL by defendants from a judgment of the Appellate Division of the Supreme Court, Second Department, affirming a judgment of a Trial Term for Orange County in favor of plaintiff in an action brought to recover for work alleged to have been performed under a building contract, and for damages for breach of said contract. *Reversed.*

The facts sufficiently appear in the opinion of the court.

Messrs. **Bacon & Rorty**, for appellants:

There is no suggestion that the plaintiff ever fully performed this contract, and until he did he was not entitled to any payment.

Smith v. Brady, 17 N. Y. 187, 72 Am. Dec. 442; Catlin v. Tobias, 26 N. Y. 217, 84 Am. Dec. 183; People ex rel. Cossey v. Grout, 179 N. Y. 426, 72 N. E. 464, 1 Ann. Cas. 39; M'Millan v. Vanderlip, 12 Johns. 165, 7 Am. Dec. 299; Jennings v. Camp, 13 Johns. 94, 7 Am. Dec. 367; Reab v. Moor, 19 Johns. 337; Lantry v. Parks, 8 Cow. 63; Marsh v. Rulesson, 1 Wend. 515; Champlin v. Rowley, 13 Wend. 259; Henderhen v. Cook, 66 Barb. 21; Delehanty v. Dunn, 151 App. Div. 695, 136 N. Y. Supp. 193.

As the plaintiff was not entitled to recover because of refusal by the defendants to comply with the demand for payment, upon either of the propo-

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sitions submitted to the jury by the court, the verdict must be set aside for error in the instructions upon this question.

Ring v. Cohoes, 77 N. Y. 83, 33 Am. Rep. 574; Ayres v. Hammondsport, 130 N. Y. 668, 29 N. E. 265; Buchanan v. Belsey, 65 App. Div. 58, 72 N. Y. Supp. 601; Rosenstock v. Metzger, 136 App. Div. 620, 121 N. Y. Supp. 52; Pettit v. Pettit, 149 App. Div. 485, 134 N. Y. Supp. 133; Thompson v. Peterson, 152 App. Div. 674, 137 N. Y. Supp. 635; McGuire v. Bell Teleph. Co. 167 N. Y. 208, 52 L.R.A. 437, 60 N. E. 433; Carpenter v. Taylor, 164 N. Y. 180, 58 N. E. 53; Cornwell v. Sanford, 208 N. Y. 130, 101 N. E. 709; People v. Lambrix, 204 N. Y. 261, 97 N. E. 524.

Mesrs. **Joseph W. Gott and Percy V. D. Gott** for respondent.

Crane, J., delivered the opinion of the court:

The defendants are partners in the pipe fitting business under the name of Newbury Manufacturing Company.

The plaintiff is a contractor and builder residing at Tuxedo, New York.

The parties had the following correspondence about the erection for the defendants of a concrete mill building at Monroe, New York.

Alexander Stewart,
Contractor and Builder,
Tuxedo, N. Y., July 18th, 1911.

Newbury Mfg. Company,
Monroe, N. Y.:

Gentlemen:—

With reference to the proposed work on the new foundry building I had hoped to be able to get up and see you this afternoon, but find that impossible, and am in consequence sending you these prices, which I trust you will find satisfactory.

I will agree to do all excavation work required at sixty-five ($.65) cents per cubic yard.

I will put in the concrete work, furnishing labor and forms only, at two and 05–100 ($2.05) dollars per cubic yard.

I will furnish labor to put in reinforcing at four ($4) dollars per ton.

I will furnish labor only to set all window and door frames, window sash and doors, including the setting of hardware, for one hundred twelve ($112) dollars. As alternative, I would be willing to do any or all of the above work for cost, plus 10 per cent, furnishing you with first-class mechanics, and giving the work considerable of my personal time.

Hoping to hear favorably from you in this regard, I am,

Respectfully yours,
(Signed) Alexander Stewart.

The Newbury Mfg. Co.,
Steam Fittings, Grey Iron Castings,
Skylight Opening Apparatus,
Monroe, N. Y.
Telephone Connection.

Monroe, N. Y., July 22, 1911.

Alexander Stewart,
Tuxedo Park, N. Y.:

Dear Sir:—

Confirming the telephone conversation of this morning we accept your bid of July 18th to do the concrete work on our new building. We trust that you will be able to get at this the early part of next week.

Yours truly,
The Newbury Mfg. Co.,
H. A. Newbury.

Nothing was said in writing about the time or manner of payment. The plaintiff, however, claims that after sending his letter, and before receiving that of the defendant, he had a telephone communication with Mr. Newbury, and said: "I will expect my payments in the usual manner," and Newbury said: "All right, we have got the money to pay for the building." This conversation over the telephone was denied by the defendants.

The custom, the plaintiff testified, was to pay 85 per cent every thirty days, or at the end of each month, 15 per cent being retained till the work was completed.

In July the plaintiff commenced work and continued until September 29th, at which time he had progressed with the construction as far as the first floor. He then sent a bill for the work done up to that date for $896.35. The defendants

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refused to pay the bill, and work was discontinued.

The plaintiff claims that the defendants refused to permit him to perform the rest of his contract, they insisting that the work already done was not in accordance with the specifications. The defendants claimed upon the trial that plaintiff voluntarily abandoned the work after their refusal to pay his bill.

On October 5, 1911, the defendants wrote the plaintiff a letter, containing the following: "Notwithstanding you promised to let us know on Monday whether you would complete the job or throw up the contract, you have not up to this time advised us of your intention. . . . Under the circumstances, we are compelled to accept your action as being an abandonment of your contract and of every effort upon your part to complete your work on our building. As you know, the bill which you sent us, and which we declined to pay, is not correct, either in items or amount, nor is there anything due you under our contract, as we understand it, until you have completed your work on our building."

To this letter the plaintiff replied the following day. In it he makes no reference to the telephone communication agreeing, as he testified, to make "the usual payments," but does say this: "There is nothing in our agreement which says that I shall wait until the job is completed before any payment is due, nor can this be reasonably implied. . . . As to having given you positive date as to when I should let you know what I proposed doing, I did not do so; on the contrary I told you that I would not tell you positively what I would do until I had visited the job, and I promised that I would do this at my earliest convenience, and up to the present time I have been unable to get up there."

The defendant Herbert Newbury testified that the plaintiff "ran away and left the whole thing." And the defendant F. A. Newbury testified that he was told by Mr. Stewart's man that Stewart was going to abandon the job; that he thereupon telephoned Mr. Stewart, who replied that he would let him know about it the next day, but did not.

In this action, which is brought to recover the amount of the bill presented, as the agreed price, and $95.68 damages for breach of contract, the plaintiff had a verdict for the amount stated in the bill, but not for the other damages claimed, and the judgment entered thereon has been affirmed by the appellate division.

The appeal to us is upon exceptions to the judge's charge. The court charged the jury as follows: "Plaintiff says that he was excused from completely performing the contract by the defendants' unreasonable failure to pay him for the work he had done during the months of August and September. . . . Was it understood that the payments were to be made monthly? If it was not so understood, the defendants' only obligation was to make payments at reasonable periods, in view of the character of the work, the amount of work being done, and the value of it. In other words, if there was no agreement between the parties respecting the payments, the defendants' obligation was to make payments at reasonable times. . . . But whether there was such an agreement or not, you may consider whether it was reasonable or unreasonable for him to exact a payment at that time and in that amount."

The court further said, in reply to a request to charge: "I will say in that connection, if there was no agreement respecting the time of payment, and if there was no custom that was understood by both parties, and with respect to which they made the contract, then the plaintiff was entitled to payments at reasonable times."

The defendants' counsel thereupon made the following request which was refused: "I ask your Honor to instruct the jury that if the circum-

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stances existed as your Honor stated in your last instruction, then the plaintiff was not entitled to any payment until the contract was completed."

The jury was plainly told that, if there were no agreement as to payments, yet the plaintiff would be entitled to part payment at reasonable times, as the work progressed, and if such payments were refused he could abandon the work and recover the amount due for the work performed.

This is not the law. Counsel for the plaintiff omits to call our attention to any authority sustaining such a proposition, and our search reveals none. In fact the law is very well settled to the contrary. This was an entire contract. Ming v. Corbin, 142 N. Y. 334, 341, 37 N. E. 105. Where a contract is made to perform work and no agreement is made as to payment, the work must be substantially performed before payment can be demanded. Gurski v. Doscher, 112 App. Div. 345, 98 N. Y. Supp. 588, affirmed in 190 N. Y. 536, 83 N. E. 1125; Cunningham v. Jones, 20 N. Y. 486; People ex rel. Cossey v. Grout, 179 N. Y. 417, 426, 72 N. E. 464, 1 Ann. Cas. 39; Delehanty v. Dunn, 151 App. Div. 695, 136 N. Y. Supp. 193; Smith v. Brady, 17 N. Y. 173, 187, 72 Am. Dec. 442; Catlin v. Tobias, 26 N. Y. 217, 84 Am. Dec. 183; Cronin v. Tebo, 71 Hun, 59, 61, 24 N. Y. Supp. 644, affirmed in 144 N. Y. 660, 39 N. E. 344; Coburn v. Hartford, 38 Conn. 290; Poland v. Thomaston Face & Ornamental Brick Co. 100 Me. 133, 60 Atl. 795; Thompson v. Phelan, 22 N. H. 339; Freidman v. Schleuter, 105 Ark. 580, 151 S. W. 696.

Building contract—time for payment—contract silent.

This case was also submitted to the jury upon the ground that there may have been a breach of contract by the defendants in their refusal to permit the plaintiff to continue with his work, claiming that he had departed from the specifications, and there was some evidence justifying this view of the case; but it is impossible to say upon which of these two theories the jury arrived at its conclusion. The above errors, therefore, cannot be considered as harmless and immaterial. Stokes v. Barber Asphalt Paving Co. 207 N. Y. 252, 257, 100 N. E. 597; Condran v. Park & Tilford, 213 N. Y. 341, 107 N. E. 565; Clarke v. Schmidt, 210 N. Y. 211, 215, 104 N. E. 613. As the verdict was for the amount of the bill presented, and did not include the damages for a breach of contract, which would be the loss of profits, it may well be presumed that the jury adopted the first ground of recovery charged by the court as above quoted, and decided that the plaintiff was justified in abandoning work for nonpayment of the instalment.

Appeal—error in instructions—prejudice.

The judgment should be reversed, and a new trial ordered, costs to abide the event.

Hiscock, Ch. J., **Collin**, **Cardozo**, **Pound**, and **Andrews**, JJ., concur; **Cuddeback**, J., absent.

ANNOTATION.

When payment is due under contract to render services silent as to time of payment.

I. In general, 522.
II. Contract specifying rate per day, week, month, or year, or per item:
 a. Majority rule, 525.
 b. Minority rule, 528.
III. Effect of construction by parties, 529.

I. In general.

It may be stated as a general rule that, where a contract to render services is silent as to the time of payment, payment is due when the services have been rendered. Friedman v.

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Schleuter (1912) 105 Ark. 580, 151 S. W. 696; Oliphant v. Home Builders (1917) 34 Cal. App. 720, 168 Pac. 700; Cunningham Lumber Co. v. New York, N. H. & H. R. Co. (1905) 77 Conn. 628, 60 Atl. 107; Reynolds v. Reeder (1895) 104 Mich. 265, 62 N. W. 355; Thompson v. Phelan (1851) 22 N. H. 339; Howe v. Carpenter (1899) 58 Barb. (N. Y.) 382; Cronin v. Tebo (1893) 71 Hun, 59, 24 N. Y. Supp. 644, affirmed in (1895) 144 N. Y. 660, 39 N. E. 344; Reab v. Moor (1822) 19 Johns. (N. Y.) 337; Gurski v. Doscher (1906) 112 App. Div. 345, 98 N. Y. Supp. 588, affirmed in (1907) 190 N. Y. 536, 83 N. E. 1125; Pullan v. Cochran (1881) 6 Ohio L. J. 390; Stanton v. Dennis (1911) 64 Wash. 85, 116 Pac. 650. And see the reported case (STEWART v. NEWBURY, ante, 519).

Thus, in Reynolds v. Reeder (1895) 104 Mich. 265, 62 N. W. 355, supra, it was said that, under a contract providing for certain work by one and payment by another, the natural inference is that payment is to be made on completion of the work. So, in Friedman v. Schleuter (1912) 105 Ark. 580, 151 S. W. 696, it was held that the time for payment of compensation under a building contract, silent as to that matter, was presumed to be on the completion of the work. See to the same effect, Cunningham Lumber Co. v. New York, N. H. & H. R. Co. (1905) 77 Conn. 628, 62 Atl. 107. And in Stanton v. Dennis (1911) 64 Wash. 85, 116 Pac. 650, the court said by way of dictum that where a contract for the performance of work on a building was silent as to the time of payment the condition was implied that payment should be made within a reasonable time after the work was completed.

In Bradshaw v. Branan (1851) 5 Rich. L. (S. C.) 465, it appeared that the plaintiff agreed to work for the defendant for a period of one year, for $120. Before the expiration of the year the defendant discharged the plaintiff, who then brought an action on the contract. It was held that the action was premature, as payment on the contract was not due until at the expiration of the year, and the wrongful conduct of the defendant did not make the day of payment ambulatory.

In Thayer v. Wadsworth (1837) 19 Pick. (Mass.) 349, the court said: "It will be remembered that the special contract, as proved by the defendants, was silent as to the times of payment; and although a contract for services to be performed within a short period would, in the absence of all explanatory proof, be prima facie a contract to pay at the expiration of the term of service, yet this is a mere presumption as to the time of payment, to be submitted to the jury, which may be rebutted by any evidence from which the jury may lawfully infer a different arrangement between the parties."

In Pullan v. Cochran (1881) 6 Ohio L. J. 390, the plaintiff in his petition alleged that he entered into a contract with the defendants, whereby he was to furnish them with credit ratings for a period of one year for the sum of $50. The action was brought to recover that sum, and was brought before the year had expired. The petition also averred that, by a custom well understood and acted on by persons transacting this kind of business, payment was due and payable on the day on which the contract was entered into. It was held that, under the contract, payment for the services was not due until they had been rendered. Although it was admitted that, where parties contracted with full knowledge of a custom existing in trade and the contract was silent concerning matters governed by the custom, the court was at liberty to infer that the parties contracted with reference to this custom, it was held that the petition did not allege that the parties contracted with reference to the custom referred to in the petition, and a demurrer thereto was properly sustained.

In Gurski v. Doscher (1906) 112 App. Div. 345, 98 N. Y. Supp. 588, affirmed in (1907) 190 N. Y. 536, 83 N. E. 1125, the payment, under a contract whereby the plaintiff agreed "to do all the brick work for twenty-two houses, . . . for the sum of $4,600," was held to be due when the contract was completed.

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In Krumb v. Campbell (1894) 102 Cal. 370, 36 Pac. 664, it appeared that an attorney entered into a contract with the heirs of a deceased person, whereby he engaged to give his services as an attorney throughout the administration of the estate. As compensation, the attorney was to receive 3 per cent of the interest of the heirs in the estate, but he was required to bear his personal expenses in connection with the rendition of the services. The attorney then entered into a contract with the plaintiff, whereby the latter agreed to render all the assistance required to enable the attorney to carry out the terms of the first contract, and as compensation he was to receive ⅔ of the net amount received. Under that contract, while the administration of the estate was still pending, the attorney received a certain sum of money from the heirs by way of compensation for partial distributions of the estate. The plaintiff, claiming ⅔ of the sum received under the first contract, less the expenses incurred up to that time, brought an action to enforce his claim. It was held that the action was premature, because the contract under which the plaintiff was employed was entire, and, there being no provision in the contract for payment of compensation in advance, he was not entitled to any until he had fully performed all the labor required of him under his agreement.

In Thompson v. Phelan (1851) 22 N. H. 339, it appeared that the plaintiff and the defendant made a written contract, whereby the defendant agreed to pay the plaintiff 9½ cents per yard for raising an embankment. It was held that, no time being fixed for payment by the contract, the inference of law was that the payment should be made when the work was completed, and that evidence, showing that at the time the contract was made it was further agreed orally that the plaintiff should be paid at the end of each month for the work done on the contract, was inadmissible.

In Cronin v. Tebo, 71 Hun, 59, 24 N. Y. Supp. 644, affirmed in (1895) 144 N. Y. 660, 39 N. E. 344, it was held that where a party, who had agreed to dredge a trench for the sum of $2,300, abandoned the contract before its completion, he was not entitled to any compensation, as no payment was due under the contract until the completion of the work.

In Howe v. Carpenter (1869) 53 Barb. (N. Y.) 382, it appeared that an agreement was made, whereby the plaintiff was to keep a sow and some pigs for the defendant, from May 25 to September 1, and to receive as payment therefor two of the pigs and $5. Shortly thereafter there was a conversation between the parties, in which the plaintiff asked the defendant what pigs he should take, to which the defendant replied that there was no choice except the boar pig, and that the plaintiff might take which he had a mind to. Several weeks thereafter the plaintiff, without notice to the defendant, selected two of the pigs and put them by themselves. On August 1 the defendant took away these two pigs without the plaintiff's consent, but it did not appear that he knew that the plaintiff had selected them for his own. On August 2 the plaintiff brought an action, in which he was nonsuited, to recover damages for the taking of the pigs. The nonsuit was held proper, as he was not entitled to any pay for the keeping of the pigs until the term had expired, and there was no such setting apart of the two pigs for the plaintiff as amounted to a making them over as so much payment in advance.

In Oliphant v. Home Builders (1917) 34 Cal. App. 720, 168 Pac. 700, it appeared that the plaintiff was employed by the defendant for a year, for a salary of $6,000, payable at the rate of $500 per month. It was held that this contract did not entitle the plaintiff to collect his compensation in advance, the court saying: "The ordinary rule is that services are paid for after they have been performed, unless there is a special contract to the contrary. The contract here exhibited contains no terms to that effect."

In Burnetta v. Marceline Coal Co. (1904) 180 Mo. 241, 79 S. W. 136, it appeared that a workman was em-

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ployed by a mining company, which had a contract with a miners' union relative to times of payment. The workman was a member of the union, and at the time of his employment he was asked whether he understood the rules relative to the days of payment, under which the mine was working, to which he gave an affirmative answer. The days of payment were approximately on the 15th and 30th of each month, and the period for which payment at those times was made was the half month before the preceding pay day. After working awhile, the employment of the workman was terminated by the mutual consent of the parties on the 9th day of a month in which the first pay day occurred on the 16th. The employee, not receiving at that time payment for the services rendered during that month, immediately entered suit against the company, which was defended on the ground that it was premature. It was held that there was no express agreement between the parties as to the time of payment for the services, and that the law by implication fixed the status of the parties in regard to that question; that the employer had a reasonable time in which to have paid the wages due the employee, and consequently that the suit was not premature.

II. Contract specifying rate per day, week, month, or year, or per item.

a. Majority rule.

The rule obtains in a majority of jurisdictions that where a contract for the rendering of services for the performance of a particular piece of work, or for a definite time, is silent as to the time of payment, payment is not due until the expiration of the specified time, or the performance of the work called for, although the contract calls for a specified wage per day, week, month, or year, or per item or piece. Coburn v. Hartford (1871) 38 Conn. 290; Carney v. Havens (1879) 23 Kan. 82; Miller v. Goddard (1852) 34 Me. 102, 56 Am. Dec. 638; Poland v. Thomaston Face & Ornamental Brick Co. (1905) 100 Me. 133, 60 Atl. 795; Thayer v. Wadsworth (1837) 19 Pick. (Mass.) 349; Davis v. Maxwell (1847) 12 Met. (Mass.) 286; Soule v. Soule (1892) 157 Mass. 451, 32 N. E. 663; Isaacs v. McAndrew (1872) 1 Mont. 437, 9 Mor. Min. Rep. 690; Riddell v. Peck-Williamson Heating & Ventilating Co. (1902) 27 Mont. 44, 69 Pac. 241; Blodgett v. Berlin Mills Co. (1872) 52 N. H. 215; M'Millan v. Vanderlip (1815) 12 Johns. (N. Y.) 165, 7 Am. Dec. 299; Jennings v. Camp (1816) 13 Johns. (N. Y.) 94, 7 Am. Dec. 367; Reab v. Moor (1822) 19 Johns. (N. Y.) 337; Cunningham v. Jones (1859) 20 N. Y. 486; Gminder v. Zeltner Brewing Co. (1908) 126 App. Div. 776, 111 N. Y. Supp. 215; Larkin v. Buck (1860) 11 Ohio St. 561; Tebo v. Ballard (1863) 36 Vt. 612; Diefenback v. Stark (1883) 56 Wis. 462, 43 Am. Rep. 719, 14 N. W. 621.

Thus, in Carney v. Havens (1879) 23 Kan. 82, the rule was applied to a contract, whereby one party agreed to supervise the conveying of two herds of cattle for the other, and to receive as compensation a fourth interest in the profits of the herds, and it was held that the contract was an entirety, and payment thereunder was not due until the completion of the contract. The court said: "Wages for services, when a specific time or amount of service is contracted for, are only due when the services are fully rendered, and it matters not how great may be the variety or amount of the services, provided they are included in a single contract. . . . Ordinarily, parties fix by their agreement the time and mode, as well as the amount, of payment, at least, in cases of importance. But when they fail to express either, it is understood that they intend what the law implies. We see nothing to take this case out of the general rule. The only thing that tends to show this an exception is the manner in which the compensation was to be determined, i. e., by the profits on each drove. If he was to receive a certain share of the profits on the first drove, irrespective of the results of the second, was it not due to him when those profits were ascertained and realized? Doubtless this was a circumstance from which, with

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very little additional testimony, a jury would be warranted in finding that payment was intended as soon as the profits were realized upon the first drove; but it does not, standing by itself, as matter of law, prove that payment was then due. It does not of itself divide the contract, otherwise shown to be an entire one. Many reasons might have induced defendants to desire to retain payment until full completion of the contract. As they were furnishing the funds, they might need the money. They might desire to hold it as a guaranty of good faith, and against negligence or abandonment on the part of deceased. Whatever might have been the motive, unless they so contracted, they were not bound to pay until the full completion of the contract. That the parties did not intend earlier payment is supported by the fact that they did not pay; and also by the fact that Dudley, who was with deceased in care of the first drove, and who came in with him after closing up the sale, was settled with and paid; and by the further fact that defendants paid deceased, at the same time, the proceeds of some individual property sold with the drove."

In Miller v. Goddard (1852) 34 Me. 102, 56 Am. Dec. 638, it appeared that the plaintiff agreed to work for the defendant for a number of months, at a certain wage per month, but quit working before the term expired. It was held that he could recover nothing for the labor performed. The court said: "It is a rule of the common law that where an entire service is to be performed, for an entire compensation to be paid at its completion, the performance of the service is a condition precedent to the recovery of the compensation. The language of such contract indicates clearly that it is not intended by the parties that the stipulated price should be paid until the service is performed."

In Diefenback v. Stark (1883) 56 Wis. 462, 43 Am. Rep. 719, 14 N. W. 621, it was held that a contract, whereby the plaintiff agreed to work for the defendant six months at $16 per month, was an entire one, and payment thereunder was not due monthly, but at the end of the six months.

In Tebo v. Ballard (1863) 36 Vt. 612, an action was brought by the plaintiff to recover wages for services rendered by his minor son to the defendant. It appeared that there was a contract between the parties for the son's services, for a period of nine months, at a specified rate per month. The boy worked for a period of five months, and the suit was brought three months before the expiration of the term of service. It was held that the suit was premature, as no payment was due until the end of the term.

In Larkin v. Buck (1860) 11 Ohio St. 561, the question whether a contract for service upon a farm, "for six months certain," at a specified rate per month, no time being expressed therein for its payment, confers upon him who renders the service the legal right to sue for a partial performance, when he voluntarily abandons such service, without justification or excuse, at the end of the first month, was answered in the negative. This case apparently overruled Winterhalter v. Johnson (1851) 1 Ohio Dec. Reprint, 575, wherein it was charged that a contract, by which it was provided that the plaintiff should work for the defendants for a year, at a specified rate per month, entitled the plaintiff to receive his wages at the expiration of each month. It also apparently overruled the case cited in the note to the case last cited, wherein a contract by which a journeyman tailor was employed to work at coat making "for the season," at a specified price per piece, was construed to authorize the tailor to demand pay for each piece as it was finished.

In Poland v. Thomaston Face & Ornamental Brick Co. (1905) 100 Me. 133, 60 Atl. 795, the plaintiffs were verbally engaged to sink an artesian well at $3.50 a foot. No limit was set to the depth of the well, and the time of payment was not referred to in the contract. After drilling 386 feet, a depth much greater than at first anticipated, and not obtaining a supply of water, the financial condition of the

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plaintiffs made it difficult for them to continue the work without some payment on account, which was refused. The plaintiffs then discontinued the work, and brought an action of assumpsit to recover for the labor performed. It was held that the contract was subject to an implied condition that both parties should be excused from their obligations in case its actual completion became impossible; and it would have been fulfilled when a sufficient amount of water had been obtained, or when it became reasonably certain that further drilling would be useless. And on completion of the work, within this construction of the contract, plaintiffs were entitled to payment.

In Coburn v. Hartford (1871) 38 Conn. 290, it appeared that a third person agreed to build a sewer for a municipal corporation, and was to receive therefor $1.72 per lineal foot. Before the completion of the work a creditor of the contractor brought an action against him, and served a writ of garnishment against the municipal corporation. It was held that the writ was not maintainable, as no compensation was due the contractor until he had completed his work, and the fact that the municipal corporation had made payments to persons employed under similar contracts, before their completion, was immaterial.

In Jennings v. Camp (1816) 13 Johns. (N. Y.) 94, 7 Am. Dec. 367, it appeared that the plaintiff had agreed to clear and fence 10 acres of land for $8 an acre. It was held that he could not maintain assumpsit before he had substantially performed his contract. And in M'Millan v. Vanderlip (1815) 12 Johns. (N. Y.) 165, 7 Am. Dec. 299, cited in People ex rel. Cossey v. Grout (1904) 179 N. Y. 426, 72 N. E. 464, 1 Ann. Cas. 39, a contract whereby a workman agreed to serve for ten and one-half months, and to be paid 3 cents for each run of yarn spun by him, was held entire, and payment thereunder not to be due until he had performed his contract of service. So, in Cunningham v. Jones (1859) 20 N. Y. 486, payment under a contract for the erection of an addition to a brewery, the labor to be performed "by day's work," was held to be due only on the completion of the building. Likewise, in Reab v. Moor (1822) 19 Johns. (N. Y.) 337, an action was brought to recover for work and labor performed by the plaintiff. It appeared that he had worked for the defendant for a period of less than three months. There was a contract between the parties, whereby the plaintiff was to work for the defendant eight months, for the sum of $104, or $13 per month. It was held that the action was premature, as the plaintiff had no claim until at the expiration of eight months. In Gminder v. Zeltner Brewing Co. (1908) 126 App. Div. 776, 111 N. Y. Supp. 215, it appeared that the plaintiff entered into a contract with the defendant, whereby he agreed to devote his time and energy to the sale of beer for the defendant, and the latter agreed to pay the plaintiff 12½ cents per barrel for all beer sold, provided the sales were not less than 30,000 barrels per annum. The contract provided for monthly settlements. It was held that the plaintiff was not entitled to any compensation before the end of the year, or at least not until he had sold 30,000 barrels, the clause relating to monthly settlements not being construed to provide for monthly payments; and, consequently, the plaintiff could not maintain an action before that time. But in Heim v. Wolf (1850) 1 E. D. Smith (N. Y.) 70, it was said: "Where a contract is made for the labor of an individual at a monthly compensation, I understand the common and legal construction of such a contract to be a compensation to be paid, as earned, by the month."

In Riddell v. Peck-Williamson Heating & Ventilating Co. (1902) 27 Mont. 44, 69 Pac. 241, it appeared that the plaintiff had entered into a contract with another, whereby he agreed to furnish all the labor and material necessary for the installation of a heating and sanitary apparatus, in accordance with a schedule fixing prices for various items. The plaintiff abandoned the work before its completion, owing to a lack of funds, and

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brought an action to recover for the work and labor furnished. It was held that he could not recover, as the contract was an entire one, payment under which was not due until the contract was performed, the fixing of prices on the different items not operating as a severance. And it was held error to admit evidence of a usage or custom under such contracts to make payments as the work was done and materials furnished.

Where the plaintiff had agreed to work for the defendant for seven months at $12 per month, and left the defendant's service before the time expired, it was held that he could not recover for the partial service performed, as the contract was an entire one, and payment on the contract was not due until performance of the contract. Davis v. Maxwell (1847) 12 Met. (Mass.) 286. But in Soule v. Soule (1892) 157 Mass. 451, 32 N. E. 663, it was held that an agreement to pay a yearly salary was simply an agreement to pay so much for services by or for the year, and no more imported that the amount was to be paid at a particular time than the purchase of any other commodity, in the absence of any usage or understanding, express or implied, imported that the price was to be paid at any particular time; and that, consequently, in an action to recover salary under a contract of the kind described, interest was not recoverable except from the date of the writ, no demand for payment having been made previously.

In Thayer v. Wadsworth (1837) 19 Pick (Mass.) 349, it appeared that the plaintiff agreed to work as a spinner in the defendant's factory until a certain date, to be paid a stated sum per yard. It was held that, presumptively, no payment was due until the completion of the contract, but that the question was for the jury.

In Isaacs v. McAndrew (1871) 1 Mont. 437, 9 Mor. Min. Rep. 690, it was held that a contract between the owners of a mine and a superintendent, for the employment of the latter for five years, at a salary of $4,000 per year, was an entire one, under which the payment for the services was not due until at the expiration of the five years; and, where the superintendent was prevented from performing his share of the contract by the other parties to the contract, he could not recover for services already performed, by declaring on the contract.

In Blodgett v. Berlin Mills Co. (1872) 52 N. H. 215, it was held that an action brought before the end of the logging season, by the plaintiffs, to recover for services rendered under a logging contract, providing for the payment of a specified wage per month, would have been premature if the contract was one for the season.

b. Minority rule.

In De Lappe v. Sullivan (1883) 7 Colo. 182, 2 Pac. 926, the following rule was enunciated: "Where, by contract, one is employed by another to work by the day, or month, and nothing is said as to the time of payment for the services to be rendered, his wages are due and may be demanded at the close of each day or month, as the case may be." This rule seems to find support in several jurisdictions. Taylor v. Laird (1856) 1 Hurlst. & N. 266, 156 Eng. Reprint, 1203, 25 L. J. Exch. N. S. 329; Stone v. Bancroft (1903) 139 Cal. 78, 70 Pac. 1017, 72 Pac. 717; Chicago Soap & Polish Co. v. Stansbury (1902) 99 Ill. App. 488; Re Sheets Lumber Co. (1900) 52 La. Ann. 1337, 27 So. 809.

Thus, in Chicago Soap & Polish Co. v. Stansbury (1902) 99 Ill. App. 488, it appeared that the plaintiff was employed by the defendant for a period of one year, for a wage of $2 per day. After working for nearly two months, the plaintiff left because he could not get his pay, and brought an action to recover the amount due him. The defense was that the plaintiff broke the contract by leaving before the end of the term. In disposing of this defense, the court said: "An engagement to work for one year for $2 per day, payment to be made at the expiration of the term, is so unusual that it is not to be presumed."

In Re Sheets Lumber Co. (1900) 52 La. Ann. 1337, 27 So. 809, it was held that, where a person is employed for

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a monthly salary, payment thereof is due at the end of the month.

In Taylor v. Laird (1856) 1 Hurlst. & N. 266, 156 Eng. Reprint, 1203, 25 L. J. Exch. N. S. 329, it appeared that the defendants offered, by letter, to employ the plaintiff to take command of a ship, with "pay to be at the rate of £50 per month," together with a percentage of the proceeds. The plaintiff accepted the offer by a letter in which he used the expression "pay of £50 per month." It was held that payment under the contract was due monthly, and gave the plaintiff a cause of action as each month accrued.

In Stone v. Bancroft (1903) 139 Cal. 78, 70 Pac. 1017, 72 Pac. 717, it was held that, under a written contract providing for a specified salary per month, the salary was due and owing at the conclusion of each month. But in Mixer v. Mixer (1905) 2 Cal. App. 227, 83 Pac. 273, the defendant, by a cross complaint, recovered from the plaintiff for twelve months' services rendered the plaintiff at $30 per month. It appeared that the services were not rendered under any contract specifying the amount or the time for their payment. It was held that the wages could not be held to have accrued monthly, so as to permit the recovery of interest on each month's wages from the time they were due.

III. Effect of construction by parties.

It seems that where a contract to render services, silent as to the time of payment, has been construed by the parties as calling for payment at particular intervals, the courts will adopt that construction. F. B. Tait Mfg. Co. v. Tinsman (1907) 138 Ill. App. 76; Reynolds v. Reeder (1895) 104 Mich. 265, 62 N. W. 355; Osgood v. Paragon Silk Co. (1897) 19 Misc. 186, 43 N. Y. Supp. 271; Booth v. Ratcliffe (1890) 107 N. C. 6, 12 S. E. 112.

In F. B. Tait Mfg. Co. v. Tinsman (Ill.) supra, it appeared that a mechanic was employed for three years at an annual salary of $1,800. Not having been paid his salary for several months, he left his employment before the expiration of the first year, and brought an action to recover the wages due him. A statement prepared by the defendant's bookkeeper was introduced in evidence, showing that the plaintiff was credited with his salary at the rate of $150 per month. A recovery for the plaintiff was resisted on the ground that he was not entitled to recover any salary until the expiration of each successive year, but this contention was held insupportable, as the evidence showed that the contract was construed by both parties as meaning that the salary was to be paid in monthly instalments.

In Osgood v. Paragon Silk Co. (1897) 19 Misc. 186, 43 N. Y. Supp. 271, where it appeared that a yearly contract of employment was, by the parties thereto, construed as one calling for monthly payments, by uniformly adopting that method of payment, it was held that in an action on the contract that construction would prevail.

In Reynolds v. Reeder (1895) 104 Mich. 265, 62 N. W. 355, it appeared that a traveling salesman agreed to sell $40,000 worth of goods, for which he was to receive $800 and expenses. He was to receive an additional 1 per cent on all goods sold by him in excess of $40,000, and if, at the end of the year, his sales were less than that sum, 2 per cent of the shortage was to be deducted from his salary. Money was asked for by the salesman at intervals, and was furnished. The court held that the most reasonable construction of the contract was that the salesman was to be paid from time to time on the basis of goods sold, but not beyond the rate of $800 per annum and expenses.

In Booth v. Ratcliffe (1890) 107 N. C. 6, 12 S. E. 112, the plaintiff brought a suit against the defendant to recover for several months' wages. The only testimony was that of the plaintiff, to the effect that he was to work for the defendant during the year for $100, and was to be furnished a house in which to live; that if either party became dissatisfied with the bargain during the year the plaintiff was to stop work; that when the contract was

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made nothing was said as to the time of payment, but afterwards the defendant said he would pay the plaintiff as he had the money, and as the plaintiff would need it, to which the latter assented; that the plaintiff was paid $1 on his wages, and after several months left, because the roof of the house in which he lived leaked very badly. It was held that there was no implied or express contract that nothing was to be paid till the end of the year, and that the plaintiff could recover.

In Cunningham Lumber Co. v. New York, N. H. & H. R. Co. (1905) 77 Conn. 628, 60 Atl. 107, it was held that the making of several voluntary part payments on a building contract, silent as to time of payment, was not such a practical construction as would render any part of the contract price due before the completion of the work.

R. J. B.

STANLEY VINESECK, Appt.,
v.
GREAT NORTHERN RAILWAY COMPANY, Respt.

Minnesota Supreme Court — February 16, 1917.

(136 Minn. 96, 161 N. W. 494.)

Judgment — omission of cause — res judicata.

1. Where an item of a single cause of action is omitted from the complaint in an action brought to recover thereon by reason of the fraud of defendant, or the clearly established mutual mistake of the parties, the judgment in such action is not res judicata as to the omitted item.

[*See note on this question beginning on page* 534.]

Evidence — sufficiency.

2. The record is held to present facts sufficient to require a trial of the action upon its merits, and to justify the submission to the jury, if sufficient evidence be produced, of the issue whether a release signed by plaintiff was procured by the fraud of defendant.

Action — splitting — waiver.

3. The rule against splitting a cause of action into several parts and bringing an action upon each is primarily for the benefit of defendant in the action, which he may waive, or preclude himself from invoking by his fraud.

Same — suit on omitted cause.

4. In such case a subsequent action may be brought upon the omitted item without first applying for a vacation of the former judgment. Such vacation of the judgment is unnecessary.

Headnotes by BROWN, Ch. J.

APPEAL by plaintiff from an order of the District Court for Hennepin County denying a new trial and granting defendant's motion to dismiss the action, brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. **John P. Nash, William M. Nash, John P. Devaney, and Arthur M. Higgins** for appellant.

Messrs. **M. L. Countryman, Cobb, Wheelwright, & Dille, and C. M. Bracelen,** for respondent:

The release is valid and defeats this action.

Archie Valley v. Crookston Lumber Co. 128 Minn. 387, 151 N. W. 137.

The former judgment is a bar to this action.

Almquist v. Wilcox, 115 Minn. 37, 131 N. W. 796; Liimatainen v. St. Louis River Dam & Improv. Co. 119 Minn. 238, 137 N. W. 1099; McKnight

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v. Minneapolis Street R. Co. 127 Minn. 207, L.R.A.1916D, 1164, 149 N. W. 131; Tuder v. Oregon Short Line R. Co. 131 Minn. 317, 155 N. W. 200; Watson, Damages for Personal Injuries, § 6; 1 Sutherland, Damages, 4th ed. § 106; 1 R. C. L. 341; Jenkins v. Atlantic Coast Line R. Co. 179 Fed. 535.

Brown, Ch. J., delivered the opinion of the court:

This action was brought to recover for personal injuries alleged to have been caused by the negligence of defendant. Defendant interposed in defense, in addition to a general denial of the allegations of the complaint: (1) That plaintiff's right of recovery was barred by a judgment duly rendered by the United States circuit court for the district of North Dakota, in a former action between the same parties, brought for the same alleged negligence; and (2) that long prior to the commencement of this action plaintiff fully settled with defendant for his injuries, and executed to defendant a formal written release and discharge of all claims on account thereof. Plaintiff replied that the settlement was procured by fraud and fraudulent representations of defendant's agents. At the trial counsel for plaintiff made the usual opening statement of the case to the jury which, in connection with certain concessions of counsel in reference to the defense of settlement and release, and the recovery of the former judgment, was made the basis of a motion by defendant to dismiss the action on the ground that the settlement and release, and the former judgment, were conclusive against plaintiff's right of recovery. The court granted the motion, and plaintiff appealed from an order denying a new trial.

The facts as disclosed by the statement of counsel to the jury, and the concessions made for the purposes of the motion to dismiss, are substantially as follows:

Plaintiff is a native of Poland, twenty-eight years of age; he has resided in this country eight years or more, but speaks and understands the English language to a limited extent only. At the time of the injury of which he complains, he was in the employ of defendant as a car repairer, in its yards at Williston, in the state of North Dakota. While engaged in the discharge of his duties he received certain injuries as the result of the negligence of defendant, namely: (1) To his leg, which was so crushed as to necessitate the amputation thereof above the knee, and (2) a severe blow upon the head, rendering him for some time unconscious, and which affected his eyes, resulting finally in total blindness. Both injuries were caused at the same time and by the same act of negligence. Immediately following the accident plaintiff was taken to a hospital and placed in charge of the defendant's local physician, who amputated the injured leg and continued to treat plaintiff until he was discharged from the hospital, further treatment then being deemed unnecessary. The physician was active on behalf of defendant in efforts to effect a settlement with plaintiff for his injuries, and joined with a claim agent of defendant in an offer of $750 therefor. The offer was made when plaintiff was at the hospital and still under treatment. During the time of the treatment, and when this offer of settlement was made, he called the attention of the physician to the injury to his eyes, and complained of having trouble with them. The physician stated to him that the trouble with the eyes was temporary, not serious, and that he would fully recover therefrom when the nervous shock had passed away. Plaintiff declined the offer of $750, and upon his discharge from the hospital, some months after the accident, he employed attorneys, and they brought an action for him against defendant in the district court of North Dakota to recover for the injury to and loss of his leg, making no claim for the injury to his head or eyes. The action was, in due course of procedure, removed by defendant to the United States circuit court for the district of

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North Dakota. At the time of the commencement of the action plaintiff was still at Williston, and thereafter the physician who had treated him for his injuries, and a claim agent of defendant, renewed their efforts to effect a settlement with him. The negotiations were carried on through an interpreter produced by the claim agent or physician. At this time plaintiff again complained of his eyes, and the physician again assured him that his eye trouble was only temporary, and that his recovery therefrom would be complete. Plaintiff accepted an offer then made of $1,250, in full for the injury to the limb; and, relying upon the statement of the physician that his eyes were only temporarily affected, made no claim in that respect. However, he signed a prepared release expressly discharging defendant of all claims on account of the injuries received, which necessarily included the injury, if any, to plaintiff's eyes. The money was paid over, part of which went to plaintiff's attorneys, and the latter entered into a stipulation for a dismissal of the action with prejudice, which as heretofore stated involved only the injury to plaintiff's limb. Judgment was formally entered in the Federal court, where the action was then pending, dismissing the action with prejudice, but without costs to either party. The accident occurred in March, 1913, and the settlement was effected and the judgment of dismissal entered in September of the same year.

Thereafter plaintiff removed to this state, where he has since continued to reside. The trouble with his eyes continued, gradually increasing, and he finally became totally blind, a direct and proximate result of the injury to his head. The present action was commenced in the courts of this state in January, 1916.

In dismissing the action the trial court necessarily held either: (1) That the claim of fraud and fraudulent representations interposed by plaintiff to impeach the release was affirmatively disproved by the facts presented in counsel's opening statement to the jury; or (2) whether such facts appeared or not, that the judgment of the Federal court in the former action is a conclusive bar to the present action. In other words, that on the facts stated plaintiff had but one cause of action, each item of which he was bound to bring forward in the former action, and, though the claim of injury to the eyes was not in fact included, it could have been included, and the bar of the judgment is effective, notwithstanding the fact that the particular claim may have been omitted because of the wrongful conduct and fraud of defendant.

If the court was right as to either, the order appealed from must be affirmed. We dispose of the two questions in the order stated.

1. We have no particular difficulty in holding that the statements of counsel were sufficient, if supported by competent evidence, to require the submission to the jury of the question whether the release was obtained by misrepresentations of the defendant's agent, the physician who stated that plaintiff's eye trouble was a temporary and not a serious matter, and whether plaintiff relied and had the right to rely thereon in making settlement, without including a claim for the injury to the eyes. If the representation was made to induce and bring about the settlement, and was not true, there was fraud in law sufficient to overcome the release, though the physician may not have intended thereby to deceive or mislead plaintiff. Jacobson v. Chicago, M. & St. P. R. Co. 132 Minn. 181, L.R.A.1916D, 144, 156 N. W. 251, Ann. Cas. 1918A, 355. We find in the statement of counsel no conceded state of facts which would preclude the right of plaintiff to recover, and the case was not, therefore, one for dismissal without evidence. Barrett v. Minneapolis, St. P. & S. Ste. M. R. Co. 106 Minn. 51, 18 L.R.A.(N.S.) 416, 130 Am.

Evidence—sufficiency.

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St. Rep. 585, 117 N. W. 1047; St. Paul Motor Vehicle Co. v. Johnston, 127 Minn. 443, 149 N. W. 667. Whether plaintiff retained the benefits of the settlement after discovery of the fraud (Archie Valley v. Crookston Lumber Co. 128 Minn. 387, 151 N. W. 137) is a question to be disposed of by the evidence. No concession that he had so acted was made.

2. The more important question in the case is whether the judgment in the former action is res judicata, and a bar to the present suit. The decision of the question involves the elementary rule that a single cause of action cannot be split or divided and independent actions brought upon each separated part. The rule is well established by the courts, and is strictly followed and applied. 2 Dunnell's Dig. (Minn.) § 5167; Almquist v. Wilcox, 115 Minn. 37, 131 N. W. 796; McKnight v. Minneapolis Street R. Co. 127 Minn. 207, L.R.A.1916D, 1164, 149 N. W. 131; King v. Chicago, M. & St. P. R. Co. 80 Minn. 83, 50 L.R.A. 161, 81 Am. St. Rep. 238, 82 N. W. 1113. In actions in tort for personal injuries, like the case at bar, each item of injury must be included in one suit, and, if voluntarily omitted, no further action can be maintained thereon. In short, the judgment in such an action precludes the parties as to all issues and questions, all items of injury or damage, which were or could have been litigated therein. But the rule is one adopted by the court for the orderly administration of the law and to prevent a multiplicity of suits, and, like other rules of either substantive law or procedure, has its exceptions. It has been repeatedly held that the rule is designed primarily for the benefit of the defendant, to protect him from vexatious litigation, and that he may waive the same. 23 Cyc. 1175, note 88; 1 C. J. 1108; Welch v. Farmers' Loan & T. Co. 91 C. C. A. 399, 165 Fed. 561; Claflin v. Mather Electric Co. 39 C. C. A. 241, 98 Fed. 699. It has been held by respectable authority that, where plaintiff is ignorant of all the items of his cause of action when the suit is brought, the judgment rendered therein is not a bar to a subsequent action to recover upon the omitted items. Kane v. Morehouse, 46 Conn. 300; Edmonston v. Jones, 96 Mo. App. 83, 69 S. W. 741; Morgan v. St. Louis & S. F. R. Co. 111 Mo. App. 721, 86 S. W. 590. Or where such item is omitted through mistake (Stevens v. Damon, 29 Vt. 521; Post v. Smilie, 48 Vt. 185), or at the instance or suggestion of defendant. Mills v. Garrison, 3 Abb. App. Dec. 297; Carrington v. Crocker, 37 N. Y. 336. And particularly in cases where the omission was brought about and caused by the fraud of defendant. Johnson v. Provincial Ins. Co. 12 Mich. 216, 86 Am. Dec. 49. In 1 Van Fleet, Former Adjudication, p. 206, the exception to the general rule is stated in this language: "If a person, by excusable accident, mistake, or neglect, or by the fraud of his adversary unmixed with his own fault, splits a single cause of action into two parts, an adjudication in respect to one will not bar a suit upon the other." And the statement is supported by the authorities generally. Gedney v. Gedney, 160 N. Y. 471, 55 N. E. 1; Cheatham Electric Switching Device Co. v. Transit Development Co. (D. C.) 203 Fed. 285; Wilson v. Colorado Min. Co. 142 C. C. A. 245, 227 Fed. 721; Jones v. Beaman, 117 N. C. 259, 23 S. E. 248; Cunningham v. Union Casualty & Surety Co. 82 Mo. App. 607; O'Dougherty v. Remington Paper Co. 81 N. Y. 496; Stern v. Riches, 111 Wis. 591, 87 Am. St. Rep. 892, 87 N. W. 555; 1 R. C. L. p. 342. We need not stop to consider whether a mere mistake on the part of plaintiff, or his ignorance of the full scope of his claim or cause of action, would justify in all cases an application of the exception, for no claim of that kind is here made. An application of the exception is here invoked

Action—splitting—waiver.

Judgment—omission of cause—res judicata.

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on the claim of fraud or mutual mistake. If the omission is caused by the fraud of defendant, or by a clearly established mutual mistake, it seems clear that the former judgment should not be held a bar to the omitted part of the claim. If the rule of res judicata is one primarily for the benefit and protection of the defendant, and he may waive the same, he may, a fortiori, estop himself from insisting upon the rule when he has misled the plaintiff by actual fraud, or by misrepresentations amounting to fraud as a matter of law. We so hold. And in the case at bar, if it shall appear from the evidence that plaintiff refrained from presenting in the former action the injury to his eyes by reason of the representation of the company's physician; that he suffered no injury in that respect; that the trouble experienced by him with his eyes was a temporary matter only, and the representation was made under such circumstances that plaintiff rightly might rely thereon, and he was not chargeable with any negligence in efforts to ascertain the true condition of this particular injury; then he may recover, notwithstanding the former judgment. The showing made in this respect must be clear and satisfactory, and be of a character equivalent to that necessary to impeach a settlement and release upon the same ground. If plaintiff had the means at hand to ascertain and learn the true condition of the injury to his eyes, and he negligently failed to avail himself thereof, he must fail in the action, for the neglect to present the claim in the former action must appear to have been due solely to the fraud of defendant. Macon & A. R. Co. v. Garrard, 54 Ga. 327. What has been said would apply also to a clearly established mutual mistake.

In this view of the law no application for a vacation of the former judgment is necessary. The judgment may stand as conclusive of the injury there complained of and adjudicated upon, namely, the injury to the leg, until vacated and set aside in some direct proceeding. But the injury here complained of was not in fact involved in that action, and, within the exception of the rule against splitting a cause of action, may be litigated without a vacation of that judgment.

Same—suit on omitted cause.

Order reversed.

ANNOTATION.

Application of doctrine of res judicata to item of single cause of action omitted from issues through ignorance, mistake, or fraud.

I. Omission due to ignorance, 534.
II. Omission due to mistake, 537.
III. Omission due to fraud, 541.

I. Omission due to ignorance.

While it is a well-settled and familiar rule that a single claim, arising either on contract or in tort, cannot be divided and made the subject of several suits; and, if several suits be brought for different parts of a claim, a judgment on the merits in either will be available as a bar to the other suits (see 15 R. C. L. title, Judgments, p. 965), there are certain well-recognized exceptions to the rule. Thus, where it appears that the plaintiff had no knowledge or means of knowledge of the omitted items, his ignorance will excuse him, and the judgment in the first action will not bar a subsequent action to recover on the omitted items. Phillips v. Bossard (1888) 35 Fed. 99; Cheatham Electric Switching Device Co. v. Transit Development Co. (1913) 203 Fed. 285, affirmed in (1913) 126 C. C. A. 297, 209 Fed. 229; Kane v. Morehouse (1878) 46 Conn. 300; Moran v. Plankinton (1876) 64 Mo. 337; Morgan v. St. Louis & S. F. R. Co. (1905) 111 Mo. App. 721, 86 S. W. 590; Gedney v. Gedney (1899) 160 N. Y. 471, 55 N. E. 1; Risley v. Squire (1869) 53 Barb. (N. Y.) 280; Jones v.

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Beaman (1896) 119 N. C. 300, 25 S. E. 970, former appeal in (1895) 117 N. C. 259, 23 S. E. 248; Bagot v. Williams (1824) 3 Barn. & C. 235, 107 Eng. Reprint, 721, 5 Dowl. & R. 87, 27 Revised Rep. 340. And see the following cases wherein, though the point was not directly in issue, unavoidable ignorance of the full extent of the wrongs received or injuries done was recognized as an exception to the rule against splitting a cause of action: Wheeler Sav. Bank v. Tracey (1897) 141 Mo. 252, 64 Am. St. Rep. 505, 42 S. W. 946; Cunningham v. Union Casualty & Surety Co. (1900) 82 Mo. App. 607; Edmonston v. Jones (1902) 96 Mo. App. 83, 69 S. W. 741; Brunsden v. Humphrey (1884) L. R. 14 Q. B. Div. (Eng.) 145, 53 L. J. Q. B. N. S. 476, 51 L. T. N. S. 529, 32 Week. Rep. 944, 49 J. P. 4.

In Moran v. Plankinton (1876) 64 Mo. 337, it appeared that, at the time of a judgment for the conversion of a portion of property stolen and sold to a third party, the owner did not know that the same person was in possession of the balance of his property, and had no means then of ascertaining that fact. The court, holding that the judgment in the first action did not bar a second action for the remainder of his property, as to the whereabouts of which he had no knowledge at the time of obtaining the first judgment, stated the rule as follows: "There is no doubt respecting the general correctness of the proposition expressed in the maxim: 'Nemo debet bis vexari pro una et eadem causa.' This rule, however, is not of universal application. The origin and object of the rule were the prevention of the vexations incident to a multiplicity of suits, which the law equally as much as equity abhors. The principle above asserted finds more familiar expression in the statement that a party shall not split his cause of action. Now, it is quite obvious that such prohibition presupposes knowledge of the constituent elements of the cause of action sought to be unwarrantably divided. If this be true, and it be true also that the law does not require what is impossible, then it must needs follow that a party should not be precluded in consequence of a former action, if such action were brought in unavoidable ignorance of the full extent of the wrongs received or injuries done. Any other conclusion would be reached only through sanctioning the rankest injustice."

Similarly, where a judgment was obtained against a warehouseman for the recovery of the number of bags of chicory, as set out in the warehouse receipt, and afterwards it was discovered that the receipt should have been for five more bags than was stated, it was held that a second action for the five bags was not barred by the judgment in the first action. Risley v. Squire (1869) 53 Barb. (N. Y.) 280.

In Phillips v. Bossard (1888) 35 Fed. 99, it appeared that an action was brought to subject certain property of a defaulting bank cashier to the payment of the loss, and judgment was obtained. Subsequently, an action was commenced on his official bond to recover for additional defalcations which were not known at the time of the first action. It was contended that the judgment in the first action barred any further action. The court held that, as the bank was ignorant of the items of loss sued for in the second action, at the time when the first action was brought, the judgment did not operate as a bar.

Where a judgment was obtained in action at law for certain specific instances of infringement of a patent, it was held that the judgment did not bar a subsequent suit in equity to recover for other instances of infringement by the same person, which were unknown to the plaintiff at the time the first action was brought. Cheatham Electric Switching Device Co. v. Transit Development Co. (1913) 203 Fed. 285.

In Kane v. Morehouse (1878) 46 Conn. 300, it appeared that a judgment was obtained for an account stated, and subsequently the plaintiff brought an action for the amount of an order that had been credited to the defendant at the time the account was taken, but which was afterwards

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fonnd not to have been paid. It was insisted that the judgment in the first action barred the second. Answering this contention, the court said: "It is difficult to see upon what principle the plaintiff was bound to make any such claim before the justice, when he was ignorant of its existence."

Where, in an action brought by an administrator d. b. n. on the account of a deceased administrator, a judgment was obtained for the amount of indebtedness as shown by such account, it was held that such a judgment was not a bar to a subsequent action for an additional indebtedness which did not appear in the account, and of which the administrator d. b. n. had no knowledge. Jones v. Beaman (1896) 110 N. C. 300, 25 S. E. 970, former appeal in (1895) 117 N. C. 259, 23 S. E. 248.

In Morgan v. St. Louis & S. F. R. Co. (1905) 111 Mo. App. 721, 86 S. W. 590, wherein it appeared that, after obtaining a judgment against a railroad company for the loss of a rail fence by fire, the plaintiff commenced a second action for damages to his young timber caused by the same fire, the court, holding that his right to recover depended on his knowledge or lack of knowledge of this item of damage, stated the rule as follows: "All the damages caused by the fire accrued before the first suit was brought, and plaintiff knew that the fire had burned over his 200 acres of woodland, and that the mulch thereon (an item of damages included in the second suit) had been consumed by the fire. But plaintiff's evidence tends to show that the damage to his trees had not developed, or but partially developed. Now, if the damages had not developed at all, and there was no indication at the time the suit was brought that the trees would die, then I think it may be well said that plaintiff was unavoidably ignorant of such damage. . . . It is commendable to make an exception to the rule in cases where the plaintiff was unavoidably ignorant of the damages alleged in his second suit when he brought the first one. The exception is founded on justice and supported by sound reasoning, and has been established in this jurisdiction. We conclude, therefore, that if, at the time plaintiff brought his first suit, no damage had developed to his trees, and there was no evidence present that any would develop in the future, he was unavoidably ignorant of such damage, and the first suit is not a bar to the present one. On the other hand, if any damage to the trees had developed, however slight, or if evidence was present that any would likely develop in the future, he was not ignorant of such damage, within the meaning of the exception to the rule, and the suit is barred by the first one. Whether or not this case comes within the exception is a question of fact for the triers of the facts, under appropriate instructions."

In Bagot v. Williams (1824) 3 Barn. & C. 235, 107 Eng. Reprint, 722, 5 Dowl. & R. 87, 27 Revised Rep. 340, wherein it appeared that an action was brought against a steward for various sums alleged to have been received by him, it was held that the judgment obtained in that action would bar any action for additional sums of which the plaintiff had knowledge at the time of the first suit, but as to an item of which he had no knowledge the judgment would not operate as a bar.

In Gedney v. Gedney (1899) 160 N. Y. 475, 55 N. E. 1, wherein it appeared that a judgment was obtained by one cotenant against the estate of his cotenant for rents collected from a particular piece of property, the court, holding that such a judgment was no bar to a subsequent action for rents collected from a different piece of property, of which the plaintiff had no knowledge at the time of instituting the first action, said: "Even if it were possible to apply the rule against the splitting up of accounts or demands, the facts show here, and the referee has so found, that at the time he filed his claim against the estate of Charles William did not know that Charles had collected the rents now in question. Of necessity, the splitting up of accounts or demands implies on the part of the suitor a conscious act or knowledge. But here, with the established

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fact of no knowledge on the part of William, when he filed his previous claim against Charles's estate, of his also having a further demand growing out of Charles's act in collecting these rents, we have a perfect answer to the contention, and the case is brought within a recognized exception to the general rule of law adverted to."

However, where a part of a claim is omitted through ignorance due to the want of care and negligence of the claimant, the exception does not apply, and a judgment for the part sued for will bar a second action for the omitted items. Macon & A. R. Co. v. Garrard (1875) 54 Ga. 327. In that case it appeared that, after having a settlement with his debtor, a creditor brought suit for the amount agreed on and obtained judgment. Subsequently, he brought a second action, claiming that several items had been omitted, but the court, holding that they were omitted through the plaintiff's own negligence, and that the first judgment operated as a bar, said: "It is not sufficient to overturn this rule of law, for the plaintiff to reply to a plea of former recovery that when the first suit was brought he did not know the whole amount of his claim —in this case, how many crossties he had in fact furnished—where that ignorance was from his own fault and negligence. Equity would not relieve in such a case; that is, where the party by reasonable diligence could have had knowledge of the truth. Code, § 3126. And the principle goes still further. Even ignorance of a fact known to the opposite party will not justify an interference, if there has been no misplaced confidence nor misrepresentation nor other fraudulent act. Ibid. Here the evidence shows that the plaintiff below was all the while in full possession of all the means of ascertaining the true facts, and what his entire claim was. He had twice moved in the matter; once in making a settlement with his debtor. Not satisfied with that, he brought one suit. On a second investigation, which he was legally competent to assert, a judgment was had; that judgment was pleadable in bar against a second suit for a breach of the same contract, if that breach had occurred when the first suit was brought. There is no principle in equity that will relieve him from the rule, under the evidence in this case."

II. Omission due to mistake.

In case of items of a claim which were known to the plaintiff, but were omitted from the issues by mistake, it has been held that, where the mistake did not arise from the negligence of the plaintiff or his agent, the judgment in the first action will not bar a subsequent action for the recovery of the omitted items. Wilson v. Colorado Min. Co. (1915) 142 C. C. A. 245, 227 Fed. 721; State ex rel. Richardville v. Brutch (1859) 12 Ind. 381; Whiley v. Bradway (1812) 3 N. J. L. 996; Conklin v. Field (1869) 37 How. Pr. (N. Y.) 455; Stevens v. Damon (1857) 29 Vt. 521; Post v. Smilie (1874) 48 Vt. 185; Seddon v. Tutop (1796) 1 Esp. 401, 6 T. R. 607, 101 Eng. Reprint, 729, 3 Revised Rep. 274.

In Wilson v. Colorado Min. Co. (Fed.) supra, it appeared that a judgment was obtained for a certain number of shares of corporate stock alleged to have been converted, and that a subsequent suit between the same parties was brought for another block of stock not included in the first action because of the mistaken belief of the plaintiff that he had no cause of action as to that stock. Holding that the judgment in the first action was not a bar to the second, the court said: "If the claims to recover on account of the 15,000 shares were a part of the indivisible cause of action first brought by Wilson, the pleadings in that case that this stock had been sold and assigned to the hospital and to Croxall, and the testimony of Wilson that he did not know, during the pendency of these actions, that those assignments were defeasible, present such convincing evidence that the claims now in suit were omitted from Wilson's first action by mutual mistake that a court of equity ought not to hesitate to exercise its immemorial jurisdiction to relieve from

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such a mistake, and to permit the suits upon these claims to be maintained."

In Post v. Smilie (1874) 48 Vt. 185, wherein it appeared that an action was brought to recover on an item of an account omitted in a former action by mistake, the court, holding that, the item having been omitted by mistake, the judgment in the first action was no bar to the second, set out the facts and its ruling as follows: "This defendant had sued the plaintiff on book, and recovered final judgment. On that trial, this plaintiff presented an account in offset against the defendant, who was plaintiff in that suit, and among such items was a charge against this defendant, 'Feb'y 5th, 1872, Bissonette order, $100.' There were three of such orders, of different dates, but each of the same amount. They were all charged on the plaintiff's book, and credited on the defendant's book. After the commencement of that suit, and before the audit, this defendant charged on the debit side of his book to the plaintiff, 'to error in Bissonette order, Feb'y 5, 1872, $100.' On the trial before the auditor in that case, the plaintiff and his counsel compared the defendant's credits with the plaintiff's charges as to these three orders, and found them to agree. But in this defendant's specifications but two orders were credited, and the charge for error in this order was omitted. The auditor, being informed by the parties that the books of the parties agreed as to these orders, computed the balance due this defendant upon his (defendant's) specification, whereby this plaintiff lost all benefit of his order. As the order has found there was no fraudulent design on the part of this defendant, we think the case shows that this item of $100 was omitted, and not presented to the auditor for adjudication by casualty and mistake, and not, therefore, barred by that adjudication."

In State ex rel. Richardville v. Brutch (1859) 12 Ind. 381, it appeared that a judgment was obtained on an administrator's bond for an amount shown by his report and vouchers to be due the estate, but that subsequently an item allowed on the credit side of the account was disallowed and rejected, and a second action was commenced on the same bond to recover this item. It was held that, the item having been omitted in the first action through excusable mistake, the judgment in that action was not a bar to a second action brought to recover the omitted item.

Similarly, it has been held that where a party brought an action for the balance supposed to be due on a note, and obtained judgment therefor, and it afterwards appeared that a credit indorsed on the note was made under a mistake of fact, the judgment would not bar a subsequent action to recover the amount of the credit. Conklin v. Field (1869) 37 How. Pr. (N. Y.) 455. In this case the mistake arose through the erroneous belief of the plaintiff that he was authorized to credit the payment by a third person, who, however, after the first suit, recovered the amount so indorsed against the plaintiff.

In Whiley v. Bradway (1812) 3 N. J. L. 996, wherein it appeared that, after a settlement of accounts, the debtor confessed judgment for the balance due, but subsequently brought an action against the other party to recover the amount of an order alleged to have been omitted from the settlement through mistake, and which should have been credited to the debtor, it was held that the confessed judgment was not a bar to an action on the omitted item.

In Stevens v. Damon (1857) 29 Vt. 521, an action on a book account, it appeared that in a former action between the same parties a judgment was had on an account between them, but the items of the account later sued on were omitted through the mistaken belief on the part of the plaintiff that they had been settled. The court, holding that the subsequent action was not barred by the judgment in the first, said: "Ordinarily such a judgment will bar a subsequent suit on the account so omitted, as the plaintiff cannot divide his account and make it the subject of several actions. It is prima facie evidence that all the previ-

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ous account was adjudicated and settled. But it has been held that the judgment has no such effect if the account omitted was not then due or payable, or if its omission was occasioned by mistake, or other sufficient reason. . . . Those charges, therefore, which were adjudicated by the justice in that action, whether on the part of the plaintiff or defendant, and which went in to make the balance which was allowed, cannot be regarded as subsisting accounts, or open for adjudication in this action. Neither can we regard that judgment as affecting the plaintiff's right to recover in this action. The present account was kept in the plaintiff's book on another page, and in no way connected with the account adjudicated by the justice. The plaintiff supposed this account had been settled by the application of the defendant's account, but which has since been allowed to him in that action, and which the plaintiff has been compelled to satisfy. There was no fraud or advantage designed or obtained in withholding that account, and, as the plaintiff has been deprived of that satisfaction of this account which he supposed existed, it is reasonable that he should recover its amount in this action."

In Byrket v. State (1851) 3 Ind. 248, wherein it appeared that certain sums were omitted by mistake where a judgment was had against a justice of the peace for money collected and not paid over, it was held that the judgment was not a bar to a subsequent action to recover the omitted sums.

In Seddon v. Tutop (1796) 1 Esp. 401, 6 T. R. 607, 101 Eng. Reprint, 729, 3 Revised Rep. 274, wherein it appeared that a judgment was obtained on a bill of exchange given for a part of an indebtedness for goods sold, in an action declaring on the bill and also, generally, for goods sold and delivered, but that the judgment did not cover the balance of the account for the goods sold, as the counsel for the plaintiff, through mistake, had only gone into evidence on the bill of exchange, it was held that the judgment did not bar a second action for the balance of the account.

In the reported case (VINESECK v. GREAT NORTHERN R. Co. ante, 530), it is held that if a failure to include an injury to the eyes in an action for personal injuries is due to the mutual mistake of the plaintiff and the defendant's physician, the judgment will not bar a subsequent action for such injury. But where the items were omitted through a mistake which was the result of negligence on the part of the plaintiff, a judgment on a single cause of action will bar a subsequent action for the omitted items. Newport & C. Bridge Co. v. Douglass (1877) 12 Bush (Ky.) 673; Russell v. McIlvoy (1897) 19 Ky. L. Rep. 755, 41 S. W. 765; Callahan v. Murrell (1897) 20 Ky. L. Rep. 28, 45 S. W. 67; Russell v. England (1899) 20 Ky. L. Rep. 1879, 50 S. W. 250; Folsom v. Clemence (1876) 119 Mass. 473; Sullivan v. Baxter (1889) 150 Mass. 261, 22 N. E. 895; Ewing v. McNairy (1870) 20 Ohio St. 315; Ahl's Estate (1895) 169 Pa. 609, 32 Atl. 621.

In Trask v. Hartford & N. H. R. Co. (1861) 2 Allen (Mass.) 331, it was held that, after a judgment for damages for the loss of a shop from fire set by sparks from a passing locomotive, a second action could not be maintained for the loss of a dwelling, destroyed in the same fire, the court saying: "It would be unjust, as well as in violation of the fixed rule of law, to allow him to subject the defendants to the hazard and expenses of another suit to obtain an advantage which he lost, either by his own carelessness and neglect, or by an intentional withholding of a part of his proof."

In Ewing v. McNairy (1870) 20 Ohio St. 315, an action to enforce a lien against a lot for its proportion of an assessment for street improvement, it appeared that in the petition in the original action the amount claimed was $365.90, for which judgment was duly rendered. In the subsequent action it was claimed that the amount should have been $1,365.90, but that through clerical error $1,000 had been omitted from the amount of the claim. Holding that the omission of a part of the claim in the former suit being

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the fault of the plaintiff, he was barred by the judgment in that action, the court said: "As we understand the case made by the original petition, this was an action seeking the correction of a mistake, made by the plaintiffs themselves, or their attorney, in taking judgment in a former suit upon the same cause of action. If such be the true reading of the petition, it is quite evident that the court below erred in holding it to be a good petition. By the first action the subject-matter had become res judicata. The judgment in that action was a bar to any action, unless it could be avoided for some fraud or fault of the defendant, or, at least, for some mutual mistake of the parties. No such fraud or mistake is alleged. The plaintiffs simply seek relief against their own carelessness, or that of their attorney, without showing any fault or omission by the adversary party. Such relief the law never administers. By refusing to relieve parties against the consequences of their own neglect, it seeks to make them vigilant and careful. On any other principle there would be no end to an action, and there would be an end to all viligance and care in its preparation and trial."

In Folsom v. Clemence (1876) 119 Mass. 473, an action in tort for the conversion of certain furniture and store fixtures, it appeared that the conversion was at the same time and by the same act as that of the stock in trade in the same store, for which a judgment had been recovered in a former action. It was sought to prove the title and facts as in the former case, and that the property which was the subject of the instant action was not included in the former one, through the accidental omission of the plaintiff's attorney, the mistake not being discovered until after the judgment. It was held, however, that as the cause of action was single a second action could not be maintained to recover the items omitted through the fault of the plaintiff.

In Sullivan v. Baxter (1889) 150 Mass. 261, 22 N. E. 895, it appeared that a contractor, in a former action for the conversion of a derrick, recovered a judgment for the value of the derrick only, and by mistake failed to claim in that action certain special damages which resulted from the conversion of the derrick, consisting of the loss of profits from a contract which he had. It was held that, as the contractor could have alleged and proved in the first action any special damages which he was entitled to recover, the judgment in that action barred any subsequent action.

In Russell v. McIlvoy (1897) 19 Ky. L. Rep. 755, 41 S. W. 765, it appeared that a contract, involving among other things the right of attorneys to a commission on one item, was in dispute. The litigation had extended over a period of twelve years, being before the court of appeals four times, during which period the attorneys had based their claim solely on the written contract. After an adverse decision by the appellate court it was sought to amend the pleadings, introducing entirely new grounds as a basis for the claim for the commission, on the ground that the written instrument did not contain all of the contract, a part of it having been left out by mistake. The court, refusing to allow such an amendment, held that the question of the commission had been decided by the appellate court, and was then res judicata, and the claim of mistake could not avail under the circumstances of that case.

In Bennett v. Hood (1861) 1 Allen (Mass.) 47, 79 Am. Dec. 705, it was held that, after judgment for the conversion of a daguerreotype saloon and a camera, a second action could not be maintained for damages to pictures and chemicals, taken at the same time as the saloon and camera, and which were in the saloon when it was returned, it not appearing that the pictures and chemicals were concealed or otherwise disposed of, so that they could not have been replevied in the original action.

In Russell v. England (1899) 20 Ky. L. Rep. 1879, 50 S. W. 250, it was held that, after a judgment for the sale of land to satisfy certain lien notes, a second action could not be maintained on a note omitted from the judgment

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through accident or clerical error. Here the court said the error could have been corrected by motion in the original suit.

In Callahan v. Murrell (1897) 20 Ky. L. Rep. 28, 45 S. W. 67, wherein it appeared that a judgment was obtained on a note for its face value, though after the action had been commenced, and before judgment, the maker had made a payment on the note. In a subsequent action to recover the payment made it was held that, as the maker had failed (presumably through mistake or oversight, though this was not definitely stated in the opinion) to have the credit entered in the original action, he was precluded from further action by the judgment rendered.

In Newport & C. Bridge Co. v. Douglass (1897) 12 Bush (Ky.) 673, wherein it was sought to recover taxes which had been the subject of a former suit, but which were claimed by the state not to have been considered in that action because of a mistaken basis of assessment, the court, holding that the second action was barred, said: "The amount of taxes due from those companies for the years mentioned was once the subject of litigation. The commonwealth may have adopted a mistaken basis of assessment, but it has once had its day in court; and so long as the judgment heretofore rendered in its favor remains in force it cannot have a retrial of the issues once litigated, nor the issues which, according to the established rules of procedure, ought to have been litigated."

In Ahl's Estate (1895) 169 Pa. 609, 32 Atl. 621, it was held that a trustee could not maintain an action to recover money paid out for a claim which had existed and was known to all parties prior to and at the time of an action wherein an account was taken supposedly of all the items involved, but which was omitted, apparently through oversight.

III. Omission due to fraud.

As a general rule, where the omission of an item from a single cause of action is caused by the fraud or deception of the opposing party, the rule as to splitting a cause of action does not apply, and the judgment in the first action will not bar a subsequent action for the omitted item. Johnson v. Provincial Ins. Co. (1863) 12 Mich. 216, 86 Am. Dec. 49. And see the reported case (VINESECK v. GREAT NORTHERN R. Co. ante, 530). See also United States v. Throckmorton (1879) 98 U. S. 61, 25 L. ed. 93, wherein, although the point was not directly in issue, the court recognized and stated the rule.

In Johnson v. Provincial Ins. Co. (Mich.) supra, it appeared that a judgment was obtained on a bond given by an insurance agent for certain defalcations committed by the agent, and that, after judgment, a scire facias was issued to recover on further breaches of the same bond which occurred before the first action was brought, but which were alleged to have been fraudulently concealed from the company, they being in ignorance of such defalcations until after the judgment was rendered. Holding that the judgment in the original action did not bar the subsequent proceedings, the court said: "The bond was given to secure an accounting, as well as payment; and this was necessary, for the obvious reason that generally an insurance company has no means of discovering the receipt of money until the agent informs his principal of the fact. An agent cannot be permitted to set up his own wrong to avoid a liability; and if he kept the company in ignorance of his receipts, he cannot on that ground object that they have not acted as if they knew what they did not know. Our statute makes a fraudulent concealment of a cause of action a ground for excepting it from the Statute of Limitations (Comp. Laws, § 5372); and if it avails for such a purpose, it must equally avail in a case like the present. The scire facias avers that it is a new breach, and gives the fraudulent concealment as a sufficient reason for not including it in the original pleadings and judgment."

In the reported case (VINESECK v. GREAT NORTHERN R. Co. ante, 530), it is held that if a failure to include

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injury to the eyes in an action for personal injuries is due to the fraudulent misrepresentation of the defendant's physician, a judgment does not bar a second action for such injury. But it has been held that, even where a part of the articles wrongfully withheld from the owner by another were omitted from the first action for conversion through the fraud of the wrongdoer, a second action for their recovery was barred by the judgment in the first action. McCaffrey v. Carter (1878) 125 Mass. 330, wherein it appeared that a landlord took possession of the goods of his tenant on the premises, which were used as a machine shop, claiming under a mortgage which covered most of the personal property therein. In an action by the tenant for conversion, a judgment was recovered for a good part of the property, and subsequently a second action was instituted to recover some of the remaining articles, it being alleged that they were omitted from the first action by reason of the fraudulent refusal of the landlord to permit the plaintiff to enter on the premises and make a list of his property. Holding that the second action was barred, it was said: "It is not necessary to consider whether any refusal by the defendant to allow access to his building by the plaintiff for the purpose of ascertaining whether any and what property belonging to him was there can in law be fraudulent. We assume that the defendant did fraudulently conceal the fact that the articles which are the subject of the present suit were a part of the chattels originally taken. Assuming this, what is the effect? The cause of action (and the plaintiff had but one cause of action) was not concealed. The plaintiff knew its existence, brought his action upon it, recovered judgment, and that judgment was satisfied. The fraud was in preventing the plaintiff from proving in that case the full extent of his damage. With the right of the plaintiff to require full disclosure of all facts necessary to his case, upon interrogatories filed, the power to compel him to produce all documents and to examine him as a witness, and the authority of the court to allow amendments, it is difficult to understand how the defendant could fraudulently conceal from the plaintiff the extent of the damages sustained, even if it is any part of the defendant's duty to afford such facilities. We should certainly be inclined to regard the failure of the plaintiff to make the proper proofs as evidence rather of his own laches than of a fraud of the defendant, at least, until he had exhausted the means within his power to ascertain the extent of his damages. But assuming the fraud to the extent claimed by the plaintiff, the former judgment is, while it remains unreversed, upon principle and authority, a bar to this suit." The foregoing case, however, was criticized in Stern v. Riches (1901) 111 Wis. 591, 87 Am. St. Rep. 892, 87 N. W. 555, the court saying: "That is an extreme application of the rule, one that could not be followed without hesitation and careful consideration." M. B.

SIOUX FALLS LODGE NO. 262 of the Benevolent and Protective Order of Elks, Appt.,

v.

CHARLES F. MUNDT, Minnehaha County Treasurer, Respt.

South Dakota Supreme Court — March 13, 1916.

(37 S. D. 97, 156 N. W. 799.)

Tax — exemption — prospective use for charity.

Land purchased by a benevolent association upon which to erect a lodge building is not, so long as it remains vacant, exempt from taxation under

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a constitutional provision authorizing the exemption of property used exclusively for charitable purposes, if the association has a lodge building in use which it intends to sell before erecting another.

[*See note on this question beginning on page* 545.]

APPEAL by plaintiff from a judgment of the Circuit Court for Minnehaha County in favor of defendant in an action brought to recover back an amount paid under protest for county taxes. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Bates & Bates for appellant.

Mr. Charles V. Caldwell, for respondent:

Plaintiff is not a charitable institution, within the meaning of the Constitution and the statute.

Green Bay Lodge v. Green Bay, 122 Wis. 452, 106 Am. St. Rep. 984, 100 N. W. 837; Boston Lodge v. Boston, 217 Mass. 176, 104 N. E. 453; Royal Highlanders v. State, 77 Neb. 18, 7 L.R.A. (N.S.) 380, 108 N. W. 183; St. Louis Lodge v. Koeln, 262 Mo. 444, L.R.A. 1915C, 694, 171 S. W. 329, Ann. Cas. 1916E, 784; Lacy v. Davis, 112 Iowa, 106, 83 N. W. 784; Atty. Gen. v. Detroit, 113 Mich. 388, 71 N. W. 632.

The burden is on plaintiff to show that it comes clearly within the constitutional and statutory provisions relative to exemptions, and, if there is doubt as to the intent of the statute and Constitution, that doubt will be resolved in favor of defendant.

Cooley, Taxn. 3d ed. p. 357; State ex rel. Spillers v. Johnston, 214 Mo. 656, 21 L.R.A.(N.S.) 171, 113 S. W. 1083; Com. v. Lynchburg Y. M. C. A. 115 Va. 745, 50 L.R.A.(N.S.) 1197, 80 S. E. 589; State ex rel. Hayes v. Board of Equalization, 16 S. D. 220, 92 N. W. 16; 37 Cyc. 891.

The property in question is not used exclusively for charitable purposes.

Parsons Business College v. Kalamazoo, 166 Mich. 305, 33 L.R.A.(N.S.) 921, 131 N. W. 553; Green Bay & M. Canal Co. v. Outagamie County, 76 Wis. 587, 45 N. W. 536; Nugent v. Dilworth, 95 Iowa, 49, 63 N. W. 448; All Saints Parish v. Brookline, 178 Mass. 404, 52 L.R.A. 778, 59 N. E. 1003; Montana Catholic Missions v. Lewis & Clark County, 13 Mont. 559, 22 L.R.A. 684, 35 Pac. 2; Mullen v. Erie County, 85 Pa. 288, 27 Am. Rep. 650; Ramsey County v. Macalester College, 51 Minn. 437, 18 L.R.A. 278, 53 N. W. 704; St. Paul's Church v. Concord, 22 Ann. Cas. 356, note; Boston Soc. v. Boston, 129 Mass. 181; Presbyterian Bd. of Relief v. Fisher, 68 N. J. L. 143, 52 Atl. 228; 12 Am. & Eng. Enc. Law, 323; State ex rel. Hayes v. Board of Equalization, 16 S. D. 219, 92 N. W. 16; First Christian Church v. Beatrice, 39 Neb. 432, 58 N. W. 166; Grand Lodge of Masons v. Burlington, 84 Vt. 202, 78 Atl. 973; Institute of Holy Angels v. Ft. Lee, 80 N. J. L. 545, 77 Atl. 1035; Y. W. C. A, v. Spencer, 29 Ohio C. C. 249.

Polley, P. J., delivered the opinion of the court:

Appellant is a local chapter or lodge of the Benevolent and Protective Order of Elks, in Sioux Falls. Respondent is the county treasurer of Minnehaha county. For some time past, appellant has owned a building used by it for lodge rooms and other purposes connected with the organization. In the month of October, 1913, it purchased a certain tract of ground, described in the complaint, upon which it intends to erect a new building, to be used exclusively for lodge purposes. During the year 1914, and before the erection of any building thereon had been commenced, the said tract of ground was assessed for taxation and certain taxes levied against the same. Appellant paid said taxes to the county treasurer, but did so under protest, and brought this action to recover the amount so paid back from the county.

Appellant bases its right of recovery upon the provisions of § 6, article 11, of the Constitution. This section reads as follows: "The legislature shall, by general law, exempt from taxation, property used exclusively for agricultural and horticultural societies, for school, religious, cemetery and charitable purposes, and personal property to any amount not exceeding in value

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two hundred dollars for each individual liable to taxation."

Pursuant to the provisions of said section, the legislature enacted § 2056 of the Political Code, which reads, in part, as follows: "All property described in this section to the extent herein limited shall be exempt from taxation. . . . Third. All property belonging to any charitable, benevolent or religious society, or used exclusively for charitable, benevolent or religious purposes."

The Constitution authorizes the exemption only of property that is used exclusively for the purposes therein enumerated, so that the first clause of the above subdivision need be given no consideration. State ex rel. Hayes v. Board of Equalization, 16 S. D. 219, 92 N. W. 16. It is contended by respondent that the property in question is not used exclusively for any purpose enumerated in the Constitution, and with this contention we fully agree. The mere fact that the said ground was purchased with the intention of using it exclusively for lodge purposes at some time in the future is not sufficient. There is no building of any kind on it at present, and until a building is erected thereon it is not claimed that it can be used for any such purposes. The building already owned by appellant answers all its purposes, and there is no plan or intention on the part of appellant to begin the erection of a building on the ground in question until the building already owned and the ground occupied thereby can be sold. In fact appellant is depending upon the proceeds of the sale of the property now in use for a fund with which to erect the new building.

Tax—exemption—prospective use for charity.

The rule of law applicable to this case seems to be well settled. This court held, in State ex rel. Hayes v. Board of Equalization, supra, that property, to be exempt under the Constitution, must be used exclusively for some of the enumerated purposes. This implies that the use must be a present, immediate use, and certainly it means more than a plan, however definite, to put the property to such use at an indefinite time in the future. Montana Catholic Missions v. Lewis & Clarke County, 13 Mont. 559, 22 L.R.A. 684, 35 Pac. 2; All Saints Parish v. Brookline, 178 Mass. 404, 52 L.R.A. 778, 59 N. E. 1003; Institute of Holy Angels v. Ft. Lee, 80 N. J. L. 545, 77 Atl. 1035; Ramsey County v. Macalester College, 51 Minn. 437, 18 L.R.A. 278, 53 N. W. 704. In Re Miriam Osborn Memorial Home Asso. 140 N. Y. Supp. 786, it is said: "It is sufficient if the construction of buildings or improvements on the land 'is in good faith contemplated.'"

But, in that case, the land in question was already in use for purposes of the association, and there was on hand a fund with which to erect the contemplated building. In this case the fund with which the building is to be erected cannot be raised until the property occupied by the old building is sold. The date when this will happen is necessarily uncertain, and, in the meantime, the members or manager of appellant may change their plans, and the building may never be built at all.

This disposes of the case, and it is not necessary to determine whether a building used exclusively for lodge purposes is exempt from taxation under the said constitutional provision, and we express no opinion upon that question.

The judgment appealed from is affirmed.

Gates, J., being a member of appellant, does not participate in this decision.

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ANNOTATION.

Prospective use for religious or charitable purpose as rendering property exempt from taxation.

I. In general, 545.
II. Land on which building is being erected, 549.
III. Rule in New York, 550.

I. In general.

Exemption from taxation is the exception to the rule that all property is liable to contribute to the common burden, and is not favored in law. It can be allowed only when granted in clear and unmistakable terms, and can never be presumed. Consequently the rule generally obtains that a mere prospective use of property for religious or charitable purposes does not exempt it from taxation.

Enaut v. McGuire (1884) 36 La. Ann. 804, 51 Am. Rep. 14; Boston Soc. v. Boston (1880) 129 Mass. 178; All Saints Parish v. Brookline (1901) 178 Mass. 404, 52 L.R.A. 778, 59 N. E. 1008; Montana Catholic Missions v. Lewis & Clarke County (1893) 13 Mont. 559, 22 L.R.A. 684, 35 Pac. 2; Y. M. C. A. v. Douglas County (1900) 60 Neb. 642, 52 L.R.A. 123, 83 N. W. 924; Children's Seashore House v. Atlantic City (1902) 68 N. J. L. 385, 59 L.R.A. 947, 53 Atl. 399; Presbyterian Bd. of Relief v. Fisher (1902) 68 N. J. L. 143, 52 Atl. 228; Matlack v. Jones (1858) 2 Disney (Ohio) 2; Y. M. C. A. v. Spencer (1907) 29 Ohio C. C. 249; Grace M. E. Church v. Philadelphia (1911) 23 Pa. Dist. R. 223; Green Bay & M. Canal Co. v. Outagamie County (1890) 76 Wis. 587, 45 N. W. 536. And see the reported case (SIOUX FALLS LODGE v. MUNDT, ante, 542).

Thus, in Matlack v. Jones (1858) 2 Disney (Ohio) 2, it appeared that a religious society acquired a lot for the purpose of erecting thereon a house of public worship. Owing to the lack of sufficient funds, the construction of the church edifice was not commenced until after taxes assessed against the property had become due. An action was brought by the society to restrain a sale of the lot for taxes on the ground that the property was exempt from taxation under a statute exempting "houses used for public worship . . . and the grounds attached to such buildings." It was held that the suit could not be maintained. The court, in discussing the probable consequences of a different view, said: "On any other view of the question, the trustees of a religious society might purchase the most desirable city property, hold it for years without improvement, and, if it should meanwhile increase in value, dispose of it, reaping the benefit of the speculation, without having paid a dollar to the public treasury to sustain the government which has protected the property from injury, and enabled the owners to acquire as well as to alien it; nay, further, if ever there should be such a case, a religious body already possessed of a church edifice might be desirous to erect a new and more commodious building, and in anticipation of such an event purchase another location for the prospective edifice, and, on the theory of the plaintiffs, the newly acquired property as well as that already possessed would be exempted from taxation. The effect of such an example would be, as we have already intimated, to withdraw property from taxation for an indefinite period, to be limited only by the will or the convenience of the owners; and though it is said it may yield in the interval no profit to the proprietors the difficulty is not obviated. It still exists; for such an answer to be of any value must as well apply to individuals who own vacant and unproductive city lots; they may derive no revenue from their estate, but they are never excused from the payment of the taxes with which it is assessed."

In Y. W. C. A. v. Spencer (1907) 29 Ohio C. C. 249, it was held that a vacant lot purchased by a Young Women's Christian Association out of moneys provided and to be used by it for acquiring a site and erecting thereon a building suitable for its

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purposes did not come within the provision of a statute exempting from taxation buildings of institutions of public charity, together with the land "actually occupied by such institutions."

In Montana Catholic Missions v. Lewis & Clarke County (1893) 13 Mont. 559, 22 L.R.A. 684, 35 Pac. 2, an action was brought to enjoin the collection of taxes assessed against lands owned by a charitable institution. The complaint alleged that the lands were held for the purpose of erecting buildings for charitable purposes. The statute exempted from taxation such "property as may be used exclusively for . . . institutions of public charity." It was held that the intention to use the property for charitable purposes was not sufficient to constitute the use contemplated by the statute.

In Children's Seashore House v. Atlantic City (1902) 68 N. J. L. 385, 59 L.R.A. 947, 53 Atl. 399, it appeared that a charitable organization, which owned property and had its buildings thereon, bought a lot with the purpose of selling its property and removing its institution to the newly acquired lot. The property not being sold, it used the lot as a summer camp to accommodate the overflow from the main institution, the only structures on the lot being a frame dwelling used for a laundry and kitchen and tents which were put up when the camp was used. In an action brought by the organization to enjoin the collection of taxes against the lot, it was held that the plaintiff was not entitled to relief under a statute exempting from taxation "all buildings used exclusively for charitable purposes, with the land whereon the same are erected and which may be necessary for the fair enjoyment thereof."

In Grace M. E. Church v. Philadelphia (1911) 23 Pa. Dist. R. 223, it appeared that a lot adjoining a church was used as a means of entrance and exit to and from the church, but was not necessary for that purpose, there being entrances to the church from two other streets. The lot was held by the church corporation with the intention of building a church on it at some future time. It was held that the intention to build a church on the lot was not sufficient to exempt it from taxation.

In Boston Soc. v. Boston (1880) 129 Mass. 178, it appeared that a religious society owned a vacant lot separated by a private way from the lot in which its buildings were located. It was intended to erect at some time a building for school purposes on the lot. In a suit brought by the society to recover back the amount paid by it as a tax on the lot, it was held that the lot was not occupied by it within the terms of the statute, exempting from taxation real estate belonging to incorporated benevolent or charitable institutions, and occupied by them for the purposes for which they were incorporated. The court said: "We do not find, among the agreed facts, that the lot of land in question is occupied by the plaintiff or its officers for the purposes for which it was incorporated. The most that can be said is that the plaintiff intends that it shall be so occupied at some time; but to all appearance the time of such occupation is left wholly indefinite, and there is nothing to prevent the plaintiff from changing its plans and alienating the property whenever it pleases. Without insisting on the strictest and most literal interpretation of the word 'occupied,' as found in the third clause, we cannot avoid the belief that some actual appropriation of the land to the purposes for which the plaintiff was incorporated must be unequivocally shown, in order to exempt it from taxation, and that an intent to do so at some wholly indefinite future time is not sufficient for that purpose. It should at least appear that it had begun to build. New England Hospital v. Boston (1873) 113 Mass. 518."

In All Saints Parish v. Brookline (1901) 178 Mass. 404, 52 L.R.A. 778, 59 N. E. 1003, it was held that land procured for the purpose of erecting a church, but on which there was as yet no house of religious worship, either finished or begun, was not exempt from taxation as a house of worship. In that case it appeared that a

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parcel of land was conveyed to a religious corporation by a deed containing a provision that the grantee by its acceptance agreed to begin forthwith the construction of a church edifice. The plans of the corporation were for the erection of a stone church, and in the meantime a wooden structure was erected which was to be used until the completion of the stone structure. The wooden structure was situated on one side of the lot, and the other side was the proposed site for the stone church. The latter side was assessed for taxation for two years, exemption being allowed as to the side on which the wooden church was situated. At the time of the first assessment, work on the stone church had not yet begun, because sufficient funds to commence building had not yet been raised, and at the time of the second assessment, although sufficient funds had been raised, the drawings and specifications were not completed. It was held that the action of the assessors was correct, that part of the lot not being exempt from taxation as a house of religious worship.

But in New England Hospital v. Boston (Mass.) supra, wherein it appeared that a benevolent and charitable institution, at the date of the assessment of a tax, had purchased land for the purpose of establishing and maintaining a hospital thereon, and was diligently proceeding with the preliminary measures necessary to its erection, it was held that the land was deemed to have been occupied by them for charitable purposes, and as such exempted from taxation by statute.

In Y. M. C. A. v. Douglas County (1900) 60 Neb. 642, 52 L.R.A. 123, 83 N. W. 924, it appeared that a Young Men's Christian Association leased temporarily, for business purposes, the first floor of its building. In a suit brought by the association to enjoin the collection of a tax against the property, it was alleged to be the purpose of the plaintiff to use the first floor for its own purposes, but at that time it was unable to do so, owing to its restricted income. The statute exempted from taxation property used exclusively for religious and charitable purposes, and it was conceded that the object and purposes of the organization were such as to otherwise entitle it to the benefit of the statute. It did not appear whether the assessment of taxes sought to be restrained was against the entire property, or only the portion rented for business purposes. It was held that the property was not wholly exempt from taxation as the intention to use the portion of the property used for business purposes, for the purposes of the organization, was not the use contemplated by the statute. The court said: "It is provided by § 2, article 9, of the Constitution that 'the property of the state . . . shall be exempt from taxation, and such other property as may be used exclusively . . . for school, religious, . . . and charitable purposes, may be exempted from taxation, but such exemption shall be only by general law.' By § 2, article 1, chapter 77 of the Revenue Laws it is provided: 'The following property shall be exempt from taxation in this state: . . . such other property as may be used exclusively . . . for school, religious, cemetery and charitable purposes.' While there is an allegation that the plaintiff intends to use the rooms now rented for business purposes, for offices, gymnasium, and other purposes proper and necessary for carrying out the objects of its organization, we do not think such allegation can materially affect the decision of the case as to the present situation and uses to which the property is put, as disclosed by the petition. An intention to use it for such purposes in the future, which would doubtless, when so used, exempt it from taxation, is not a present exclusive use, as contemplated by the constitutional and statutory provisions quoted."

In Green Bay & M. Canal Co. v. Outagamie County (1890) 76 Wis. 587, 45 N. W. 536, it appeared that a vacant lot belonging to a religious society was exempted from taxation for a certain year. Two years afterwards a church building was erected on the lot. The exemption was held illegal,

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under a statute exempting real property owned by a religious association, "used exclusively for the purposes of such association, and necessary for the location and convenience of buildings of such association," and the building of the church was held to be immaterial. It was said, however, that if the church had been in process of construction the property might have been exempt as if it were complete.

In Enaut v. McGuire (1884) 36 La. Ann. 804, 51 Am. Rep. 14, it appeared that church authorities, impressed by a belief that the city in which their church was situated was destined to increase in population, bought several lots in order that the church might have some ground for improvements in case the city should increase, and it was intended to build a schoolhouse, or church, or hospital, as might be needed, on the lots. A constitutional provision exempted from taxation "places of religious worship, all charitable institutions, all buildings and property used exclusively for colleges or other school purposes." It was held that the lots were not entitled to exemption from taxation. The court distinguished the case before them from a supposititious case in which it appeared that a church or hospital was being erected on property sought to be taxed.

In Presbyterian Bd. of Relief v. Fisher (1902) 68 N. J. L. 148, 52 Atl. 228, it appeared that a devise was made in trust of buildings and grounds to be used as a home for disabled ministers. After the transfer of the property to the trustee it was assessed for taxation. There were no inmates during the year for which the tax was assessed. In an action to test the legality of the assessment it was held that a statute exempting from taxation buildings and land "used exclusively for charitable purposes" did not apply, the court holding that an intention to use property at some future time for purposes that would entitle it to exemption from taxation will not relieve it from liability to the imposition of taxes.

In Com. v. Williams (1904) 102 Va. 778, 47 S. E. 867, 1 Ann. Cas. 434, it was held that a legacy to a charitable institution, while in the hands of the executor, is not exempt from taxation as property of a charitable institution.

Where it appeared that a church made a contract for the sale and conveyance of its property, it was held that the obligation of the purchaser for the purchase price unpaid was exempt from taxation, where there was a present purpose of securing a lot and erecting thereon necessary buildings, to be used as a place of religious worship, within a provision of the Constitution exempting from taxation "places actually used for religious worship." Com. v. First Christian Church (1916) 169 Ky. 410, 183 S. W. 948, Ann. Cas. 1918B, 525, rehearing denied in (1916) 171 Ky. 62, 186 S. W. 880. The court said: "The obligation of Starks was for the payment to the church of the price of the property, which was exempt from taxation; the sale was made for the purpose at once of securing a more desirable place for religious worship with the proceeds of such sale. When a new place of actual religious worship was secured, and the funds arising from the sale invested therein, it would, without question, be exempt from taxation. To the extent that the proceeds of the obligation of Starks was invested in another place of religious worship, it was simply the changing of the proceeds of the sale from one piece of exempted property to another, and a reasonable construction of the constitutional provisions, . . . would not render such proceeds liable for taxation, because the assessing period should catch the funds designed to provide a place of religious worship, between the exempted piece of property out of which they came, and the one into which they are to be presently invested. Such funds are the representative of a 'place actually used for religious worship,' and without such funds the religious body could not acquire a place for worship. To tax such funds would defeat the purpose of the exemption."

Under a statute exempting from taxation "churches . . . and . . .

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funds devoted to charitable purposes and church parsonages," a lot leased by its owner to a church to be used for a place of religious worship, a lot on which no buildings were erected at the time for assessment, and which was not actually used for religious services until nearly a year later, was held not to be exempt from taxation. Louisville v. Werner (1904) 25 Ky. L. Rep. 2196, 80 S. W. 224.

In Ellsworth College v. Emmet County (1912) 156 Iowa, 52, 42 L.R.A. (N.S.) 580, 135 N. W. 594, it appeared that a testator devised a number of tracts of land to trustees, directing them to sell the lands and appropriate $25,000 of the proceeds for the establishment and maintenance of a home for the aged, and pay the balance of the proceeds to the trustees of a college for the sole use and benefit of the college. While the land was in the hands of the testamentary trustees it was assessed for taxation, and a suit was brought in equity to set aside and cancel the levy on the ground that the land was exempt from taxation, because it was part of the endowment fund of the college and constituted a fund to build and maintain a home for the aged. It was held that the claim for exemption should be granted to the extent of the interest of the college in the land. But the exemption was not allowed to the extent of the devise to the home for the aged, because the home had not been created, and no one knew what the nature of the institution would be when created, and there were no allegations in the petition which would have exempted the property were it, or part of it, owned by the home.

II. Land on which building is being erected.

There is some conflict in authority as to whether the exemption from taxation of property used for religious or charitable purposes applies to property on which are being erected buildings to be used for charitable and religious purposes. The exemption has been upheld by some cases. Trinity Church v. Boston (1875) 118 Mass. 164, cited in Old South Soc. v. Boston (1879) 127 Mass. 378. See also Enaut v. McGuire (1884) 36 La. Ann. 804, 51 Am. Rep. 14; Green Bay & M. Canal Co. v. Outagamie County (1890) 76 Wis. 587, 45 N. W. 536.

Thus, in Trinity Church v. Boston (Mass.) supra, it was held that real estate held by a religious society, not more than sufficient in extent to meet its reasonable requirements, and devoted in good faith to the erection of a church edifice, on which the work of erection, already commenced, is prosecuted without unreasonable delay, and which is all the real estate so held, is entitled to exemption from taxation, under a statute exempting from taxation "houses of religious worship," when owned by a religious society. It was determined, however, not to be necessary to define at what stage in the erection of a building the property became a house of religious worship, within the statute, or to say that land, only, might under some circumstances be exempt from taxation, although no building actually had been begun on it.

In Green Bay & M. Canal Co. v. Outagamie County (Wis.) supra, an exemption from taxation of a lot owned by a religious society, and on which a church was afterwards built, was held to be invalid; but the court said that, if the church had been in process of erection at the time of the assessment, the property might have been exempt as if the church were completed.

In Enaut v. McGuire (1884) 36 La. Ann. 804, 51 Am. Rep. 14, it was held that an indefinite intention to build a schoolhouse, church, or hospital on property owned by a religious society was insufficient to exempt the property from taxation. The court, distinguishing the case before it from one in which it might appear that a church or hospital was being erected on property sought to be taxed, said: "Obviously, it is not yet determined whether a church, or a school, or a hospital shall be established. A mere vague purpose exists at some indefinite time to establish one or more of these institutions on the property, as may be needed. Nothing fixes this purpose; nothing prevents the owner

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from abandoning it at will; nothing opposes his right to convert it into business or residence property, or to sell it to the first advantageous purchaser. Such an ambulatory and purely potestative dedication amounts to nothing. . . . Analogy is entirely wanting between this case and those supposititious ones instanced by plaintiff's counsel, such as property upon which a church, school, or hospital is being constructed, or property on which such buildings had existed, which had been burned down, and while preparations were being made to rebuild; or the new graveyard, waiting for death to bring its tenants. Such cases will be determined when they arise, but upon principles entirely inapplicable here."

But under a statute, exempting from taxation property "actually used" for charitable purposes, it has been held that a lot on which a building to be used for those purposes was being erected was not exempt from taxation. Longport v. Bamberger Seashore Home (1917) — N. J. —, 102 Atl. 633; Institute of Holy Angels v. Ft. Lee (1910) 80 N. J. L. 545, 77 Atl. 1035. And the same has been held under a statute, exempting from taxation "all churches, meeting houses, or other regular places of stated worship, with the ground thereto annexed," and which was passed to carry out a clause in the Constitution, exempting "actual places of religious worship." Mullen v. Erie County (1877) 85 Pa. 288, 27 Am. Rep. 650, affirming (1877) 13 Phila. 509, and cited in Moore v. Taylor (1892) 147 Pa. 481, 23 Atl. 768; Trinity Reformed Church v. Philadelphia (1914) 23 Pa. Dist. R. 343. And it has been held that a statute, designed to exempt from taxation land on which a church was being erected, was in conflict with the provision in the Constitution heretofore quoted. Pittsburgh v. Phelan (1901) 11 Pa. Dist. R. 572; Trinity Reformed Church v. Philadelphia (Pa.) supra.

In Ottawa Y. M. C. A. v. Ottawa (1913) 29 Ont. L. R. 574, 5 Ont. Week. N. 383, 15 D. L. R. 718, it was held that buildings which were being prepared for the transfer to them of the headquarters of a Young Men's Christian Association were being "occupied by and used for the purposes of the association," within a statutory provision granting exemption from taxation.

III. Rule in New York.

In New York, it is provided by statute (Tax Law, § 4, subd. 7, McKinney's Consol. Laws, bk. 59, p. 23) that the real property of corporations or associations organized for religious, charitable, and certain other purposes, from which no rents, profits, or income are derived, shall be exempt from taxation, though not in actual use for the purposes of the organization because of the absence of suitable buildings or improvements thereon, if the construction of such buildings or improvements is in progress, or is in good faith contemplated. This statute was construed in the case of Re Miriam Osborn Memorial Home Asso. (1912) 140 N. Y. Supp. 786, wherein it was held that where a charitable association in good faith contemplated the erection of buildings on land for its use, and already had a fund which could be used for the purpose, the land was exempt from taxation.

In St. James Church v. New York (1886) 41 Hun (N. Y.) 309, it was held that, where a tax against real estate was not confirmed until a month or more after the property had been conveyed to a religious corporation, and after the erection of a church edifice was commenced, the tax was invalid as being one against exempt property.

In Washington Heights M. E. Church v. New York (1880) 20 Hun (N. Y.) 297, it appeared that the erection of a church was commenced in December previous to the year for which it was assessed for taxation. The premises on which the church was built were conveyed to the church authorities in the following June. The preliminaries to taxation having been performed during the early part of the year, the tax was confirmed in September. It was held that the tax was improperly assessed, as the possession of the premises, together with the fact

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that the work on the church edifice was progressing to completion, was sufficient for the allowance of a claim for exemption. But in Trinity Church v. New York (1854) 10 How. Pr. (N. Y.) 138, it was held that lots set apart as a situation for a church building were not entitled to exemption from taxation, as a building for public worship. R. J. B.

J. M. WALSH et al., Appts.,
v.
STATE OF ALABAMA EX REL. THOMAS L. COOK et al.

Alabama Supreme Court — February 1, 1917.

(— Ala. —, 74 So. 45.)

Corporation — change of by-laws — changing date of annual meeting.

1. Directors cannot, where the charter of a corporation provides for annual meetings for the election of officers and directors, by a change of by-laws, so change the time of holding the annual election as to have the effect of continuing themselves in office against the will of a majority of the stockholders.

[*See note on this question beginning on page* 558.]

Same — failure to hold election — effect.

2. Under a statute requiring election of the directors of a corporation annually, who shall hold office for one year and until their successors are elected, and requiring stockholders' meetings to be held annually, the successors in office of the directors must, in case of failure to hold the election at the time required by the by-laws, be elected within a reasonable time thereafter by the stockholders.

Same — duty to warn of elections.

3. It is the duty of the proper committee of a corporation to warn stockholders of the annual meetings of the society for the election of officers.

Mandamus — to compel election of officers.

4. Mandamus lies to compel the annual election of officers of a corporation as required by statute.

Corporation — right of stockholders to vote.

5. The holding of stock in a corporation confers the right to vote for directors at the elections which the statutes require to be held annually for that purpose.

Same — right of antagonistic stockholder to vote.

6. One who appears from the books of a corporation to be a holder of stock cannot be deprived of his right annually to vote for directors upon the allegation that he proposes to use his rights for purposes which other stockholders may think not to be for the best interests, or even to be to the detriment, of the corporation.

Same — removal of directors.

7. A director of a corporation cannot be removed from office until the end of his term without just cause.

Same — right to restoration.

8. A director of a corporation unlawfully removed from office is entitled to be reinstated, in an appropriate action to test the title to the office of director.

Same — provision as to time for election — effect.

9. A provision in statute or by-law, requiring the election of directors of a corporation to be held on a specified day, is to be regarded as directory, so that if an election is not held on a specified day it may be held at a later date within a reasonable time thereafter.

Same — passing of election — necessity of change of by-laws.

10. Change of by-laws fixing a new date for holding the annual election of officers and directors of a corporation is not necessary, in case the time fixed for such election passes without holding it, before such election can be held; but the directors must, especial-

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ly upon request of stockholders, call a meeting, as required by the statute and by-laws within a reasonable time.

Same — notice of meeting — who must give.

11. The directors are the proper officers to cause to issue and be given the legal notice of the time and place of a stockholders' meeting when the by-laws do not designate the same.

Same — excuse for not holding election.

12. That the ownership of corporate stock is in litigation, and that the corporation has bought some in to enforce its lien for a debt of the stockholder, is no excuse for failure to hold the annual election.

Evidence — right to vote — stock book.

13. The stock book is evidence of the right to vote, at a corporate election, the stock shown to be in the name of its owner.

Same — treasury stock — right to vote.

14. Stock purchased by a corporation to enforce its lien for a debt of the stockholder is not entitled to be voted at a corporate election.

APPEAL by defendants from an order of the Law and Equity Court for the County of Mobile granting a writ of mandamus commanding them to take the necessary steps to hold an annual meeting of the stockholders of a wrecking company of which they were the directors. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Gregory L. Smith & Son, for appellants:

Where the date for holding the annual election of directors is fixed, the directors cannot be elected upon any other date without first changing the by-law.

Weatherly v. Medical & Surgical Soc. 76 Ala. 569; Nathan v. Tompkins, 82 Ala. 437, 2 So. 747; State ex rel. Sears v. Wright, 10 Nev. 167.

No notice of the annual meeting of July, 1916, was given, but while notice of such meeting was required, it was not necessary.

Medical & Surgical Soc. v. Weatherly, 75 Ala. 261.

Messrs. Stevens, McCorvey, & McLeod, for appellees:

Where the officers whose duty it is to issue the call or give notice of a stockholders' meeting either fail or refuse to do so, the stockholders may, by mandamus, compel them to issue the call or give the proper notice for meetings.

1 Thomp. Corp. 2d ed. § 810; Cummings v. State, L.R.A.1915E, 774, note; 26 Cyc. 352; Congregational Soc. v. Sperry, 10 Conn. 207; Elkins v. Camden & A. R. Co. 36 N. J. Eq. 469; Sylvania & G. R. Co. v. Hoge, 129 Ga. 734, 59 S. E. 809; State ex rel. Sears v. Wright, 10 Nev. 174; Stabler v. El Dora Oil Co. 27 Cal. App. 516, 150 Pac. 644.

A majority of the board of directors cannot abrogate nor extend their term of office by either directly or indirectly changing the time of the annual meeting of the stockholders.

Nathan v. Tompkins, 82 Ala. 448, 2 So. 747; 10 Cyc. 319; 1 Thomp. Corp. 2d ed. § 810; Elkins v. Camden & A. R. Co. 36 N. J. Eq. 469; Congregational Soc. v. Sperry, 10 Conn. 200; People ex rel. Miller v. Cummings, 72 N. Y. 436.

If the annual meeting of stockholders is not held on the day provided by the by-laws, it is the duty of the directors to call the meeting within a reasonable time, certainly to call it whenever demanded by any stockholder, and when called it is just as much an annual meeting as if called upon the day specified in the by-laws.

State ex rel. Sears v. Wright, 10 Nev. 174; Sylvania & G. R. Co. v. Hoge, 129 Ga. 734, 59 S. E. 809; 10 Cyc. 318, 322; Stabler v. El Dora Oil Co. 27 Cal. App. 516, 150 Pac. 644.

The directors are the proper officers to issue or give a legal and valid notice of the time and place of stockholders' meetings.

1 Thomp. Corp. 2d ed. § 808; Dusenbury v. Looker, 110 Mich. 58, 67 N. W. 987; Knoll v. Levert, 136 La. 241, 66 So. 959.

It was not the duty of the stockholders to meet on the second Tuesday of July (July 11, 1916) without a call by the directors, as the by-laws do not provide the place where the meeting is to be held or the hour for the meeting, both of which should be fixed by the directors.

Knoll v. Levert, supra.

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While the minority of the stockholders are entitled to protection against the fraudulent or illegal action of the majority, that protection is not to be had by denying to the majority their right annually to elect the board of directors.

Mottu v. Primrose, 23 Md. 501.

Where a corporation has bought in stock of a former stockholder at a sale, had for the purpose of enforcing the corporation's statutory lien on such stock for a debt due it by the stockholder, the corporation is estopped from denying that such stock is treasury stock.

2 Cook, Corp. 6th ed. § 618; 1 Cook, Corp. 6th ed. § 129; 8 Thomp. Corp. 2d ed. § 1945; 4 Thomp. Corp. 2d ed. § 3762; Market Street R. Co. v. Hellman, 109 Cal. 571, 42 Pac. 230.

Thomas, J., delivered the opinion of the court:

This is an appeal from an order granting the writ of mandamus commanding the directors of the Mobile Towing & Wrecking Company to take the necessary steps to hold an annual meeting of the stockholders of said company. The order was made on submission upon the petition for the writ, with the answers of the defendants thereto, and the admission that witnesses present would testify to the truth of the allegations of defendants Pope, Walsh, and Dorgan.

The question presented by this appeal is: When the by-laws of the corporation provide that the directors shall be elected at an annual meeting of stockholders to be held on a designated date, and that the officers and directors then and thus elected shall hold office for one year and until their successors are elected, can an election for officers and directors be validly held on another date, where the annual election was not called or held by reason of the failure of the directors or other officials whose duty it was to issue the call therefor?

The Mobile Towing & Wrecking Company, of which petitioners and respondents were the respective stockholders and directors, was organized under and subject to the provisions of article 1, chap. 69, of the Code of 1907, pp. 397 et seq. The several statutory provisions pertinent to this inquiry are to the effect that "every corporation organized under article one of this chapter must have at least three directors, who shall be owners of stock of the corporation, and who shall be elected annually, and hold office for one year and until their successors are elected." Code, § 3463; Rush v. Aunspaugh, 179 Ala. 542, 60 So. 802; Nathan v. Tompkins, 82 Ala. 437, 2 So. 747. And that the "failure to elect directors shall not work a dissolution of the corporation, but the existing board of directors shall continue to manage the affairs of the corporation until their successors are elected." Code, § 3464; Curry v. Woodward, 53 Ala. 371, 375.

By § 3478 of the Code it is provided in part as follows: "Meetings of the stockholders of a corporation shall be held annually, of which meetings, as well as special meetings, notice shall be given as the by-laws prescribe," etc.

And § 3481 of the Code authorizes a corporation "to make and alter at pleasure all needful by-laws, rules, and regulations for the transaction of its business, and the control of its property and affairs," etc.

When said several sections are construed together, it is clear that it was the legislative intent to prevent a dissolution of the corporation by a failure to elect new directors at the annual stockholders' meeting; that it was in the contemplation of the statute that there should be an election of officers and directors annually; and that, when the election was not held as required by the statute and the by-laws, the successors in office of such officers and directors should be elected within a reasonable time thereafter by the stockholders.

Corporation—failure to hold election—effect.

It has long been declared law that it is the duty of the "society's committee" to warn of the annual

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meetings of the society for the election of officers; and that if this duty be neglected a writ of mandamus, "directed either to the society's committee, or to the society itself, would enforce the annual election of the necessary officers." Rex v. Cambridge, 4 Burr. 2008, 2011, 98 Eng. Reprint, 48; Rex v. Tregory, 8 Mod. 113, 88 Eng. Reprint, 88; Congregational Soc. v. Sperry, 10 Conn. 208; Stabler v. El Dora Oil Co. 27 Cal. App. 516, 519, 150 Pac. 643; People ex rel. Hart v. Blackhurst, 25 Abb. N. C. 242, 11 N. Y. Supp. 670; Thomp. Corp. § 810; 9 Mod. Am. Law, 216; 2 Kent, Com. 295; 26 Cyc. 352; 1 Thomp. Corp. 2d ed. 807, 810; 2 Cook, Corp. 6th ed. 603.

Same—duty to warn of elections.

Mandamus—to compel election of officers.

The right to hold annual elections for directors of a corporation, and to vote at such elections, is a right that is inherent in the ownership of stock in the corporation; and a stockholder, who appears by the books of the corporation to be such, cannot be deprived of this right upon the allegation that he proposes to use his legal rights for purposes which other stockholders may think not to the best interests, or even to the detriment, of the corporation. Camden & A. R. Co. v. Elkins, 37 N. J. Eq. 273; Pender v. Lushington, L. R. 6 Ch. Div. 70, 46 L. J. Ch. N. S. 317, 57 L. T. N. S. 353; Hurlbut v. Marshall, 62 Wis. 590, 22 N. W. 852; Wright v. Com. 109 Pa. 560, 1 Atl. 794; Com. v. Gill, 3 Whart. 228, 247; 2 Cook, Corp. p. 1365, § 603.

Corporation—right of stockholders to vote.

Same—right of antagonistic stockholder to vote.

A director cannot be suspended or removed from office until the end of his term, at least, without cause. If unlawfully removed from office, he is entitled to be reinstated in an appropriate action to test the title to the office of director. Moses v. Tompkins, 84 Ala. 613, 616, 4 So. 763; Crow v. Florence Ice & Coal Co. 143 Ala. 541, 39 So. 401; Medical & Surgical Soc. v. Weatherly, 75 Ala. 248, s. c. 76 Ala. 567; People ex rel. Manice v. Powell, 201 N. Y. 194, 94 N. E. 634.

Same—removal of directors.

Same—right to restoration.

Where the charter of a corporation provides that annual meetings of stockholders shall be held for the election of officers and directors, the directors cannot, by a change in by-laws, so change the time of holding the annual election as to have the effect of continuing themselves in office, against the will of the majority of stockholders. 1 Thomp. Corp. § 812; Mottu v. Primrose, 23 Md. 482; West Side Hospital v. Steele, 124 Ill. App. 534; Elkins v. Camden & A. R. Co. 36 N. J. Eq. 467, 470; 10 Cyc. 319.

Same—change of by-laws—changing date of annual meeting.

In State ex rel. Sears v. Wright, 10 Nev. 167, 175, the chief justice said: "The fact that the day provided for in the by-laws for the calling such an election has passed does not justify the trustees in refusing to call the meeting. When the day has passed it is the duty of the trustees to call the meeting within a reasonable time—certainly to call it whenever demanded by any stockholder. When called, it is just as much an annual meeting as if called upon the day specified in (and by the) by-law." State ex rel. Flagg v. Lady Bryan Min. Co. 4 Nev. 406, 3 Mor. Min. Rep. 526; Stabler v. El Dora Oil Co. 27 Cal. App. 516, 150 Pac. 644; State ex rel. Atty. Gen. v. Bonnell, 35 Ohio St. 10; 2 Cook, Corp. § 604; 1 Thomp. Corp. § 812.

In Sylvania & G. R. Co. v. Hoge, 129 Ga. 734, 740, 59 S. E. 809, it is said: "For some reason, presumably because they were not informed that it was in their power to legally elect a board of directors, no action was taken at the January meeting. The term of the old board of directors expired at this time, and it was the duty of the stock-

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holders to have elected their successors. As no election was held, any stockholder could, by mandamus, compel the calling of a meeting for the purpose of complying with the statutory duty."

The rule is thus stated in Stabler v. El Dora Oil Co. supra: "That stockholders may avail themselves of the remedy by mandamus to compel a recalcitrant board of directors to call an annual meeting for the election of directors admits of no controversy. Mr. Thompson in his work on Corporations, § 810, says: 'Officers have been known to attempt to defeat the will of stockholders by purposely failing to give notice of either regular or special meetings. But where the officers whose duty it is to issue the call or give notice of a stockholders' meeting either fail or refuse to do so, the stockholders are not without remedy. Whatever may be the rule with reference to the liability of officers under such circumstances, it is now the well-setled rule that stockholders may, by mandamus, compel the officers to issue the call or give the proper notice for meetings.'"

In People ex rel. Young v. Fairbury, 51 Ill. 152, it is said: "The old board are still in office, and may exercise all the powers and should perform all the duties properly belonging to them in their official capacity; and one of those powers and duties is to give notice for the election of their successors. This notice need not, necessarily, be given within the year for which they were elected; 'the sounder and better doctrine' is, as laid down by Chancellor Kent, 'that, where the members of a corporation are directed to be annually elected, the words are only directory, and do not take away the power incident to the corporation to elect afterwards, when the annual day has, by some means free from design or fraud, been passed by.' 2 Kent, Com. 295."

The hardship of any other rule is stated in People ex rel. Miller v. Cummings, 72 N. Y. 436, as follows: "If trustees could keep themselves in office by not having an annual election, the stockholders would be powerless, and they might perpetuate themselves in power as long as they chose. Such a course would also be in direct opposition to the mandatory provision, requiring that trustees to be annually elected shall manage the affairs of the company. The enactment . . . prevents any such arbitrary use of power, and protects stockholders of corporations from the misconduct of their officers in this respect. . . . To hold that an election of officers of a corporation must utterly fail because those in power, by accident or design, omit to do their duty, and by neglecting to give the proper notice, or by failing to make proper by-laws for that purpose, would be in contravention of the manifest intention of the law and sanction a construction entirely unwarranted."

Appellants insist that, where no election of directors is had on the date fixed by the by-laws, the remedy is to call a special meeting of the stockholders to amend its by-laws, fixing a new date for the annual election, and then call an annual meeting in conformity with the by-laws as thus amended; that until this procedure is adopted no annual election can be held, though the annual election in the instant case was prevented by the unprecedented storm that devasted Mobile on the day on which the annual election was to be held, according to the by-laws of the corporation. The cases of Weatherly v. Medical & Surgical Soc. 76 Ala. 567, 572, and Nathan v. Tompkins, 82 Ala. 437, 2 So. 747, are cited as authorities. In the latter case this court said: "The statutes fix the term of office of the directors, contemplating only annual elections. The term of office of those first elected continues until the time fixed for the annual election, which was the third Tuesday in April, 1888. No power is conferred by the charter or by statute, and there is no inherent power, to remove directors, who are elected

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for a definite period fixed by statute, before the expiration of that period. . . . They really constitute the governing body; and the charter of incorporation, the statutes, and the by-laws are a contract between the shareholders, as to their election and the duration of their term of office. A majority of the board of directors cannot abrogate nor extend their term of office by merely changing the time of the annual meeting of the stockholders. If they have such power, they could cause quarterly or monthly elections, by successive amendments of the by-laws changing the time of the annual meeting."

The court pointed out that it could not be determined from the record in the Nathan Case what four of the new directors, if any specifically, were elected to fill the vacancies on the board; that the sale and transfer of the stock of the four directors did not operate, ipso facto, to remove said four directors from office (though it may have afforded sufficient cause for removal); and that it certainly did not remove the remaining directors, who had not parted with their stock, nor constitute a cause therefor. It was further pointed out that "without proceedings looking to removal, or even declaring vacancies, the majority of the stockholders elected an entire new board, thus indirectly superseding *all* the directors first elected."

Thus, the Nathan Case specifically points out that a majority of the board of directors cannot extend their term of office by merely changing the time of the annual meeting of the stockholders; nor extend their term of office by negligently or designedly refusing to call the annual stockholders' meeting at which officers are required to be elected; nor amend the by-laws to prevent the call for a stockholders' meeting for the election of officers.

If appellants have the correct view of this question, any board of directors failing or refusing, by inadvertence or design, to call the annual meeting of stockholders, can continue themselves in power for an additional period beyond the statutory term, in the office to which they were elected, and thus affect or jeopardize the serious business interests of the corporation and of its stockholders. As illustrated in brief of appellant's counsel, by their own neglect or design, the directors in the instant case would remain in office from July 11, 1916, to November 21, 1916, beyond the year for which they were elected by the stockholders.

The Weatherly Case is not in conflict with the view we have expressed. There there was an application by a licensed physician for a writ of mandamus to a medical and surgical society, a private corporation, to compel the restoration of relator to membership and office in the society. By the provisions of the society's constitution, the business of each regular meeting was particularly specified; and it was further declared that the prescribed order of business might be suspended at any time by the vote of a majority of the members present. The holding was, that while the society might, at any meeting set apart for any specified purpose, suspend the prescribed order of business by the vote of a majority present, and postpone consideration to a future meeting, this could be done only at the particular meeting at which such business was, by the constitution of the society, prescribed to be considered. The business relating to the revision of the roll of members, being specially prescribed for the regular meeting in April, it was held, could not be transacted at a call meeting in August, unless regularly postponed to that time from the regular meeting in April. Relator's name having been "struck from the roll of membership" at the regular meeting in April, by proceedings which were thereafter held to be irregular and which were set aside by its order, the society had no authority, at a call meeting in August, to strike relator's name

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from the roll. Mandamus was awarded to compel his restoration.

It has been held that provisions in statutes and by-laws requiring the election of directors to be had on a specified day are to be regarded as directory; that, if the given election is not held on the specified day, it may be held at a later date within a reasonable time thereafter; and that the directors then chosen will be directors de jure. Hughes v. Parker, 20 N. H. 58; Nashua F. Ins. Co. v. Moore, 55 N. H. 48 (in regard to a by-law); Beardsley v. Johnson, 121 N. Y. 224, 24 N. E. 380; Scanlan v. Snow, 2 App. D. C. 137; Vandeburgh v. Broadway Under-Ground Connecting R. Co. 29 Hun, 348; 1 Thomp. Corp. § 812; 10 Cyc. 321, 322.

Same—provision as to time for election—effect.

We believe it to be in consonance with both the letter and the spirit of our statute that, where the annual meeting of stockholders is not called or held on the date prescribed in the by-laws, it becomes the duty of the directors within a reasonable time thereafter to call such annual meeting. Especially is this true when demand is made on the directors for such purpose by a stockholder. When such meeting of the stockholders is called and held, it becomes the annual meeting thereof, required to be held by the by-laws and by the statute. State ex rel. Sears v. Wright, 10 Nev. 175; Sylvania & G. R. Co. v. Hoge, 129 Ga. 740, 59 S. E. 809; Stabler v. El Dora Oil Co. 27 Cal. App. 516, 150 Pac. 644; Hicks v. Lanceston, 1 Rolle, Abr. 514, pl. 6; 10 Cyc. 318.

Same—passing of election—necessity of change of by-laws.

The directors are the proper officers to cause to issue and be given the legal notice of the time and place of stockholders' meeting, when the by-laws do not designate the same. 1 Thomp. Corp. 2d ed. § 808; Cook, Corp. 6th ed. §§ 593, 594; 10 Cyc. 321; Knoll v. Levert, 136 La. 241, 66 So. 959. The directors failing to give this notice and to call the annual meeting in the case at bar, the petitioning stockholders first applied to the directors for redress of their grievance—the failure to call the annual meeting—requesting that the annual meeting be forthwith called for the election of officers. The directors failing to comply with this request, the petitioners applied for the writ of mandamus to compel the issuance of the call for the annual meeting of stockholders. King v. Livingston Mfg. Co. 192 Ala. 269, 68 So. 897; Howze v. Harrison, 165 Ala. 150, 51 So. 614; Louisville & N. R. Co. v. Neal, 128 Ala. 149, 29 So. 865; Crow v. Florence Ice & Coal Co. 143 Ala. 541, 39 So. 401.

Same—notice of meeting—who must give.

That the ownership of some of the corporation's stock was in litigation, and certain of its stock had been bought in by the corporation at a sale for the purpose of enforcing the corporation's statutory lien thereon for a debt due the corporation by a stockholder, was no good reason why the annual election should not be held, and the stockholders entitled to participate therein given the opportunity to express a choice for directors and other officers for the ensuing year. The stock book is evidence of the right to vote the stock shown to be in the name of its owner. 2 Cook, Corp. § 611; Com. ex rel. Eberhardt v. Dalzell, 152 Pa. 217, 34 Am. St. Rep. 640, 25 Atl. 535; Morrill v. Little Falls Mfg. Co. 53 Minn. 371, 21 L.R.A. 174, 55 N. W. 547; State ex rel. White v. Ferris, 42 Conn. 568; Hoppin v. Buffum, 9 R. I. 513, 11 Am. Rep. 291; People ex rel. Allen v. Hill, 16 Cal. 113.

Same—exemption for not holding election.

Evidence—right to vote—stock book.

The stock purchased by the corporation to enforce its statutory lien becomes treasury stock, and, as such, is not entitled to be voted. 2 Cook, Corp. 6th ed. 611, 613; 1 Cook, Corp. 6th ed. § 129; 8 Thomp. Corp. 2d ed. § 1945; 4

Same—treasury stock—right to vote.

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Thomp. Corp. 2d ed. § 3763; Market Street R. Co. v. Hellman, 109 Cal. 571, 42 Pac. 230; Ex parte Willcocks, 7 Cow. 402, 17 Am. Dec. 525.

Applying the foregoing well-established rules for the protection and management of the affairs of corporations, to the admitted facts in this case, we are of opinion that the writ of mandamus awarded by the judge of the Law and Equity Court of Mobile was properly awarded, that the petitioners were entitled to the relief prayed, and that the judgment should be and it is affirmed.

The time having passed for compliance with the writ heretofore granted by the lower court, said lower court will fix another day for compliance with said former writ of mandamus granted in said cause.

Anderson, Ch. J., and Mayfield and Somerville, JJ., concur.

ANNOTATION.

Power of directors to change time for regular meetings of stockholders.

It is the purpose of this note to discuss only those cases dealing directly with the power of the directors of a corporation to change the time of the regular meetings of the stockholders, as fixed by the charter or by-laws of the company. Cases dealing with adjourned meetings or with the validity of a meeting called by the directors where, through inadvertence or neglect, the regular meeting was not held at the duly appointed time, are excluded.

It is well settled that, where the date for the regular meeting of the stockholders of a corporation is fixed by the charter or by-laws of a corporation, the directors have no power to change the time of the meeting unless the stockholders acquiesce, particularly where the effect of the change is to postpone an election of directors. Pond v. Vermont Valley R. Co. (1876) Fed. Cas. No. 11,264; Nathan v. Tompkins (1886) 82 Ala. 437, 2 So. 747; Mottu v. Primrose (1865) 23 Md. 482; Elkins v. Camden & A. R. Co. (1883) 36 N. J. Eq. 469; Canairo v. Serrao (1897) 11 Haw. 22; Smith v. Paringa Mines [1906] 2 Ch. Eng. 193, 94 L. T. N. S. 571, 75 L. J. Ch. N. S. 702, 13 Manson, 316; And see the reported case (WALSH v. STATE, ante, 551).

In Elkins v. Camden & A. R. Co. (1883) 36 N. J. Eq. 467, the court, holding that the board of directors of a corporation had no power to change the date of the annual meeting of the stockholders without their consent, set out the facts and its rulings thereon as follows: "The charter provides that annual meetings of the stockholders shall be held for the election of directors, and that each share of stock shall be entitled to one vote. For some years prior to 1881, the annual meeting for the election of directors was held on the fourth Thursday of October in each year, but on the 21st of July, 1881, the directors adopted a by-law, changing the date from the fourth Thursday of October to the fourth Thursday of February. The change thus made, so far as the record in this case shows, was acquiesced in by the stockholders, and the present board was elected on the day so designated. On the 19th day of October, 1882, the present board attempted, by resolution, to change the time of the annual meeting from the fourth Thursday of February to the fourth Thursday of October. This action is the grievance of which the complainant complains. The effect of the change, it will be perceived, is to increase the term of office of the persons who attempted to make it, from one year to one year and eight months, nearly double the period for which they were elected. And this they have attempted to do without the consent of the proprietors of the corporation, except so far as they may happen to be represented by the persons constituting the board of directors. If they may lawfully do what they have at-

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tempted, it is difficult to perceive why they may not, a month, more or less, before the day now fixed, make another change, and to continue changing the day from time to time, as long as they may find it agreeable to continue in office, and thus absolutely deprive the proprietors of the corporation of that provision of the charter which secures to them the right to designate annually the persons who shall manage the affairs of the corporation. That provision of the charter which declares that annual meetings of the stockholders shall be held for the election of directors grants to the stockholders a highly important and valuable right, which the directors can neither defeat nor impair. It gives the stockholders the right to say, once in each year, not once in eighteen months or two years, by a vote of a majority of shares, who shall be elected directors, and as such have the conduct and management of the business of the corporation for the next year. The right, therefore, to change the day for the annual meeting is one which, from its very nature, can alone be exercised by the stockholders. No board of directors can, without the stockholders' consent, hold office for a period longer than one year."

In Smith v. Paringa Mines [1906] 2 Ch. (Eng.) 193, it appeared that the directors of a corporation attempted to postpone the annual meeting of the stockholders to a date three weeks later than that fixed by the articles of association. The court, holding that they were without the power to make such a change, said: "I entirely agree with the opinion given by counsel that it was not competent for the board to postpone the meeting. The articles provide for the adjournment of a general meeting in certain events, but they contain no provision for postponement. It is said that the directors must be able to postpone the meeting because they may fix the time and place at which the meeting is to be held; but in my opinion that is not so. On the other hand, if the directors had power to postpone, and a meeting adverse to the directors was called, they might postpone it for a week or a month, or perhaps sine die. I cannot see that there is any doubt upon the point."

In Nathan v. Tompkins (1886) 82 Ala. 437, 2 So. 747, quoted in the reported case (WALSH v. STATE), it appeared that the directors changed the date of the annual meeting from April, 1888, to May, 1887, nearly a year earlier than the time fixed by the by-laws, and at a meeting held on the new date it was attempted to consolidate with another corporation. The court held the entire proceeding to be illegal and void.

In Mottu v. Primrose (1865) 23 Md. 482, it appeared that, under the by-laws of a corporation, the election of the board of managers was to be held at the annual meeting of the stockholders fixed for the third Tuesday in May of each year. The board, fearing that they would be deprived of office if the election were held at the regular annual meeting, passed a resolution changing the date of the meeting to the second Tuesday of November. Holding that the board exceeded its powers in passing the resolution, the court said: "It is contended that their power to pass the resolution is to be found in the authority given to them to specify in a by-law the time for the annual election. It is plain that the object of this provision is to enable the board to carry out the intent of the act by securing an annual election, and not to authorize them to defeat that intent by preventing such election. The power to fix the time for the annual election cannot be construed into a power in the incumbents to extend their term of office indefinitely. So to hold would defeat the provisions of the charter, and overturn the principles upon which, alone, the corporation can be safely carried on, by depriving the stockholders of the right secured to them by law, of controlling the management of the company."

In Pond v. Vermont Valley R. Co. (1876) Fed. Cas. No. 11,264, it appeared that a by-law of a corporation provided as follows: "The annual meeting of the stockholders of this association shall be held in the month

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of June, or at such other time as the directors may order." It was held that a resolution of the board of directors, postponing the annual meeting until the following December, was not valid, it appearing that the action was taken in order to prevent the exercise by the holders of newly issued stock of their right to participate in the affairs of the company.

In Canairo v. Serrao (1897) 11 Haw. 22, it was held that, where the by-laws of a corporation provided that the annual meeting of stockholders should be held on January 15th, the directors had no power, without the consent of the stockholders, to change the date to January 17th, and that officers elected at a meeting held on the latter date were not entitled to the offices, and could be ousted by quo warranto proceedings. M. B.

JOSEPHA WUNSEWICH, Appt.,

v.

EDWARD OLSON et al., Respts.

Minnesota Supreme Court — June 1, 1917.

(137 Minn. 98, 162 N. W. 1054.)

Intoxicating liquor — suit on bond — leave of court.

1. Suit may be brought upon a liquor dealer's bond without obtaining leave of court to bring such suit.

[*See note on this question beginning on page* 563.]

Appeal — record — sufficiency.

2. The rules require an appellant to print only so much of the record as will fully and clearly present the questions raised by him. If respondent deems other parts of the record necessary to properly present all the questions involved, he may print a supplemental record, or refer to the folios or pages of the settled case on file.

Trial — jury — cause of accident.

3. Plaintiff's son became intoxicated and was struck and killed by a locomotive. The evidence made a question for the jury as to whether the accident happened in consequence of his intoxicated condition, and as to whether such condition was in part attributable to liquor sold him in defendant Olson's saloon while he was intoxicated.

Headnotes by TAYLOR, C.

APPEAL by plaintiff from an order of the District Court for Pine County denying a motion for new trial in an action on a saloon keeper's bond, to recover damages for loss of means of support on account of the death of plaintiff's son, who was killed while intoxicated. *Reversed.*

The facts are stated in the Commissioner's opinion.

Mr. Thomas J. Joyce, for appellant:

Leave to sue was not a necessary prerequisite to the authorized commencement of the action.

Bartels v. Gove, 4 Wash. 633, 30 Pac. 675; Waseca County v. Sheehan, 42 Minn. 57, 5 L.R.A. 785, 43 N. W. 690.

Even if leave to sue was necessary to the legal institution of the action, the omission to obtain it was waived by the defendants.

State ex rel. Roscoes v. Dreger, 97 Minn. 224, 106 N. W. 904; Anderson v. Hanson, 28 Minn. 403, 10 N. W. 429; Litchfield v. McDonald, 35 Minn. 167, 28 N. W. 191; Leuthold v. Young, 32 Minn. 122, 19 N. W. 652; McCollister v. Bishop, 78 Minn. 228, 80 N. W. 1118; Harris v. Hardy, 3 Hill, 393; Higgins v. Allen, 6 How. Pr. 30; Nye v. Kelly, 19 Wash. 73, 52 Pac. 528.

A verdict was not justifiable in any view of the case.

Eaton v. Gale, 96 Minn. 161, 104 N. W. 833.

Since the defendant Olson was not

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entitled to a directed verdict, the court was in error in directing a verdict in favor of both defendants.

First Nat. Bank v. Holan, 63 Minn. 528, 65 N. W. 952.

Messrs. John Jenswold and John D. Jenswold for respondents:

Both upon the pleadings and the evidence, there could be no recovery.

Koski v. Pakkala, 121 Minn. 450, 47 L.R.A.(N.S.) 183, 141 N. W. 793; State v. Lundgren, 124 Minn. 163, 144 N. W. 752, Ann. Cas. 1915B, 377.

Leave of court to sue on the bond is a condition precedent to the maintenance of the action.

Litchfield v. McDonald, 35 Minn. 167, 28 N. W. 191; Wood v. Myrick, 16 Minn. 494, Gil. 447; Lanier v. Irvine, 24 Minn. 116; Schmidt v. Gayner, 59 Minn. 303, 61 N. W. 333, 62 N. W. 265; Cook v. Thurston, 18 Misc. 506, 42 N. Y. Supp. 1084.

Taylor, C., filed the following opinion:

Plaintiff brought this action upon a saloon keeper's bond to recover damages for the death of her adult son, Adolph Wunsewich, who was killed by a railroad train while intoxicated. At the close of the evidence, defendants moved for a directed verdict in their favor on the ground that plaintiff had failed to procure leave of court to bring suit upon the bond, and on the further ground that she had failed to prove any breach of the bond. The trial court, after remarking that the evidence made a question for the jury as to whether there had been a breach of the bond, granted the motion, for the reason that plaintiff had not been given leave to bring suit upon it. Plaintiff appealed from an order denying a new trial.

Defendants made a preliminary motion to dismiss the appeal under the rules for the failure of plaintiff to serve or print the evidence. Plaintiff has raised no questions which require a consideration of the evidence. She rests her appeal upon the contention that the court erred in holding that her failure to obtain leave of court to bring the suit entitled defendants to a verdict. The rules require her to serve and print only so much of the record as will fully and clearly present the questions raised by her. This she has done. If defendants deem other parts of the record necessary to properly present all the questions involved, the rules authorize them to print a supplemental record, or to refer to the folios or pages of the settled case on file. The motion is denied.

Appeal—record—sufficiency.

The first question is whether it was incumbent upon plaintiff to make an application to the court and obtain leave to sue upon the bond before she brought her suit.

The statutes require a plaintiff to procure leave of court before bringing suit upon certain statutory bonds. A plaintiff other than the state or body politic to whom the bond is given must procure leave of the district court before bringing suit upon the official bond of a public officer (Gen. Stat. 1913, §§ 8243, 8244). Leave to sue must be obtained from the probate court before bringing suit upon a bond given in proceedings in that court (Gen. Stat. 1913, § 7421). The statutes also authorize suits upon certain statutory bonds, without providing that leave to sue shall first be obtained. No such provision is contained in the statute requiring bonds from persons who contract to perform public work for the state or its municipalities (Gen. Stat. 1913, §§ 8245–8247); nor in the statute requiring bonds from liquor dealers, and under which the bond in controversy was given (Gen. Stat. 1913, §§ 3116, 3117). It is contended that the provision in respect to suits upon the official bonds of public officers is intended to apply to suits upon all statutory bonds, and applies to suits upon the bonds of liquor dealers. We cannot so hold. While the bond of a liquor dealer is a statutory bond in that the statute requires it to be given, and prescribes the conditions which it shall contain and the burdens which it shall impose upon the obligors thereon, it is in no proper sense an official bond. The liquor

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dealer is not a public officer, and the bond is not given to secure the performance of any official duties by a public officer. Its purpose is to secure the observance of the regulations and restrictions placed upon the liquor traffic, and to provide responsible persons to whom those suffering injury from a nonobservance of such regulations and restrictions may look for compensation. The fact that the legislature has expressly required a plaintiff to obtain leave of court before bringing suit upon certain statutory bonds, and has omitted to require him to obtain such leave before bringing suit upon certain other statutory bonds, indicates that the legislature did not intend that the same rule should apply as to all statutory bonds, but that this limitation upon the right to sue should apply only in those cases where it was expressly imposed. If the legislature had intended that the limitation in respect to official bonds should also apply to the bonds given by liquor dealers, it would doubtless have inserted a provision to that effect, as it did in § 15 of chapter 230 (p. 320) of the Laws of 1905, and § 18 of chapter 127 (p. 127) of the Laws of 1909, relating to the bonds required from ditch contractors. We have reached the conclusion that plaintiff had the right to bring her suit without first obtaining leave of court to do so. This conclusion is in harmony with the conclusion reached in Rosman v. Bankers Surety Co. 126 Minn. 435, 148 N. W. 454.

Intoxicating liquor—suit on bond—leave of court.

Defendants insist that the evidence is not sufficient to make a question for the jury as to whether there had been a breach of the bond, and invoke the well-established rule that a correct decision will not be reversed because it was based on a wrong reason. We have read the evidence attentively and conclude, as claimed by defendants' counsel, that the present question narrows down to this: Is the evidence sufficient to make a question for the jury as to whether Wunsewich's condition at the time of the accident was attributable to intoxicating liquor sold to him by defendant Olson or his bartender while he was intoxicated? The evidence is conflicting, but we are not now concerned with the weight of the evidence. The question here is whether the jury, if they had believed the evidence supporting plaintiff's contention and had disbelieved the evidence opposed thereto, could reasonably have found that such sales had been made, and that the accident had resulted in consequence of the furnishing of the liquor illegally sold. There was only the one saloon in the village. Wunsewich was struck by the locomotive at 9:23 in the forenoon of August 7, 1915. There is evidence from which the jury could find that he was badly intoxicated the evening before the accident and at the time of the accident, and that he had purchased and drank liquor in the saloon on the morning of the accident; and we think it would be permissible for the jury to infer from the evidence on the part of plaintiff, if they believed it, and from the facts and circumstances disclosed by the evidence, that his condition at the time of the accident was in part attributable to liquor furnished him in the saloon while he was intoxicated, and that such condition was the proximate cause of the accident. The complaint sufficiently alleges such facts as a basis for the cause of action, and we think that the case should have been submitted to the jury.

Trial—jury—cause of accident.

Order reversed.

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ANNOTATION.

Leave of court as prerequisite to action on statutory bond.

I. Generally, 563.
II. Bond of executor or administrator, 563.
III. Bond of guardian, 569.
IV. Bond of county clerk, 571.
V. Bond of county treasurer, 571.
VI. Bond of constable, 572.
VII. Bond of sheriff, 573.
VIII. Bond of warden, 573.
IX. Bond of liquor dealer, 574.
X. Bond of receiver, 574.
XI. Bond for costs, 575.
XII. Bond of public contractor, 575.
XIII. Injunction bond, 575.

I. Generally.

It seems that leave of court is not prerequisite to an action on a statutory bond unless it is required by statute. Hudson v. Bishop (1887) 32 Fed. 519; State use of Thompson v. Wilson (1873) 38 Md. 338; Graffiin v. State (1906) 103 Md. 171, 63 Atl. 373, 7 Ann. Cas. 1061; Waseca County v. Sheehan (1889) 42 Minn. 57, 5 L.R.A. 785, 43 N. W. 690; Carver County v. Bongard (1901) 82 Minn. 431, 85 N. W. 214; State ex rel. Jackson County v. Chick (1898) 146 Mo. 645, 48 S. W. 829; State ex rel. Christian County v. Gideon (1900) 158 Mo. 327, 59 S. W. 99; People v. Holmes (1829) 2 Wend. (N. Y.) 281; Higley v. Robinson (1832) 7 Wend. (N. Y.) 482; Dunne v. American Surety Co. (1899) 43 App. Div. 91, 59 N. Y. Supp. 429; Levin v. Robie (1893) 5 Misc. 529, 25 N. Y. Supp. 982; State ex rel. Boothe v. Upchurch (1892) 110 N. C. 62, 14 S. E. 642; State use of Magie v. Cutting (1853) 2 Ohio St. 1; State ex rel. Coleman v. Cason (1879) 11 S. C. 392; Bartels v. Grove (1892) 4 Wash. 632, 30 Pac. 675. And see the reported case (WUNSEWICH v. OLSON, ante, 560).

However, in Beall v. New Mexico (1873) 16 Wall. (U. S.) 535, 21 L. ed. 292, wherein no statute was referred to, it was said with respect to an action on an administrator's bond: "The bond is taken by the probate court, and is subject to its control, and the money which may be recovered thereon is ordinarily to be paid into said court for distribution as assets of the estate, unless recovered to satisfy a particular judgment or decree. These considerations seem to demonstrate the propriety of requiring the order of the probate court for prosecuting the bond."

No general rule can be laid down as to the necessity of obtaining leave of court to sue on a particular bond, the matter being governed wholly by the statutes of the particular jurisdiction applicable to bonds of that kind. See the reported case (WUNSEWICH v. OLSON), wherein the court discusses by way of dictum the statutes applicable to bonds of several kinds.

II. Bond of executor or administrator.

In Connecticut leave of the probate court is apparently required by statute (Revision 1875, p. 400, § 13) in case of a suit on a probate bond. In Prindle v. Holcomb (1877) 45 Conn. 111, it was held that the failure of a person suing a testamentary trustee to obtain leave of court was waived by failure to plead it in abatement.

In Maryland it has been held, the terms of the statute not appearing, that leave of court is not prerequisite to a suit on the bond of an executor to recover for the nonpayment of a legacy. State use of Thompson v. Wilson (1873) 38 Md. 338.

A Massachusetts statute relative to leave of court to sue on the bond of an executor or administrator (Rev. Laws 1902, chap. 149, §§ 20–23) provides as follows: "Section 20. Bonds given by executors or administrators for the performance of their trust may be put in suit by a creditor of the deceased for his own benefit, when such creditor has recovered judgment for his debt against the executors or administrators and they have neglected upon demand made by him to pay the same or to show sufficient goods or estate of the deceased to be taken on execution for that purpose. Section 21. A

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creditor of an estate which has been represented insolvent may bring such action if the amount due to him has been ascertained by the decree of distribution, and the executor or administrator neglects upon demand to pay such amount. Section 22. Such action may be brought by a person who is next of kin to recover his share of the personal property after a decree of the probate court ascertaining the amount due to him, if the executor or administrator neglects upon demand to pay such amount. Section 23. If the probate court, upon the representation of any person interested in an estate, finds that the executor or administrator has failed in any manner not specified in the three preceding sections to perform the conditions of his bond, it may authorize any creditor, next of kin, legatee or other person aggrieved by such maladministration, to bring an action on the bond." Under that statute, authority from the probate court to bring suit on a probate bond given by an executor or administrator is necessary except in the cases specified in the first three sections of the statute quoted. White v. Weatherbee (1879) 126 Mass. 450; McKim v. Roosa (1903) 183 Mass. 510, 63 N. E. 651.

In the case first cited it was said: "The statutes provide for three cases in which suit may be brought upon a probate bond without obtaining leave of the probate court: 1st, by a creditor who has recovered judgment against a solvent estate; 2d, by a creditor of an insolvent estate who has obtained a decree of distribution in his favor; and 3d, by 'a person who is next of kin, to recover his share of the personal estate after a decree of the probate court ascertaining the amount due to him.' In each of these cases, the claim of the plaintiff is liquidated and ascertained by matter of record amounting to a conclusive judgment between the parties; and nothing remains but payment. It was the intention of the statutes to give any party thus situated the right to sue upon the bond without obtaining leave of the probate court, and to have an award of execution in his favor for the amount due him. Gen Stat. chap. 101, §§ 19–29." It was held in that case that if a creditor or a person next of kin died, his executor or administrator was by law substituted in his place, and succeeded to his rights to maintain an action under the statutes. So in McKim v. Roosa (Mass.) supra, it was held that an action might be brought, without authority therefor having been given by the probate court, against an executor and his sureties on a probate bond by a creditor who had recovered judgment against the executor and had made an ineffectual demand on him to pay the same or show sufficient goods to be taken on execution. In Robbins v. Hayward (1820) 16 Mass. 524, it was held that no action can be maintained on a probate bond given by an administrator for the use of one who is not a creditor having his debt ascertained by judgment or decree of distribution, or an heir claiming his distributive share, the quantum having been ascertained by a decree of the judge, without an assignment of the bond by the judge of probate, or, what is equivalent, a permission or license from the judge, to institute process on the bond. See, to the same effect, Paine v. Stone (1829) 10 Pick. (Mass.) 75. Compare Re Jones (1829) 8 Pick. (Mass.) 121.

So, where the debt is not so ascertained, the creditor must obtain permission from the judge of probate to institute a suit in his name on the bond. Paine v. Stone (Mass.) supra.

A former Minnesota statute (Gen. Stat. chap. 55, § 2) enacted that "an action may be brought on the bond of any executor or administrator by any creditor, where the amount due to him has been ascertained and ordered by the decree of distribution to be paid, if the executor or administrator neglects to pay the same when demanded." Another section (§ 6) of the same chapter provides that "on the application of any person authorized by this chapter to commence an action on such bond, the judge of probate may grant permission to such person to prosecute the same, and shall thereupon furnish to the applicant, on his paying the legal fee, a certified copy

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of the bond, together with a certificate that permission has been granted to prosecute, and the name and residence of the applicant." It was held, in Wood v. Myrick (1871) 16 Minn. 494, Gil. 447, that by this statute a right of action on an administrator's bond was given to the creditor under certain circumstances; that is, when the amount due him had been ascertained and ordered by the decree of distribution to be paid; when the same had been demanded by the creditor and refused by the executor or administrator; and when permission to sue had been granted to the creditor by the probate judge. Until all these circumstances coincided, it was held, the creditor had no right of action on the bond. In the same case it was held that in actions on the bonds of executors and administrators, the Statute of Limitations does not begin to run until a demand has been made and leave to sue granted. See to the same effect, Lanier v. Irvine (1877) 24 Minn. 116. The statute now in force (Gen. Stat. 1913, § 7421) provides as follows: "All bonds authorized or required by law in proceedings in the probate court, or in respect of any estate under administration therein, save as otherwise expressly provided, shall be approved by the probate judge, and shall run to such judge and his successors in office; and, in case of breach of any condition thereof, such bond may be prosecuted by leave of said court in the name and for the benefit of any person interested."

In the reported case (WUNSEWICH v. OLSON, ante, 560) it said, obiter, that leave to sue must be obtained from the probate court before bringing suit on a statutory bond given in proceedings in that court. In Connecticut Mut. L. Ins. Co. v. Schurmeier (1914) 125 Minn. 368, 147 N. W. 246, an action against the sureties on the bond of the executors of an estate for a breach thereof in having failed to pay the claim of a creditor of the estate, it was stated that the creditor, before bringing the action, had procured leave to do so from the probate court, as was necessary, and therefore it was held that, after the commencement of the action, the probate court could not affect it by vacating its order.

The Nebraska statute (Rev. Stat. 1866) relative to the bringing of actions on executors' or administrators' bonds, provides as follows: "Sec. 314. When it shall appear, on the representation of any person interested in the estate, that the executor or administrator has failed to perform his duty in any other particular than those before specified, the judge of probate may authorize any creditor, next of kin, legatee, or other person aggrieved by such maladministration, to bring an action on the bond." "Sec. 316. In all suits upon such bonds, the writ and proceedings shall be in the name of the judge of probate; and when the action is brought for the benefit of any particular person as creditor, next of kin, or legatee, as provided in this subdivision, the execution shall express that it is for the use of such creditor, next of kin, or legatee, and in such case the person for whose use the action is brought shall be deemed the plaintiff." In Buel v. Dickey (1879) 9 Neb. 285, 2 N. W. 884, it was said that, under these two sections, it was manifest that, in order to collect a legacy by action on the bond of an executor, the legatee must have been authorized to proceed by the probate judge.

Under the New Hampshire statute (Gen. Stat. chap. 187, §§ 4–6) a suit on a probate bond should be in the name of the judge of probate, after an order by him permitting it. Prescott v. Farmer (1879) 59 N. H. 90. In that case, however, it appeared that the suit was instituted before the commissioner of insolvency, and the court held that if any order for its prosecution had been necessary, the acceptance by the judge of probate of the commissioner's report, which included the allowance of the claim sued for, was all that was necessary. The court declared that the law compelled a plaintiff to present his claim for allowance, or suffer the consequence of a legal bar (Gen. Stat. chap. 181, § 16); and that hence the statute requiring a formal order for leave to bring a suit

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could not be held to apply to a case of this kind. In Judge of Probate v. Tillotson (1833) 6 N. H. 292, it was said that when a suit is to be instituted on a probate bond for the benefit of any person interested in the estate of the deceased, the statute requires that an application shall be made to the judge of probate for an order to commence the suit, and that the interest and claim of the applicant be stated in the application. The object of this, the court said, is that the judge of probate may see, before he makes the order, that there is a legal claim which may be enforced by a suit on the bond, and that the executor or administrator may understand what is sought to be recovered. And the court held that no execution for the benefit of any person interested in the estate could be awarded thereunder, unless such application was shown.

Under the territorial laws of New Mexico it was held in Beall v. New Mexico (1873) 16 Wall. (U. S.) 535, 21 L. ed. 292, that leave of court was essential to the prosecution of an action on an administrator's bond, no statute being referred to.

A New York statute (Code Civ. Proc. § 2606) provides that, where an executor dies, the surrogate's court has the same jurisdiction, on petition of his successor, or of a surviving executor, to compel the personal representatives of the decedent to account, which it would have as against the decedent if his letters had been revoked. And the next sections provide for three classes of actions on the official bonds of executors and administrators, as follows: Section 2607 provides that, where an execution issued on a surrogate's decree against an executor or administrator has been returned unsatisfied, an action may be maintained on his official bond. Section 2608 provides that, where letters have been revoked by decree of the surrogate's court, the successor of the executor or administrator whose letters are so revoked may maintain an action on his predecessor's official bond. Section 2609 provides that, where the letters are so revoked and no successor is appointed, any person aggrieved may, on obtaining leave by order of the surrogate so to do, maintain an action on the bond in behalf of himself and all others interested. In Scofield v. Adriance (1883) 1 Dem. S. 196, 3 N. Y. Civ. Proc. Rep. 323, the court stated that leave of the surrogate need not be procured before the commencement, under § 2607, of proceedings against the sureties on the bond of an executor or administrator. In Hood v. Hayward (1888) 48 Hun, 330, 1 N. Y. Supp. 566, affirmed in (1891) 124 N. Y. 1, 26 N. E. 331, the court said that it did not seem to be necessary under § 2608, that leave should be granted to a "successor," or one standing in place of a successor (in this case an executrix), to sue on the official bond of her coexecutor, whose letters had been revoked. The court stated that the foregoing sections, when read together, showed the distinction. In Scofield v. Adriance (N. Y.) supra, the court said that § 2608 was silent as to the necessity of preliminarily obtaining the surrogate's leave to proceed against the sureties on an executor's or an administrator's bond, and purposely so, it would seem; for the very next section (2609) declared that, "if no successor to the removed officer had been appointed, such leave must be procured before a person aggrieved" might maintain an action on such officer's bond. In Prentiss v. Weatherly (1893) 68 Hun, 114, 22 N. Y. Supp. 680, affirmed in (1895) 144 N. Y. 707, 39 N. E. 858, an action by a general guardian on the bond of an administrator who had been removed, the court held that § 2609, providing that an action brought thereunder should be by leave of the surrogate, did not apply to actions like the one at bar, but to actions brought by "any person aggrieved, . . . in behalf of himself, and all others interested," and hence it was not necessary that leave to bring it should have been granted by the surrogate. See also People v. Falconer (1848) 2 Sandf. (N. Y.) 81, wherein it was contended that the declaration in a suit on an administrator's bond should have stated an

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application to the surrogate to have the bond put in suit, either by a creditor, a legatee, or one entitled to a distributive share, as no others could apply, and the order could not be made except on such an application. The court held, however, that there being shown a case in which the surrogate might direct the bond to be sued, and in which he would be required so to direct on the application of one entitled to a distributive share, and it being further shown that the surrogate had in fact made an order that the bond be prosecuted, it was to be taken that such order was rightfully made, and the count was sufficient. In Dunne v. American Surety Co. (1899) 43 App. Div. 91, 59 N. Y. Supp. 429, it was held that under §§ 2606–2609 of the Code of Civil Procedure, supra, an administrator de bonis non of the estate of a decedent, appointed in place of a deceased administrator, succeeds to all the powers and duties of the latter, and to all rights of action, whether at law or in equity, against his personal representatives. Such an administrator de bonis non may, without leave of the court, sue the surety on his predecessor's bond, conditioned to "obey all lawful decrees and orders of the surrogate's court," where his predecessor has appropriated the proceeds of property belonging to his decedent's estate to his own use, removed to a foreign state, and died there, leaving no personal property or representatives in the state—thus preventing a literal breach of the conditions of the bond. And an action on the bond is, in such case, an action in equity. See, to the same effect, Dunne v. American Surety Co. (1901) 34 Misc. 584, 70 N. Y. Supp. 391.

In Ohio, the only cases in which a creditor is permitted to sue on the bond of an executor or administrator are prescribed in §§ 182 and 184 of the statute (Act of March 30, 1840, part 7) relating to suits and other proceedings on the administrator's bond. By § 182, it is provided that "after a creditor is entitled by law to the payment of his debts from the executors or administrators, and the amount of the claim has either been admitted to be just, or allowed by them, or has been ascertained by judgment or award against them, or by an order of distribution, the bond given by them for the discharge of their trust may be put in suit by such creditor, if the executor or administrator shall neglect, upon demand, made by such creditor, to pay such claim." Section 183 furnishes the same remedy on the same terms, to any legatee, widow, or other distributee. Section 184 provides that "when it shall be made to appear to the court, on the representation of any person interested in the estate of any deceased testator or intestate, that the executor or administrator has failed to perform his duty, in any other particulars than those above specified in the two preceding sections, the court may authorize any creditor, next of kin, legatee, administrator de bonis non, or other person aggrieved by such maladministration, to bring a suit on the bond." Section 185 allows the suit to be brought in the court where the bond is filed, either at law or in chancery, and requires the proceedings to conform in either case to the further provisions of the statute. In State use of Magie v. Cutting (1853) 2 Ohio St. 1, it was held that the first three sections taken together provided a remedy for every breach of the bond, and § 185 allowed the remedy to be pursued at law or in chancery, at the election of the party prosecuting. It was held that no leave of the court, to the person entitled under §§ 182 and 183 to make use of the bond, was required,—the absolute right was conferred by the law, the recovery was had, and execution issued, for his sole benefit. So, it was said, when suit was brought for the benefit of a creditor, he must make a case under § 182, by showing himself entitled to a specific liquidated amount from the estate, which the executor had in his hands, and on demand refused to pay over; and having a clear right to a specific sum of money, in his own right, the court held that the law gave him the benefit of the bond, without leave of court, and an execution in his own name to re-

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cover it. (§ 186, first clause.) The court held, however, that under § 184, any other breach of the bond, or failures of the executor or administrator to "perform his duty" in "other particulars than those specified" in §§ 182 and 183, might be prosecuted under it, by leave of the court only, and execution must be ordered, in the name of the state, for the benefit of all interested in the estate (§ 186, third clause). To the same effect, see Everett v. Waymire (1876) 30 Ohio St. 308, wherein, in holding that the plaintiffs had no cause of action against an administrator on his bond, the court said: "We are strengthened in this view by a consideration of the fact that plaintiffs thought it necessary to obtain leave of the probate court to bring an action on the administrator's bond. They knew the provisions of the Administration Act upon the right of creditors to sue on administrators' bonds. They knew if their claim was admitted to be just, had been allowed by the administrator, had been ascertained by judgment or award against the administrator, and the administrator de bonis non had committed a breach of his bond, they could bring an action on his bond at their option, under the provisions of § 182 of the Administration Act. When, however, no one of the conditions exists in relation to the claim named in § 182, before a creditor can bring an action on the bond, he must avail himself of the condition named in § 184, and first obtain leave of a court to bring his action on the administrator's bond. In this condition of the law, we are authorized to presume that plaintiffs were of opnion or knew their claim in this case had not been admitted to be just, had not been allowed by the administrator, and had not been ascertained by judgment or award against the administrator de bonis non. If it existed, in either of the conditions named in § 182, why obtain leave of the court to bring his action under § 184?"

In Vermont it was held in Rutland Probate Ct. v. Hull (1885) 58 Vt. 306, 3 Atl. 472, that one who has never been granted leave to prosecute the probate bond given by an administratrix has no right to cause his name to be indorsed on the writ as prosecutor; and that the court has the right to disregard his claim to appear as a prosecutor, and to order his name to be stricken from the record. See also Probate Ct. v. Sawyer (1886) 59 Vt. 57, 7 Atl. 281, wherein the decision implied that leave of the court was necessary in order to prosecute a probate bond. It appeared in that case that no person injured by the breach of the bond had ever applied to the probate court for leave to prosecute the bond, and that the court never had granted such leave to any person injured, or claiming to be injured, by the breach of the bond. The court held that, with these facts admitted, it followed that the prosecution was either by the probate court of its own motion, or at the instance of a person who had no right to prosecute the bond, neither of which was lawful.

The Washington statute (Code 1881, § 654) provides that before any action shall be commenced by a plaintiff, other than the state or municipality, against any public officer for official misconduct, etc., leave shall first be obtained from the court or judge where the action is triable. In Bartels v. Gove (1892) 4 Wash. 682, 30 Pac. 675, it was held that this section did not apply to suits against administrators, as an administrator was not a public officer within the meaning of that chapter. Hence, it was not necessary that application first be made to the court, and leave obtained, to sue on an administrator's bond.

In Wisconsin, in Johannes v. Youngs (1879) 48 Wis. 101, 4 N. W. 32, the holding of the court that the objection that permission or leave was not given by the county judge to prosecute an administration bond was only matter in abatement, not in bar to the action, and must have been specially pleaded in the answer to be available, indicates that leave or permission to sue on the bond is required.

In Canada a statute (Surrogate Court Act, Consol. Stat. (U. C.) chap. 16, § 68) provides that "the bond to be given by the person to whom ad-

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ministration is committed shall be given to the judge of the surrogate court from which the grant is made, to inure for the benefit of the judge of such court for the time being, or in case of the separation of counties, to inure for the benefit of any judge of a surrogate court to be named by the court of chancery." Section 65 provides: "That the surrogate judge, on motion or petition, on being satisfied that the condition of the administration bond had been broken, may order the registrar of the court to assign the bond to some person named in such order, and such person shall be entitled to sue on the bond in his own name," etc. Thereunder, in Stapf v. McCarrow (1874) 35 U. C. Q. B. 22, it appeared that an administration bond was made to the then surrogate judge for the united counties of Huron and Bruce. Another was later appointed judge in his stead for the united counties, during whose term of office the counties were separated, he remaining, by operation of law, surrogate judge of the senior separated county of Huron. Previous to this separation the bond in question, by force of the statute, inured for his benefit, but after the separation, from the provision in the statute, it clearly therafter only inured for the benefit of such surrogate judge as should be named by the court of chancery; and the plaintiff failed to show that the surrogate of Huron was so named. The plaintiff's solicitor also stated that he did not obtain an order from the court of chancery, or from a judge thereof, for the assignment of the bond to the plaintiff by the surrogate of Huron county, nor was it contended at the trial that the court of chancery had named the judge of the surrogate court for the county of Huron, as the judge for whose benefit the bond was to inure. The court held that the judge referred to in § 65 could only mean the judge for whose benefit the bond inured at the time such order was made, and when the bond was made to or had primarily inured to the surrogate judge of the united counties, as in this case, after their separation, the only judge then authorized to hear such a motion or application, and make an order for the assignment of such a bond, was a judge named by the court of chancery. That being the case, the court held, in the absence of any such nomination of the surrogate of Huron as the judge for whose benefit the bond was to inure, he, as surrogate of Huron, had no authority to hear or adjudicate on the petition, or to order an assignment of the bond to the plaintiff, and the latter could not sue thereon, or succeed in his action, as he had not an assignment of the bond from the proper authority.

III. Bond of guardian.

A Minnesota statute (Gen. Stat. 1894, § 4699, now Gen. Stat. 1912, § 7421) provides as follows: "That all bonds required to be taken by order of the probate court shall run to the judge of probate and his successor in office, unless otherwise provided, and, in case of any breach of the conditions thereof, may be prosecuted in the name and for the benefit of any person interested therein, whenever the probate court directs. Section 4700 places in the probate court entire power, upon its own motion, to require additional bonds, and to remove executors, administrators, or guardians for failure to comply with the order of the court to furnish new or additional bonds to the satisfaction of the court. Section 4702 reads: When, on application, the probate court has authorized any bond to be prosecuted, it shall make a certified copy of the bond, and a certificate, under the seal of the court, that permission has been given to the person named in such certificate to prosecute the same." The court held that the language used was not permissive, but imperative, the clear intent of these sections being to place under the control of the probate court the complete supervision of executors, administrators, and guardians, so far as pertained to the furnishing of security and consenting to the commencement of litigation based on such bonds. Hence the court held that it was a necessary prerequisite that consent of the probate court be obtained, in order to maintain an ac-

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tion against the sureties on a guardian's bond. Eaton v. Gale (1905) 96 Minn. 161, 104 N. W. 833. In the reported case (WUNSEWICH v. OLSON, ante, 560), it is said, obiter, that leave to sue must be obtained from the probate court before suing on a statutory bond given in that court.

Though a Mississippi statute (Code 1871, § 1207) provides that guardians' bonds "may be sued upon, by order of the proper chancellor, for any breach of the condition thereof, by the guardian whilst acting, or by the minor after attaining the age of majority," it has been held that a suit may be maintained on a guardian's bond for an amount already found due without a previous order by the chancellor. Klaus v. State (1877) 54 Miss. 644.

In New York, in Behrens v. Rodenburg (1876) 1 N. Y. City Ct. Rep. 93, it was claimed that, under the statute relating to the conveyance of lands by infants, and the sale and disposition of their estates (2 Edm. Rev. Stat. § 173), no action could be maintained on the official bond of a special guardian until it had first been declared forfeited, and until leave to prosecute it had been obtained from the court of common pleas. The court held, however, that the bond was given directly to the infant, and for her exclusive benefit; and after she ceased to be a ward of court, and became sui juris, she became entitled to assert her rights whenever it became necessary, without asking the favor of any court. The court said that the confirmation of the referee's report on the accounting, accompanied by the final directions or judgment of the court of common pleas requiring the special guardian to pay her an ascertained and specific amount, in full discharge of his duties as guardian, left the plaintiff at liberty to enforce that final order or judgment, either in that court, against the guardian personally, or in any other court having jurisdiction of the subject-matter, by action on the guardian's official bond; and this final order of the common pleas might be regarded, if necessary, as a declaration forfeiting the bond, and as a permission to the plaintiff to assert her rights, as established and determined, in any manner which she might think best for her protection and safety. In Cuddeback v. Kent (1835) 5 Paige (N. Y.) 92, it was held that it could not be set up as a defense to a suit in a special guardian's bond, that suit had been instituted without an express order of the chancellor, directing the bond to be prosecuted.

In Probate Ct. v. Sprague (1855) 3 R. I. 205, it was held that it should appear on the record in a suit against the surety on a guardian's bond, that the court of probate had given leave to institute the suit on the bond. See also State ex rel. Boothe v. Upchurch (1892) 110 N. C. 62, 14 S. E. 642, set out at length, infra, X.

A Wisconsin statute (Rev. Stat. chap. 170, § 3968) provides that "every bond given by a guardian shall be filed and recorded in the office of the county court requiring the same, and in case of any breach of the condition thereof, may be prosecuted in the name of the ward for the use and benefit of such ward, or any person interested in the estate, whenever the county court shall direct; but no action shall be maintained against the sureties on any bond given by a guardian unless it be commenced within four years from the time when the guardian shall have been discharged." Thereunder, in Hudson v. Bishop (1887) 32 Fed. 519, it was contended that no suit could be maintained on a guardian's bond unless it was directed to be brought by the county court in which the bond was filed. By the terms of the bond in that case, it was made the duty of the guardian to settle his accounts with the wards, if they should be of full age, and to pay to the parties entitled thereto the sums found due them, the bond running to the wards by name. The court held that this was an express contract with the wards, and that there was no reason why it should be held that after the wards had become of age, they might not maintain suit thereon without authority from the court.

In Grafflin v. State (1906) 103 Md. 171, 63 Atl. 373, 7 Ann. Cas. 1061, it

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was held that the circumstance that a suit was instituted on the bond of the committee of an insane person without first obtaining an order of the court could not affect the right of the plaintiff to recover, if a valid cause of action existed.

IV. Bond of county clerk.

In State ex rel. Hickory County v. Dent (1894) 121 Mo. 162, 25 S. W. 924, it was held that under the provisions of a statute (Rev. Stat. 1879, §§ 5626, 5628) it was a condition precedent to an action on the bond of a county clerk that the county court should have had a settlement with him, and at that settlement made an order requiring him to pay the excess over the amount allowed him, into the county treasury; and that it was also a condition precedent that, on his failure to comply with the order within fifteen days after its making, the court should have ordered suit to be brought on the bond of the clerk.

In two subsequent cases, however, it was held that it was not a prerequisite that an order for suit on the bond of a county clerk should have been made under the statute (Rev. Stat. 1889, §§ 5009–5011; Laws 1891, pp. 152–154, §§ 30–32); State ex rel. Jackson County v. Chick (1898) 146 Mo. 645, 48 S. W. 829; State ex rel. Christian County v. Gideon (1900) 158 Mo. 327, 59 S. W. 99. These cases were distinguished from State ex rel. Hickory County v. Dent (Mo.) supra, on the ground that the breaches assigned in the petitions were not for failure to pay over the excess found to be due on the settlements with the clerk, as in that case, but were for his failure to make true returns by which such excess could have been properly ascertained; and to such cases, the orders required by the statutes were held obviously not to be applicable.

V. Bond of county treasurer.

It is provided by an Oregon statute as follows: "When a public officer, by official misconduct or neglect of duty, shall forfeit his official undertaking or other security, or render his sureties thereon liable upon such undertaking or other surety, any person injured by such misconduct or neglect, who is by law entitled to the benefit of the security, may maintain an action at law thereon in his own name against the officer and his sureties, to recover the amount to which he may by reason thereof be entitled." Code, § 338. But it is further provided that "before an action can be commenced by a plaintiff other than the state, or the municipal or public corporation named in the undertaking or other security, leave shall be obtained of the court or judge thereof where the action is triable. Such leave shall be granted upon the production of a certified copy of the undertaking or other security, and an affidavit of the plaintiff or some person on his behalf, showing the delinquency. But if the matters set forth in the affidavit be such that, if true, the party applying would clearly not be entitled to recover in the action, the leave shall not be granted. If it does not appear from the complaint that the leave herein provided for has been granted, the defendant, on motion, shall be entitled to a judgment of nonsuit; if it does, the defendant may controvert the allegation, and if the issue be found in his favor, judgment shall be given accordingly." (§ 339.) In Crook County v. Bushnell (1887) 15 Or. 169, 13 Pac. 886, an action was brought by a county against the county treasurer and his bondsmen on his official undertaking as such treasurer, which was in the usual form, running to the state. The court held that by the statute, before an action could be commenced by a plaintiff other than the state or the body politic named in the bond as obligee, leave must have been obtained of the court, or the judge thereof where the action was triable. It was therefore held that, the state being the only obligee named in the bond, and Crook county, the plaintiff in the action, not being named as an obligee, it must, before an action could be commenced or maintained, obtain such leave, and allege the same in its complaint; and not having done so, the court held that the motion for a judgment of nonsuit should have been allowed.

In Waseca County v. Sheehan (1889) 42 Minn. 57, 5 L.R.A. 785, 43 N. W.

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690, it was held that the provision in the statute (Gen. Stat. 1878, chap. 78, § 3) that leave to prosecute must be obtained before an action could be brought on an official bond by a plaintiff other than the state or a body politic, did not apply to an action on a county treasurer's bond by the county. The court said that that section was not applicable as a restriction on the right of the county to sue on the treasurer's bond, for, by another statute (Gen. Stat. 1878, chap. 8, § 158), it was made the duty of the county auditor, on default of a treasurer, as therein specified, on receiving instructions from the county commissioners, to cause an action to be commenced against the treasurer and his sureties. This last section, the court held, did not contemplate an application to the court for leave to commence the action. And in Carver County v. Bongard (1901) 82 Minn. 431, 85 N. W. 214, following and approving the decision in Waseca County v. Sheehan, it was held that an action might be prosecuted by a county against its treasurer and his sureties on the county treasurer's bond without first obtaining leave of the court for that purpose. In the reported case (WUNSEWICH v. OLSON, ante, 560), it is said, obiter, that a plaintiff other than the state or a body politic to whom a statutory bond is given must procure leave of the district court before bringing suit on the official bond of a public officer (Minn. Gen. Stat. 1913, §§ 8243, 8244).

VI. Bond of constable.

In Levin v. Robie, 5 Misc. 529, 25 N. Y. Supp. 982, it was held that the bond required by the Buffalo city charter (Laws 1891, chap. 105, § 472) of a constable appointed by the judges of the municipal court from the body of constables elected for the several wards of the city did not partake of the characteristics of a penal bond, but was in the nature of an agreement between the constable and his sureties to the person aggrieved by the act of the constable, or an ordinary constable's bond, covering the proper performance of his duty. Hence, the court held that under the Code section (3041) providing that a person "may maintain an action in his own name, upon the instrument of security given by the constable and his sureties," no leave to sue on such a constable's bond was necessary. The court also stated that § 1880 of the Code, and the subsequent sections, especially the general provision of § 1888, which provides that leave should be obtained to prosecute the official bonds of public officers where special provision was not otherwise made by law, provided for and applied to the official bonds of public officers, running to the people of the state, which were penal in their character, but did not apply to a bond like the one in suit.

In People v. Holmes (1829) 2 Wend. (N. Y.) 281, it was held that any person to whom a constable had become responsible on account of an execution delivered to him for collection was entitled to commence a suit on the "bond or instrument in writing" executed by him to insure the faithful discharge of his duties, and previous leave to prosecute was not necessary. In New York v. Brett (1859) 2 Hilt. (N. Y.) 560, an action against the sureties on a constable's bond, given to the mayor, aldermen, and commonalty of the city of New York, pursuant to the provisions of the statute (2 Rev. Laws 1913, p. 397, § 147), the court held that the plaintiffs were not bound to show on the trial that they had obtained the leave of the court, and that the want of proof of that fact constituted no ground for a nonsuit.

In Litchfield v. McDonald (1886) 35 Minn. 167, 28 N. W. 191, however, it was held that the statute (Gen. Stat. 1878, chap. 78, §§ 1-3) requiring private persons to obtain leave from a district court or judge before bringing an action on an official bond applied to actions on constables' bonds. In the reported case (WUNSEWICH v. OLSON, ante, 560), it is said, obiter, that a plaintiff other than the state or a body politic, to whom a statutory bond is given, must procure leave of the district court before bringing suit

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on the official bond of a public officer (Gen. Stat. 1913, §§ 8243, 8244).

VII. Bond of sheriff.

Under the South Carolina statute (Gen. Stat. 215, § 11), providing that "the bond of any public officer in this state may, at all times, be sued on by the public, any corporation or private person aggrieved by any misconduct of any such public officer," the sheriff, in the execution of ordinary process, acts as a public officer, and is thus within the provisions of the statute. Hence, an action can be maintained against him and the sureties on his official bond, for failure to pay money received on executions, without a previous order of the court. State ex rel. Coleman v. Cason (1879) 11 S. C. 392.

In People ex rel. Wehle v. Conner (1876) 8 Hun (N. Y.) 533, in affirming an order vacating an order granting leave to sue on a sheriff's bond, the court construed the statute directing that, on proof of a sheriff's default, "the court shall order that such bond be prosecuted" (3 Rev. Stat. 5th ed. 779, §§ 1, 3). The court held that while the terms used in the statute were, in form, mandatory, it was evident, from the fact that an action could not be maintained without leave of the court, that they were not designed so to be construed and applied. If the party having a right to redress, of the description mentioned in the statute, had been intended to be invested with an absolute and unqualified right to sue on the bond, the court held that no precedent application to the court for leave to do so would have been rendered necessary, as it had been. The court said: "The object of requiring an application to be made for leave could have been nothing less than to require the court, before it should be given, to make such an investigation into the case alleged as would enable it to determine whether the suit would be just and proper. The power to give the leave implied the existence of authority to deny it. The proceeding provided for was evidently intended to protect the sheriff and his sureties against needless actions; and, at the same time, to allow all such suits upon the bond as should appear to be reasonably necessary."

An Oregon statute (Hill's Anno. Laws, § 342) provides as follows: "Before an action can be commenced by a plaintiff other than the state, or the municipal or public corporation named in the undertaking or other security, leave shall be obtained of the court or judge thereof where the action is triable. Such leave shall be granted upon the production of a certified copy of the undertaking or other security, and an affidavit of the plaintiff or some person on his behalf, showing the delinquency. But if the matters set forth in the affidavit be such that, if true, the party applying would clearly not be entitled to recover in the action, the leave shall not be granted. If it does not appear from the complaint that the leave herein provided for has been granted, the defendant on motion shall be entitled to judgment of nonsuit; if it does, the defendant may controvert the allegation, and if the issue be found in his favor, judgment shall be given accordingly." In Hume v. Kelly (1896) 28 Or. 398, 43 Pac. 380, an action instituted in the name of the district attorney on the official bond of a sheriff and tax collector, it was held it was not error to disallow a motion for leave to amend the complaint which did not allege leave of court to sue by adding the county as a party plaintiff, the court saying that neither the county nor the original plaintiff could sue on the bond without leave of court, which must be alleged.

VIII. Bond of warden.

A Washington statute [2 Hill's Code, § 695 (Bal. Code, § 5685)] provides as follows: "When a public officer by official misconduct or neglect of duty shall . . . render his sureties therein liable upon such bond, any person injured by such misconduct or neglect, or who is by law entitled to the benefit of the security, may maintain an action at law thereon in his own name against the officer and his sureties," etc. The next section [§ 696] is as follows: "Before an action can be commenced by a plaintiff other than the state, or the municipal

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or public corporation named in the bond, leave shall be obtained of the court or judge thereof where the action is triable. Such leave shall be granted upon the production of a certified copy of the bond, and an affidavit of the plaintiff, or some person in his behalf, showing the delinquency. But if the matter set forth in his affidavit be such that, if true, the party applying would clearly not be entitled to recover in the action, the leave shall not be granted. If it does not appear from the complaint that the leave herein provided for has been granted, the defendant, on motion, shall be entitled to judgment of nonsuit; if it does, the defendant may controvert the allegation, and if the issue be found in his favor, judgment shall be given accordingly." In Nye v. Kelly (1898) 19 Wash. 73, 52 Pac. 528, it appeared that the directors of a penitentiary, in their official capacity, brought an action against the bondsmen of the deceased warden, and it was contended that the action should have been dismissed because they had not obtained leave of court to prosecute it. The court held, however, that under the section of the statute last quoted, supra, where the state was the plaintiff, it was not necessary that leave to sue should have been obtained, and that there was no reason for the adoption of a different rule in an action brought by the agents of the state, for its sole benefit.

IX. Bond of liquor dealer.

In the reported case (WUNSEWICH v. OLSON, ante, 560), it is held that no provision requiring that leave to sue shall first be obtained is contained in the statute requiring bonds from liquor dealers (Minn. Gen. Stat. 1913, §§ 3116, 3117). Hence, this limitation on the right to sue applying only in those cases where it was expressly imposed, the court holds that it was not incumbent on a plaintiff to make an application to the court and obtain leave to sue on a liquor dealer's bond, before bringing an action on the bond to recover damages for the death of her adult son, who was killed while intoxicated.

X. Bond of receiver.

In People use of Wipfler v. Wipfler (1911) 167 Mich. 13, 132 N. W. 444, it was held that an action might be maintained against a receiver and the surety on his bond without leave of the court appointing the receiver, where nothing remained for the receiver to do except to pay a decree rendered against him.

In North Carolina, the rule is that in all cases where a creditor of an insolvent corporation or an insolvent individual proposes to sue the sureties on the bond of a receiver appointed by an order of the court and placed in charge of the assets of the company, or the property taken out of the hands of the person, he must first obtain leave of the court to bring his action. State ex rel. Boothe v. Upchurch (1892) 110 N. C. 62, 14 S. E. 642; Black v. Gentery (1896) 119 N. C. 502, 26 S. E. 43. See also Bank of Washington v. Creditors (1882) 86 N. C. 323, and Atkinson v. Smith (1883) 89 N. C. 72, in both of which cases it was stated that the regular course of procedure, according to well-settled practice in cases of this nature, was to proceed against the receiver in the first instance, and, if he failed in the proper discharge of his duty within the scope of his bond, then to obtain leave of the court to sue on his bond.

It is not necessary, however, to obtain leave of court to sue the sureties on the bond of a clerk of the superior court, or other persons who are ex officio receivers of certain funds. State ex rel. Boothe v. Upchurch (N. C.) supra. In that case it appeared that a clerk of the superior court was appointed receiver of a minor's estate during infancy, under the statute (Code, § 1585) authorizing the judge to appoint "the clerk of the superior court or some discreet person." It was held that he did not discharge this trust as a creature of the court, and under the rules applicable to ordinary receivers, but that he held the money virtute officii as clerk, and hence that a ward might proceed, on reaching maturity, as summarily as might any other person who was secured in the same way, against

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his sureties as well as himself. In holding, therefore, that the ward might maintain an action against the sureties on the official bond of the clerk without previously having obtained leave to sue thereon, the court said: "The statute (Code, § 1883) provides that every person injured by the neglect, misconduct, and misbehavior of any clerk of the superior court, etc., may institute a suit or suits against the officer and the sureties upon his 'bonds for the due performance of his duties.' The law gives in express terms the right to bring one or more suits upon one or more of the bonds to 'every injured person,' not on leave from the court, but absolutely and unconditionally so soon as the breach occurs, except that it is to be instituted in the name of the estate. Conceding, therefore, that it may have been necessary to ask the leave of the court before commencing a suit to subject the bond of 'another discreet person' who had been appointed at the instance of the solicitor, and had filed his bond as receiver in the court, subject to the approval of the judge, it is manifest that the legislature did not intend to place the clerk under the special protection of the court, where he misappropriates the funds of infants, and thus tie the hands of a class of persons upon whom the law looks with peculiar favor, while all other injured persons may reap the reward of their diligence and promptness in proceeding against him."

XI. Bond for costs.

In Higley v. Robinson (1832) 7 Wend. (N. Y.) 482, it was held that previous leave of the court to sue on a bond given as security for costs was not necessary, it being only incumbent on the plaintiff to show that the bond was forfeited, to entitle him to sustain his action.

XII. Bond of public contractor.

In the reported case (WUNSEWICH V. OLSON, ante, 560), it is said, obiter, that no provision that leave to sue shall first be obtained is contained in the statute requiring bonds from persons who contract to perform public work for the state or its municipalities (Minn. Gen. Stat. 1913, §§ 8245–8247), and hence that suit may be brought on such statutory bonds without leave of court.

XIII. Injunction bond.

In Lothrop v. Southworth (1858) 5 Mich. 436, it was held that if the statute required that application for leave to prosecute a bond given under the requirements of the statute on the allowance of an injunction to restrain proceedings at law should be made to the court, the want of an order granting such leave would be a valid objection, perhaps; but that no such power was reserved to the court.

H. D. B.

JOHN BOWLIN et al., Appts.

v.

CITIZENS' BANK & TRUST COMPANY, as Trustee, etc., and Exr., etc., of William Bowlin, Deceased.

Arkansas Supreme Court—November 6, 1917.

(131 Ark. 97, 198 S. W. 288.)

Trust — spendthrift — acquisition of remainder — effect.

1. The acquisition of the remainder by the life tenant, for whom property has been left in trust to pay him the income for life without power of anticipation and to relieve him from the care of an estate which the testator believes him to be incompetent to manage, does not accelerate the remainder so as to entitle him to a termination of the trust.

[*See note on this question beginning on page* 579.]

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Merger — life estate and remainder.

2. The acquisition by beneficiaries of an equitable life estate of the legal remainder in fee merges the estate unless a merger is held in abeyance by the clear intent and purpose of the trust.

Same — destruction of trust.

3. Equity will not recognize a merger upon union of the legal and equitable estates in the same person, if contrary to the intention of the parties and the effect would be to destroy a valid trust.

Same — validity.

4. A spendthrift trust will be enforced in equity.

Will — right to dispose of property.

5. A person in sound mind and otherwise competent may dispose of his property according to his pleasure, unless in contravention of some statute or the well-established rule against perpetuities.

APPEAL by complainants from a decree of the Crawford County Chancery Court dismissing a bill filed to terminate a trust and recover the trust fund. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Wear & London and Starbird & Starbird, for appellants:

Merger in the case at bar destroyed the life estate and accelerated the remainder.

16 Cyc. 651; Harrison v. Johnston, 109 Tenn. 245, 70 S. W. 414; Mendinhall's Appeal, 124 Pa. 387, 10 Am. St. Rep. 590, 16 Atl. 881; Thom v. Thom, 95 Va. 413, 28 S. E. 583; Puegnet v. Berthold, 183 Mo. 61, 81 S. W. 874.

It is contrary to the spirit of our law to hinder a person sui juris in the management of property wholly his own.

Re Dado, 71 Mo. App. 642; Sears v. Choate, 146 Mass. 395, 4 Am. St. Rep. 320, 15 N. E. 786; Grosvenor v. Bowen, 15 R. I. 549, 10 Atl. 589; Underhill, Trusts, 370.

A trust probably, and a spendthrift trust certainly, cannot be attached to any greater estate than one for life.

Bennett v. Bennett, 217 Ill. 434, 4 L.R.A.(N.S.) 470, 75 N. E. 339; Potter v. Couch, 141 U. S. 315, 35 L. ed. 731, 11 Sup. Ct. Rep. 1005.

Messrs. Southmayd & Southmayd, for appellee:

Generally, when legal and equitable estates in trust property unite in the same person, there is a merger of such estates and the trust fails; but it will be otherwise where the purposes for which the trust was created require that such estate should remain distinct.

39 Cyc. 246; Moore's Estate, 198 Pa. 611, 48 Atl. 884; 2 Washb. Real Prop. 6th ed. § 1484; Asche v. Asche, 113 N. Y. 232, 21 N. E. 70; Watson v. Dundee Mortg. & Trust Invest. Co. 12 Or. 474, 8 Pac. 548; Mason v. Rhode Island Hospital Trust Co. 78 Conn. 81, 61 Atl. 57, 3 Ann. Cas. 586.

The trust in the case at bar is in the nature of a spendthrift trust, and as such will be recognized as valid in this state.

Nichols v. Eaton, 91 U. S. 716, 23 L. ed. 254; Honnett v. Williams, 66 Ark. 153, 49 S. W. 495; Booe v. Vinson, 104 Ark. 439, 149 S. W. 524; Fortner v. Phillips, 124 Ark. 395, 187 S. W. 318; Wagner v. Wagner, 244 Ill. 101, 91 N. E. 66, 18 Ann. Cas. 490; Graham v. More, — Mo. —, 189 S. W. 1186; Sherman v. Havens, 94 Kan. 654, 146 Pac. 1030, Ann. Cas. 1917B, 394; Anderson v. Williams, 262 Ill. 308, 104 N. E. 659, Ann. Cas. 1915B, 720; Metcalfe v. Union Trust Co. 181 N. Y. 39, 73 N. E. 498; Shelton v. King, 229 U. S. 90, 57 L. ed. 1086, 33 Sup. Ct. Rep. 686; Broadway Nat. Bank v. Adams, 133 Mass. 170, 43 Am. Rep. 504; Blackburn v. Blackburn, 167 Ky. 113, 180 S. W. 48; Brock v. Brock, 168 Ky. 847, 183 S. W. 213; Mason v. Rhode Island Hospital Trust Co. 78 Conn. 81, 61 Atl. 57, 3 Ann. Cas. 586; Lampert v. Haydel, 96 Mo. 439, 2 L.R.A. 113, 9 Am. St. Rep. 358, 9 S. W. 780; Higbee v. Brockenbrough, — Mo. —, 191 S. W. 994.

Humphreys, J., delivered the opinion of the court:

Appellants brought suit against appellee, as trustee for John Bowlin and Mattie Bowlin, and as executor of the last will of William Bowlin, deceased, in the Crawford chancery court, to terminate a trust and recover the trust fund, amounting in round numbers to $22,000. A demurrer to the bill was sustained. Appellants refused to plead further, and the bill was dismissed for want of equity. From the decree dismiss-

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ing the bill, an appeal has been prosecuted to this court.

The alleged trust was created by the eighth clause of the last will of William Bowlin, deceased, which is as follows, to wit: "I give and bequeath unto the Citizens' Bank and Trust Company, of Van Buren, Arkansas, as trustee for John Bowlin and Mattie Bowlin, his wife, the one-seventh part of the remainder of my personal property after paying my debts and funeral expenses and the legacies hereinbefore set forth in articles three and six more particular set forth in article of seven of this will, upon the trust that said trustee shall invest the same in its name as trustee in any manner proper for a trust that it may yield the greatest income, with power from time to time to vary and change such investments, and the income thereof upon such trust fund shall be paid by my said trustee quarterly the one half thereof to my said John Bowlin and the one half thereof to his wife Mattie Bowlin, during their natural lives, provided that if the said Mattie Bowlin shall survive her husband John Bowlin and remain a widow, and if the said Mattie Bowlin shall survive the said John Bowlin and marry again, that this shall immediately cease and determine upon the happening of that event, that upon the death of either the said John and Mattie Bowlin the one half of said income shall be paid to Marcus L. Bowlin, Paul C. Bowlin, Othel Bowlin, and Maud E. Campbell, children and their heirs or the survivor of them until the final determination of this trust as hereafter provided. That upon the death of John and Mattie Bowlin, or the marriage of Mattie Bowlin should she survive her husband John Bowlin, this trust shall immediately cease and determine and the trust fund with any income that may have accrued at the time I give and bequeath unto the said Marcus Bowlin, Paul C. Bowlin, Othel Bowlin, and Maud E. Campbell and their heirs, share and share alike, or their survivors in the event that either of said legatees should not survive the determination of this trust and die without issue of their bodies. I further direct that this trust shall be without power of anticipation of such income by way of assignment charge or otherwise by the said beneficiaries. It is not that I have any less affection for my son John than my other children that I make this provision in my will for him, but to provide a stated income for him and his wife and relieve him of the care and charge of an estate which I fear that he would not be able to properly care and manage."

John Bowlin and Mattie Bowlin, cestuis que trust of the life estate in said property, acquired the remainder interest therein from the remaindermen, all of whom were, at the time, sui juris.

Appellants contend that under the doctrine of merger of estates and acceleration of remainders, the trust was terminated when the beneficiaries of the life estate acquired the interest of the remaindermen. As a general rule, this is true when the estates, both legal and equitable, unite in the same person, but otherwise, if the merger is held in abeyance by the clear intent or purpose of the trust. What is characterized in law as a spendthrift trust usually acts as a barrier and prevents a merger. It seems that equity will not recognize a merger, even where there is a union of legal and equitable estates in the same person, if contrary to the intention of the parties, if the effect would be to destroy a valid trust. 39 Cyc. 246; Moore's Estate, 198 Pa. 611, 48 Atl. 884; 2 Washb. Real Prop. 6th ed. § 1484; Evansville Gaslight Co. v. State, 73 Ind. 222, 38 Am. Rep. 129; Watson v. Dundee Mortg. & Trust Invest. Co. 12 Or. 474, 8 Pac. 548; Asche v. Asche, 113 N. Y. 232, 21 N. E. 70; Mason v. Rhode Island Hospital

Merger—life estate and remainder.

Same—destruction of trust.

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Trust Co. 78 Conn. 81, 61 Atl. 57, 3 Ann. Cas. 586.

The soundness then of appellants' contention must depend upon whether spendthrift trusts are valid in Arkansas, and, if valid, whether a spendthrift trust was created by the terms of the section of the will quoted above. The English doctrine condemns and the American doctrine upholds spendthrift trusts. Nichols v. Eaton, 91 U. S. 716, 23 L. ed. 254. It is a mooted question in this state. Being a question of first impression here, the court adopts the American doctrine, both upon reason and because the American doctrine is supported by the increasing weight of authority. This court said in the well-considered case of Booe v. Vinson, 104 Ark. 439, 149 S. W. 524, that "although it is intimated in Honnett v. Williams, 66 Ark. 153, 49 S. W. 495, that such a trust cannot be created or exist in this state, the increasing weight of authority in America favors the contrary rule."

Same—validity.

It may be noted also that the distinguished jurist, in rendering the opinion in Honnett v. Williams, supra, reserved the question for future consideration. It was unnecessary to decide the question in Booe v. Vinson, for the reason that no restriction was placed upon the cestuis by the testator in the disposition of the income from the life estate. This court has jealously protected the free and unlimited right of a person in sound mind and otherwise competent to dispose of his property according to his pleasure, unless in contravention of some statute or the well-established rule against perpetuities. Fortner v. Phillips, 124 Ark. 395, 187 S. W. 318.

Will—right to dispose of property.

There is no misconstruing the intent of the testator in the instant case. The language of the eighth clause is direct and unambiguous. By the very wording, the legal title and the absolute control of the property passed to the trustee for the sole purpose of creating, by use and investment, a permanent income for the maintenance of the testator's son during life, and his daughter-in-law so long as she remained the wife or widow of his son. The testator assigned as a reason for creating the trust the inability of his son to care for and manage the estate. In the fear that his son might resort to some method of defeating his purpose, he provided against the anticipation of the income *in any manner*. He evidenced his intention most clearly by creating a *stated* income. His purpose was to impound the corpus of the estate in such way that the cestuis should not receive it, or even the income therefrom, except at certain and reasonable intervals. All power of alienation of the trust fund was withheld from the cestuis. By the bequest appellants acquired no vested estate therein. Every essential necessary to creat a spendthrift trust is present in the devise.

Having subscribed to the American doctrine upholding spendthrift trusts, and the intention of the testator being manifest to create such a trust for the protection of the cestuis against improvidence and incapacity, which trust is not contrary to law or public policy, and being convinced the doctrine of merger of estates cannot operate to destroy a valid spendthrift trust, the decree of the learned Chancellor is affirmed.

Trust—spendthrift—acquisition of remainder—effect.

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ANNOTATION.

Effect of acquisition of remainder by beneficiary of a trust for life.

It is a settled principle that a trust may be terminated before the expiration of the time fixed by its creator, where there is no longer any object in continuing its existence. "No matter what may be the nominal duration of an estate given to a trustee, it continues in equity no longer than the thing sought to be secured by the trust demands." Culbertson's Appeal (1874) 76 Pa. 145. It is not enough to warrant its continuance that the trustee has active administrative duties to perform so long as the trust property remains in his hands, if he is not vested with a right or fixed with a duty to exercise any discretion in the payment of income or disposition of the corpus of the estate.

Accordingly, where the only purpose of the trust is to preserve the corpus of the fund for the person entitled to receive it, the acquisition by the life beneficiary of the right to receive the corpus at the termination of the trust, whether by purchase or inheritance, gives such beneficiary the right to have the trust dissolved. See Whall v. Converse (1888) 146 Mass. 345, 15 N. E. 660; Sears v. Choate (1888) 146 Mass. 395, 4 Am. St. Rep. 320, 15 N. E. 786; Langley v. Conlan (1912) 212 Mass. 185, 98 N. E. 1064, Ann. Cas. 1913E, 421; Bennett v. Chapin (1889) 77 Mich. 526, 7 L.R.A. 377, 43 N. W. 893; Simmons v. Northwestern Trust Co. (1917) 136 Minn. 357, L.R.A. 1917F, 736, 162 N. W. 450; Peugnet v. Berthold (1904) 183 Mo. 61, 81 S. W. 874; Turnage v. Greene (1874) 55 N. C. (2 Jones, Eq.) 63, 62 Am. Dec. 208; Taylor v. Huber (1862) 13 Ohio St. 288; Gloyd v. Roff (1887) 2 Ohio C. C. 253, 1 Ohio C. D. 472; Sharpless's Estate (1892) 151 Pa. 214, 25 Atl. 44; Yerkes's Appeal (1885) 2 Chester Co. Rep. (Pa.) 410; Owens's Estate (1893) 15 Pa. Co. Ct. 196; Thom v. Thom (1887) 95 Va. 413, 28 S. E. 583. And the same result follows where the life beneficiary and the remainderman both convey their respective interests to a third person. See Armour v. Murray (1907) 74 N. J. L. 351, 68 Atl. 164; Brooks v. Davis (1913) 82 N. J. Eq. 118, 88 Atl. 178; Lee v. Oates (1916) 171 N. C. 717, 88 S. E. 889, Ann. Cas. 1917A, 514; Angle v. Marshall (1904) 55 W. Va. 671, 47 S. E. 882.

It is not accurate to say that in such a case the equitable life estate is merged in the reversion. Merger can take place only where the interests meeting in the same person are of the same character, either both legal or both equitable; it cannot take place where the life estate is under a trust which the law recognizes as valid and the ownership of the remainder is legal. The intervening legal estate of the trustee prevents a merger. See Asche v. Asche (1889) 113 N. Y. 232, 21 N. E. 70; Moore's Estate (1901) 198 Pa. 611, 48 Atl. 884.

But the acquisition of the remainder will terminate the trust only where the effect is to do away with the necessity for its continuance; hence, it will not have such effect where the evident purpose of the trust is to put the corpus of the fund beyond the hazard of impairment and waste during the life of the beneficiary. See BOWLIN v. CITIZENS' BANK & TRUST Co. (reported herewith) ante, 575; Mason v. Rhode Island Hospital Trust Co. (1905) 78 Conn. 81, 61 Atl. 57, 3 Ann. Cas. 586; Moore v. Sinnott (1903) 117 Ga. 1010, 44 S. E. 810; Watson v. Watson (1916) 223 Mass. 425, 111 N. E. 904; Smith v. Smith (1897) 70 Mo. App. 448; Asche v. Asche (1889) (N. Y.) supra; Greer v. Chester (1892) 131 N. Y. 629, 30 N. E. 863, affirming, on opinion of Learned, Ch. J., in court below (1891) 62 Hun, 329, 17 N. Y. Supp. 238; Moore's Estate (Pa.) supra; Mather's Estate (1900) 17 Pa. Dist. R. 127.

Nor will it have the effect to terminate the trust where the trustee is given discretion as to the distribution of the income. See Smith v. Smith (1916) 194 Mo. App. 309, 188 S. W. 1111.

Nor will it have such effect where

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all parties with a possible interest cannot be ascertained. See Allen v. Allen (1911) 141 Ky. 689, 133 S. W. 543.

The courts will not declare the trust terminated where the life beneficiary has acquired only a fractional part of the reversionary interest. See Smith v. Smith (1897) 70 Mo. App. 448.

In New York, the right of the life beneficiary to terminate the trust upon acquiring the remainder interest in the trust fund is regulated by statute. The original provision, found in 1 Rev. Stat. (1st ed.) p. 730, pt. 2, chap. 1, title 2, § 63, of the Statute of Uses and Trusts, was that "no person beneficially interested in a trust for the receipt of the rents and profits of land can assign or in any manner dispose of such interest; but the rights and interest of every person for whose benefit a trust for the payment of a sum in gross is created are assignable." The effect of this statute is stated in Lent v. Howard (1882) 89 N. Y. 169, as follows: "Whatever view may be taken of the general jurisdiction of courts of equity, in the absence of any statutory or legislative policy, to abrogate continuing trusts created for the purpose of providing a sure support for the widow or children of a testator, or other beneficiary, the indestructibility of such trust here, by judicial decree, results, we think, from the inalienable character impressed upon them by statute. The beneficiaries of trusts for the receipt of the rents and profits of land are prohibited from assigning or disposing of their interest (1 Rev. Stat. 729, § 63), and this provision is held to apply, by force of other sections of the statute, to the interest of beneficiaries in similar trusts of personalty. Graff v. Bonnett (1865) 31 N. Y. 9, 88 Am. Dec. 236. This legislative policy cannot, we think, be defeated by the action of the court, permitting such alienation or abrogating the trust." After undergoing various modifications presently to be discussed, the foregoing statutory provision was, in effect, restored by chapter 88, Laws of 1903, now § 103 of the Real Property Law, and chapter 87, Laws of 1903, now embodied in the Personal Property Law (chap. 45, Laws 1909; Consol. Laws, chap. 41, § 15), which provide that the right of the beneficiary of an express trust to receive rents and profits of real property and apply them to the use of any person, and the right of the beneficiary to enforce the performance of a trust to receive the income of personal property and to apply it to the use of any person, cannot be transferred by assignment or otherwise; but the right and interest of the beneficiary of any other trust in real or personal property may be transferred. In as much as these statutes contained a saving clause stating: "The provisions of this act shall not impair or affect any rights existing at the date of its passage; but the act hereby amended shall have the same force and effect with respect to such existing rights as though this amendatory act had not been passed,"—the decisions arising under the intermediate acts are not wholly without value.

The first innovation upon the provisions of § 63 of the Statute of Uses and Trusts, supra, was made by chapter 452 of the Laws of 1893, whereby such provision was amended so as to permit "the person beneficially interested in the whole or any part of the income of any trust heretofore or hereafter created for receipt of the rents and profits of the lands or the income of personal property," who "shall have heretofore become, or may hereafter be, or become, entitled" to the remainder in a trust fund, to release to himself all his interest in the income of the trust estate, and declared that thereafter the estate of the trustee should cease and determine. For discussion of the constitutionality of this statute, see Metcalfe v. Union Trust Co. (1903) 87 App. Div. 144, 84 N. Y. Supp. 183, and, on appeal, in (1905) 181 N. Y. 39, 73 N. E. 498. It was held, though by a divided court, in Mills v. Mills (1900) 50 App. Div. 221, 63 N. Y. Supp. 771, that the effect of this statute was not to limit the right to terminate a trust by conveyance or release to a case where the remainder has devolved upon the cestui que trust by operation of law, but that it includes

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the case of an acquisition of the remainder by purchase. It has been held that the word "entitled," as used in the provision that the beneficiary who shall become "entitled" in his own right to the remainder in a principal fund may terminate the trust in the manner described, refers not simply to a right which is vested in a present interest, but one which is also free from the possibility of an ultimate defeasance, and, accordingly, that a trust to pay the income to three certain persons, with remainder to the survivor upon the death of two of them, could not be terminated by their joint action, it being not only uncertain who the survivor would be, but uncertain whether there would be any survivor. Thall v. Dreyfus (1903) 84 App. Div. 569, 82 N. Y. Supp. 691.

Owing to the ambiguous and unsatisfactory character of the Statute of 1893 (see Cook v. Straiton (1893) 41 Misc. 206, 83 N. Y. Supp. 964), its provisions were varied by subsequent legislation (Real Property Law of 1896, § 547; Personal Property Law of 1897, § 415), which differs from the Act of 1893 in that the words giving a retroactive effect were omitted (see Metcalfe v. Union Trust Co. (1905) 181 N. Y. 39, 73 N. E. 498), and the privilege of the beneficiary of a part only of the income to terminate the trust was withdrawn, leaving the right open solely to a beneficiary of all the income. Cook v. Straiton (N. Y.) supra, affirmed on opinion below in (1904) 96 App. Div. 625, 89 N. Y. Supp. 1102.

Where the conditions prescribed by the statute are all fulfilled, the beneficiary has an absolute right to determine the trust, and the court has no discretion in the matter. Re Barber (1901) 36 Misc. 433, 73 N. Y. Supp. 749.

Such provisions have been held to allow of the termination of a trust to apply and divide the income of a fifth part of the trust fund for the benefit of each of testator's children during his or her life, with power of disposition to each of such children of one fifth thereof, where, by reason of the testator's failure to dispose of the remainders in default of appointment, the residue of the trust estate created by him vested in his children as of the time of his death. Connolly v. Connolly (1907) 122 App. Div. 492, 107 N. Y. Supp. 185.

These provisions have been held inapplicable in the case of a beneficiary entitled only to such part of the income as might be necessary for his support (Re United States Trust Co. (1903) 175 N. Y. 304, 67 N. E. 614, affirming (1903) 80 App. Div. 77, 80 N. Y. Supp. 475); or where the right of the beneficiary to the income is conditional, as in the case of a trust to pay the income to testator's widow for life, or until she should remarry (Metcalfe v. Union Trust Co. (1905) 181 N. Y. 39, 73 N. E. 498, affirming (1903) 87 App. Div. 144, 84 N. Y. Supp. 183).

They have no application where the remainder is subject to be devested or to diminution. See Re United States Trust Co. and Cook v. Straiton (N. Y.) supra; Re Hogarty (1901) 34 Misc. 610, 70 N. Y. Supp. 428, affirmed in (1901) 62 App. Div. 79, 70 N. Y. Supp. 839; Re Gibson (1903) 42 Misc. 157, 85 N. Y. Supp. 1077.

As above noted, the indestructibility of trusts to receive and apply income to the use of another has been restored by the acts of 1903.

Under these statutes the acquisition by the life beneficiary of the remainderman's interest cannot operate to destroy the trust under which he is entitled to a life estate only, nor terminate in any way his life estate, nor enlarge it into absolute ownership of the whole fund. Dale v. Guaranty Trust Co. (1915) 168 App. Div. 601, 153 N. Y. Supp. 1041.

But their provisions apply only to trusts to receive and apply income to the use of beneficiaries specified, and not to other trusts; and where a beneficiary having the right to receive from a trust fund, whether principal or income, as much as may be necessary for her comfortable support and maintenance, becomes entitled to the reversionary interest in the trust fund

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as legatee of the person to whom such reversionary interest was given by the original testator, she may terminate the trust. Re Bloodgood (1918) 184 App. Div. 798, 172 N. Y. Supp. 509.

E. S. O.

STATE PUBLIC UTILITIES COMMISSION EX REL. SPRINGFIELD DRAIN TILE COMPANY

v.

ILLINOIS CENTRAL RAILROAD COMPANY, Appt.

Illinois Supreme Court — April 17, 1918.

(283 Ill. 425, P.U.R.1918D, 674, 119 N. E. 294.)

Carrier — discrimination in switching charges — steam and electric roads.

A railroad company cannot, by a contract made with the respective companies, discriminate in switching charges on freight delivered to it by steam and electric railways, against the interests of shippers located on such lines, where the statute forbids the granting of any preference or advantage to any person or corporation.

[*See note on this question beginning on page* 585.]

APPEAL by defendant from a judgment of the Circuit Court for Sangamon County affirming an order of the Public Utilities Commission in favor of petitioner in a proceeding to compel defendant to provide for the absorption of switching charges from complainant's plant to competitive points. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **John G. Drennan, Blewett Lee,** and **W. S. Horton,** for appellant:

The making of reciprocal arrangements between certain carriers at an industrial point, and the refusal to make the same arrangements with other carriers so as to serve certain industries, is not discrimination or otherwise unlawful.

Dixie Cotton Oil Co. v. St. Louis, I. M. & S. R. Co. 27 Inters. Com. Rep. 295.

Any order requiring the absorption of a switching charge is made without authority of law, and is unconstitutional.

Southern R. Co. v. St. Louis Hay & Grain Co. 214 U. S. 297, 53 L. ed. 1004, 29 Sup. Ct. Rep. 678; St Louis Southwestern R. Co. v. Arkadelphia Mill. Co. 120 Ark. 572, 180 S. W. 200.

A carrier is not required to switch the goods of a competing line, and a law requiring it to do so is unconstitutional, as taking property without due process of law.

Louisville & N. R. Co. v. Central Stock Yards Co. 212 U. S. 133, 53 L. ed. 441, 29 Sup. Ct. Rep. 246.

There is no law that imposes upon a railroad company the duty, or confers power to require it to perform the service, of transporting freight, where it does not participate in the revenue.

Gulf & I. R. Co. v. Texas & N. O. R. Co. 93 Tex. 482, 56 S. W. 328.

The Utilities Commission has no power except such as is expressly conferred upon it.

State Public Utilities Commission ex rel. Wabash R. Co. v. Illinois C. R. Co. 274 Ill. 41, 113 N. E. 162.

Messrs. **Edward J. Brundage,** Attorney General, **George T. Buckingham, W. E. Trautmann,** and **A. D. Rodenberg,** Assistant Attorneys General, and **James R. Orr,** for appellees:

Carriers interchanging traffic with each other cannot refuse to interchange with other carriers, provided the circumstances and conditions are substantially the same; and to require them to do so is not a violation of a constitutional right.

St. Louis, S. & P. R. Co. v. Peoria & P. U. R. Co. 26 Inters. Com. Rep. 226; Nashville v. Louisville & N. R. Co. 33 Inters. Com. Rep. 76; Louisville Bd. of

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Trade v. Louisville & N. R. Co. 40 Inters. Com. Rep. 679; Traffic Bureau v. Louisville & N. R. Co. 28 Inters. Com. Rep. 533; Louisville & N. R. Co. v. United States, 216 Fed. 672; Buffalo, R. & P. R. Co. v. Pennsylvania Co. 29 Inters. Com. Rep. 114; Pennsylvania Co. v. United States, 214 Fed. 445, 236 U. S. 351, 59 L. ed. 616, P.U.R. 1915B, 261, 35 Sup. Ct. Rep. 370; Grand Trunk R. Co. v. Michigan R. Commission, 231 U. S. 457, 58 L. ed. 310, 34 Sup. Ct. Rep. 152.

The prescribing of switching rules or charges does not violate the constitutional provision against taking property without due process of law.

Louisville & N. R. Co. v. United States, 216 Fed. 672; Pennsylvania Co. v. United States, 214 Fed. 445, 236 U. S. 351, 59 L. ed. 616, P.U.R.1915B, 261, 35 Sup. Ct. Rep. 370; Grand Trunk R. Co. v. Michigan R. Commission, 231 U. S. 457, 58 L. ed. 310, 34 Sup. Ct. Rep. 152.

If inequality results from exaction of a special rate from one shipper and a different rate to another, upon like traffic, contemporaneously transported under substantialy similar circumstances and conditions, the section is violated.

Board of Trade v. Chicago & A. R. Co. 27 Inters. Com. Rep. 535.

What is undue or unreasonable preference is not a question of law but of fact.

Pennsylvania Co. v. United States, 236 U. S. 351, 59 L. ed. 616, P.U.R. 1915B, 261, 35 Sup. Ct. Rep. 370.

The Utilities Commission has authority to require the establishment by steam railroad of through routes and joint rates with interurban electric railroads engaged in the interstate transportation of freight.

Chicago, O. & P. R. Co. v. Chicago & N. W. R. Co. 33 Inters. Com. Rep. 573.

Cooke, J., delivered the opinion of the court:

This is an appeal by the Illinois Central Railroad Company from a judgment of the circuit court of Sangamon county, affirming an order of the State Public Utilities Commission, requiring appellant and certain other steam railroad companies to "cease and desist from applying a different rule governing the absorption of connecting line switching charges to or from the plant of the Springfield Drain Tile Company, situated upon the tracks of the St. Louis, Springfield, & Peoria Railroad, than they at the same time apply to, or from, industries similarly situated upon the tracks of steam carriers in the city of Springfield, county of Sangamon, and state of Illinois."

This order of the Commission was made, after a hearing, upon the petition of the Springfield Drain Tile Company, setting forth, among other things, that petitioner was compelled to pay the St. Louis, Springfield, & Peoria Railroad Company (referred to by the witnesses and in the briefs as the Illinois Traction System) a charge of 10 cents per ton, with a minimum per car of $2 and a maximum per car of $4, for switching cars from the petitioner's plant to the respondent's lines, which switching charge the respondents refuse to absorb, and praying that the Commission make such order in the premises as may seem meet.

The evidence taken before the Commission shows that the plant of the Springfield Drain Tile Company is located near to and has a sidetrack connecting with the tracks of the Illinois Traction System, an electric railway, and that the Illinois Traction System has a switch connection with the tracks of appellant; that, while appellant absorbs the switching charges for all cars delivered to it from plants in the city of Springfield located on the lines or sidetracks of steam railroads, it has refused to absorb the switching charges of the Illinois Traction System for delivering cars to it from plants in Springfield, and elsewhere in Illinois, located on the lines or sidetracks of the Illinois Traction System. To state the proposition more clearly: Whether appellant absorbs the switching charges for cars delivered to it by other carriers in Springfield does not necessarily depend on the kind of freight contained in the cars, but on whether the cars are delivered to it by a steam railroad or by the electric railroad. No such discrim-

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ination is authorized by the law. The assistant general freight agent of appellant testified that his company does not refuse to absorb the switching charges for cars delivered from the plant of the Springfield Drain Tile Company by the Illinois Traction System because they contain drain tile, but because the cars are delivered to appellant by the Illinois Traction System, and that if the plant of the Springfield Drain Tile Company were located on the line or sidetrack of a steam railroad appellant would absorb the switching charge.

Appellant argues this case upon the theory that it has the right to make a contract or agreement with one railroad company to absorb the switching charges for cars delivered to it by that railroad from plants located on its lines, without being obliged to enter into the same agreement with other connecting carriers similarly situated; that the matter of the absorption of switching charges is contractual in its nature, and that the carrier having the line haul and the connecting carrier are the parties having the right to control the matter by contract. The fallacy of this argument lies in the fact that such a contract or agreement between the carrier having the line haul and the connecting carrier is not between the parties to be affected by the so-called contract. The connecting carrier receives its compensation in any event, either from the carrier having the line haul or from the shipper, and it is not a matter of concern to it which of the parties pays its charges. The making of a so-called contract between the carrier having the line haul and the connecting carrier, by which the carrier having the line haul agrees to pay the switching charges of the connecting carrier, amounts to no more than the voluntary assumption of the switching charges by the carrier having the line haul. It is in no proper sense of the word a contract for the absorption of the switching charges by the carrier having the line haul. The proper parties to such a contract, to be of any force and effect, would necessarily be the railroad having the line haul and the shipper, and manifestly the carrier having the line haul would have no right to enter into a contract with one shipper, by which the carrier agreed to absorb the switching charges, and at the same time refuse to make the same contract with or render the same service for another shipper, similarly situated on the line of some other railroad, where the switching charges and the charges for the line haul are in each case the same. To recognize such a right would be to sanction unjust discrimination by a common carrier against certain shippers. Section 38 of the Public Utilities Act provides: "No public utility shall, as to rates or other charges, services, facilities or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates or other charges, services, facilities, or in any other respect, either as between localities or as between classes of service. Every public utility shall, upon reasonable notice, furnish to all persons who may apply therefor and be reasonably entitled thereto, suitable facilities and service, without discrimination and without delay." [Laws 1913, p. 479.]

Carrier—discrimination in switching charges—steam and electric roads.

In enforcing this section of the statute the Commission, under the facts in this case, properly made the order which appellant here seeks to have set aside.

The judgment of the Circuit Court is affirmed.

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ANNOTATION.

Right of railroad to discriminate in respect of switching charges.

The court in the reported case (STATE PUBLIC UTILITIES COMMISSION EX REL. SPRINGFIELD DRAIN TILE CO. v. ILLINOIS C. R. CO. ante, 582) bases its decision squarely upon the principle that the question of discrimination, being one of fact, must be decided by a broad view of the effect of the practice complained of, and points out the evident fact that the effect of the contract between the two carriers was to burden the patrons of one road with a charge with which patrons of other roads were not burdened. This principle of determining what is a discrimination is commendable, especially with reference to competitive business. It is, however, too broad for development by cases within the scope of this annotation.

A common carrier must not discriminate in the matter of switching cars; and, if it refuses to switch cars for a particular industry without a valid reason, it may be compelled by mandamus to perform its duty without discrimination. Larabee Flour Mills Co. v. Missouri P. R. Co. (1906) 74 Kan. 808, 88 Pac. 72, affirmed in (1909) 211 U. S. 612, 53 L. ed. 352, 29 Sup. Ct. Rep. 214. The carrier was a switching company holding itself out as prepared to do switching for the public, had been doing switching for plaintiff and others, and continued to serve others after refusing to serve the plaintiff, for the reason that plaintiff had disputed and refused to pay a claim for demurrage, which defendant claimed should be paid. The court held that this was not a valid reason for the refusal to serve plaintiff.

It is stated in St. Louis, I. M. & S. R. Co. v. Dixie Cotton Oil Co. (1914) 112 Ark. 147, 165 S. W. 251, that "the right to make a switching charge for car deliveries to an industry not situated on the delivering carrier's line is recognized by all parties to this litigation, and the existence of this is too thoroughly settled to be questioned here;" and the case was disposed of on this principle, ultimately. But the carrier was switching cars for the plaintiff's competitor, free of charge, over the line of another railroad, which line also passed plaintiff's industrial plant, while it was charging plaintiff $3 for each car delivered to it. It was, however, performing the free service under a contract with the other railway company, under the terms of which both railways used in common the track of the other company, and a piece belonging to the defendant railway. The court said: "It occurs to us that a fair statement of the position of the Dixie company is to say that, because the railroad companies have made a contract which resulted in giving the Buckeye company free switching service, they should therefore be compelled to enlarge the contract so that it may have free switching services." It then held that this contention was not sound. The same court in a later case (St. Louis Southwestern R. Co. v. Arkadelphia Mill. Co. (1915) 120 Ark. 572, 180 S. W. 200) restated this holding as follows: "A railway company will not be held to have discriminated in favor of one shipper and against another, when, by reason of the location of the tracks of another railroad company, it is able to furnish switching facilities free to the first shipper, but, because of different conditions, makes a charge for switching to the other shipper." It should be noted here, also, that "on competition business, the Iron Mountain absorbs this charge on both inbound and outbound traffic." The Interstate Commerce Commission had previously decided this contention in the same way. See (1913) 27 Inters. Com. Rep. 295.

In St. Louis Southwestern R. Co. v. Arkadelphia Mill. Co. (Ark.) supra, it was held that a railway company has the right to adopt a policy of switching cars to and from industries located on or reached by its own rails, and at the same time refuse to switch cars loaded upon its own siding with goods that have been brought there by

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water, the place of loading not being a regular station.

It was held in Smith v. Louisville & N. R. Co. (1915) 131 Tenn. 531, L.R.A. 1916A, 1107, 175 S. W. 557, that a railroad company is not prevented from contracting to make a particular stockyard within a city the place of delivery for all live stock shipped into the city, so as to require a payment of a switching charge for delivery of carloads of stock to other yards, by a statute making it unlawful to give an undue advantage to any particular person or description of traffic, or subject any person or particular description of traffic to undue or unreasonable prejudice or disadvantage. But in so holding the court indicates quite clearly that the same principle could not be upheld if the commodity had not been live stock.

The practice with reference to switching charges should be uniform, and the treatment of such charges should be the same in Oklahoma as it is in Texas, Kansas, and other surrounding states. Re Order to All Railroad Cos. Operating in Oklahoma at the rates approved or established (1915; Okla.) P.U.R.1915A, 217.

Every railroad company operating in Louisiana is required to switch cars employed in intrastate business for any other railroad with which it connects, or for any shipper or consignee, at the rates approved or established by the Commission, without discrimination, whether such cars are loaded or empty. Re Switching Service (1915; La.) P.U.R.1915B, 849.

Where a carrier does not connect with stockyards with its own tracks, a switching charge on shipments of live stock to and from the yards is ordinarily not discriminatory; but where other carriers similarly situated, and charging no higher rates, absorb the charge, and the defendant carrier itself absorbs the switching charges on shipments of all commodities originating at or destined to competitive points, and absorbs greater switching charges on wheat shipments to the same point, a switching charge on shipments of live stock is, under these circumstances, discriminatory. South Omaha Live Stock Exch. v. Chicago, St. P. M. & O. R. Co. (1916; Neb.) P.U.R.1916A, 1034.

The failure of a railroad company to make a charge for moving cars from the place within the premises of the consignee where they are first placed for unloading, to a second point where the unloading is completed, although no other movement of the car is necessary for reloading it for a line haul, is a discrimination as against patrons who do not receive such switching services by the railroad company. Joseph Schlitz Brewing Co. v. Chicago, M. & St. P. R. Co. (1915; Wis.) P.U.R. 1915C, 49. J. W. M.

JOHN LASKOWSKI
v.
PEOPLE'S ICE COMPANY, Plff. in Err.

Michigan Supreme Court — September 27, 1918.

(— Mich. —, 168 N. W. 940.)

Judgment — in favor of wife — effect in husband's action.

1. A judgment in favor of a woman in an action to recover damages for injuries to her person is not conclusive upon the question of defendant's negligence, and absence of her contributory negligence, in an action by her husband for the damages resulting to him from such injuries.

[*See note on this question beginning on page* 592.]

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Parties — action for injury to wife.

2. Under the Married Woman's Acts a man is not a necessary or proper party to an action by his wife to recover damages for injuries to her person, and he cannot control the action in her behalf.

Evidence — judgment — facts.

3. Judgments and decrees are conclusive evidence of the facts only as between parties and privies to the action.

Husband and wife — action for expense of wife's injuries — payment by wife.

4. A man is not precluded from recovering the expense due to personal injuries inflicted upon his wife, by the fact that the bills were paid by her, if she made the payments at his request and under his promise to reimburse her.

Same — services rendered by strangers.

5. A man cannot recover against one responsible for injuries to his wife, for the value of services gratuitously rendered by strangers in the care of her, nor for services performed by her daughter without promise of compensation.

ERROR to the Circuit Court for Wayne County to review a judgment in favor of plaintiff in an action brought to recover for the loss of his wife's services, and expenses incurred, by reason of injuries received by her in an accident. *Reversed.*

Statement by Ostrander, Ch. J.:

Anna Laskowski had judgment against the People's Ice Company for personal injuries caused by a runaway horse, owned and used by said People's Ice Company. The judgment was affirmed on appeal. 190 Mich. 331, 157 N. W. 6. The plaintiff in the case at bar is the husband of Anna Laskowski, and he brought this action to recover from the People's Ice Company damages for such pecuniary injuries as resulted to him from the injuries to his wife. In his declaration he alleges the facts and circumstances attending the injuries his wife sustained, and the resulting injury to himself. A traverse of the matters set up in the declaration puts in issue every fact necessary to be proved to sustain a recovery. The trial proceeded as though all material facts were in issue. The testimony elicited is not substantially different from that given upon the trial of the suit begun by the wife. The cause was submitted to a jury, a verdict for $2,300 was returned for plaintiff, for which sum a judgment was rendered. A new trial was denied. Plaintiff introduced in evidence, without objection, the files and record in the case of Anna Laskowski v. People's Ice Company. It is stipulated by counsel "that neither the files nor records, nor copies thereof, in the case of Anna Laskowski v. People's Ice Company, introduced into evidence on the trial of this case, need be returned with the bill of exceptions, or record, or printed in the printed record; that it appears from such files and records that the same accident was complained of in the said case of Anna Laskowski v. People's Ice Company as in the present case of John Laskowski v. People's Ice Company; that the plaintiff in the former case is the wife of the plaintiff in the latter case, and that the defendant was the same in both cases; and that the pleadings and proofs in the case of Anna Laskowski v. People's Ice Company appear fully in the printed record of the same to the supreme court of this state, being now there on file and being case No. 26,960 therein, which was decided March 30, 1916, and is reported in 190 Mich. 331, 157 N. W. 6."

Upon the subject of the negligence of defendant and contributory negligence of Anna Laskowski, the jury was instructed that both points were settled in the suit brought by the wife, and they were told they "must find that the defendant ice company was guilty of negligence as charged, and that the plaintiff's

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wife, Anna Laskowski, was free from contributory negligence. The only questions, therefore, for your consideration, are whether or not the plaintiff has sustained damage, loss, and damage, as a proximate result of the injuries to his wife, Anna Laskowski, sustained through the accident; and if you find that he has, then the only remaining question is for you to determine the amount of the damage."

Points raised and discussed are stated by appellant as follows:

"First. In charging and instructing the jury that the judgment obtained by Anna Laskowski, the wife of the plaintiff, against this defendant, for her personal damages for injuries received by her in this same accident, was conclusive as to the question of the negligence of the defendant, and that the plaintiff's wife, Anna Laskowski, was free from contributory negligence; that that judgment could not be reviewed; and that the only question for the jury's consideration was whether or not the plaintiff had sustained damage as the proximate result of the injuries to his wife, sustained through this accident, and, if he had, the amount of such damage.

"Second. By admitting in evidence certain receipted bills for medicines and doctor's services, without proof that they were paid by the plaintiff.

"Third. In refusing to admit testimony that the bills for medicines and doctor's services were paid by the wife of the plaintiff out of her personal funds.

"Fourth. For refusing to strike out, on defendant's motion, certain testimony as to an alleged agreement between the plaintiff and his wife, that the wife was to pay the expenses of her care, and that the plaintiff was to later reimburse her.

"Fifth. By charging and instructing the jury that the plaintiff was liable for the expenses for the care of his wife, and entitled to recover therefor, whether paid by him or not, and refusing the defendant's request in this regard.

"Sixth. By refusing the defendant's request to instruct the jury that the plaintiff could not recover for services gratuitously rendered him.

"Seventh. By admitting certain testimony, over the defendant's objection, as to the value of the services rendered by the plaintiff's daughter, and refusing the defendant's request to instruct the jury that the plaintiff was not liable for the services rendered him by his minor daughter.

"Eighth. In failing and refusing to charge and instruct the jury that the plaintiff could not recover for future loss or expense, unless the same were proven to a reasonable certainty.

"Ninth. Because the court erred in failing and refusing to grant the defendant's motion for a new trial, because the verdict is against the great weight of evidence.

"Tenth. Because the court erred in failing and refusing to grant the defendant's motion for a new trial, because the verdict is grossly excessive."

Messrs. **Berger & Milburn**, for appellant:

The judgment obtained by plaintiff's wife in her suit against defendant, to which plaintiff was not a party, for her personal damages arising out of the same accident, is not conclusive and binding upon the defendant as to its negligence in this accident, nor that the wife of the plaintiff was free from contributory negligence.

2 Black, Judgm. 807, 828; Fowler v. Blount, 191 Mich. 575, 158 N. W. 114; Detroit Sav. Bank v. Truesdail, 38 Mich. 444; Young's Appeal, 52 Mich. 592, 18 N. W. 373; Axford v. Graham, 57 Mich. 422, 24 N. W. 158; Love v. Francis, 63 Mich. 181, 6 Am. St. Rep. 290, 29 N. W. 843; Fisher v. Wineman, 125 Mich. 642, 52 L.R.A. 192, 84 N. W. 1111; Detroit v. Detroit R. Co. 134 Mich. 11, 95 N. W. 992, 99 N. W. 411; Bean v. Bean, 163 Mich. 396, 128 N. W. 413; Bacon v. Walden, 186 Mich. 139, 152 N. W. 1061; Berger v. Jacobs, 21 Mich. 215; Michigan C. R. Co. v. Coleman, 28 Mich. 440, 4 Am. Neg.

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Cas. 1; McCauley v. Detroit United R. Co. 167 Mich. 297, 133 N. W. 11; Bigelow, Estoppel, p. 9; 1 Herman, Estoppel & Res Judicata, 25; Womach v. St. Joseph, 201 Mo. 467, 10 L.R.A.(N.S.) 140, 100 S. W. 443; Neeson v. Troy, 29 Hun, 173; Berg v. Third Ave. R. Co. 89 N. Y. Supp. 433; Walker v. Philadelphia, 195 Pa. 173, 78 Am. St. Rep. 801, 45 Atl. 657; Brierly v. Union R. Co. 26 R. I. 119, 58 Atl. 451, 16 Am. Neg. Rep. 578; Cooney v. Lincoln, 20 R. I. 186, 37 Atl. 1031; Neeson v. Troy (1883) 29 Hun, 173; Groth v. Washburn (1886) 39 Hun, 324; Stamp v. Franklin, 144 N. Y. 607, 39 N. E. 634; Duffee v. Boston Elev. R. Co. 191 Mass. 563, 77 N. E. 1036; West Michigan Park Asso. v. Pere Marquette R. Co. 172 Mich. 187, 137 N. W. 799; Corry v. Lackey, 105 Mich. 366, 63 N. W. 418; Besancon v. Brownson, 39 Mich. 392; Phillips v. Jamieson, 51 Mich. 154, 16 N. W. 318; McCarthy v. William H. Wood Lumber Co. 219 Mass. 566, 107 N. E. 439; Atchison, T. & S. F. R. Co. v. Nelson, 135 C. C. A. 621, 220 Fed. 56; Boyken v. Sharp, 193 Mo. App. 607, 187 S. W. 91; Selleck v. Janesville, 104 Wis. 570, 47 L.R.A. 691, 76 Am. St. Rep. 892, 80 N. W. 944.

Plaintiff could not recover for any expenses to which he himself had not been put, or was not then liable for; and no agreement between himself and wife, as to reimbursement of her, would be binding upon the defendant.

Schulte v. Holliday, 54 Mich. 73, 19 N. W. 752; Vergin v. Saginaw, 125 Mich. 499, 84 N. W. 1075; Lacas v. Detroit City R. Co. 92 Mich. 412, 52 N. W. 745, 4 Am. Neg. Cas. 138; Walden v. Clark, 50 Vt. 383.

Defendant was not liable for any services rendered by plaintiff's minor daughter.

Walker v. Philadelphia, 195 Pa. 174, 78 Am. St. Rep. 801, 45 Atl. 657; Goodhart v. Pennsylvania R. Co. 177 Pa. 1, 55 Am. St. Rep. 705, 35 Atl. 191.

Plaintiff could not recover for future loss or expenses, unless the same were proven to a reasonable certainty.

Kethledge v. Petosky, 179 Mich. 311, 146 N. W. 164; Brininstool v. Michigan United R. Co. 157 Mich. 180, 121 N. W. 728, 13 Cyc. 139.

Messrs. **Charles T. Wilkins** and **Edward R. Kehoe**, for appellee:

The judgment obtained by the wife of the plaintiff in her suit against defendant, for her personal damages arising out of the same accident, is conclusive and binding upon the defendant as to its negligence in this accident, and that the wife of the plaintiff was free from contributory negligence.

2 Black, Judgm. 2d ed. § 500; Brown v. Missouri P. R. Co. 96 Mo. App. 164, 70 S. W. 527; Gallaher v. Moundsville, 34 W. Va. 730, 26 Am. St. Rep. 942, 12 S. E. 859; Western Min. & Mfg. Co. v. Virginia Cannel Coal Co. 10 W. Va. 250; Lindsey v. Danville, 46 Vt. 144; Harmon v. Auditor, 123 Ill. 122, 13 N. E. 161; Anderson v. Third Ave. R. Co. 9 Daly, 488; Jones v. Silver, 97 Mo. App. 231, 70 S. W. 1109.

Ostrander, Ch. J., delivered the opinion of the court:

More or less persuasive reasons have been before now advanced in support of the proposition that, if a wife recovers a judgment for personal injuries, the determination in her suit that the defendant was negligent, and the plaintiff free from negligence, is conclusive upon defendant in a suit brought by the husband against the same defendant, for damages arising out of the same circumstances. In Anderson v. Third Ave. R. Co. 9 Daly, 487, it appeared that plaintiff's infant son had received injuries, and his guardian brought an action for his damages, in which action it was determined, upon the merits, that the injuries arose from the negligence of the defendant. The father, in an action brought to recover for the loss of his son's services on account of the injury, in his complaint set up the facts and circumstances of the injury, and also pleaded the action and recovery in behalf of the son. On motion to strike out the allegations as to the former recovery, the court, in denying the motion, said: "If, in an action brought against the defendants for the son, by his guardian, it has been judicially determined that the accident which caused the injury was not owing to any negligence on the part of the son, but was due solely to the negligence of the defendants, there is no reason why that question should be tried over again in the action brought for the loss of the son's services, as it would involve

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an inquiry which has been already made and settled, between the party to whom the accident happened and the defendants. In this action, the plaintiff is limited to the recovery only of such damages as he may have sustained by the loss of his son's services; and I can see no reason why, to establish his cause of action, he should be required to prove that the accident, which deprived him of his son's services, was caused by the defendant's negligence, when that fact has been judicially determined against the defendants in the action brought for the benefit of the son."

In Brown v. Missouri P. R. Co. 96 Mo. App. 164, 70 S. W. 527, the action was brought by the husband for damages for his injuries, growing out of personal injuries to his wife. It appeared that the husband and wife, in a joint action, had recovered a final judgment against the defendant for personal injuries to the wife. Citing and approving Anderson v. Third Ave. R. Co. supra, and Lindsey v. Danville, 46 Vt. 144, it was said: "According to the principles to which we have alluded, the judgment in the joint action by the husband and wife against defendant must be held to be conclusive in this action on every issue determined in that. It sufficiently appears from the record in that case, admitted in evidence, that the issues of negligence and contributory negligence were determined in favor of the plaintiffs. The injury to the wife, for which damages were claimed, was the same in both cases. The issues upon which the right to recover depended were exactly the same in both cases. The plaintiff was a party in that case as well as this. The defendant was the same in both. Every question of fact that could arise in the present case was determined in that, except as to the kind and quantum of damages to which plaintiff was entitled, and the evidence given was ample to support the verdict for such damages. It follows that with the action of the trial court in permitting the plaintiff to introduce in evidence the record of the pleadings and judgment in the case of the plaintiff and his wife against defendant, and in refusing to permit the defendant to introduce any evidence tending to disprove the negligence alleged in the plaintiff's petition and to prove that of plaintiff as alleged in its answer, we can find no fault."

In Lindsey v. Danville supra, Judge Redfield delivered the opinion, and it was said, among other things: The "husband and wife, having recovered final judgment in a joint action against defendant town for personal injuries to the wife occasioned by" the negligence of the defendant, the latter "is estopped in an action by the husband to recover damages for the loss of the wife's services, [etc.,] . . . to deny facts put in issue and found against it in the former action."

There are decisions of equity courts, of which Harmon v. Auditor, 123 Ill. 122, 5 Am. St. Rep. 502, 13 N. E. 161, and Gallaher v. Moundsville, 34 W. Va. 730, 26 Am. St. Rep. 942, 12 S. E. 859, are examples, to the effect that where a number of taxpayers, in behalf of themselves and all other taxpayers, seek to prevent the issue of municipal bonds, the decree sustaining the validity of the issue is binding and a bar to any further litigation; the Illinois supreme court holding that a judgment or decree against a municipal corporation, or its legal representatives, as to the validity of an issue of bonds, is binding upon all its citizens, though not parties to the suit, citing Freeman on Judgments, 3d ed. § 178, to the effect: "A judgment against a county or its legal representatives as a matter of general interest to all its citizens, is binding upon the latter, though they are not parties to the suit. A judgment for a sum of money rendered against a county imposes an obligation against the citizens which they are compelled to discharge. Every taxpayer is a real, though not a nominal, party to such judgment. If, for the purpose of providing for

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its payment, the officers of the county levied and endeavored to collect the tax, none of the citizens can, by instituting proceedings to prevent the levy or enforcement of the tax, dispute the validity of the judgment, nor relitigate any of the questions which were or which could have been litigated in the original action against the county."

Counsel for appellee cites these cases, as well as Western Min. & Mfg. Co. v. Virginia Cannel Coal Co. 10 W. Va. 250, and Jones v. Silver, 97 Mo. App. 231, 70 S. W. 1109. Only Anderson v. Third Ave. R. Co. is precisely in point, since in the Missouri and Vermont cases the husband, necessarily or otherwise, was in fact a party plaintiff in the suit first begun, and, however much respect ought to be paid to the early decisions of the court of common pleas of the city and county of New York, we are referred to no decision of the court of last resort of New York, sustaining this decision. Opposed to it are Neeson v. Troy, 29 Hun, 173, and Groth v. Washburn, 39 Hun, 324, while in Malsky v. Schumacher & Ettlinger, 7 Misc. 8, 27 N. Y. Supp, 332, and Berg v. Third Ave. R. Co. (City Ct.) 89 N. Y. Supp. 433, the case of Anderson v. Third Ave. R. Co. is substantially overruled. So, in Fearn v. West Jersey Ferry Co. 143 Pa. 122, 13 L.R.A. 366, 22 Atl. 708, 6 Am. Neg. Cas. 348, Walker v. Philadelphia, 195 Pa. 168, 78 Am. St. Rep. 801, 45 Atl. 657; Brierly v. Union R. Co. 26 R. I. 119, 58 Atl. 451, 16 Am. Neg. Rep. 578, and Duffee v. Boston Elev. R. Co. 191 Mass. 563, 77 N. E. 1036, the rule is laid down that in cases like the one at bar the husband is enforcing an independent right, there is no privity between the husband and wife in that respect, and that the judgment in an action brought by one cannot be put in evidence on the trial of an action brought by the other. In Missouri, in Womach v. St. Joseph, 201 Mo. 467, 10 L.R.A.(N.S.) 140, 100 S. W. 443, the question was: "If a wife sue to recover damages for injuries done by negligence to her body and and for the pain of body and anguish of mind flowing therefrom, and if she be cast on trial, does the judgment in her suit, as a matter of law, bar the husband's recovery in his suit against the same defendant for the damages personal to himself and arising out of the same event?"

Judgment—in favor of wife—effect in husband's action.

The opinion of the court is a valuable one, and answers the question in the negative.

Upon principle, the rule laid down by the learned trial judge is plainly wrong. The action of the wife, like the action of this plaintiff, is in personam. The right of the wife to bring and control her own action was subject, legally, to no interference on the part of the husband. He was not a necessary or a proper party to her suit. He could neither institute nor control the action in her behalf. The judgment is her sole property. Berger v. Jacobs, 21 Mich. 215; Michigan C. R. Co. v. Coleman, 28 Mich. 440, 4 Am. Neg. Cas. 1; McCauley v. Detroit United R. Co. 167 Mich. 297, 133 N. W. 11. The husband is not privy to the wife in blood, representation, estate, or law. He derived no title to his present demand from or through her. She could not have released it, and had she failed to recover in her action that would not have barred him. It is the general rule that judgments and decrees are conclusive evidence of facts only as between parties and privies to the litigation. Besancon v. Brownson, 39 Mich. 388, 392; Phillips v. Jamieson, 51 Mich. 153, 154, 16 N. W. 318.

Parties—action for injury to wife.

Evidence—judgment—facts.

As the case must go down for a new trial some of the other assignments of error will be considered. It appears that considerable expense was involved in the treatment of plaintiff's wife for the injuries she received, and was paid for out of her money, recovered in her suit

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against this defendant. There was testimony tending to prove that the husband, the plaintiff in this action, agreed with his wife that if she would pay it he would reimburse her. It does not appear that medical and other assistance was rendered upon the credit of the wife, so that she might have included the cost in her own claim for damages in her suit. If the husband had authorized any other person to pay these charges on his account, it would not have been a bar to his recovery for them in this action, and no good reason is perceived for saying that if his wife, upon his request and promise to repay her, paid them, he may not now recover them from defendant.

Husband and wife—action for expense of wife's injuries—payment by wife.

As to services gratuitously rendered to plaintiff and his wife, of course defendant is not liable, nor for those performed by a minor daughter, out of employment and living at home, at least, in the absence of a contract to pay her.

Same—services rendered by strangers.

The charge of the court upon the subject of future damages is criticized. The rule stated in Brininstool v. Michigan United R. Co. 157 Mich. 172, 180, 121 N. W. 728, and restated in Kethledge v. Petoskey, 179 Mich. 301, 311, 146 N. W. 164, should have been given to the jury. It is not likely that other questions presented upon the record will arise upon a new trial, and they are not considered.

The judgment is reversed, with costs to appellant, and a new trial granted.

ANNOTATION.

Judgment in wife's suit for personal injuries as affecting husband's action for resulting damage.

Cases are excluded which pass upon the question as to the effect of a judgment, in an action by the personal representative of the wife, upon the right of the husband to maintain an action to recover for pecuniary injuries resulting to him from his wife's death. Nor are cases included which involved joint actions by husband and wife, even though the husband was merely a nominal plaintiff.

A judgment in one action is not, as a general rule, effective as a bar or estoppel in any other action, unless it is between the same parties or their privies, and involves the same subject-matter. The husband is not in privity with the wife to the extent that an action by her to enforce a right peculiar to herself will operate to bar or estop the husband maintaining an action to recover for injuries peculiar to himself, although the injuries in both cases are based upon the same wrongful act. In application of this general rule, it has been held that a judgment in favor of the defendant, in an action by the wife to recover damages for personal injuries, is not conclusive in favor of defendant in an action against it by the husband to recover for injuries personal to him, arising out of injuries to the wife. Lindsay v. Oregon Short Line R. Co. (1907) 18 Idaho, 477, 12 L.R.A.(N.S.) 184, 90 Pac. 984; Duffee v. Boston Elev. R. Co. (1906) 191 Mass. 563, 77 N. E. 1036; Womach v. St. Joseph (1907) 201 Mo. 467, 10 L.R.A. (N.S.) 140, 100 S. W. 443 (disapproving Brown v. Missouri P. R. Co. (1902) 96 Mo. App. 164, 70 S. W. 527); Canterbury v. Kansas City (1908) 130 Mo. App. 1, 108 S. W. 574; Brierly v. Union R. Co. (1904) 26 R. I. 119, 58 Atl. 451; 16 Am. Neg. Rep. 578.

And a judgment in the wife's favor in a suit for personal injuries is not conclusive, in a subsequent action by the husband to recover for resulting pecuniary damage to himself as to the negligence of the defendant (Groth v. Washburn (1886) 39 Hun (N. Y.) 324; Neeson v. Troy (1883) 29 Hun (N. Y.) 173; Berg v. Third Ave R. Co. (1903) 89 N. Y. Supp. 433) or as to

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the freedom of the wife from contributory negligence (LASKOWSKI v. PEOPLE'S ICE CO. [reported herewith] ante, 586); nor is a judgment in favor of the wife conclusive as to the liability in general of the defendant for resulting injuries to the husband (Selleck v. Janesville (1899) 104 Wis. 570, 47 L.R.A. 691, 76 Am. St. Rep. 892, 80 N. W. 944). A judgment in favor of the wife does not operate to estop the husband from maintaining an action for pecuniary injury to himself, due to the injuries to the wife. Neumeister v. Dubuque (1877) 47 Iowa, 465; Mundell v. Greeley (1907) 76 Kan. 799, 92 Pac. 1117.

On this point, see also Louisville & N. R. Co. v. Kinman (1918) 182 Ky. 597, 206 S. W. 880, which holds that a settlement by a wife with the wrongdoer for her personal injuries, including pain and suffering, does not affect the husband's right of action for the loss of his wife's services in and about his household, her society, and the loss of the consolation of the marital relationship.

Another case of interest on the point is Bernhardt v. Perry (1919) — Mo. —, 208 S. W. 462, which holds that a wife is not entitled to recover for personal injuries to her husband, which incapacitated him from the performance of his marital duties toward her. The court held that the husband is entitled to recover from the wrongdoer full compensation for all injuries he sustained, including physical injury to his person, and for being incapacitated to care for, associate with, and protect her, as well as being deprived of his right to consort with her.

It is obvious, however, that, though a judgment in favor of or against a wife in an action for injury to her is not res judicata in an action by the husband for the resulting damage to himself, on account of the injury to her, the rules of law set forth in an action by the wife, and the conclusions drawn therefrom, may, on the principle of stare decisis, control in the subsequent action by the husband, in so far as there is substantial identity in the material facts. See Cawley v. La Crosse City R. Co. (1900) 106 Wis. 240, 82 N. W. 197. A. G. S.

H. J. SPANELL, Appt.,
v.
STATE OF TEXAS.

Texas Court of Criminal Appeals — March 27, 1918.

(— Tex. Crim. Rep. —, 203 S. W. 357.)

Criminal law — double murder — acquittal of one — effect on other.

1. The acquittal of one charged with murder of his wife, whom he unintentionally killed when shooting at another, is a bar to his prosecution for murder of the latter, since his guilt or innocence of the charge with respect to his wife depended on whether or not the shot was justifiable; and it is immaterial that more than one shot was fired if they were all fired with one volition.

[*See note on this question beginning on page* 606.]

Homicide — shooting at another — killing third.

2. One who unintentionally kills his wife by shooting at another with malice is guilty of murdering her.

Same — act committed in self-defense.

3. One who, in defending himself against the unlawful attack of another, unintentionally kills his wife, is guilty of no offense.

Criminal law — killing two — firing more than one shot.

4. When two persons are killed or injured in one transaction, the fact that more than one shot was fired does not, as matter of law, render it insuscepti-

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ble of proof that they were both killed by one act.

Same — series of shots — one act.

5. A series of shots may constitute one act, in a legal sense, where they were fired with one volition.

Same — burden of proving plea.

6. One pleading former acquittal in a prosecution for unintentionally killing another when firing at the one for whose murder he is on trial has the burden of proving his plea.

Same — question for jury — conflict of testimony.

7. Testimony of accused that he had no intention of killing his wife when defending himself against another is sufficient to carry the question to the jury, although the circumstances indicate that she was killed after the assailant was disabled, and accused was in a place of safety, if not after the assailant was in fact killed.

Jury — credibility of accused.

8. When an accused avails himself of the statutory privilege of testifying in a prosecution against him, the question of his credibility is for the jury.

Evidence — intent of accused.

9. An accused may testify as to his intent and motive.

Criminal law — former acquittal — when available.

10. A judgment of acquittal for the identical act or volition will sustain a plea of former acquittal, and the evidence, lack of evidence, or reasons which impelled the court to enter the judgment are not important, other than as they bear on the issue of identity.

Evidence — condition of body in other murder.

11. Upon trial for murder of one who pleads former acquittal of murdering another, killed by the same act, as a defense, the state may show the condition of the body and wounds on the person of the victim in the former trial, as bearing upon the question of identity of the acts in the two cases.

Same — character — vile remarks.

12. The character of a deceased person cannot be shown by proof of vile remarks concerning women, alleged to have been made by him.

Same — evidence of other crimes.

13. Evidence of the killing of another by the same act which resulted in the death of the one for whose murder accused is on trial is not inadmissible under the rule excluding evidence of other crimes.

Same — transaction out of which homicide arises.

14. Upon trial for murder in a quarrel growing out of misconduct of deceased toward accused's wife while she was upstairs immediately preceding the homicide, evidence of what actually took place upon such occasion is admissible, but not conclusive as to the wife's purpose in going upstairs, of which accused had no knowledge.

On Rehearing.

Criminal law — former acquittal — how determined.

15. In case of a plea of former acquittal, where there was a double murder from one act, and accused has been acquitted for one killing and is on trial for the other, the identity of the offenses is to be determined by parol evidence, and not by the record as under a plea of res judicata.

APPEAL by defendant from a judgment of the District Court for Coleman County, convicting him of murder. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. **Anderson & Upton, L. A. Dale, Williams & Williams,** and **Critz & Woodward,** for appellant:

Bloody clothes, showing the entrance of bullets, knife cuts, etc., are not admissible unless they solve some disputed issue in the case, and are necessary to establish the location of the wounds on the body.

Huey v. State, — Tex. Crim. Rep. —, 197 S. W. 203; Cole v. State, 45 Tex. Crim. Rep. 225, 75 S. W. 527; Christian v. State, 46 Tex. Crim. Rep. 47, 79 S. W. 562; Crenshaw v. State, 48 Tex. Crim. Rep. 77, 85 S. W. 1147; Lucas v. State, 50 Tex. Crim. Rep. 219, 95 S. W. 1055; Melton v. State, 47 Tex. Crim. Rep. 451, 83 S. W. 822; Puryear v. State, 50 Tex. Crim. Rep. 454, 98 S. W. 258.

If a part is admissible, but others inadmissible, it is error to introduce the part which does not explain or solve any disputed fact in the case.

Lucas v. State, 50 Tex. Crim. Rep. 219, 95 S. W. 1055.

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Defendant should have been permitted to testify as a fact whether his wife was for him or against him, and he should have been permitted to testify as to what he thought about it, and the impression created in his mind by her acts, words, and conduct.

Powers v. State, 23 Tex. App. 42, 5 S. W. 153; Latham v. State, 75 Tex. Crim. Rep. 575, 172 S. W. 812; Richardson v. State, 7 Tex. App. 486; Allen v. State, 8 Tex. App. 67.

To permit the state to introduce the undisclosed motives of the deceased was highly injurious to the rights of the defendant, especially in view of the verdict of the jury convicting him of murder instead of manslaughter.

Brumley v. State, 21 Tex. App. 238, 57 Am. Rep. 612, 17 S. W. 140; Johnson v. State, 22 Tex. App. 224, 2 S. W. 609; Ball v. State, 29 Tex. App. 125, 14 S. W. 1012; Gilcrease v. State, 33 Tex. Crim. Rep. 619, 28 S. W. 531; Stell v. State, — Tex. Crim. Rep. —, 58 S. W. 75; Woodward v. State, 42 Tex. Crim. Rep. 207, 58 S. W. 135; Stanton v. State, 42 Tex. Crim. Rep. 271, 59 S. W. 271; Wall v. State, — Tex. Crim. Rep. —, 62 S. W. 1062; Adams v. State, — Tex. Crim. Rep. —, 64 S. W. 1055, 44 Tex. Crim. Rep. 66, 68 S. W. 271; Wooley v. State, — Tex. Crim. Rep. —, 64 S. W. 1054; Gray v. State, 47 Tex. Crim. Rep. 377, 83 S. W. 705; Saye v. State, 50 Tex. Crim. Rep. 572, 99 S. W. 551; Tillman v. State, 51 Tex. Crim. Rep. 204, 101 S. W. 210; Young v. State, 41 Tex. Crim. Rep. 444, 55 S. W. 331; Pratt v. State, 53 Tex. Crim. Rep. 281, 109 S. W. 138; Gant v. State, 55 Tex. Crim. Rep. 291, 116 S. W. 801; Bradley v. State, 60 Tex. Crim. Rep. 398, 132 S. W. 483.

If the defendant was in fact mistaken in reference to the motives and intentions of the deceased, yet if he had reasonable grounds to so believe, and did so believe, and acted upon that belief and under circumstances which would reduce a homicide to manslaughter, he would be guilty of nothing higher than manslaughter.

Jones v. State, 33 Tex. Crim. Rep. 492, 47 Am. St. Rep. 46, 26 S. W. 1082; Messer v. State, 43 Tex. Crim. Rep. 107, 63 S. W. 643; McAnear v. State, 43 Tex. Crim. Rep. 518, 67 S. W. 117; Hudson v. State, 43 Tex. Crim. Rep. 423, 66 S. W. 668; Canister v. State, 46 Tex. Crim. Rep. 223, 79 S. W. 24; Bays v. State, 50 Tex. Crim. Rep. 551, 99 S. W. 561; Gillespie v. State, 53 Tex. Crim. Rep. 168, 109 S. W. 158.

If the evidence raised the issue of the defendant's right to defend against an assault upon his wife, and the court fails to so charge the jury, it is reversible error.

Branch, Crim. Law, § 454; Guffee v. State, 8 Tex. App. 187; Foster v. State, 8 Tex. App. 253; Ashworth v. State, 19 Tex. App. 194; Butler v. State, 33 Tex. Crim. Rep. 234, 26 S. W. 201; Palmer v. State, 47 Tex. Crim. Rep. 270, 83 S. W. 202; Voight v. State, 53 Tex. Crim. Rep. 271, 109 S. W. 205; Griffin v. State, 57 Tex. Crim. Rep. 280, 122 S. W. 553; Scott v. State, 60 Tex. Crim. Rep. 318, 131 S. W. 1073; Alford v. State, 8 Tex. App. 567; Ross v. State, 10 Tex. App. 466, 38 Am. Rep. 643; Snell v. State, 29 Tex. App. 240, 25 Am. St. Rep. 723, 15 S. W. 722; North v. State, 12 Tex. App. 111; Johnson v. State, 60 Tex. Crim. Rep. 512, 132 S. W. 804; Glover v. State, 33 Tex. Crim. Rep. 227, 26 S. W. 204; Sterling v. State, 15 Tex. App. 249; Monson v. State, — Tex. Crim. Rep. —, 63 S. W. 649; Brod v. State, 78 Tex. Crim. Rep. 69, 179 S. W. 1189; Vickers v. State, 70 Tex. Crim. Rep. 558, 157 S. W. 767; Phipps v. State, 34 Tex. Crim. Rep. 610, 31 S. W. 657; Saens v. State, — Tex. Crim. Rep. —, 20 S. W. 737; Johnson v. State, 42 Tex. Crim. Rep. 103, 58 S. W. 69; Parnell v. State, 50 Tex. Crim. Rep. 419, 98 S. W. 269; Terrell v. State, 53 Tex. Crim. Rep. 604, 111 S. W. 152; Scott v. State, 70 Tex. Crim. Rep. 57, 153 S. W. 871; Mundine v. State, 37 Tex. Crim. Rep. 5, 38 S. W. 619; White v. State, 18 Tex. App. 57; Stacy v. State, 48 Tex. Crim. Rep. 95, 86 S. W. 327.

Where there is only one intent and one volition, it is in contemplation of law but one act, and there can be but one offense, and defendant cannot be convicted upon an act, intent, and volition for which he has been previously acquitted, though more than one person was injured or killed.

Cook v. State, 43 Tex. Crim. Rep. 182, 96 Am. St. Rep. 854, 63 S. W. 873; Ashton v. State, 31 Tex. Crim. Rep. 482, 21 S. W. 48; Carson v. State, 4 Colo. App. 463, 36 Pac. 551; Clem v. State, 13 Am. Rep. 369, and note, 42 Ind. 420; Rex v. Jennings, Russ. & R. C. C. 388; Augustine v. State, 41 Tex. Crim. Rep. 69, 96 Am. St. Rep. 765, 52 S. W. 77; Herera v. State, 35 Tex. Crim. Rep. 607, 34 S. W. 944.

Where an essential element of the offense denounced in the indictment has once been passed upon favorably

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to the defendant by a jury, in a trial between the state and the defendant, this decision is final and conclusive between the parties, and will support a plea of former jeopardy as against a trial on some other charge growing out of the same transaction; and said original judgment is conclusive in favor of such person on the subsequent trial.

Cooper v. Com. 106 Ky. 90, 45 L.R.A. 216, 90 Am. St. Rep. 275, 51 S. W. 789, 59 S. W. 524, 11 Am. Crim. Rep. 625; Murff v. State, 76 Tex. Crim. Rep. 5, 172 S. W. 249; Coffey v. United States, 116 U. S. 436, 29 L. ed. 684, 6 Sup. Ct. Rep. 437; Rex v. Kingston, 20 How. St. Tr. 358; 2 Van Fleet, Former Adjudication, p. 1242, § 628; Freeman, Judgm. § 318; Bishop, New Crim. Law, § 1051.

Former adjudication, if any, is conclusive of the issue as against the state; and if there be no issue of fact as to whether the same has been decided, but it conclusively appears to have been, it is the duty of the court to affirmatively instruct the jury that such former adjudication is conclusive upon all the issues so adjudicated.

2 Van Fleet, Former Adjudication, § 628, p. 1242; Cook v. State, 43 Tex. Crim. Rep. 182, 96 Am. St. Rep. 854; 63 S. W. 873; Coffey v. United States, 116 U. S. 436, 29 L. ed. 684, 6 Sup. Ct. Rep. 437; Cooper v. Com. 106 Ky. 909, 45 L.R.A. 216, 90 Am. St. Rep. 275, 51 S. W. 789, 59 S. W. 524, 11 Am. Crim. Rep. 625; Murff v. State, 76 Tex. Crim. Rep. 5, 172 S. W. 249; Fenton v. State, 33 Tex. Crim. Rep. 633, 28 S. W. 537; Carson v. People, 4 Colo. App. 463, 36 Pac. 551; Freeman, Judgm. § 318; People v. McDaniels, 92 Am. St. Rep. 159, and note, 137 Cal. 192, 59 L.R.A. 578, 69 Pac. 1006; Bishop, New Crim. Law, § 1051; Rex v. Kingston, 20 How. St. Tr. 358; United States v. Givert, 2 Sumn. 19, Fed. Cas. No. 15,204; Flehash v. State, 35 Tex. Crim. Rep. 601, 34 S. W. 928; Powell v. State, 42 Tex. Crim. Rep. 11, 57 S. W. 94.

Messrs. **Wright & Harris, Snodgrass, Dibrell, & Snodgrass, J. K. Baker, Walter U. Early, W. Van Sickle, and E. B. Hendricks,** Assistant Attorney General, for the State.

Morrow, J., delivered the opinion of the court:

Appellant was convicted of the murder of M. C. Butler.

Appellant, his wife, and deceased were in an automobile together at night, and Major Butler and Mrs. Spanell were killed. Appellant claimed, and testified, that Major Butler assaulted him, and that several shots were fired by him at Major Butler with no intent to injure Mrs. Spanell. He was indicted in separate indictments for each of the homicides, was tried and acquitted for the murder of his wife, and filed in this case a plea of former acquittal, based upon the proposition that the two homicides, resulting from a single act and volition, constituted but one offense. The court's refusal to submit the plea to the jury is made the basis of complaint.

Homicide—shooting at another—killing third.

If, in shooting at Major Butler with malice, appellant unintentionally killed his wife, he would be guilty, and could be prosecuted for murdering her. Richards v. State, 35 Tex. Crim. Rep. 38, 30 S. W. 805; McCullough v. State, 62 Tex. Crim. Rep. 128, 136 S. W. 1056, in which the court says: "If appellant shot at Ollie Jamison with either his express or implied malice, and killed his wife without intending to kill her, his offense would be murder in the second degree."

Same—act committed in self-defense.

If, in defending his life against an unlawful attack by Major Butler, appellant accidentally killed his wife, he was guilty of no offense. Plummer v. State, 4 Tex. App. 310, 30 Am. Rep. 165; Clark v. State, 19 Tex. App. 495; Vining v. State, 66 Tex. Crim. Rep. 316, 146 S. W. 912. From the Plummer Case, supra, we quote as follows: "We take the law to be that if the jury believed that the defendant found himself in a condition where he would have been justified in taking the life of Smelser in order to save himself from death or the infliction of great bodily harm, and, in so defending himself from such danger, he, by mistake or accident, shot Mrs. Smelser, then he would not only not be guilty of an

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assault with intent to murder Mrs. Smelser, but he would not be guilty of any offense whatever."

See Lankster v. State, 41 Tex. Crim. Rep. 603, 56 S. W. 65.

If he shot at Butler and in the same act killed Mrs. Spanell unintentionally, his guilt or innocence of each of the homicides would depend on whether, in shooting at Butler, he acted with malice or in self-defense. Assuming that the shots were fired at Butler only, and killed Mrs. Spanell, appellant having no intent or volition to injure her, to determine whether he was guilty or innocent on his trial for her murder it was necessary to decide whether, in shooting at Butler, he acted in self-defense or with malice. On this state of facts the decision that he was innocent of the murder of Mrs. Spanell necessarily involves the finding that appellant's act in firing at Butler was not such as to constitute murder.

It follows that, whether, in shooting at Butler, appellant acted with malice or was justified, if in the same act, with no volition to injure his wife, he killed her, there could be but one offense, and the state, prosecuting under separate indictments for each of the homicides, would be concluded as to both by the judgment rendered in one of them. Cook v. State, 43 Tex. Crim. Rep. 185, 96 Am. St. Rep. 854, 63 S. W. 872; Rucker v. State, 7 Tex. App. 551; Sadberry v. State, 39 Tex. Crim. Rep. 466, 46 S. W. 639; Herera v. State, 35 Tex. Crim. Rep. 607, 34 S. W. 943; Moore v. State, 33 Tex. Crim. Rep. 166, 25 S. W. 1120; Carson v. People, 4 Colo. App. 463, 36 Pac. 551; Cooper v. Com. 106 Ky. 909, 45 L.R.A. 216, 90 Am. St. Rep. 275, 51 S. W. 789, 59 S. W. 524, 11 Am. Crim. Rep. 625; Coffey v. United States, 116 U. S. 436, 29 L. ed. 684, 6 Sup. Ct. Rep. 437; Scott v. State, 46 Tex. Crim. Rep. 310, 81 S. W. 950. In Rucker's Case, 7 Tex. App. 551, this court held that the rule inhibiting the indictment for two felonies in the same count did not render invalid an indictment which in a single count charged the accused with the murder of two persons by the same act,—citing numerous authorities, among them Clem v. State, 42 Ind. 420, 13 Am. Rep. 369, quoting from it, as follows: "If it be true, as we suppose it is, that the killing of two or more persons by the same act constitutes but one crime, then it follows that the state cannot indict the guilty party for killing one of the persons, and after a conviction or acquittal indict him for the killing of the other; for the state cannot divide that which constitutes but one crime, and make the different parts of it the bases of separate prosecutions."

Criminal law—double murder—acquittal of one—effect on other.

Where two persons are killed or injured in one transaction, the fact that more than one shot was fired does not, as a matter of law, render it insusceptible of proof that they were both killed by one act. A series of shots may constitute one act, in a legal sense, where they are fired with one volition. In cases where two persons have been killed or wounded by a series of shots, and under the general issue of not guilty it is urged as a defense that one of the homicides or injuries resulted from shots aimed at one striking another, the issue of singleness of the act and intent, bringing the double result, has not been made to depend on the number of shots fired. This is illustrated in Lankster v. State, 41 Tex. Crim. Rep. 603, 56 S. W. 65, and in Plummer v. State, 4 Tex. App. 310, 30 Am. Rep. 165, in each of which two shots were fired, and in the McCullough Case, 62 Tex. Crim. Rep. 128, 136 S. W. 1055, several shots were fired. In Cook v. State, 43 Tex. Crim. Rep. 185, 96 Am. St. Rep. 854, 63 S. W. 872, where the question of the identity of the act and volition resulting in two injuries was raised on plea

Same—killing two—firing more than one shot.

Same—series of shots—one act.

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of former acquittal, the court uses the following language: "The evidence shows that two shots were fired. According to the evidence of the defense, both of these shots were fired at Goodman. According to the evidence of the state, one of the shots was fired at the deceased, Hargrove. Then it becomes a question of fact, and the court should have admitted the evidence under defendant's plea, and then have charged the jury that if they believed from the evidence, beyond a reasonable doubt, that defendant shot at deceased, and not at Goodman, then they would find against appellant's plea of former acquittal, and proceed to consider whether or not defendant was guilty of any offense under other portions of the charge. . . . Where there is one act, one intent, one volition, as is evidenced by the testimony of appellant in this case, then appellant cannot be convicted upon an act, intent, and volition for which he had been previously acquitted."

We do not understand the Ashton Case, 31 Tex. Crim. Rep. 482, 21 S. W. 48, the Augustine Case, 41 Tex. Crim. Rep. 59, 96 Am. St. Rep. 765, 52 S. W. 77, and the Keaton Case, 41 Tex. Crim. Rep. 627, 57 S. W. 1125, as varying from this view. In each of them the plea was denied upon the ground that the two homicides were the result of separate acts, but the principle controlling them is thus stated in the Ashton Case, supra: "The true test in such cases must be, that, if the intent to kill the one is an intention formed and existing distinct from and independent of the intention to kill the other, the two acts cannot constitute a single offense."

Lillie's Case, 79 Tex. Crim. Rep. 615, 187 S. W. 482, is apparently in conflict with the case of Cook v. State, supra, and other cases cited in connection therewith. In the Lillie Case, however, the point passed upon was the refusal of a charge submitting the issue of former conviction. While the facts raised the issue, there was not, as in this case, specific testimony of intent of the accused to injure but one of the parties. If the Cook Case had been cited it is probable that the court would have held the charge proper. From the fact that it is not cited, either in the brief or the opinion, we draw the inference that it was not the intention of the court to overrule it.

Same—burden of proving plea.

Counsel for the state are correct in stating that the burden was upon appellant to prove his plea. Fehr v. State, 36 Tex. Crim. Rep. 96, 35 S. W. 381, 650, and 2 Bishop, New Crim. Proc. p. 634, from which we quote as follows: "The identity of the parties and of the offense, the defendant taking, as just said, the burden of proof, is shown by parol. It is so even though the two indictments are alike. A common method is to produce the testimony of persons who were present at the previous trial as to what was there investigated, and if it appears to be within the present indictment, a prima facie case is made, to be overcome only by proof from the other side of the diversity of the two offenses. Such witnesses need not be those of the former trial, the calling of whom is not indispensable, even though they are within reach of process."

Major Butler and Mrs. Spanell were both killed by pistol shots. Persons reaching them immediately after the shooting found three wounds, apparently fired at close range, in the head of Mrs. Spanell, each of them from a 38-caliber pistol, and in the body of Butler they found two similar wounds, and one fired from a 45-caliber pistol. Appellant claimed that while he was driving the automobile, sitting on the front seat, Major Butler and Mrs. Spanell sitting on the back seat, he was assaulted by Butler; that he got hold of the larger pistol which was in the car, and that in the struggle with Butler it was fired once, when he lost possession of it; that he was thrown out of the car,

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and fired at Butler several shots from the smaller pistol, having no desire or intent to shoot his wife.

The state claimed that the physical facts were such as to justify the court in deciding the issue raised by the plea against appellant without submitting it to the jury. They direct attention to the fact that there was evidence that appellant got out of the car during the struggle and fired a number of shots thereafter; that some shots were fired before he got or was thrown out of the car; that some of the wounds on Mrs. Spanell bore evidence of powder burns; that the wound inflicted upon Butler with the big pistol would have disabled him so that he could not have continued to fight, as appellant claims he did; that there was evidence that Mrs. Spanell spoke to appellant after he was out of the car, from which the state draws the inference that she was killed after Butler was killed, by a separate act and separate volition.

Same—question for jury—conflict of testimony.

We think that appellant's testimony, in connection with the circumstances attending the transaction, was such as to require the court to submit his theory to the jury. In Wilson v. State, 70 Tex. Crim. Rep. 355, 156 S. W. 1185, the question of mistake of identity of the person killed was supported by appellant's testimony alone, and a reversal resulted because it was ignored by the court. In McCullough v. State, 62 Tex. Crim. Rep. 128, 136 S. W. 1055, the issue as to whether appellant fired at another in self-defense when he killed his wife, as he claimed, unintentionally, was held raised by his testimony. In Koller v. State, 36 Tex. Crim. Rep. 496, 38 S. W. 44, the opinion states that the state produced strong testimony to show an intent to kill on the part of appellant, who was charged with murder, and concludes with the following statement: "He had a right to testify to his intention. He denies any such intention; hence we cannot assume that" it "was false."

Jury—credibility of accused.

When an accused avails himself of the privilege of testifying, given by article 790, Code Crim. Proc. he becomes a witness, and his credibility is for the jury. Vernon's Code Crim. Proc. p. 709. In Branch's Ann. P. C. § 1884, are listed many cases holding that an accused may testify to his intent and motive. See Berry v. State, 30 Tex. App. 423, 17 S. W. 1080; Lewallen v. State, 33 Tex. Crim. Rep. 412, 26 S. W. 832; Kinnard v. State, 35 Tex. Crim. Rep. 276, 60 Am. St. Rep. 47, 33 S. W. 234; Matthews v. State, — Tex. Crim. Rep. —, 42 S. W. 375; Turner v. State, — Tex. Crim. Rep. —, 51 S. W. 366; Murmutt v. State, — Tex. Crim. Rep. —, 67 S. W. 509; Pratt v. State, 50 Tex. Crim. Rep. 227, 96 S. W. 8; Money v. State, — Tex. Crim. Rep. —, 97 S. W. 91. Mr. Wharton in his work on Evidence, vol. 1, § 431, lays down the same proposition.

Evidence—intent of accused.

We do not think that the distinction with reference to carving, which is made with reference to the pleas of former jeopardy and former acquittal, and discussed in Wright v. State, 17 Tex. App. 158, justified the refusal of the trial court to submit the issues raised by appellant's plea to the jury. In Wright v. State, 37 Tex. Crim. Rep. 629, 40 S. W. 491, the authorities touching this distinction are reviewed and the rule recognized, as we understand it, that if the two alleged offenses are a result of a single act and volition the plea of former acquittal is available. The distinction mentioned was not considered by the court to render the plea presented in Cook's Case, 43 Tex. Crim. Rep. 185, 96 Am. St. Rep. 854, 63 S. W. 872, inoperative. That was a plea of former acquittal on the facts, raising the same legal propositions that must control in this case.

If Major Butler killed Mrs. Spanell, or if appellant, with separate acts and volition, killed her, the offenses were not identical. The stat-

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ute (Code Crim. Proc. art. 572) designates as the special pleas available, former conviction, former acquittal, which include former jeopardy. Pope v. State, 17 Tex. App. 345. We infer that the plea of res judicata, in so far as it is distinct from these, is not to be entertained. This perforce of the statute (art. 572), supra, which names, as one of the two special pleas permitted, "that he has been before acquitted by a jury of the accusation against him, in a court of competent jurisdiction, whether the acquittal was regular or irregular. It is the judgment of acquittal for the identical act and volition which will operate to sustain his plea, and the evidence, lack of evidence, or reasons which impelled the court to enter the judgment are not important further than as they bear on the issue of identity.

Criminal law—former acquittal—when available.

The doctor who examined the body of Mrs. Spanell immediately after the homicide went into details in the description of the wounds, which perhaps would not have been permissible except by reason of the issues raised by the plea of former acquittal, on the question as to whether the homicides were the result of separate acts. The state was entitled to have the condition of the bodies and the wounds thereon accurately described. It relied, in part, upon the physical facts to which the doctor's testimony related in part, to rebut the appellant's theory and evidence to the effect that the shots that killed Mrs. Spanell were fired at Butler with no intent to injure her.

Evidence—condition of body in other murder.

Appellant's attempt to prove certain vile remarks attributed to Major Butler, concerning women, was a means of proving character not sanctioned by the law as construed by the decisions of this court. Coffee v. State, 1 Tex. App. 550; Brownlee v. State, 13 Tex. App. 257; Holsey v. State, 24 Tex. App. 35, 5 S. W. 523.

Same—character—vile remarks.

The proof of the homicide of Mrs. Spanell was a part of the res gestæ and not to be excluded under the rule rejecting proof of other crimes. It was an essential part of the evidence on the plea of jeopardy.

Same—evidence of other crimes.

The conclusion of Mrs. Butler that shortly before the homicide Mrs. Spanell went upstairs to wash her hands, on account of having handled a letter possibly infected with tuberculosis, is not, we think, admissible against appellant in the absence of evidence of his knowledge of this purpose. What took place upstairs on the occasion mentioned was a part of the case, because appellant based his complaint of Major Butler, in part, upon his misconduct toward Mrs. Spanell upon that occasion, and it was the subject of the conversation which he claims took place in the automobile immediately preceding the homicide, and basis of a statement he claims his wife made to him immediately before he and Mrs. Spanell and Major Butler got into the automobile, touching insulting conduct and words of Major Butler, which was the immediate cause of the difficulty which resulted in the homicide. It was therefore permissible for the state to prove by Mrs. Butler what, in fact, took place.

Same—transaction out of which homicide arises.

The failure of the court to admit evidence and submit to the jury the issues raised by the plea of former acquittal requires a reversal of the judgment, which is ordered.

Davidson, P. J., concurring:

I concur with Judge Morrow in reversing the judgment. He places his decision upon that ground, in the plea of former acquittal, which pertains to the accused shooting at Butler and killing his wife in so shooting. I concur that, if the accused killed his wife lawfully or unlawfully in shooting at Butler, the plea of former acquittal should be sus-

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tained. This issue was passed on directly by the jury in the trial of appellant for shooting his wife, and decided in his favor under appropriate instructions. The accused cannot be tried twice for the same offense, whether the verdict be guilty or not guilty. If the same facts adduced in the trial for killing Butler were introduced and relied upon by the state for the killing of the wife, and a conviction had been obtained under any phase of the testimony, there would have been no doubt of his plea of former conviction. The jury having found in his favor, the state ought to be barred from further prosecution, so far as those phases of the case are concerned, on his plea of acquittal. Mr. Branch thus states the rule with reference to former conviction, and accurately: "If evidence of more than one offense is admitted, and a conviction for either could be had under the indictment or information, and neither the state nor the court elects, a plea of former conviction is good upon a subsequent prosecution, based upon one of said offenses; it being uncertain for which one the conviction was had. Deshazo v. State, 65 Ark. 38, 44 S. W. 453; Piper v. State, 53 Tex. Crim. Rep. 550, 110 S. W. 899; Alexander v. State, 53 Tex. Crim. Rep. 553, 110 S. W. 918; Fears v. State, 77 Tex. Crim. Rep. 297, 178 S. W. 519."

With reference to the plea of former acquittal found in Mr. Branch's Ann. P. C. p. 321, § 632, he states the rule: "If the case about to be tried is not based upon the identical indictment, information, or complaint upon which the former acquittal was had, the plea, to be sufficient, must set out the former indictment, information, or complaint, and show the identity of the party acquitted and the identity of the two offenses alleged, so that the plea will show upon its face that the proof necessary to secure a legal conviction in the instant case would have sustained a legal conviction in the former, and that the state is attempting to prosecute again for the same transaction. Boggess v. State, 43 Tex. 347; Williams v. State, 13 Tex. App. 288, 46 Am. Rep. 237; Jerue v. State, 57 Tex. Crim. Rep. 215, 123 S. W. 414."

He further states in this connection: "A plea of former acquittal is not good if the evidence necessary to support the second indictment, information, or complaint would not have been sufficient to sustain a legal conviction upon the first."

In support of this he cites a great number of authorities. For similar reasoning, the plea ought to be good if he killed her intentionally.

There has been a recognized difference between the pleas of former conviction and former acquittal. Some of the authorities hold that this is based upon the doctrine of carving. These are recognized and understood. Generally stated, the doctrine of carving would apply where the acts were different, or where evidence under one trial would not sustain a conviction under the indictment on which the party was tried, but I do not understand the rule to be that the doctrine of carving would apply in cases where the party could have been convicted under the indictment upon which he was first tried. The difference between the doctrine of former conviction and former acquittal was discussed in Simco v. State, 9 Tex. App. 338, and Wright v. State, 17 Tex. App. 158. Those cases lay down the rule that where a party may have taken several animals at one time from different owners, and was charged by separate indictments for these takings, an acquittal for taking one could not be pleaded in bar of a prosecution for taking any of the other cattle. This grows out of the proposition that the two indictments could not be supported by the same facts. The taking may have been the same, but the intents may have been different, and the ownership different. But, as we understand that rule, it does not impair the other rule; that is, if the accused could have been convicted under the indictment un-

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der which he was acquitted for the taking of any of the other cattle, the plea of former jeopardy or former acquittal would be good. This would be true whether we apply the doctrine of jeopardy, former conviction, or acquittal, or the doctrine of res judicata. So, it seems to me, not only from the adjudicated cases, but from the Constitution and statutes as well, that, where an accused can be convicted under an indictment that involves the same facts that would justify his conviction under a second indictment, he cannot again be tried, whether he be acquitted or convicted on the first trial. That idea proceeds upon the theory that there was, or could have been, an adjudication of all these matters under the first indictment, and the respective parties are bound by that adjudication and judgment.

Coming to the instant case, two propositions are relied upon to sustain the jeopardy plea: First, that appellant did not shoot his wife intentionally and by an independent act; and, second, that if he shot her at all he did so in shooting at Butler. The state relied for a conviction, and prosecuted the accused vigorously for killing his wife, upon two propositions: First, that the accused killed his wife intentionally; and, second, that if he did not he killed her in an unlawful assault upon Butler. As before stated, I do not care to discuss the last proposition, and so far as that viewpoint is concerned it is immaterial whether the killing of Butler was lawful or unlawful. Judge Morrow concurs in this view. This is the basis of his opinion.

As to the other proposition, the general rule is that where two or more offenses are committed in the same transaction, but were distinct in point of time and action so as to constitute different acts and intents, and the proof so shows, a plea of former conviction or acquittal can neither be sustained. But the other rule is as well and successfully established as that quoted; that is, that where evidence of more than one offense growing out of the transaction is admitted, and a conviction for either could be sustained or had under the indictment or pleading, then a plea of former conviction or acquittal can be successfully pleaded. The state's theory of the two transactions, and the right to prosecute for both, is based upon their proposition and the state's evidence to the effect that appellant killed his wife, and then turned upon Butler and killed him, or killed Butler and turned upon his wife and killed her. This, under the general rule, would make two different intents and purposes, well recognized by the authorities. If the matter stopped here, that phase of the case ought not to be presented to the jury under the plea of jeopardy, but this case does not stop here. It comes within the other rule stated; that is, under the indictment for killing his wife, he could have been convicted for killing, either intentionally or by accident, in shooting unlawfully at Butler. The state relied upon both theories, and the court submitted both issues to the jury. They could have found him guilty under either proposition under the other indictment, and their verdict would have been sustained, so far as that theory of the case is concerned; but they acquitted. Under the doctrine of former acquittal, this phase of the plea of jeopardy ought to be held good.

Applying the rule laid down in Simco and Wright Cases, supra, it would sustain the above statement of the law. Under the indictment in the Wright Case, for instance, if Wright could have been convicted for taking the other cattle not charged in the indictment under which he was tried, then his plea of former acquittal would have been good. Suppose the indictment in the case of killing Mrs. Spanell had contained two counts, and the state had gone to trial upon both, the first charging an intentional killing of his wife, and the second the killing the wife in an unlawful assault upon Butler, the state would not have been required to elect. It

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could have sustained the conviction under proper evidence under either count. But suppose in such case the state, or the court for the state, after the trial begun, appellant's plea entered, and the jury sworn, and at some subsequent stage of that trial, had dismissed as to one of the counts, or the court finally only submitted one of the counts, it would not be debatable that appellant was in jeopardy on both counts, and never could be tried again on the dismissed count, whatever the verdict might have been on that submitted to the jury, whether guilty or not guilty; and the same might be said had the indictment for killing Butler, from which this appeal is predicated, so charged. There would be no question of the fact that jeopardy would then apply. Here the only count in the former indictment necessarily embodied the unlawful killing of the wife in the unlawful shooting at Butler, and the verdict passed that out of the case, whether by the trial and acquittal, as effectually as by dismissing one of the counts, had such been in the indictment as before stated. The state replied as strongly, and properly, upon the facts to show the unlawful killing from both standpoints, as if there had been two counts in the indictment. It relied as strongly on one theory as on the other, and either would have supported a conviction on the first trial. The facts necessarily grew out of the tragedy in which Butler and Mrs. Spanell lost their lives. They were necessary to a decision of the case on both issues alike, at the hands of the jury, because both cases are the same on these issues. The state elected and relied upon both theories in the first case, and cannot now be heard to discount what was done in that case. The state cannot thus obtain a new trial, for it is interdicted by law. The state has neither the right to ask for a new trial nor take an appeal. If the state could indirectly secure a new trial in this way against the verdict of the jury in the former case, it could, with equal propriety, cogency, and legality, have asked for a new trial against that verdict directly in that case. This circumlocution would not have been necessary, and cannot be upheld.

Therefore I concur with Judge Morrow on the phase of the jeopardy he discusses. I am fully persuaded that the other ground is as fully and as legally correct as that discussed. I believe the plea of jeopardy should be sustained on both propositions.

A motion for rehearing having been filed, **Morrow**, J., on May 8, 1918, handed down the following additional opinion:

The original opinion was rendered after careful investigation and mature thought. A review of the subject leaves the writer convinced that, so far as he is able to judge, the conclusion reached was right. The subject is one upon which the courts are not in complete harmony. From Van Fleet's Former Adjudication, vol. 2, § 622, we quote as follows: "If several persons are injured in person or property by the same act, it is held in Connecticut, Georgia, Illinois, Indiana, Iowa, Missouri, New York, Texas, Vermont, and England, that there is but one offense; but the contrary is ruled in Arkansas, California, Kentucky, New York, South Carolina, and Virginia; while in Massachusetts it is decided that the state may elect to prosecute for one or for several offenses."

See also People v. McDaniels, 92 Am. St. Rep. 120, and note (137 Cal. 192, 59 L.R.A. 578, 69 Pac. 1006).

In the decisions of the courts mentioned we find but meager discussion of the procedure to be followed, when a plea like that in this case is filed. Appellant's counsel insist that upon such plea the record on the former trial should control, and the practice of res judicata follow. The writer is not able to agree with this contention. Res judicata, generally speaking, is applicable to civil cases. The principles touching it, in a sense, obtain in criminal pleas

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of former jeopardy. From Van Fleet's work, cited above, § 594, we take the following: "There is but little similarity between the rules which govern the doctrine of res judicata in civil and criminal cases."

At § 628 the author indicates that the principles of res judicata might be applied to a criminal case. The procedure, however, in determining the identity of the offense charged on pleas of this character, is not made clear. In People v. McDaniels, supra, are listed numerous cases illustrating the fact that on a plea of this kind parol evidence is heard to show the identity of the offenses, and that is in accord with the rule adduced from the numerous authorities cited by Mr. Bishop in his work on Criminal Procedure, p. 634, vol. 2, quoted in the original opinion, and in Van Fleet's work, supra, § 661, discussing the subject, the author says: "But when the former record showing those facts is introduced, the court cannot, as a question of law, rule the two offenses are identical; that must be left to the jury."

Criminal law—former acquittal—how determined.

See also, § 663.

It appears to be the rule followed by this court in the case of Benton v. State, 52 Tex. Crim. Rep. 422, 107 S. W. 837, and while the procedure is not discussed in several of the cases in this state involving the plea of former jeopardy where there was a double injury from one assault, a reading of the cases indicates that the procedure followed was to determine the identity of the offenses by parol evidence. See Keaton v. State, 41 Tex. Crim. Rep. 621, 57 S. W. 1125; Ashton v. State, 31 Tex. Crim. Rep. 482, 21 S. W. 48; Sadberry v. State, 39 Tex. Crim. Rep. 466, 46 S. W. 639, and other cases cited in the original opinion.

Our legislature, cognizant of the rules of res judicata referred to, passed the statute mentioned in the original opinion. While the statute as held in Powell v. State, 17 Tex. App. 345, and as indicated in some other instances, both by decisions and statutes, does not in fact include all of the special pleas that may be filed, it does, however, we think, indicate the legislative intent to provide a form of procedure in pleas of this character. We do not think the evidence heard upon the trial as to Mrs. Spanell is conclusive, either as to the state or the defendant, as to the identity of the offenses. If there was but one offense committed, the acquittal in the trial for the murder of Mrs. Spanell would operate as a complete discharge of appellant, although there had been no evidence introduced upon the trial of that case. Under the statute as we construe it, it is the acquittal of the same offense which discharges him. He is now charged with the murder of Major Butler. He claims in his plea that the killing of Major Butler and Mrs. Spanell was but one offense; that by the same act that he killed Major Butler he killed Mrs. Spanell, with no intent or volition to injure her, and that he has been tried and acquitted for her murder. He assumes the burden of proof to sustain his plea. The procedure to be followed in making this proof is that laid down by this court in the leading case of Cook v. State, 43 Tex. Crim. Rep. 187, 96 Am. St. Rep. 854, 63 S. W. 873, which is relied on by appellant, and from which we take the following quotation: "The evidence shows that two shots were fired. According to the evidence of the defense, both of these shots were fired at Goodman. According to the evidence of the state, one of the shots was fired at the deceased, Hargrove. Then it becomes a question of fact, and the court should have admitted the evidence under defendant's plea, and then have charged the jury that if they believed from the evidence, beyond a reasonable doubt, that defendant shot at deceased, and not at Goodman, then they would find against appellant's plea of former acquittal, and proceed to consider

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whether or not defendant was guilty of any offense under other portions of the charge."

The fact that appellant had been indicted and acquitted for the murder of Christabel Spanell was provable by the indictment and judgment. The fact that Christabel Spanell, for whose murder he was tried, was the same person he killed in the transaction in which Butler lost his life, and the alleged fact that she was killed by shots fired at Butler, and that appellant had no intent or volition to kill her, were facts lying in parol, which, when testified to, would make a prima facie case, which the state by parol evidence might rebut, by any evidence, circumstantial or direct, relevant under the rules of evidence to solve the controverted issue of the identity of the offenses.

On the issues arising out of the plea of former acquittal, the evidence of the doctor who described the wounds upon Mrs. Spanell was admissible, except, perhaps, that part where he makes the comparison to an eggshell might, on specific objection, be regarded as argumentative.

We endeavored to make plain our view with reference to the testimony of Mrs. Butler when we stated in the original opinion the following: "It was therefore permissible for the state to prove by Mrs. Butler what in fact took place." Supplementing what is stated in that opinion, we will add that the part of Mrs. Butler's testimony mentioned in the bill, which we think should have been excluded, was that part of it in which she stated, as her conclusion, the purpose for which Mrs. Spanell went upstairs in the hotel.

The motion for rehearing is overruled.

Prendergast, J.:

I concur in the conclusions of Judge Morrow in his opinion.

Davidson, P. J., concurring (May 10, 1918):

Adhering to what I stated in my concurring opinion on the original hearing, I wish to say, in connection with the majority opinion overruling the state's motion for rehearing, that upon a careful review of the matters involved and decided I am convinced of the correctness of what I formerly wrote.

Two issues were presented and decided on the trial for killing his wife: First, that appellant killed his wife by an independent act and not in connection with shooting at Butler; second, that he killed her in killing Butler. There were two phases presented by the latter proposition; one by the state, that he illegally killed her in killing Butler, and the other by defendant, that he killed her in killing Butler in self-defense. These issues were presented by the testimony and the charge, and were decided by a verdict favorable to appellant. It is not questioned that the jury had the right to and did pass upon these questions under the indictment charging him with killing his wife. Had the jury believed that he killed his wife independent of shooting at Butler, they certainly would have convicted, and were so instructed by the court. They therefore necessarily decided that he did not kill her by an independent act. This ought to eliminate the question of two separate and distinct killings by separate and distinct motives. In regard to the second proposition, the jury decided, under appropriate instructions from the court, that he killed his wife accidentally in killing Butler in self-defense. Simco v. State, 9 Tex. App. 338, is authority for the proposition that, if the accused can be convicted under the indictment of the subject-matter to be tried under the second indictment, his former acquittal plea is good. This was followed in Wright v. State, 17 Tex. App. 152, and in Hooper v. State, 30 Tex. App. 412, 28 Am. St. Rep. 926, 17 S. W. 1066.

It is legally a self-evident proposition that appellant's guilt or innocence in killing his wife depended upon the legality of killing Butler. Both propositions were fully adju-

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dicated, and necessarily so by the jury on appellant's trial for killing his wife, followed by the adjudication of the court as the result of that verdict. The former jury could not have acquitted without necessarily deciding that he was legally justified in killing Butler. The issues were sharply drawn, squarely met, and emphatically decided and adjudicated. The state cannot try appellant again for such killing, whether it be former acquittal, or former conviction, or res judicata. One trial on the law and the facts precludes a further prosecution by the state. The state cannot appeal from such adverse adjudication, whether that appeal is sought to be made to the courts or the jury. The decision is a final determination of the case and involved issues. It is res judicata and final. This is well settled in this state. See Anderson v. State, 24 Tex. App. 705, 7 S. W. 40; Augustine v. State, 41 Tex. Crim. Rep. 59, 96 Am. St. Rep. 765, 52 S. W. 77; Murff v. State, 76 Tex. Crim. Rep. 5, 24, 172 S. W. 238. Some of the cases are collated in the Murff Case, in the opinion on rehearing which is found on page 24. The reasoning in these cases is sound and the conclusions reached are legally correct. The jury determined, and the court decided, on the trial for killing his wife: First, that he did not kill her by an independent act; that there were not two separate killings. This, therefore, eliminated the question of two distinct killings. Second, that he accidentally killed his wife in legally killing Butler. Necessarily both issues were decided, because they were raised by the facts, submitted in the charge of the court, and decided by the jury, and this was followed by the adjudication in the judgment.

With reference to the question of res judicata, in addition to the cases above cited, see Cooper v. Com. 106 Ky. 909, 45 L.R.A. 216, 51 S. W. 789, 59 S. W. 524, 11 Am. Crim. Rep. 625; Petit v. Com. 22 Ky. L. Rep. 262, 57 S. W. 14; United States v. Butler (D. C.) 38 Fed. 498; Coffey v. United States, 116 U. S. 436, 24 L. ed. 684, 6 Sup. Ct. Rep. 437; Shideler v. State, 129 Ind. 523, 16 L.R.A. 225, 28 Am. St. Rep. 206, 28 N. E. 537, 29 N. E. 36. See also, Gelston v. Hoyt, 3 Wheat. 246, 4 L. ed. 381; Rex v. Kingston, 20 How. St. Tr. 355–538. Judge Van Fleet says, in his treatise on the law of Former Adjudication, p. 1242, § 628: "If there is a contest between the state and defendant in a criminal case over an issue, I know of no reason why it is not res judicata in another criminal case,"—citing a number of American decisions in support of the text.

The state had its day in court on both issues, and lost by a legal adjudication on both questions. It would seem to follow, therefore, necessarily, that further prosecution cannot be had, but is barred from any legal viewpoint, whether former acquittal, former conviction, or res judicata.

I concur in the reversal, but am of the opinion that the majority should have gone further, and decided the questions I have above mentioned in their opinion. The plea in bar called for such decision favorable to such plea.

ANNOTATION.

Acquittal on charge as to one as bar to charge as to the other, where one person is killed or assaulted by acts directed at another.

The cases in this note, although differing somewhat on the facts, generally support the reported case (SPANELL v. STATE, ante, 593) which, it will be observed, considers that there can be but one offense where a person, with no volition to injure his wife, killed her in firing at and killing another, whether justifiably or with malice; and that an acquittal of accused on a trial for the murder of the wife will bar a subsequent prosecu-

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tion of accused for the murder of the other person killed, the decision that accused was innocent of the murder of his wife necessarily involving the finding that his act in firing at the other person was not such as to constitute murder. In this case several shots were fired by accused, but the court observes that a series of shots may constitute one act, in a legal sense, where they are fired with one volition.

So, as a controlling case (SPANELL v. STATE) refers to Cook v. State (1901) 43 Tex. Crim. Rep. 185, 96 Am. St. Rep. 854, 63 S. W. 872, where the question of the identity of the act and volition resulting in two injuries was raised on plea of former acquittal. In the Cook Case, defendant fired two shots in rapid succession at one person, one of the shots killing a third person. A plea of former acquittal of assault with intent to murder the person at whom the shots were fired was considered a bar to a prosecution for the murder of such third person, the court stating that where there is one act, one intent, one volition, as is evidenced by the testimony of assailant in this case, then assailant cannot be convicted upon an act, intent, and volition for which he has been previously acquitted.

Both of the above cases were reversed because of failure to submit to the jury a plea of former acquittal. The court in Cook v. State observed that the rule in reference to pleas of this character is, that if the plea shows upon its face that they are different transactions, independent of and not connected with each other, then it is proper for the court to sustain the motion to strike out the plea. But if the plea presents a question of fact, then it is a question for the jury, and not for the court. In other words, the rule to be deduced from the authorities is, that, where the offenses charged in different indictments are so diverse as not to admit of proof that they are the same, the courts may decide the issue without submitting it to the jury.

In Moss v. State (1917) — Ala. App. —, 75 So. 179, accused fired four shots in rapid succession at one person, killing him, and in so doing unintentionally killed an innocent bystander. The court stated that it may be conceded —and it is the law—that where a man kills two men in quick succession with a formed design as to each man, there are two offenses; but where the killing is pursuant to, and is a continuation of, the assault, and done under the impulse of the same design, it is but one act. It therefore follows that if accused, without any design or intention, killed an innocent bystander while engaged in defending his own life or limb, under such circumstances as would justify him in so doing, and a court of competent jurisdiction had so held, and acquitted him upon the charge, he cannot again be put in jeopardy for the same offense.

Where a woman was killed in a quarrel between accused and her husband, by one of two or three shots fired in rapid succession by accused at the husband, it was stated in Carson v. People (1894) 4 Colo. App. 463, 36 Pac. 551, that under a statute declaring that involuntary manslaughter is the killing of a human being without intent, in the commission of an unlawful act, or a lawful act, which probably might produce such a consequence, in an unlawful manner; provided that where such involuntary killing shall happen in the commission of an unlawful act, which, in its consequences, naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent, the offense shall be deemed and adjudged to be murder, a conviction of involuntary manslaughter for the killing of the wife could be pleaded as a former acquittal of an assault with intent to kill the husband, for, in arriving at a verdict of involuntary manslaughter, the jury necessarily found that, in committing the act resulting in the death of the wife, accused was guilty of no violation of law. The court said: "If they had found the act which produced her death to be unlawful, or to have been committed in the prosecution of a felonious intent, they would have been compelled to find the defendant guilty

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of murder; but to agree upon a verdict of involuntary manslaughter, they necessarily found that, although the act which resulted in the death of . . . [the wife] was committed in an unlawful manner, yet the act itself was lawful. The defendant in his plea alleged, in substance, that the assault charged in this information, and the affray which cost . . . [the wife's] life, were one and the same transaction. The demurrer admitted this to be true, and, so accepting it, the only question which was tried, or which could possibly have been tried, in the first case, was the character of the assault charged in this, and the verdict of involuntary manslaughter was, as to the alleged felonious assault upon . . . [the husband], a verdict of acquittal." The court further stated that if the assault by accused upon the husband, which caused the wife's death, was felonious, he would have been guilty of murder, and his conviction of that crime might have been no bar to this prosecution, although there are cases which hold otherwise; but, as the assault was found and adjudged not to be an offense, the question of the legal effect of one unlawful act, operating upon different objects, was not in the case.

Where defendant pleaded former acquittal of the murder of one person as bar to prosecution for assault with intent to murder another, the court in Burnam v. State (1907) 2 Ga. App. 395, 58 S. E. 683, said: "The same-transaction test adopted in this state may make a trial for the murder of one person a bar to a prosecution for assault with intent to murder a different person. For instance, if the defendant shot at A, intending to kill him, and by reason of bad marksmanship struck and killed B, whom he did not intend to kill, the transactions, the assault with intent to murder A and the actual murder of B, are legally the same. As intimated by this court in the case of Fews v. State (1907) 1 Ga. App. 122, 58 S. E. 64 [plea of former conviction], if by separate shots the defendant wounded two persons, the transaction would be single if the shooting was done in repelling a joint assault of these two persons. The intent of the defendant determines the matter."

Where, during a fight at night, accused struck two persons, one of them by mistake, thinking he was the other with whom accused had the quarrel, it was stated in Jones v. State (1889) 66 Miss. 380, 14 Am. St. Rep. 570, 6 So. 231, that a former acquittal of assault and battery with intent to kill the person purposely struck was a bar to a prosecution for assault and battery, or simple assault, upon the person unintentionally struck.

Where, however, one attempted to kill another and, in the struggle to disarm the assailant, a third person was accidentally shot and killed, it was held in Winn v. State (1892) 82 Wis. 571, 52 N. W. 775, that an acquittal of the murder of the person accidentally shot was no bar to a prosecution for assault with intent to kill the person purposely attacked. "The special plea in bar of this prosecution," observed the court, "sufficiently avers that the charge of the murder of Coates in the first information, and the charge of an assault with intent to murder Defoy in the present information, are predicated upon one and the same act of Winn. It is correctly argued in the plea, as it was at the bar, that if he committed the alleged felonious assault upon Defoy, and in doing so killed Coates, although unintentionally, he is guilty of murder. But the jury acquitted him of the crime of murder, and from that fact the inference is plausibly drawn that the jury must necessarily have negatived the alleged felonious assault upon Defoy, for otherwise they would have convicted Winn of the murder charged. It was very earnestly and ingeniously contended in argument by the learned counsel for Winn that, in substance and legal effect, such acquittal is an acquittal of the charge of felonious assault in the present information, and that by compelling the accused to trial therefor he was put twice in jeopardy of punishment for the same offense, in violation of the constitutional and statutory declaration of rights in that behalf." The court goes

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on to say: "We adopt as the law on this subject the rule laid down by Chief Justice Shaw in Com. v. Roby (1832) 12 Pick. (Mass.) 496. The rule is that the offenses charged in two indictments are not identical unless they concur both in law and in fact, and that the plea of autrefois acquit or convict is bad, if the offenses charged in the two indictments be distinct in law, no matter how closely they are connected in fact. In order to determine whether there is a concurrence in law, that is, whether a conviction or acquittal on one indictment is a good bar to a prosecution on another, the true inquiry is whether the first indictment was such that the accused might have been convicted under it, by proof of the facts alleged in the other indictment. If he could not, the conviction or acquittal under the first indictment is no bar. The result of an application of this test to the present inquiry is obvious. Winn could not have been convicted of the murder of Coates merely upon proof that he made a felonious assault upon Defoy. Proof that he killed Coates would also be required. Hence, an acquittal on the information charging the murder of Coates is no bar to this information for a felonious assault on Defoy, and the special plea was properly overruled." This language seems to be inconsistent with the view taken by the reported case (SPANELL V. STATE, ante, 593) and the other cases cited in the note. The case, however, is distinguishable upon its facts, as it appeared that the felonious assault upon Defoy was a distinct transaction, which had no connection with the killing of Coates, such killing having resulted from the struggle to disarm the defendant after he had pointed and snapped his revolver at Defoy; and, as the court observed, the acquittal on the charge of murder of Coates was very likely upon the ground that it was accidental, and the jury may not, and probably did not, consider whether accused intended to kill Defoy, or not, when the revolver missed fire. The hypothesis of the reported case (SPANELL V. STATE), of the killing of one person by an act directed at another, was, therefore, not presented in the Winn Case, which involved two distinct offenses, though they were connected in time, and were traceable to the same original difficulty. J. D. C.

JACOB J. HARMON et al., Appts.,

v.

THOMAS E. BOLLEY et al.

Indiana Supreme Court — June 28, 1918.

(— Ind. —, 120 N. E. 33.)

Tax — due process — arbitrary assessment for public improvement.

1. The fixing by the legislature of an arbitrary standard for the apportionment of special assessments for a public improvement, without opportunity to be heard as to benefits actually conferred, is invalid, as failing to provide due process of law.

[*See note on this question beginning on page* 625.]

Same — special assessment — power of legislature.

2. The legislature has power to authorize the imposition of special assessments to pay the cost of local improvements of a public nature on property affected thereby, subject to the limitations imposed thereon by the Constitution.

Constitutional law — due process — special assessments.

3. The provision of the 14th Amendment of the Federal Constitution, forbidding the taking of property of a citizen by a state without due process of law, applies as a restriction on the power to levy and collect a special assessment for local improvements.

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Courts — Federal and state — construction of state Constitution.

4. In determining the meaning and application of a provision of a state Constitution, the state supreme court has the last word, and the Federal courts will follow the decisions of the state courts on such questions.

Same — interpretation of Federal Constitution.

5. The Supreme Court of the United States has the last word when the meaning and application of the Federal Constitution is involved, and the courts of the several states are bound by the decisions of that court on that question.

Constitutional law — compensation — application of provision.

6. A statute forbidding the taking of private property for public use without just compensation applies only to the taking of specific property under the power of eminent domain, to be devoted to a public or quasi public use.

Same — special assessment.

7. A constitutional provision against taking private property for public use without just compensation does not apply to the levying of special assessments to pay the cost of public improvements.

Same — what is due process of law.

8. A proceeding, to constitute due process of law, should be just to the parties to be affected, and provide for a notice and hearing when necessary to a just protection of private rights.

Same — protection of life and liberty.

9. Notice and hearing are essential to due process of law in a proceeding which involves the life or liberty of a citizen.

Same — police power.

10. Notice and hearing of a judicial nature are not essential to due process of law where the state is engaged in the exercise of the police power.

Same — taxing power.

11. In the exercise of the taxing power for the purpose of raising revenue to defray the expenses of the government, due process of law does not require that property subject to the tax, or the amount of the tax to be raised, shall be determined by a judicial inquiry.

Tax — amount — necessities of the government.

12. The amount of money which a government has power to raise by taxation to administer the affairs of the government is limited only by the necessities of the government.

Same — special assessment — amount.

13. The amount which may be raised by special assessment for a local improvement is limited by the actual benefits which accrue to the property affected thereby.

Drainage — jurisdiction — invalidity of statute.

14. A proceeding for the repair of a drainage ditch, jurisdiction of the court over which depends upon an unconstitutional statute, should be dismissed when the court's attention is called to the invalidity of the act.

APPEAL by objectors from a judgment of the Circuit Court for Miami County, overruling their objections and motion to dismiss proceedings for the cleaning and repair of a public ditch. *Reversed.*

The facts are stated in the opinion of the court.

Mr. **Robert L. Loveland** for appellants.

Mr. **Albert H. Cole** for appellees.

Lairy, J., delivered the opinion of the court:

Appellees filed their petition in the Miami circuit court, asking for the cleaning and repair of a public ditch located in the counties of Miami and Wabash, and known as the "Squirrel creek ditch." The proceeding was had under a statute of this state specially providing for proceedings for the repair of public ditches constructed by means of a steam shovel or floating dredge. Acts 1911, p. 681, Burns's Anno. Stat. 1914, §§ 6161o–6161p. The petition was by the court referred to the county surveyor of Miami county, with directions to make an examination of the ditch proposed to be cleaned, and to report to the court as provided by the first section cited. The surveyor filed a written report in favor of the proposed

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clean-out, with complete specifications for repairs, whereupon notice by publication for two weeks was given by the clerk of the court, all as provided by the act cited.

On the return day fixed in the notice, appellants appeared and filed verified objections to the jurisdiction of the court on the ground that the statute hereinbefore cited, which purports to confer jurisdiction on the court to order the repair of ditches in the manner therein provided, is void for the reason that its provisions with reference to the manner in which assessments are to be made conflict with certain provisions of the state and Federal Constitutions. This objection and motion to dismiss the proceedings was overruled, which ruling is assigned as error, and presents the first question for consideration on appeal.

The statute under consideration provides for a hearing on the report after notice, on which the court shall determine whether such ditch shall be repaired, and, in case the finding is in favor of such report, the courts shall determine the order and manner in which said ditch shall be cleaned; and after such order has been made, the clerk shall let the contract, after giving the notice provided, to the lowest responsible bidder, which contract shall be approved by the court. The costs of such repairs, including the per diem of the county surveyor and printer's fees for the publication of all necessary notices, shall be paid by the persons, corporations, corporate roads, and railroads who are the owners of lands or rights of way originally assessed for the cost of construction of said ditch, in proportion to their original assessments as levied and made for the construction of said ditch. It is made the duty of the clerk of the court in which such proceeding is had to make a computation of the several assessments to be made and levied for such repair work by distributing the total cost of construction and the other expenses incidental thereto as in this act provided, and to prepare a report of the same, giving the name of the landowner assessed as the same appears on the tax duplicate, a description of his lands, and the amount to be apportioned to said lands, whereupon such report shall be submitted to the court for approval. If the court finds the report to be correct, it shall approve the assessments as made and fix the time within which the same shall be paid. Under the provisions of the act, all assessments paid to the clerk within the time fixed by the court shall be turned over to the county treasurer for the purpose for which the same were intended, and it is made the further duty of the clerk to certify all assessments not paid within such time to the county auditor, to be placed on the tax duplicate, and collected with a penalty of 10 per cent, as other taxes are collected.

Appellants' position is that the provisions of the act with reference to the allotment of the costs and expenses of the repairs is in conflict with the provisions of the 14th Amendment to the Federal Constitution and also of § 21, art. 1, of the Constitution of Indiana. The section of the state Constitution relied on provides that no man's property shall be taken without just compensation, and the 14th Amendment of the Federal Constitution provides that no state shall deprive any person of life, liberty, or property without due process of law. It is the theory of appellants that the statute under which the proceedings were had provides for the apportionment and assessment of the costs and expenses of the repair to the several tracts and parcels of land affected in an arbitrary manner, without regard to the real or actual benefits which will accrue to each parcel of land by virtue of the proposed improvement, and that no provision is made by the statute whereby appellants are entitled to a notice or hearing by which the actual benefits to their

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lands may be determined by any tribunal. If the statute is followed, it is apparent that an assessment will be placed against the lands of appellants which will bear the same ratio to the total costs and expenses of the proposed repairs as the original assessments against said lands bore to the total assessments made for the construction of the ditch originally, and that no provision is made whereby they can challenge the amount of the assessment so made as being in excess of the actual benefits accruing to their lands on account of such repair.

By their verified motion to dismiss the proceeding for want of jurisdiction, appellants stated that their several tracts of land would not be benefited to any extent by the proposed clean-out, thus showing that any assessment apportioned against such lands would be in excess of the actual benefits accruing thereto.

The question here presented involves a consideration of the power vested in the legislature of the state to authorize the imposition of special assessments to pay the cost of local improvements of a public nature on property affected thereby, in connection with the limitations placed on such power by the constitutional provisions to which we have referred. That such power exists subject to such limitations is settled beyond controversy. Bemis v. Guirl Drainage Co. (1914) 182 Ind. 36, 105 N. E. 496; Anderson v. Kerns Draining Co. (1860) 14 Ind. 199, 77 Am. Dec. 63. The difficulty arises in determining the application and effect of the two constitutional provisions under consideration. Do both of such provisions apply to the power of imposing such special assessments? If not, does one of them apply, and, if so, which one? The authorities hold with practical unanimity that the provision of the 14th Amendment to the Federal Constitution forbidding the taking of the private property of a citizen by a state without due process of law applies as a restriction on the power to levy and collect such special assessments; but there is hopeless confusion in the authorities as to the applicability of the provisions of state Constitutions similar to ours, forbidding the taking of private property for a public use without just compensation. By a number of decisions of this court it is held that the inhibition against the taking of private property for a public use without just compensation, as found in § 21, art. 1, of our Constitution, applies only to the taking of property under the power of eminent domain, whereby some specific property is taken from the owner and devoted to a public use. Hanly v. Sims (1910) 175 Ind. 345, 353, 93 N. E. 228, 94 N. E. 401; State v. Richcreek (1906) 167 Ind. 217, 223, 5 L.R.A.(N.S.) 874, 119 Am. St. Rep. 491, 77 N. E. 1085, 10 Anh. Cas. 899; Jackson County v. State (1896) 147 Ind. 476, 492, 46 N. E. 908; Aurora v. West (1857) 9 Ind. 74; Chicago & N. W. R. Co. v. Elmhurst (1897) 165 Ill. 148, 154, 46 N. E. 437; Roberts v. Smith (1897) 115 Mich. 5, 8, 72 N. W. 1091; Heman v. Schulte (1901) 166 Mo. 409, 419, 66 S. W. 163. In other cases decided by this court, however, this constitutional provision has been invoked and applied as a limitation on the power to make such special assessments where the assessment imposed exceeded the actual special benefits. Parke County Coal Co. v. Campbell (1894) 140 Ind. 28, 35, 39 N. E. 149, 558; Campbell v. Dwiggins (1882) 83 Ind. 473, 480; Trimble v. McGee (1887) 112 Ind. 307, 310, 14 N. E. 83.

In such cases the two constitutional provisions under consideration have frequently been referred to indiscriminately, the court saying that the enforcement of such assessment as to any excess above the actual benefits to the prop-

Tax—special assessment—power of legislature.

Constitutional law—due process—special assessments.

Courts—Federal and state—construction of state Constitution.

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erty affected would constitute the taking of property for a public use without just compensation and without due process of law. The confusion has arisen on account of the failure by the courts, in some cases, to observe any distinction in making the application of the two constitutional provisions under consideration. This distinction may be important in case of conflict between the decisions of the state courts and the Federal courts. In determining the meaning and application of provisions of a state Constitution, the supreme court of the state has the last word, and the Federal courts, including the Supreme Court of the United States, will follow the decisions of a state on such questions. Old Colony Trust Co. v. Omaha (1912) 230 U. S. 100, 116, 57 L. ed. 1410, 1416, 33 Sup. Ct. Rep. 967; Missouri, K. & T. R. Co. v. Cade (1913) 233 U. S. 642, 647, 58 L. ed. 1135, 1136, 34 Sup. Ct. Rep. 678. On the other hand, the Supreme Court of the United States has the last word when the meaning or application of a provision of the Federal Constitution is involved, and the courts of the several states are bound by the decisions of that court on such questions. Cook v. Moffat, 5 How. 295, 307, 12 L. ed. 159, 165; State v. Woodward (1883) 89 Ind. 110, 114, 46 Am. Rep. 160; 6 R. C. L. § 82, "Constitutional Law."

Same—interpretation of Federal Constitution.

In considering and applying § 21 of article 1, we must be controlled by the decisions of this court and by such reasons as may appear to this court to be sound; but if we are called on to consider and apply the "due process of law" provision of the Federal Constitution, we are controlled by the decisions of the Supreme Court of the United States, irrespective of the views of this court. It is evident that the two constitutional provisions under consideration are not identical in their meaning, scope, and application. This appears from the fact that both of such provisions are embodied in the 5th Amendment to the Federal Constitution, limiting the powers of the Federal government, and from the further fact that, when the 14th Amendment was adopted as a limitation on the powers of the states, the inhibition against depriving a citizen of life, liberty, or property without due process of law was embodied therein substantially as found in the 5th Amendment, while the other provision of that Amendment, forbidding the taking of private property for a public use without just compensation, was omitted from the 14th Amendment.

From what has preceded it will be seen that this court is of the opinion that § 21, art. 1, of our state Constitution, can properly be said to apply only to the taking of specific property under the power of eminent domain, to be devoted to a public or quasi public use. If taken for the use of the state, the damages need not be assessed and tendered before the property is taken, but if taken for any other use, the damages must be first assessed and tendered. The provisions of this section seem to indicate that the makers of the Constitution had in mind the taking of property under the power of eminent domain, and that it was not intended to apply to an exercise of the police power of the state, or to its taxing power in any of its forms. Sidener v. Norristown, H. & St. L. Turnp. Co. (1864) 23 Ind. 623; Stone v. Fritts (1907) 169 Ind. 361, 366; 15 L.R.A.(N.S.) 1147, 82 N. E. 792, 14 Ann. Cas. 295; Hanly v. Sims (1910) 175 Ind. 345, 93 N. E. 228, 94 N. E. 401.

Constitutional law—compensation—application of provision.

Same—special assessment.

The court is not unmindful of certain language employed by this court in some former decisions to the effect that the enforcement of an assessment against private property in excess of the actual benefits

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accruing to it by reason of an improvement, when imposed under a law making no provision as to a hearing on the question of actual benefits, is, as to such excess above actual benefits, a taking of private property without just compensation; but, after careful consideration, such expressions are not regarded as deliberate statements of the opinion of the court, made after a careful consideration of the meaning and application of § 21 of article 1 of our state Constitution, as compared with that of the "due process of law" provision of the Federal Constitution. If a special assessment, under a law making no provision as to a hearing on the question of actual benefits, is in excess of such actual benefits, it may be invalid, but, if so, it is because it conflicts with the "due process of law" provision of the Federal Constitution and for no other reason.

The Supreme Court of the United States has declined to attempt a definition of what amounts to due process of law, saying: "What constitutes that process it may be difficult to define with precision so as to cover all cases. It is, no doubt, wiser, as stated by Mr. Justice Miller in Davidson v. New Orleans, to arrive at its meaning 'by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded.' 96 U. S. 97, 104, 24 L. ed. 616, 619. It is sufficient to observe here that by 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and, wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty, or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights." Hagar v. Reclamation Dist. (1883) 111 U. S. 701, 707, 28 L. ed. 569, 571, 4 Sup. Ct. Rep. 663, 667.

It is apparent that this inhibition of the 14th Amendment is very broad in its scope and comprehensive in its application. The decisions of the Supreme Court of the United States seem to indicate that the provision applies to every exercise of the governmental power of a state whereby a citizen may be deprived of property in a manner which is not in accordance with the law of the land or with the due course of law. In determining what amounts to due process of law, the nature of the governmental power called into exercise should be considered as well as the result which is to be accomplished by the proceeding, and the method or process adopted should be suited to a proper and efficient exercise of the governmental power, and should be adapted to attain the desired result. It should be just to the parties to be affected, and should provide for a notice and hearing when necessary to a just protection of private rights. Turpin v. Lemon, 187 U. S. 51, 47 L. ed. 70, 23 Sup. Ct. Rep. 20. A notice and hearing are held to be essential to proceedings which involve the life or liberty of a citizen. Hagar v. Reclamation Dist. supra; Simon v. Craft (1900) 182 U. S. 427, 45 L. ed. 1165, 21 Sup. Ct. Rep. 836; Japanese Immigrant Case (Yamataya v. Fisher) 189 U. S. 86, 100, 47 L. ed. 721, 23 Sup. Ct. Rep. 611. "Due process of law in each particular case means such an exercise of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the

Same—what is due process of law.

Same—protection of life and liberty.

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one in question belongs." Cooley, Const. Lim. p. 441.

A notice and a hearing of a judicial nature are not essential in all cases to due process of law, for the reason that such a proceeding is not ordinarily appropriate to the exercise of the particular governmental power invoked, and is not well adapted to accomplish the result desired. No such procedure is required by the 14th Amendment, where a state is engaged in the exercise of its police power. Bartemeyer v. Iowa, 18 Wall. 129, 21 L. ed. 929. In the case of Doe ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 15 L. ed. 372, it was held that a notice and hearing of a judicial nature were not essential to due process of law in the enforcement of a balance due from a collector of customs by a distress warrant issued by executive authority prescribed by law.

Same—police power.

It is thus seen that due process of law does not, in all cases, require a regular proceeding in a court of justice or after the manner of such courts. In the exercise of the taxing power for the purpose of raising revenue to defray the expenses of government, due process of law does not require that the property subject to the tax or the amount of tax to be raised should be determined by a judicial inquiry. It is said: "Taxes have not, as a general rule, in this country since its independence, nor in England before that time, been collected by regular judicial proceedings. The necessities of government, the nature of the duty to be performed, and the customary usages of the people, have established a different procedure, which, in regard to that matter, is and always has been, due process of law." Kelly v. Pittsburgh, 104 U. S. 78, 26 L. ed. 658.

Same—taxing power.

"The prompt payment of taxes is always important to the public welfare. It may be vital to the existence of a government. The idea that every taxpayer is entitled to the delays of litigation is unreasonable." Springer v. United States, 102 U. S. 586, 26 L. ed. 253.

What amounts to due process of law must depend to some extent on the power of government which is being exercised and the purpose to be accomplished. The means adopted must be appropriate to the power and suitable to the end to be attained. In the exercise of the power to levy taxes for the support of government, a notice and hearing as to the amount of the tax and the manner in which it shall be apportioned is not generally necessary to due process of law; but the means which are suitable and adequate in the exercise of such power, where special benefits are not involved, would not necessarily be adapted to reach the desired result where assessments are to be made in accordance with special benefits.

There can be no doubt that special assessments, imposed on property affected by a local improvement of a public nature, to pay the costs and expenses of such improvement, are regarded as a species of taxation; but it is equally true that money so raised does not constitute any part of the general revenue of the state or of any municipality organized for governmental purposes. Such special assessments differ from taxes levied for government revenue in several important particulars. In the purposes for which they are imposed, in the principles upon which they are based, and in the objects for which their proceeds are expended, such assessments are so dissimilar to general taxes as to clearly differentiate the one from the other.

A distinction should be drawn and observed between the power to levy and collect taxes for general governmental purposes and the power to make such special assessments. The power to tax for the purpose of raising revenue to administer the affairs of government is the highest sovereign power. The amount of money which a government has

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power to raise by taxes for such purposes is limited only by the necessities of the government. The government extends to the citizen the protection of its laws, and he enjoys the rights, privileges, and immunities of citizenship. One of the highest duties of a citizen is to contribute to the public support of the government under which he lives. Taxes levied for general revenue purposes are not based on the principle of special or peculiar benefit to the individual taxpayer, but are levied for the general benefit and welfare of the nation, state, or municipality. Such taxes are not apportioned on the theory that each citizen is specially benefited by the maintenance of the government to the extent of the amount of the tax imposed. The benefits accruing to a taxpayer as a result of living under organized government are of such a nature that they cannot be measured in money, and any attempt to adjust such taxes in accordance with the actual benefits in fact received by each taxpayer would be impractical if not absurd. In imposing taxes of this character under the general taxing power, there can be no doubt as to the application of the rules announced in the cases to which we have referred. The legislature has power to determine the amount of money to be raised by the tax, to decide upon what persons or property it shall be imposed, and to fix a rule for apportioning or assessing such tax against the persons and property subjected to taxation. These matters when so determined as a matter of law are binding on the taxpayer and the courts, unless the law contravenes some constitutional provision on the subject of general taxation. A statute so framed affords due process of law for imposing a tax for revenue purposes, but it does not follow that similar provisions in a statute providing for special assessments would afford due process of law for fixing such assessments on the property to be affected. As distinguished from taxes for revenue, special assessments are not levied for the purpose of paying the expense of administering the government of any nation, state, or municipality, but for the purpose of paying the cost and expenses of making a local improvement of a public nature. The amount which can be raised by such assessments for such a purpose is limited by the actual benefits which accrue to the property affected thereby. In theory the benefits which accrue to the general public are paid by the municipality in which the improvement is located, out of its general revenue raised by taxation, while the property which is affected and benefited by the improvement in a manner not common to the public is assessed with the special and peculiar benefits which actually accrue to it as a result of the improvement. The amount so assessed is not regarded as a burden imposed for the support of government; but the theory on which such assessments are sustained is that the property on which they are imposed is increased in value or otherwise peculiarly benefited to an amount equal to the assessment. It is evident, therefore, that the power to impose special assessments should be limited to the amount of actual benefits accruing to the property affected by the improvement. The amount of actual benefit which will accrue to any particular piece of property by reason of an improvement is a fact which must be determined from the circumstances of each particular case. There may be room for controversy as to the amount of such actual benefits, and the amount in each particular case is susceptible of proof and judicial determination.

Tax—amount—necessities of the government.

Same—special assessment—amount.

In considering the due process of law provision of the 14th Amendment in connection with statutes providing for imposing special assessments as a test of the validity of such statutes, the courts, includ-

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ing the Supreme Court of the United States, have generally applied the same tests that are resorted to in determining the validity of statutes on the subject of general taxation. In the case of French v. Barber Asphalt Paving Co. 181 U. S. 325, 45 L. ed. 879, 21 Sup. Ct. Rep. 625, it was decided that special assessments to pay the cost of a local improvement are a species of taxation, and that the rule is that no judicial hearing as to the amount of such assessments, or as to the property against which they shall be assessed, is essential to constitute due process of law. The decision in that case attempts to distinguish the case of Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187, wherein it was announced that the principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and that, therefore, the owners do not in fact pay anything in excess of what they receive by reason of such improvements. The court said: "In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation."

The rule announced in the case of Norwood v. Baker, supra, seemed to be a departure from the rule announced in the earlier cases decided on the subject by the Supreme Court of the United States, but the rule in that case has not been consistently followed. Most of the later cases on the subject follow the rule announced in Spencer v. Merchant (1887) 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921, and other earlier decisions by that court. By that rule the legislature has the power to determine the amount of the tax to be raised, the property to be benefited by local improvement, and to fix a rule by which the apportionment shall be made to the several pieces of property affected, as by the front foot, according to area or according to value. These decisions proceed upon the assumption that all such assessments must be based on actual benefits accruing to the property affected, but they hold that the legislature has power to determine as a fact that certain property will be benefited by an improvement, and that each parcel of the property affected will be actually benefited to an amount to be ascertained by the application of the rule fixed, whether that be in proportion to frontage, area, or value. These facts being the subject of legislative determination, it is held that such a determination is binding on the property owner and the courts. In the case last cited the court said: "The question of special benefit and the property to which it extends is of necessity a question of fact, and when the legislature determines it in a case within its general power its decision must, of course, be final. We can see in the determination reached possible sources of error and perhaps even of injustice, but we are not at liberty to say that the tax on the property covered by the law of 1881 was imposed without reference to special benefits. The legislature practically determined that the lands described in that act were peculiarly benefited by the improvement to a certain specified amount which constituted a just proportion of the whole cost and expense; and while it may be that the process by which the result was reached was not the best attainable, and some other might have been more accurate and just, we cannot for that reason question an enactment within the general legislative power. . . . The precise wrong of which complaint is made appears to be that the landowners now assessed never had opportunity to be heard as to the original apportionment, and find themselves now practically bound by it as between their lots

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and those of the owners who paid. But that objection becomes a criticism upon the action of the legislature and the process by which it determined the amount to be raised and the property to be assessed. Unless by special permission, that is a hearing never granted in the process of taxation. The legislature determines expenditures and amounts to be raised for their payment, the whole discussion and all questions of prudence and propriety and justice being confided to its jurisdiction. It may err, but the courts cannot review its discretion."

It is thus seen that no distinction is observed between taxes levied and collected for general revenue and special assessments made for local improvements, it being held that the legislature has the same power and may pursue the same methods in imposing such special assessments as in imposing taxes for general revenue purposes, and that by so doing it does not violate the "due process of law" provision of the 14th Amendment.

While this court recognizes the obligation resting on it to follow the decisions of the Supreme Court of the United States in the construction and application of the 14th Amendment to the Federal Constitution, it finds difficulty in reconciling the decisions since the case of Norwood v. Baker, supra. Prior to that time the decisions of the United States Supreme Court were consistent in holding that the legislative branch of government had power, in its discretion, to declare as a matter of law that certain property described either as abutting property or as located within an assessment district would be specially benefited by a local improvement to the extent of the entire cost of such improvement, and that each parcel of land affected would be specially benefited to an amount to be determined by the application of a standard or rule of apportionment which the legislature had power to fix. Mobile County v. Kimball, 102 U. S. 691, 703, 26 L. ed. 238, 241; Spencer v. Merchant (1887) 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921.

In applying such laws and in making assessments under them in accordance with the standard rule of apportionment fixed, the real benefit resulting to separate tracts, as a matter of fact, was not considered. The legislature was regarded as having power to determine the amount of special benefits and to apportion them to the several tracts of land affected as a matter of law; and such law, whether just or unjust in its application, was regarded as binding on property owners and on the courts. It was uniformly held that such statutes afforded due process of law to the property owner for ascertaining and fixing the special assessments against his property and that they were not violative of the 14th Amendment in that regard. Mobile County v. Kimball, and Spencer v. Merchant, supra; Parsons v. District of Columbia (1897) 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521; Mattingly v. District of Columbia, 97 U. S. 687, 24 L. ed. 1098.

The trend of judicial opinion in this state prior to the decision in the Norwood Case, supra, was in accord with the rule adopted and announced in those decisions. Snyder v. Rockport (1855) 6 Ind. 237; Goodrich v. Winchester & D. Turnp. Co. (1866) 26 Ind. 119; Ray v. Jeffersonville (1883) 90 Ind. 567; Ross v. Stackhouse (1887) 114 Ind. 200, 16 N. E. 501; Garvin v. Daussman (1887) 114 Ind. 429, 5 Am. St. Rep. 637, 16 N. E. 826; Barber Asphalt Paving Co. v. Edgerton (1890) 125 Ind. 455, 25 N. E. 436; Terre Haute v. Mack (1894) 139 Ind. 99, 38 N. E. 468.

In the Norwood Case the Supreme Court of the United States held that assessments made against property to pay for local improvements of a public nature must be based on the actual benefits which, as a matter of fact, accrue to such property as a result of such im-

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provement, and that any assessment made in excess of benefits which in fact accrue to such property is, as to such excess, void. After the decision in that case, this court adopted the rule there announced, and has adhered to it to the present time. Adams v. Shelbyville (1899) 154 Ind. 467, 49 L.R.A. 797, 77 Am. St. Rep. 484, 57 N. E. 114; Park County Coal Co. v. Campbell (1894) 140 Ind. 28, 39 N. E. 149, 558; Watson v. Armstrong (1913) 180 Ind. 49, 102 N. E. 273; Williams v. Osborne (1913) 181 Ind. 670, 104 N. E. 27.

The rule announced by the court in the Norwood Case, supra, seems to be so directly at variance with the rule formerly followed by that court as to amount to an entirely new and different construction and application of the "due process of law" provision of the 14th Amendment in relation to special assessments. The difference between the two rules was recognized in the opinion of this court in the case of Adams v. Shelbyville (1899) 154 Ind. 467, 49 L.R.A. 797, 77 Am. St. Rep. 484, 57 N. E. 114, and the distinction was clearly pointed out by Justice Baker in the dissenting opinion, wherein it is said: "The Federal Constitution is not what the citizen may read it to be, but is what the Supreme Court of the United States declares it to be. I concur in the statement that, prior to the Norwood v. Baker decision, 172 U. S. 269, 42 L. ed. 443, 19 Sup. Ct. Rep. 187, the method stated in § 752 of Dillon on Municipal Corporations was constitutional; that is, that the legislature in its discretion might declare as a matter of law that the whole cost of a street improvement and the special benefits to abutting property equaled each other, and that the cost should be apportioned according to frontage, and that the property owners were entitled to a hearing before a tribunal authorized to review the assessment and see that it justly conformed to the frontage basis. For brevity, I shall call this the 'old' Constitution. I concur in the statement that, since the Norwood-Baker decision, the method stated in § 752 of Dillon is unconstitutional, and that nothing short of the method stated in § 761 of Dillon is constitutional; that is, that the legislature must provide a method by which the special benefits to contributing property shall be determined as a question of fact, and that the excess of cost above the sum of special benefits is a general benefit, to be paid for from the general treasury, and that property owners are entitled to a hearing before a tribunal authorized to review the assessment and see that it justly conforms to the basis of benefits in fact received. For brevity, I shall call this the 'new' Constitution. The textbooks and reports are full of the general statement that 'the only basis for special assessments is special benefits." Concerning this proposition there has never been any disagreement, so far as I have been able to learn. But from this common starting point two very dissimilar lines of thought have been followed. In one it was said: 'Special benefits are the only legitimate basis for special assessments, but the legislature may declare as a matter of law that the property owner's special benefits are exactly equal to his special assessment by frontage.' In the other it was said: 'Special benefits are the only legitimate basis for special assessments, but the property owner may not be specially assessed beyond his special benefits found as a matter of fact.' So, finding in reported cases the expression that special benefits are the only legitimate basis for special assessments does not of itself show which theory a court has adopted. It is hardly conceivable that a court would be following out the two theories at the same time. They seem as far apart as the poles, —as essentially different as a question of law is from a question of fact."

While the foregoing quotation is couched in very strong language, it is clear that the point is well made. If the thing to be determined is the

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amount to be contributed by each tract of land benefited, to be ascertained by an apportionment according to some fixed standard or rule, this can be done by a legislative declaration of law on the subject; but, if the result to be reached is the ascertainment of the special benefit which will in fact accrue to each particular tract, this can be determined only from a consideration of evidence showing the location, the extent, the value, and other characteristics of the tracts to be assessed as well as the nature of the improvement and its effect on the value and usefulness of the property. The peculiar benefits which will, in fact, accrue to any particular tract of land as a result of an improvement, can be determined only by a judicial inquiry involving a notice, a hearing, the consideration of evidence, and the decision of a question of fact. Such a proceeding is judicial in its nature. Hagar v. Reclamation Dist. 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663. It must therefore follow that, if the end to be attained in making special assessments is to apportion and fix them on the several tracts of land affected in accordance with the peculiar benefits which each in fact receives, this result can be reached only by a judicial investigation, and that due process of law cannot be afforded by a statute making no provision for a judicial hearing as to the benefits in fact received by the property affected, but providing for the apportionment of the entire cost in accordance to a fixed rule or standard established by the legislature. In the case last cited the court, speaking on this subject through Justice Field, said: "The appellant contends that this fundamental principle was violated in the assessment of his property, inasmuch as it was made without notice to him, or without his being afforded any opportunity to be heard respecting it, the law authorizing it containing no provision for such notice or hearing. His contention is that notice and opportunity to be heard are essential to render any proceeding due process of law which may lead to the deprivation of life, liberty, or property. Undoubtedly where life and liberty are involved, due process requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard; so, also, where title or possession of property is involved. But where the taking of property is in the enforcement of a tax, the proceeding is necessarily less formal, and whether notice to him is at all necessary may depend upon the character of the tax, and the manner in which its amount is determinable. . . . Of the different kinds of taxes which the state may impose, there is a vast number which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes (not dependent upon the extent of his business), and, generally, specific taxes on things or persons or occupations. In such cases the legislature, in authorizing the tax, fixes its amount, and that is the end of the matter. If the tax be not paid, the property of the delinquent may be sold, and he be thus deprived of his property. Yet there can be no question that the proceeding is due process of law, as there is no inquiry into the weight of evidence, or other element of a judicial nature, and nothing could be changed by hearing the taxpayer. No right of his is therefore invaded."

The converse of the propositions stated in the extract just quoted from the opinion may be stated thus: If the result to be attained involves the determination of facts from a consideration of evidence, and if the result could be changed by a hearing in case provision were made for notice and an opportunity to be heard, the substantial rights of the party affected would be involved by a failure of the statute to provide for such hearing. The only inference which could follow is that a statute making no provision for a hearing as to such traversable facts

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would fail to afford due process of law. It is clear that the converse of the proposition would apply to a statute authorizing special assessments based on the benefits which are in fact received by property benefited by a local improvement. The rule recognizing the right of the legislative branch of government to fix a standard by which special benefits shall be apportioned to property affected by a local improvement does not respect any right of a property owner to be heard as to benefits which will in fact accrue to his property. In fixing the rule by which such apportionment shall be made, the legislature, without doubt, would attempt to adopt a method which, as a general rule, would result in an apportionment of the cost of the improvement approximately in accordance with the actual special benefits to be received by each parcel of land affected. The application of such a rule results in the fixing of assessments which may, in the cases to which it ordinarily applies, approximate the benefits to be received by the property, but that is the most that could be accomplished by such a rule. There is no means by which such assessment can be made to correspond with actual benefits. Even in such cases, the resulting assessments would vary from the actual benefits reveived to a greater or less degree, and some cases may arise in which the assessment resulting will be grossly in excess of actual benefits.

If this method of fixing assessments affords due process of law, the assessments made in accordance therewith must be valid and enforceable, even though they exceed the benefits in fact accruing to the property assessed, and this must be true whether such excess be great or small. On the other hand, if such method of apportioning assessments to property affected does not afford due process of law, the resulting deprivation of property, however small, would be in violation of the 14th Amendment, for a state has no more power under that Amendment to deprive a citizen of property without due process of law where the amount is small than it has to do so where the amount is great.

If followed to its legitimate results, the rule established in the Norwood case, supra, is inconsistent with the rule previously followed by the Supreme Court of the United States in similar cases, as was pointed out in a dissenting opinion filed in the case of French v. Barber Asphalt Paving Co. 181 U. S. 325, 45 L. ed. 879, 21 Sup. Ct. Rep. 625, by Justice Harlan, with whom concurred Justice White and Justice McKenna. The two rules are incompatible; the courts cannot consistently follow both; one or the other must prevail. If the legislative branch of government has power to establish an arbitrary rule for apportioning the cost of a local improvement to the several tracts of land, and if such legislative act is held to afford due process of law, then all assessments made in accordance with the standard so established are valid, even though grossly in excess of actual benefits; but, if such a method of fixing assessments for special benefits does not afford due process of law, then all assessments so fixed are void.

As before stated, the Supreme Court of the United States has in most cases followed the old rule as anounced in Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; French v. Barber Asphalt Paving Co. (1900) 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; Tonawanda v. Lyon (1900) 181 U. S. 389, 45 L. ed. 908, 21 Sup. Ct. Rep. 609; Philip Wagner v. Leser (1915) 239 U. S. 207, 60 L. ed. 230, 36 Sup. Ct. Rep. 66; Houck v. Little River Drainage Dist. (1915) 239 U. S. 254, 60 L. ed. 266, 36 Sup. Ct. Rep. 58; Embree v. Kansas City & L. B. Road Dist. (1915) 240 U. S. 245, 60 L. ed. 624, 36 Sup. Ct. Rep. 317. That rule is not followed, however, where it appears that the application of the fixed standard of apportionment under the facts of the particular case will result in assessments which would

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be substantially in excess of actual benefits, or which would be manifestly unequal or unjust. Gast Realty & Invest. Co. v. Schneider Granite Co. (1915) 240 U. S. 55, 60 L. ed. 523, 36 Sup. Ct. Rep. 254; Martin v. District of Columbia, 205 U. S. 135, 51 L. ed. 743, 27 Sup. Ct. Rep. 440. Speaking on that subject in Philip Wagner v. Leser (1915) 239 U. S. 207, 60 L. ed. 230, 36 Sup. Ct. Rep. 66, the court said: "We do not understand this to mean that there may not be . . . such flagrant abuse of legislative power as would warrant the intervention of a court of equity to protect the constitutional rights of landowners, because of arbitrary and wholly unwarranted legislative action."

In the case of Houck v. Little River Drainage Dist. (1915) 239 U. S. 254, 60 L. ed. 266, 36 Sup. Ct. Rep. 58, it is said: "The state in its discretion may lay such assessments in proportion to position, frontage, area, market value, or to benefits estimated by commissioners. . . . And, as we have said, unless the exaction is a flagrant abuse, and by reason of its arbitrary character is mere confiscation of particular property, it cannot be maintained that the state has exceeded its taxing power."

Such expressions seem to indicate that the validity of such laws is to be tested by the court's judgment, as to their reasonableness and justness, and that the court should declare such a statute void if, in its opinion, the legislature has abused its power by adopting a standard of apportionment which in its application proves to be unreasonable or unjust.

Such standards are always absolute and unchanging, and are not adaptable to varying conditions. Under some conditions arising the application of such a rule may result in assessments which are approximately in accordance with actual benefits, but the standard applied under other conditions may result in assessments which are so unjust and inequitable as to amount to a practical confiscation of property. If assessments result which are unjust, or which are substantially in excess of actual benefits, it is because of a defect in the law under which they are apportioned in making no provision for a hearing in which they may be adjusted to conform to actual benefits. If such a defect renders the law void, it is not so because the law is unjust or unreasonable, or because it is the result of an abuse of legislative power, but it is void because it violates the "due process of law" provision of the Federal Constitution.

Is it conceivable that a statute or ordinance providing a given standard of apportionment could be held to be constitutional as applied to one state of facts and unconstitutional as applied to a different state of facts? If the legislature has power to fix an unvarying rule of apportionment, such power involves the right to determine what rule will result in assessments most nearly in accordance with actual benefits in the generality of cases to which it applies. In such case the justness and reasonableness of the rule would be the subject of legislative declaration and its decision would be binding. The court would have no power to overthrow the statute because the standard of apportionment was unjust, unreasonable, or arbitrary, because that would be to substitute the judgment of the court as to such questions for that of the legislature. The law was stated in Spencer v. Merchant, supra, where it is said (125 U. S. 353, 31 L. ed. 766, 8 Sup. Ct. Rep. 925): "The legislature practically determined that the lands described in that act were peculiarly benefited by the improvement to a certain specified amount which constituted a just proportion of the whole cost and expense; and while it may be that the process by which the result was reached was not the best attainable, and some other might have been more accurate and just, we cannot for that reason question an enactment within the general legislative power."

If the rule thus stated is the true rule, it should be consistently fol-

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lowed. Such a course would require the courts to uphold all rules of apportionment adopted by a legislature, for, by adopting such rule, that body determines that it is reasonable, and that its application will result in assessments reasonably approximating actual benefits in the general run of cases to which it will apply. Under such a rule the courts could not set aside any rule of apportionment established by the legislative branch of government on the ground that such rule was arbitrary and unjust. To decide that a rule is arbitrary is to hold that it is not based on reason, whereas, under the rule stated, the reasonableness and adaptability of the rule would be set at rest by legislative determination. If such rule is adhered to, a statute fixing an absolute rule for apportioning assessments could not be overthrown by the courts because it is not well adapted to accomplish the results intended when applied in a particular case. If it affords due process of law, it is not violative of that provision of the Federal Constitution even though the court may believe that the rule of apportionment fixed is unreasonable, and that, as applied to facts and conditions shown in the case before the court, it operates so as to produce a gross injustice.

Such rules of apportionment are always fixed according to some ratio, and, where no provision is made for a judicial inquiry as to actual benefits, they are invariable and unchangeable. If the result to be reached is the fixing of assessments in accordance with actual benefits, and if such rules are well adapted to reach that end, they afford due process of law and should be universally upheld. On the other hand, if such rules are not well adapted to reach that end; if their application, at best, results in assessments which are to some degree disproportioned to actual benefits, and sometimes work a gross injustice; if a judicial determination, after notice and the hearing of evidence, is more likely to result in fixing assessments in accordance with actual benefits; if that course is better adapted to protect the rights of the citizen and is more suitable to the administration of justice according to the forms of law usually recognized and adopted in the settlement of such questions,—then due process of law requires that a judicial determination after notice and hearing should be provided for. Hagar v. Reclamation Dist. 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616.

This court is of the opinion that a judicial inquiry is a means well suited and adapted to fixing assessments in accordance with actual benefits, and that no fixed and invariable standard of apportionment is or can be well adapted to that end, and that all such standards, which make no provision for the adjustment of such assessments by judicial investigation, should be condemned as unconstitutional for the reason that they do not provide for due process of law. In view of the apparently conflicting rule announced by the Supreme Court of the United States, we feel free to follow the ruling in the case of Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187. If the reasons which have led to this conclusion are fallacious, the error to which they have led may be corrected by the Supreme Court of the United States on appeal.

Same—due process—arbitrary assessment for public improvement.

The law under consideration provides that the entire costs of the repairs of ditches to which it applies shall be imposed on the lands assessed for its construction. Under this rule lands which were not assessed for the original construction of the ditch, but which find outlet through it by means of connecting drains subsequently constructed, could not be assessed to pay any part of the cost of repair, although they might be largely benefited thereby. It appears from the objections filed that a large part of the

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fill which makes the repairs necessary is located on certain lands through which the ditch runs, and that such fill was caused by the stock of the owners of those lands in tramping the adjacent soil into the ditch and thus destroying the banks. It is stated that the removal of the fill thus caused will constitute a large part of the cost of the proposed repair. Some of the objectors state that the drainage from their lands finds an outlet into the ditch at a point below the portion so filled, and that the fill to be removed was not caused by sediment washed in by their drainage, and that its removal will not afford them any better outlet for their drainage than they now have. Under the rule of apportionment adopted by the law, these facts could not be considered in fixing the assessments. The act under which the ditch in question was constructed provided that, when a public ditch is located wholly or in part in the bed of a private ditch already or partially constructed, the viewers should make an estimate of the number of cubic yards of earth already excavated, and cost of the same, on each tract of land, and deduct the same from the assessment thereon. The objectors allege that in making the assessments for the construction of the ditch the viewers, in obedience to the statute, made deductions from the estimated benefits to numerous tracts of land affected on account of existing private drains which were utilized, and that the assessment against lands, as shown by the record of that proceeding, represents the actual benefits less such deductions. It thus appears that the original assessments against such tracts of land were not in accordance with the actual benefits received from the construction of the ditch, and that an apportionment of the cost of repairing such ditch to the several tracts of land originally assessed in proportion to such original assessment would not result in fair and just assessments in accordance with the benefits. Such rule of apportionment is unreasonable and unjust as applied to the facts shown, but the law is not void for that reason. It is void because it does not afford due process of law for the protection of the rights of the landowner by providing for a notice and hearing on the question of actual benefits, whereby the assessments could be adjusted to accord with actual benefits accruing to each tract of land affected. For the reasons stated, any assessment levied under the provisions of the statute under consideration would be void, and the enforced payment of any money on account of such assessments would constitute a deprivation of the property of a citizen by the state without due process of law, within the meaning of the 14th Amendment of the Federal Constitution.

As no valid assessments can be made or collected under the provisions of the statute, the whole act fails of its purpose, for no money could be raised under its provisions to pay the costs and expenses of repairing a ditch. The purpose of the act was to provide for a special proceeding for the repair of the class of ditches described therein. The circuit courts of the state have no general jurisdiction of the subject-matter of the repair of drains, and the act in question purported to confer jurisdiction of such special proceedings on such courts. The act being void, the court had no jurisdiction to proceed thereunder. The court should have sustained the motion to dismiss upon its attention being called to the invalidity of the act.

Drainage—jurisdiction—invalidity of statute.

Judgment reversed, with instructions to sustain appellants' motion to dismiss the proceeding.

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ANNOTATION.

Validity of rule of assessment for drainage improvement.

As stated in the reported case (HARMON v. BOLLEY, ante, 609), the basis of all special assessments is a corresponding benefit to the person assessed. The majority of statutes relating to drainage construction provide for assessments according to this rule; that is, according to benefits; and the dispute in a majority of the cases in which assessments are being questioned is whether the property of the person objecting is benefited, or is benefited to the extent of the assessment; in other words, a question of fact is presented. With this question the present note does not deal, it being confined to a discussion of the validity of the various rules for apportioning the costs of the drain to property subject to assessment therefor. Although the question as to the proper rule for apportioning the cost of pavement and other municipal improvements among the parcels benefited has received much consideration from the courts, there are comparatively few cases of this kind involving drainage improvements. It will be observed that some of the drainage cases cited in the reported case involved the question whether the property was benefited, and therefore subject to assessment at all, and not the question as to the proper rule of assessments.

An assessment upon landowners for the construction of a drain, levied in proportion to the quantity of land owned, is unconstitutional; at least where the owners assessed have no voice in the management of the work. Benjamin v. Bog & F. Meadow Co. (1902) 68 N. J. L. 197, 52 Atl. 215.

The extent of the watershed is not a proper rule for the determination of the amount of an assessment on land for the construction of a drain, but the amount of surface water for which artificial drainage is required to make the lands cultivatable, and the benefits that will accrue to the lands from such drainage. Blue v. Wentz (1896) 54 Ohio St. 247, 43 N. E. 493. The rule of this case is applied in Mason v. Fulton County (1909) 80 Ohio St. 151, 24 L.R.A.(N.S.) 903, 131 Am. St. Rep. 689, 88 N. E. 401.

But a levy at a uniform rate per acre on the land within a drainage district, for the preliminary expenses of such district, has been sustained and held not to take without due process of law, contrary to the 14th Amendment of the Federal Constitution, the property of the owners of land within the district which may not be benefited by the completed drainage plans. Houck v. Little River Drainage Dist. (1915) 239 U. S. 254, 60 L. ed. 266, 36 Sup. Ct. Rep. 58.

An assessment according to value has been sustained. Springfield v. Gay (1866) 12 Allen (Mass.) 612. In this case, which involved the construction of a drainage sewer, a municipal council assessed the expense thereof to the owners of real estate according to the valuation of their property, substantially the same as that fixed for purposes of ordinary taxation. The court states that none of the facts, which the property owner objecting offered to prove, tended to show that the rule of assessment adopted was inequitable, or that it operated disproportionately. Further, the court states: "We can readily see that it would be difficult, if not impracticable, to make an assessment which would operate fairly and equally, based on an estimate of the benefits which each estate might derive from the construction of the sewer. These benefits would necessarily be conjectural and difficult of estimation, especially in relation to a territory which was not improved or occupied by buildings, and depending, as they must, in great measure, on the nature of the structures which might be erected thereon and the uses to which they might be appropriated. It seems to us that a more equitable and proportionate mode of assessment was adopted by the assessors."

A statute which apportioned the cost of a drain upon the percentage of

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benefits to accrue to the various tracts was sustained in Brady v. Hayward (1897) 114 Mich. 326, 72 N. W. 233. The court states that the fact that a drain is established involves the finding of the fact that it is necessary and conducive to the public health; and that it is not conceivable, taking this fact into consideration, that a drain is not worth to the township and to the land to be affected by it all that it costs; and the court concludes that "this being established, we cannot see any injustice in apportioning the cost of the drain in the manner provided by the statute."

The theory of Hoagland v. Wurts (1879) 41 N. J. L. 175, is not altogether clear. The statute involved in that case provided that commissioners who, after having commenced the drainage of any land "and proceeded therewith, shall, before the drainage of the same shall be completed, be compelled to suspend the completion thereof from any inability at that time to raise the money required therefor, they shall proceed to ascertain the tracts of land benefited, or intended to be benefited, by such drainage, and the relative proportions in which the said respective tracts have been or will be benefited thereby, and also the expenses already incurred in such drainage, and, as near as may be, the additional expenses required for the completion thereof, which expenses they shall assess on the respective tracts of land in the proportions aforesaid." In holding this method of assessment invalid, the court states that when it undertakes, as it does, to substitute, in allotting expenses, a judgment of valuers founded on speculation in the place of assessments founded on facts, or arrived at by a fixed standard, the procedure cannot be sanctioned. The decision seems to rest upon the speculative character of the benefits. The supreme court, in holding the statute invalid, after referring to the conflicting evidence as to benefits, states: "This uncertainty is not a proper basis of assessment for benefits. It can be made reasonably certain by the completion of the work."

W. A. E.

C. E. THOMASON et al.
v.
J. C. BESCHER et al., Appts.

North Carolina Supreme Court — December 11, 1918.

(176 N. C. 622, 97 S. E. 654.)

Option — seal — necessity of consideration.

1. An option under seal to purchase standing timber within a specified time requires no consideration to support it.

[*See note on this question beginning on page* 631.]

Seal — effect.

2. Instruments under seal require no consideration to support them.

Same — effect in equity — absence of consideration.

3. Equity looks beyond the form, and will usually refuse to exert its powers in aid of the collection or enforcement of a sealed instrument, except when supported by a valuable consideration.

Option — acceptance — effect.

4. Acceptance and offer to perform within the time allowed converts an option into an enforceable bilateral contract.

Contract — consideration — option.

5. The consideration for an option contract which is sought to be enforced is the purchase price agreed upon, and not the mere nominal amount paid for the option, or the seal which imports consideration.

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APPEAL by defendants from a judgment of the Superior Court for Randolph County in favor of plaintiffs in an action brought to compel defendants to convey a certain tract of timber, under an alleged option to purchase said timber. *Affirmed.*

Statement by Hoke, J.:

There were facts in evidence tending to show that on June 18, 1918, J. C. and W. M. Bescher, two tenants in common in a tract of land, entered into a written contract under seal, giving plaintiff Thomason the option to purchase the timber thereon, at $6,000 within sixty days, or by the 18th day of August, 1917; the said contract being in terms as follows:

"Know all men by these presents, that in consideration of the sum of one dollar ($1) to us in hand paid by C. E. Thomason of Davidson county, North Carolina, the receipt of which is hereby acknowledged, we, J. C. and W. M. Bescher, do hereby contract and agree with said C. E. Thomason to sell and convey unto said C. E. Thomason and his heirs and assigns, all that certain tract or parcel of timber and roads over land with sawmill sites, situate, lying and being in Concord township, Randolph county, adjoining the lands of B. M. Pierce and others and known as the John S. Bescher place, and containing 715 acres more or less; and that we will execute and deliver to said C. E. Thomason and his heirs and assigns at his or their request on or before the 18th day of August, 1917, a good and sufficient deed for the said timber and roads and mill sites, with full covenants and warranty; provided and upon condition, nevertheless, that the said C. E. Thomason, his heirs and assigns, pay us or our representatives or assigns the sum of six thousand dollars ($6,000) in cash or equivalent, it is understood and agreed that the said sale is to be made at the option of the said C. E. Thomason or his heirs or assigns, to be exercised on or before the 18th day of August, 1917.

"And it is further understood and agreed that if the said C. E. Thomason and his heirs and assigns shall not demand of us the deed herein provided for, and tender payment as herein provided for, and on or before the said 18th of August, 1917, then this agreement is to be null and void, and we are to be at liberty to dispose of the timber to any other person, or to use it as we may desire in the same manner as if this contract had never been made; but otherwise this contract is to remain in full force and effect.

"And to the true and faithful performance of this agreement we do hereby bind myself and my heirs, executors, administrators and assigns.

"Witness our hands and seals, this 18th day of June, 1917. All old field pine is hereby excepted—all other included,"—

coplaintiff J. F. Curry, having acquired one half interest in said contract prior to institution of suit. That prior to June 23, 1917, plaintiff Thomason, then holding the contract, notified one of the defendants that he would take the timber, etc. That plaintiff tendered the purchase price on August 7, 1917, and had always been ready and willing to pay it. There was denial of obligation on the part of defendants, with evidence tending to show that, before any acceptance or notice thereof, defendants had, in writing, notified plaintiffs that they elected to terminate the contract. On issues submitted, the jury rendered the following verdict:

"(1) At the time of the execution of the option on the 18th day of June, 1917, and as a consideration therefor, did the plaintiff C. E. Thomason pay the $1 to the defendants, as recited in the said option? Answer: No.

"(2) Did the plaintiffs thereafter notify the defendants or either of them, and prior to the 23d day of June, 1917, that they

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would take the timber, roads, and mill sites, under the terms of the said option set up in the complaint, and would be down the following week to pay the price and take the deed therefor? Answer: Yes.

"(3) Were the plaintiffs at all times able and willing to pay the purchase price of $6,000 for the property, as recited in the option, in event deed was made therefor? Answer: Yes.

"(4) Did the defendants, on the 23d day of June, 1917, serve the plaintiffs with the following notice: 'This is to notify you that the option given you on your timber, Randolph county, on Monday, the 18th of June, is withdrawn, and we will not convey the timber according to its terms?' Answer: Yes."

Judgment on verdict for plaintiffs, and defendants excepted and appealed.

Mr. J. A. Spence, for appellants:

Where but one of several owners of land agreed to convey, the others were not liable for breach of contract to convey.

Mitchem v. Wallace, 150 N. C. 640, 64 S. E. 901; Tillery v. Land, 136 N. C. 537, 48 S. E. 824.

An option for timber when no money is paid is not a contract binding the maker, but is only unilateral; and it does not become a contract binding the maker until the purchase price is tendered, and, at least, until he is notified of acceptance.

Bryant Timber Co. v. Wilson, 151 N. C. 154, 134 Am. St. Rep. 982, 65 S. E. 932; Trogden v. Williams, 144 N. C. 199, 10 L.R.A.(N.S.) 867, 56 S. E. 865; Hardy v. Ward, 150 N. C. 385, 64 S. E. 171; Gaylord v. McCoy, 161 N. C. 685, 77 S. E. 959; Winders v. Kenan, 161 N. C. 628, 77 S. E. 687.

Messrs. Raper & Raper, for appellees:

Upon notice to defendant of plaintiffs' intention to purchase the timber, and their readiness to comply, the option became a binding contract, binding all the parties.

Bryant Timber Co. v. Wilson, 151 N. C. 154, 134 Am. St. Rep. 982, 65 S. E. 932; Ward v. Albertson, 165 N. C. 218, 81 S. E. 168; Watkins v. Robertson, 105 Va. 269, 5 L.R.A.(N.S.) 1194, 115 Am. St. Rep. 880, 54 S. E. 33; Willard v. Tayloe, 8 Wall. 557, 19 L. ed. 501; O'Brien v. Boland, 166 Mass. 481, 44 N. E. 602; Weaver v. Burr, 31 W. Va. 736, 8 L.R.A. 94, 8 S. E. 743.

Hoke, J., delivered the opinion of the court:

It is the accepted principle of the common law that instruments under seal require no consideration to support them. Seal—effect. Whether this should rest on the position that a seal conclusively imports a consideration, or that the solemnity of the act imports such reflection and care that a consideration is regarded as unnecessary, such instruments are held to be binding agreements, enforceable in all actions before the common-law courts. Speaking to the question in Harrell v. Watson, 63 N. C. 454, Pearson, Ch. J., said: "A bond needs no consideration. The solemn act of sealing and delivering is a deed; a thing done, which, by the rule of the common law, has full force and effect, without any consideration. Nudum pactum applies only to simple contracts."

A similar position is stated with approval in Professor Mordecai's Lectures, at page 931, and Dr. Minor, in his Institutes (pt. 1, vol. 3, p. 139), says: "In all contracts under seal a valuable consideration is always presumed, from the solemnity of the instrument, as a matter of public policy and for the sake of peace, and presumed conclusively; no proof to the contrary being admitted, either in law or equity, so far as the parties themselves are concerned."

While there is much diversity of opinion on the subject, we think it the better position, and sustained by the weight of authority, that the principle should prevail in reference to these unilateral contracts or options when, as in this case, they take the form of solemn written covenants under seal; and its proper application is to render them binding agreements, irrevocable within the time designated, and that the stipulations may be

Option—seal—necessity of consideration.

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enforced and made effective by appropriate remedies, when such time is reasonable, and there is nothing offensive and unconscionable in the terms of the principal contract.

In Watkins v. Robertson, 105 Va. 269, 5 L.R.A.(N.S.) 1194, 115 Am. St. Rep. 880, 54 S. E. 33, the question is directly presented; and in a convincing and learned opinion by Judge Cardwell the conclusion of the court on the subject is announced, to the effect "that an option under seal for the sale of shares in a joint stock company is a binding offer, from which the promisor cannot recede during the time stipulated for in the option, and, if accepted during that time, constitutes a contract, the specific performance of which a court of equity will compel. The option is in the nature of a continuing offer to sell, and, being under seal, must be regarded as made upon a sufficient consideration; and no proof to the contrary will be received at law or in equity."

In Willard v. Tayloe, 8 Wall. 557, 19 L. ed. 501, Associate Justice Field delivering the opinion, it was held, among other things: "A covenant in a lease giving to the lessee a right or option to purchase the premises leased, at any time during the term, is in the nature of a continuing offer to sell. The offer thus made, if under seal, is regarded as made upon sufficient consideration, and therefore one from which the lessor is not at liberty to recede."

And the position is approved by other courts of the highest authority and by writers of established repute. O'Brien v. Boland, 166 Mass. 481, 44 N. E. 602; Weaver v. Burr, 31 W. Va. 736, 3 L.R.A. 94, 8 S. E. 743; McMillan v. Ames, 33 Minn. 257, 22 N. W. 612; Pom. Contr. § 387, note 1; 9 Cyc. 287.

In the citation to Pomeroy, a work of recognized merit, chiefly on the doctrine of specific performance, it is said in the note referred to: "If the unilateral contract is sealed and the common-law effect of a seal has not been taken away or changed by statute, it appears that the promissory offer contained in the writing cannot be recalled before the time for acceptance has expired."

And, in 9 Cyc: "The common-law rule that, when an offer is made under seal, it cannot be revoked, applies to options given under seal. The seal renders a consideration unnecessary, and, if the option is exercised by acceptance of the offer within the time limited, the agreement will be specifically enforced or damages may be recovered for its breach, notwithstanding an attempted revocation."

We are not unmindful of the position that, in equity causes, the court looks beyond the form, and will usually refuse to exert its powers in aid of a sealed instrument, its collection and enforcement, except when there is a valuable consideration; in our own court the case of Woodall v. Prevatt, 45 N. C. (Busbee, Eq.) 199, being an apt illustration of the principle. But these options, containing a continuing offer to sell and constituting a contract, binding on the parties because in the form of a covenant under seal, serve their purpose in keeping the offer open for the time specified, and preventing a withdrawal by the vendor. On acceptance and offer to perform within the time, a bilateral contract is then constituted, which, on breach, is enforceable by appropriate remedies, legal or equitable. And in case of action for specific performance, the consideration is not restricted to the seal or the nominal amount usually present in these bargains, but extends to and includes the purchase price agreed upon. This position is recognized with us in the case of Ward v. Albertson, 165 N. C. 218, 222, 81 S. E. 168. Speaking to the subject, the court said: "In reference to the $5 paid by plaintiff as the consideration for his interest,

Seal—effect in equity—absence of consideration.

Option—acceptance—effect.

Contract—consideration—option.

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it is the accepted position in this state that a 'binding contract to convey land, where there has been no fraud, mistake, undue influence, or oppression, will be specifically enforced, and, as a rule, the mere inadequacy of price, without more, will not affect the application of the principle.' Combes v. Adams, 150 N. C. 64, 63 S. E. 186, citing Boles v. Caudle, 133 N. C. 528, 45 S. E. 835, and Whitted v. Fuquay, 127 N. C. 68, 37 S. E. 141. And where the contract has been perfected by acceptance within the time, or proper tender of performance, on suit for specific performance, the real consideration is the contract price, which must be paid before the interest is finally acquired,—in this instance the $1,000,—and, as to the option itself, which only provides for holding the privilege open for a short period of time, and involving also the opportunity to effect a sale by the potential vendor, the $5 paid may very properly be held as a sufficient consideration to bind the party. Alabama C. R. Co. v. Long, 158 Ala. 301, 48 So. 363; Ross v. Parks, 93 Ala. 153, 11 L.R.A. 148, 30 Am. St. Rep. 47, 8 So. 368; Smith v. Bangham, 156 Cal. 359, 28 L.R.A.(N.S.) 522, 104 Pac. 689; Elliott, Contr. § 232. And there is high authority for the position that, in states where this matter has not been regulated by statute, the seal itself conclusively imports a consideration. Watkins v. Robinson, 105 Va. 269, 5 L.R.A. (N.S.) 1194, 115 Am. St. Rep. 880, 54 S. E. 33; Willard v. Tayloe, supra; Adams v. Peabody Coal Co. 230 Ill. 469, 82 N. E. 645."

And the statement, we think, presents the correct concept of these suits, and is in accord with the authorities on the subject. On the same question in McMillan v. Ames, 33 Minn. 257, 22 N. W. 612, supra, Vanderburgh, J., delivering the opinion, said: "It is true that equity will not lend its auxiliary remedies to aid in the enforcement of a contract which is inequitable, or is not supported by a substantial consideration; but at the same time it will not, on such grounds, interfere to set it aside. But no reason appears why equity might not have decreed specific performance in this case (had the land not been sold), because the substantial and meritorious consideration required by the court in such case would consist in that stipulated in the instrument as the condition of a conveyance, performance of which by the plaintiff would have been exacted as a prerequisite to relief, so as to secure to defendant mutuality in the remedy, and all his rights under the contract."

And see also Woodruff v. Woodruff, 44 N. J. Eq. 349, 1 L.R.A. 380, 16 Atl. 4; 6 Pom. Eq. Jur. § 773.

As heretofore stated, there are opposing decisions on the question, holding that a written option without valuable consideration, though under seal, may be recalled at any time before notice of acceptance given. Some of these, as pointed out in Watkins v. Robertson, supra, are dependent on statutes which change or modify the effect given to seals under the principles of the common law. In others, there being nothing in the record to present it, the mind of the judges was not specially called to the distinctions existent, and usually observable, between a mere offer to sell without consideration and without seal, and one that is effective as a binding agreement by reason of the seal. This is true in several cases in our own court; as in Bryant Timber Co. v. Wilson, 151 N. C. 154, 134 Am. St. Rep. 982, 65 S. E. 932; and Paddock v. Davenport, 107 N. C. 710, 12 S. E. 464. In both of these cases, however, it appears that there was notice of acceptance duly given within the time, thus constituting a bilateral contract between the parties, and the question of the effect of a seal on such contracts was in no way presented. And so, in the well-considered case of Winders v. Kenan, 161 N. C. 628, 77 S. E. 687,

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there was a valuable consideration for the option, and relief was denied because there was no offer to perform within the time, as the contract required. So far as examined, we have found no case with us in which the question has been directly considered; and under the principles stated, and on the facts of this record, we are of opinion, and so hold, that the defendants are bound by their covenant under seal, and not at liberty to withdraw their offer before the expiration of the time agreed upon. The verdict having established that, before any attempted withdrawal by defendants, plaintiff had notified one of the parties of acceptance, would in any event be entitled to judgment as to that interest. And it further appearing that plaintiff has been at all times ready and able to comply, tendering the entire purchase money, at latest, by August 7th, that defendants refused to accept the same, and deny any and all obligations under the alleged contract, plaintiff, as held in Ward v. Albertson, supra, and other cases of like import, is entitled to have specific performance as to both interests, and the judgment to that effect is affirmed.

ANNOTATION.

Necessity of consideration to support option under seal.

While, in many cases, the courts have apparently been reluctant to base their decision solely on this ground, the rule stated in the reported case (THOMASON v. BESCHER, ante, 626), that an option under seal, though not supported by a consideration, is irrevocable during the time therein specified, is supported by the weight of authority. O'Brien v. Boland (1896) 166 Mass. 481, 44 N. E. 602; Fuller v. Artman (1893) 69 Hun, 546, 24 N. Y. Supp. 13; Watkins v. Robertson (1906) 105 Va. 269, 5 L.R.A.(N.S.) 1194, 115 Am. St. Rep. 880, 54 S. E. 33; Womack v. Agee (1916) 79 W. Va. 22, 90 S. E. 792. And see also Mier v. Hadden (1907) 148 Mich. 488, 118 Am. St. Rep. 586, 111 N. W. 1040, 12 Ann. Cas. 88 (where the court held an option for the purchase of land, supported by a nominal consideration, irrevocable, without referring to the fact that the option was under seal); and Pollock v. Brookover (1906) 60 W. Va. 75, 6 L.R.A.(N.S.) 403, 53 S. E. 795 (where it was apparently assumed that an option under seal, supported by a merely nominal consideration of $1, was irrevocable).

This is for the reason that an option under seal, like other sealed instruments, requires no consideration to support it (Savereux v. Tourangeau (1908) 16 Ont. L. Rep. 600, 11 Ont. Week. Rep. 944); or as the rule is more often stated, though perhaps inaccurately (see Page, Contr. §§ 544, 561), on the ground that the seal imports or raises a presumption of a consideration (McMillan v. Ames (1885) 33 Minn. 257, 22 N. W. 612; Fuller v. Artman (1893) 69 Hun, 546, 24 N. Y. Supp. 13; Watkins v. Robertson (1906) 105 Va. 269, 5 L.R.A.(N.S.) 1194, 115 Am. St. Rep. 880, 54 S. E. 33). And see also the following cases, which are to the same effect; but in which the decision was also placed on the ground that the consideration, though in most cases nominal, was sufficient to support the option: Black v. Maddox (1898) 104 Ga. 157, 30 S. E. 723; Hayes v. O'Brien (1894) 149 Ill. 403, 23 L.R.A. 555, 37 N. E. 73; Guyer v. Warren (1898) 175 Ill. 328, 51 N. E. 580; Adams v. Peabody Coal Co. (1907) 230 Ill. 469, 82 N. E. 645; Ward v. Albertson (1914) 165 N. C. 218, 81 S. E. 168; Sixta v. Ontonagon Valley Land Co. (1912) 148 Wis. 186, 134 N. W. 341. Also the following cases, where the court's remarks are doubtless obiter: Willard v. Tayloe (1870) 8 Wall. (U. S.) 557, 19 L. ed. 501; Johnson v. Virginia-Carolina Lumber Co. (1908) 89 C. C. A. 632, 163 Fed. 249; Weaver v. Burr (1888) 31 W. Va. 736, 3 L.R.A. 94, 8 S. E. 743.

And though, by statute or otherwise,

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the presumption arising from the seal is not conclusive, it cannot be contradicted for the purpose of invalidating the instrument, except for fraud or illegality. McMillan v. Ames (1885) 33 Minn. 257, 22 N. W. 612; Fuller v. Artman (1893) 69 Hun, 546, 24 N. Y. Supp. 13; Watkins v. Robertson (1906) 105 Va. 269, 5 L.R.A.(N.S.) 1194, 115 Am. St. Rep. 880, 54 S. E. 33. And see Mathews Slate Co. v. New Empire Slate Co. (1903) 122 Fed. 972, where the court, without making any express ruling on this point, quoted from Fuller v. Artman (1893) 69 Hun, 546, 24 N. Y. Supp. 13, supra.

McMillan v. Ames (Minn.) supra, was an action for breach of an option agreement by withdrawal of the offer before performance by the optionee, and before the time for performance had expired. The court said: "Apart from the effect of the seal, as evidencing a consideration binding the defendant to hold open his proposition, or rather validating his promise, subject to the conditions expressed in the writing, it is clear that such promise, made for a consideration thereafter to be performed by the plaintiff, at his election, would take effect as an offer or proposition merely, but would become binding as a promise as soon as accepted by the performance of the consideration, unless previously revoked, or it had otherwise ceased to exist. Langdell, Contr. § 70. . . . If, however, his promise is binding upon the defendant, because contained in an instrument under seal, then it is not a mere offer, but a valid promise to convey the land upon the condition of payment. All that remained was performance by plaintiff within the time specified, to entitle him to a fulfilment of the covenant to convey. Langdell, Contr. §§ 178, 179. As respects the validity or obligation of such unilateral contracts, the distinction between covenants and simple contracts is well defined and established. . . . The consideration of a sealed instrument may be inquired into; it may be shown not to have been paid, or to be different from that expressed . . . ,—or, as to a mortgage, that there is no debt to secure, . . . etc., but, except for fraud or illegality, the consideration implied from the seal cannot be impeached, for the purpose of invalidating the instrument or destroying its character as a specialty."

Fuller v. Artman (1893) 69 Hun, 546, 24 N. Y. Supp. 13, supra, was a suit for specific performance of an optional contract for the purchase of land, or mining rights therein, which the promisor had attempted to revoke before exercise of the option. Evidence that there was no consideration for the option was excluded by the trial court, and the judgment was affirmed. The court said: "Of course, if there has been no consideration for the agreement, it is nudum pactum; it is not valid, and cannot be enforced; and the evidence now in question was offered for the purpose of showing that no consideration was, in fact, paid by the plaintiff's assignors for the option, and the refusal which the contract purports to assure to them. The evidence was, no doubt, properly excluded. If admitted, it would have done violence to some elementary principles of the law of evidence, bearing upon the credit and validity belonging to instruments in writing and under seal. The principles referred to may, perhaps, be embodied in a rule, to the effect that, while the mere presumption of a consideration which arises from the use of seals in the execution of the instrument is subject to rebuttal (Code Civ. Proc. § 840), the expression of a consideration in such instrument is not subject to contradiction, for the purpose or with the effect of invalidating the instrument. . . . The recital of a consideration in a deed is conclusive as to the fact that there was a consideration for the deed. . . . The consideration actually paid or promised may be shown to have been other than that recited in the instrument, or the fact of payment of the consideration agreed upon may be contradicted in an action for its recovery; but the existence of a sufficient consideration, when expressed in an instrument under seal, is not subject to dispute. The contract in question, although without mutuality

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in its covenants, was not void for want of consideration; and the defendant was not at liberty to rescind it, during the time given for the exercise of the option by the parties of the second part, or their assigns."

Watkins v. Robertson (1906) 105 Va. 269, 5 L.R.A.(N.S.) 1194, 115 Am. St. Rep. 880, 54 S. E. 33, supra, was a suit for specific performance of an optional contract for the sale of corporate stock, which the optionor had repudiated. The court, in a well-considered and instructive opinion, said: "The English authorities maintain that the recital of a valuable consideration in a deed is conclusive. In the United States, it seems to be open to question or explanation for many purposes; but for two, it is not: First, the recited consideration can never be questioned or contradicted for the purpose of showing that the deed was not founded on a valuable consideration, and so defeat it; nor, second, for the purpose of raising a resulting trust in the grantor. What is meant is that a party making a deed or offer to sell, in writing, cannot himself deny the recital in the paper he executed, for the purpose of invalidating his contract or conveyance, or to raise a resulting trust in himself. The recital cannot be disproved, but must be treated as conclusive for the purpose of giving effect to the operative words of the conveyance or offer. . . . While, as between the parties to a deed of conveyance, or even an executory contract, the recital of the receipt of the consideration would not preclude a recovery of the purchase money due in the one case, or the real amount of the consideration in the other, the recital of the payment of a consideration cannot be contradicted, so as to defeat the operation of the conveyance according to the purpose therein designated, unless it be on the ground of fraud or illegality. . . . As we view this case, it would be a denial of justice and a pernicious sanction of unfair dealing to hold that Robertson, who had by his contract in writing, under seal, executed and delivered to Elam, reciting that it was made and executed for a valuable consideration received, bound himself not to withdraw his offer therein made to sell to Elam or his assigns the 496 shares of the capital stock of the Watkins-Cottrell Company until December 1, 1904, could, after Watkins had been shown the contract, and, relying upon its binding force and effect upon Robertson, before the time limit therein named had expired, accepted the offer and offered to pay the purchase price for the stock, defeat the very object and purpose of the contract by merely showing that this recital in the contract, of the receipt of a valuable consideration, was untrue. Contracts or options of this character have, at this day, become of common use in the business world; and dealings had in reliance upon them would become very uncertain, risky, and undesirable, if such a contract, as a matter of law, may be converted into a snare and a delusion by permitting the party making it to withdraw from or break it, before it expires by its own terms; as though the contract were not under seal, and did not contain a recital that a valuable consideration had been paid therefor. Safety and fair dealing in transactions of this character require that such contracts be regarded as sacred, and as binding upon the parties intended to be bound thereby, as other contracts which can only be defeated, impeached, or avoided for fraud or illegality."

In O'Brien v. Boland (1896) 166 Mass. 481, 44 N. E. 602, the option was for the sale of land, and was apparently without consideration. The promisors attempted to revoke the option within the time therein specified; but the optionee, having accepted the offer within such time, though after the attempted revocation, specific performance was granted, notwithstanding such attempted revocation.

In Womack v. Agee (1916) 79 W. Va. 22, 90 S. E. 792, where a contract for the sale of land provided for the giving of notes for the price, and gave the purchaser an option to convey a different lot to the vendors instead of paying one of such notes, the court, while holding that this option neces-

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sarily expired at the maturity of the note, held also that the vendors' failure to place their deed in the bank, holding the note for collection extended the time for payment of the note, and thus extended the purchaser's option as to the mode of payment. The court, after saying that options under seal and those founded upon valuable considerations were irrevocable, said that the option in question was under seal, and was supported by a valuable consideration, and therefore could neither be revoked nor indirectly avoided.

The rule, as stated above, is also supported to some extent by the following cases:

—Mathews Slate Co. v. New Empire Slate Co. (1903) 122 Fed. 972, holding that where a lease containing an option to purchase was under seal, and recited a consideration of $1 and other good and valuable considerations for the option, the option was valid and binding, and might be specifically enforced, though the parties had in mind the leasing as part of the consideration, and though the lessee had not performed the terms and conditions of the lease as to payment of rent or royalty, and furnishing statements of the amount of slate quarried. The court, however, also held that, if performance of the provisions of the lease was a part of the consideration for the option, there had been a substantial compliance with its provisions; and that, in so far as there had been a default under the lease, it was cured by subsequent performance, and acceptance of such performance by the lessor;

—Mansfield v. Hogdon (1888) 147 Mass. 304, 17 N. E. 544, where, in granting specific performance of a covenant, under seal, to sell land at any time within thirty days, the court said that a covenant to sell was not voluntary, in such a sense that equity would refuse specific performance. It would seem, however, that the option had not been revoked until after its acceptance;

—Brewer v. Sowers (1912) 118 Md. 681, 86 Atl. 228, where the court said that if the amount to be paid for property, in case an option to purchase was exercised, was the full value of the property, a consideration of $1 would support the option, especially where the option was under seal. The court, however, added that the case did not depend on this question, as the option had been exercised. Specific performance was granted;

—Cummins v. Beavers (1904) 103 Va. 230, 106 Am. St. Rep. 881, 48 S. E. 891, 1 Ann. Cas. 986, in which the court, without any discussion of the fact that the option was under seal, held that an option for the sale of land, the only consideration for which was $1, was valid, and entitled the holder to specific performance, where he accepted the offer within the time specified; and that it could not be withdrawn by the promisor within that time.

In Gaar Scott Co. v. Ottoson (1911) 21 Manitoba L. R. 462, 19 West. L. R. 472, it was held that an order for machinery, under seal, was not revocable before acceptance, as an ordinary order would be. The court apparently held, however, that the order had been accepted before the revocation, though the seller had delayed shipping the machinery, in order to ship it with other machinery ordered by the purchaser from another party. The seller brought an action for the price of the machinery, and recovered. An option may, of course, be given by the buyer as well as the seller, and in this respect there is no distinction between this case and those cited above; but the theory upon which options under seal, or supported by a consideration, are held irrevocable,—in American courts, at least,—is that there is a binding completed contract; not a contract of sale, but a contract to leave the offer open. There would seem to have been no such contract in this case, unless a seal be regarded as importing a promise to leave the offer open, as well as a consideration for such promise. The ruling would seem to offer an easy way of evading (in many jurisdictions, at least) the rule that an order for goods taken by an agent, subject to acceptance by his principal, is revocable before such ac-

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ceptance by merely supplying the agent with order blanks bearing the magical letters "L. S." on the "dotted line."

There are some cases in conflict or seeming conflict with those cited above, and they may be separated into three classes: the first class consisting of cases which may be distinguished from those referred to above; the second class, consisting of a single case apparently in direct conflict with the principles stated; and the third class, consisting of those cases which, without denying such principles, deny that they apply in courts of equity. In many of the cases of the first class, as remarked in the reported case (THOMASON v. BESCHER, ante, 626), the effect of the seal does not seem to have been brought directly to the attention of the court. The following cases are of this character:

—Smith v. Reynolds. (1880) 3 McCrary, 157, 8 Fed. 696, 2 Mor. Min. Rep. 227, in which a title bond, presumably under seal and apparently optional in form, was held invalid for want of a consideration, the court saying that such bonds were of no force or effect unless carried out by a tender of the price and its acceptance by the obligor;

—Bethea v. McCullough (1915) 195 Ala. 480, 70 So. 680, where an instrument in the form of a conveyance, under seal, leaving it optional with the vendee to pay the purchase price, was not witnessed or acknowledged as a conveyance, and was, accordingly, treated as not essentially different from an option. Though the instrument was under seal, the court ignored this fact and inquired into the consideration. It, however, held that there was a consideration, and that the fact, if it was a fact, that the recited consideration of $1 was not paid did not affect the validity of the option, as the grantor was entitled to its payment and estopped to deny that it had been paid;

—Gordon v. Darnell (1880) 5 Colo. 302, in which it was held that, there being no consideration for a title bond, it imposed no obligation on either party, and was subject to revocation by the obligor at any time before acceptance by the obligee;

—Simms v. Lide (1894) 94 Ga. 553, 21 S. E. 220, in which the court held, without writing any opinion except a syllabus, that a contract, under seal, to convey land to another upon a payment by him of the stipulated price, provided such payment be made within six months, was obligatory if supported by a consideration of $5 actually paid by the obligee to the obligor;

—Paddock v. Davenport (1890) 107 N. C. 710, 12 S. E. 464; Bryant Timber Co. v. Wilson (1909) 151 N. C. 154, 134 Am. St. Rep. 982, 65 S. E. 932; Winders v. Kenan (1913) 161 N. C. 628, 77 S. E. 687, in which the court, without referring to the fact that the option involved was under seal, said that options not based on a valuable consideration might be withdrawn at any time before acceptance. In none of the cases, however, had there been any revocation of the option;

—House v. Jackson (1893) 24 Or. 89, 32 Pac. 1027, in which the court, in discussing an option to purchase land contained in a lease under seal, without referring to the effect of the seal, said that the option was not binding on the lessor unless some consideration existed at the time the contract was executed. The court, however, held that there was a consideration;

—Warren v. Castello (1891) 109 Mo. 338, 32 Am. St. Rep. 669, 19 S. W. 29, in which specific performance of an agreement in the form of a bond, presumably under seal, giving the obligee the privilege of purchasing land at any time within fifteen years, was denied because the obligee was a married woman and incapable of agreeing to purchase, and there was no consideration, the court saying that the agreement was gratuitous and voluntary, and incapable of enforcement.

In Penn Match Co. v. Hapgood (1886) 141 Mass. 145, 7 N. E. 22, there were involved contracts with promoters of a corporation for the sale of machinery and appliances to the corporation. As the corporation was not then in existence, the court held that these agreements were nothing more than offers, revocable at

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any time before acceptance by the corporation after its incorporation, and it said that the fact that one of the contracts was under seal was immaterial in this respect. The court's subsequent remarks, however, seem to indicate that it meant that the seal did not dispense with an acceptance of the offer, and that there had been no acceptance. If the court meant anything more than this, the case would seem to be inconsistent with the latter case of O'Brien v. Boland (1896) 166 Mass. 481, 44 N. E. 602, discussed above, unless it is distinguishable on the ground that one element of an option, a promise to keep the offer open, was lacking.

In Mossie v. Cyrus (1911) 61 Or. 17, 119 Pac. 485, rehearing denied (1912) 61 Or. 21, 119 Pac. 624 (the case referred to above as constituting the second class of the cases opposed to the general rule), an agreement under seal for the sale of land, being unilateral in form, was held a mere offer to sell. The vendor attempted to withdraw the offer, and the purchaser subsequently attempted to accept it, and brought suit for specific performance, which was denied. As one ground for its decision, the court held that, as no time was specified during which the offer would be held open, it could only be accepted within a reasonable time, even though supported by a consideration, and that a reasonable time had expired before the acceptance; but the court also held that the seal was only prima facie evidence of a consideration, that there was in fact no consideration, and that the offer could, therefore, be withdrawn at any time; and, though the holding that the seal was only prima facie evidence of consideration was attacked by a motion for rehearing, the court expressly refused to recede therefrom. While this was a suit for specific performance, the court's decision does not appear to have been influenced by that fact; nor does the court refer to the fact that the distinction between sealed and unsealed instruments has been abolished in Oregon, though such is said to be the case (Elliott, Contr. § 198); and, moreover, the author just cited says that the effect of such legislation is not substantially different from the effect of statutes allowing the presumption of a consideration to be rebutted, under which, as said above, it is usually held that such presumption may not be rebutted for the purpose of invalidating the instrument.

In some jurisdictions it is held that equity will inquire into the actual consideration for the option, though under seal, and that if there was no consideration, or merely a nominal consideration, and the offer was withdrawn before acceptance, specific performance will be denied. Rude v. Levy (1908) 43 Colo. 482, 24 L.R.A. (N.S.) 91, 127 Am. St. Rep. 123, 96 Pac. 560; Crandall v. Willig (1897) 166 Ill. 233, 46 N. E. 755; Corbett v. Cronkhite (1909) 239 Ill. 9, 87 N. E. 874; Storch v. Duhnke (1899) 76 Minn. 521, 79 N. W. 533; Davis v. Petty (1898) 147 Mo. 374, 48 S. W. 944. And see also Savereux v. Tourangeau (1908) 16 Ont. L. Rep. 600, 11 Ont. Week. Rep. 944, where, however, the opinion in which this question is discussed does not seem to have been concurred in by a majority of the court; and, while the judgment is reversed on other grounds, the majority apparently hold that plaintiff might have specific performance.

These cases are all based on the rule, stated by the Illinois cases (quoting from 3 Pom. Eq. Jur. § 1293), as follows: "Equity will never enforce an executory agreement unless there was an actual, valuable consideration; and, unlike the common law, it does not permit a seal to supply the place of a real consideration. Disregarding mere forms and looking at the reality, it requires an actual valuable consideration as essential in every such agreement, and allows the want of it to be shown, notwithstanding the seal, in the enforcement of covenants, settlements, and executory contracts of every description."

Storch v. Duhnke (1899) 76 Minn. 521, 79 N. W. 533, supra, involved a written agreement under seal for the exchange of land, containing a provision that it was subject to the procuring of a satisfactory loan by one party

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on the property to be taken by him. Because of this provision, it was held that it amounted only to a proposal or offer by the other party, which he was at liberty to withdraw at any time before its acceptance, and that, having been so withdrawn, specific performance could not be granted. The court based its holding that the offer was revocable on two grounds. The first was, that when a sealed instrument expresses the consideration, the seal does not import any other consideration than that expressed, which, in the agreement in question, was the mutual promises of the parties. The second ground was thus stated by the court: "If there is any one thing settled in equity jurisprudence, it is that equity will not compel a man to give away his property because he has promised to do so under seal. Equity always requires an actual consideration in the case of executory agreements, and permits evidence as to the want of it without regard to the seal. . . . The courts of equity inquire into the question of consideration, not for the purpose of setting aside the contract, but for the purpose of ascertaining whether they ought to lend their peculiar auxiliary remedies to aid in its enforcement. And if this is true in the case of executory contracts themselves, it must be equally so in the case of mere options, properly so-called, on the principle that the lesser includes [is included in] the greater, and the whole includes all its parts."

As will be seen from the cases cited in the first part of this note, most of which were cases of specific performance, such relief is granted in many jurisdictions. In those cases, however, the effect of the rule that equity will not enforce a contract not supported by a valuable consideration, though under seal, does not seem to have been squarely called to the court's attention. This question was raised in Watkins v. Robertson (1906) 105 Va. 269, 5 L.R.A.(N.S.) 1194, 115 Am. St. Rep. 880, 54 S. E. 33, overruling Graybill v. Brugh (1893) 89 Va. 895, 21 L.R.A. 133, 37 Am. St. Rep. 894, 17 S. E. 558, and the court held that specific performance could be granted; but its decision was influenced to some extent by the fact that, in Virginia, there is no statute abolishing or modifying the common-law rule as to the effect to be given to the seal upon executory contracts.

This question was also discussed in McMillan v. Ames (1885) 33 Minn. 257, 22 N. W. 612, and while the court's remarks on this point were obiter (the action having been at law), and have since been repudiated by the same court in Storch v. Duhnke (Minn.) supra, they present the argument in favor of granting specific performance quite clearly. The court said: "It is true that equity will not lend its auxiliary remedies to aid in the enforcement of a contract which is inequitable, or is not supported by a substantial consideration; but at the same time it will not, on such grounds, interfere to set it aside. But no reason appears why equity might not have decreed specific performance in this case (had the land not been sold), because the substantial and meritorious consideration required by the court in such case would consist in that stipulated in the instrument as the condition of a conveyance, performance of which by the plaintiff would have been exacted as a prerequisite to relief, so as to secure to defendant mutuality in the remedy, and all his rights under the contract. The inquiry would not in such case be directed to the constructive consideration evidenced by the seal, for a mere nominal consideration would have supported defendant's offer or promise upon the prescribed conditions."

To the same effect is the reported case (THOMASON v. BESCHER, ante, 626). And see also 6 Pom. Eq. Jur. § 773. A. McT.

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STEARNS SALT & LUMBER COMPANY, Appt.,
v.
DENNIS LUMBER COMPANY.

Michigan Supreme Court — September 28, 1915.

(188 Mich. 700, 154 N. W. 91.)

Sale — warranty — partial acceptance — divisible contract.

A purchaser of a carload of lumber warranted to be of a certain grade may accept the portion which is of that grade and reject the balance by promptly notifying the vendor of the rejection.

[*See note on this question beginning on page* 643.]

(Ostrander, Stone, and Steere, JJ., dissent.)

APPEAL by plaintiff from a judgment of the Circuit Court for Kent County in defendant's favor in an action brought to recover a balance alleged to be due on two carloads of lumber sold by plaintiff to defendant. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **Hatch, McAllister, & Raymond**, for appellant:

This was clearly a single sale and a single delivery of the goods sold, and the defendant, on inspection of the goods, was bound to accept or reject the whole, and could not accept part and reject the remainder.

George D. Sisson Lumber & Shingle Co. v. Haak, 139 Mich. 383, 102 N. W. 946; Columbus & H. Coal & I. Co. v. See, 169 Mich. 661, 135 N. W. 920; 2 Mechem, Sales, § 1398; Benjamin, Sales, § 426; Tiffany, Sales, 111; Manss-Bruning Shoe Co. v. Prince, 51 W. Va. 510, 41 S. E. 907; Morse v. Brackett, 98 Mass. 205; Mansfield v. Trigg, 113 Mass. 350.

In executory contracts, with an implied warranty, the duty is to inspect and reject, or pay the contract price.

Farrington v. Smith, 77 Mich. 550, 43 N. W. 927; Talbot Paving Co. v. Gorman, 103 Mich. 403, 27 L.R.A. 96, 61 N. W. 655; Williams v. Robb, 104 Mich. 242, 62 N. W. 352; Buick Motor Co. v. Reid Mfg. Co. 150 Mich. 118, 113 N. W. 591; Remy v. Healy, 161 Mich. 266, 29 L.R.A.(N.S.) 139, 126 N. W. 202, 21 Ann. Cas. 74; Gill v. National Gaslight Co. 172 Mich. 295, 137 N. W. 690; Columbus & H. Coal & I. Co. v. See, 169 Mich. 661, 135 N. W. 920.

Messrs. **Travis, Merrick, & Werner**, for appellee:

A purchaser of lumber of a certain agreed quality need not accept and pay for the entire shipment tendered him by the seller, where the seller has mingled with the lumber ordered other lumber, which is of a vastly inferior grade and so poor that it is absolutely worthless for any purpose.

McFadden v. Wetherbee, 63 Mich. 395, 29 N. W. 881; Lampson v. Cummings, 52 Mich. 491, 18 N. W. 232; Canton Lumber Co. v. Liller, 112 Md. 258, 76 Atl. 415; Gilbert v. Alton, 88 App. Div. 62, 84 N. Y. Supp. 682; Molling v. Dean, 18 Times L. R. 217; Pacific Coast Elevator Co. v. Bravinder, 14 Wash. 315, 44 Pac. 544; Hubbard v. George, 49 Ill. 275; Huntington v. Lowe, 3 La. Ann. 377; Flint v. Lyon, 4 Cal. 17; Robert Buist Co. v. Lancaster Mercantile Co. 73 S. C. 48, 52 S. E. 789; Cohen v. Pemberton, 53 Conn. 221, 55 Am. Rep. 101, 2 Atl. 315, 5 Atl. 682; Buckeye Buggy Co. v. Montana Stables, 43 Wash. 49, 117 Am. St. Rep. 1032, 85 Pac. 1077; Kellogg v. Murphy, 54 N. Y. 685; Rodman v. Guilford, 112 Mass. 405; Meyer v. Everett Pulp & Paper Co. 184 Fed. 945.

Kuhn, J., delivered the opinion of the court:

On December 29, 1911, the defendant company placed an order with the plaintiff company by telephone for two carloads of a certain grade of lumber, and followed this

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by letter confirming the same, which read as follows:

Dennis Lumber Company.
Grand Rapids, Mich., 12–29–11.
Stearns Salt & Lumber Company,
Ludington, Mich.

Gentlemen:—

Confirming conversation over the phone the other evening with Mr. Holland, at which time he booked our order for the two more cars of 4 in. No. 4 pine crating strips D2S to ¾ in., to be same quality as the last shipped us, we wish to inquire as to how soon you will be able to make shipment of these two cars.

Awaiting your reply, we are,
Yours very truly,
Dennis Lumber Company.

To this communication the plaintiff company replied under date of December 30, 1911, advising that the lumber would be shipped at once.

On January 6, 1912, the plaintiff mailed to the defendant an invoice of the first car of lumber shipped, and on January 11, 1912, sent an invoice of the second carload shipped. The first car of lumber was placed for unloading February 19, 1912, and was unloaded on the following day. The other car was placed for unloading on February 21, 1912, and the unloading of that car was completed within two days, on February 23. On the next day, February 24, 1912, defendant notified plaintiff of the rejection of part of the lumber received, by the following communication:

Dennis Lumber Company.
Grand Rapids, Mich., Feb. 24, 1912.
Stearns Salt & Lumber Co.,
Ludington, Mich.

Gentlemen:—

We herewith hand you report on the two cars of pine crating as follows:

B. & M. 61015.... 27,106 ft. of good
1,479 ft. of worthless culls
28,585 ft. total

—which shows a shortage of 32 ft.

O. C. L. 9114 25,540 ft. of good
2,395 ft. of worthless culls
27,935 ft. total.

The writer has looked these culls over very carefully, and there is no doubt but that our customer has been more than fair in what he has taken. However, if you wish, we will have Mr. Tillitson go over the culls, or if your Mr. Holland can spare the time to go with us to look them over the next time he is down here, it will save any unnecessary expense in the matter.

We are certainly surprised that any inspector could or would attempt to ship any such strips for No. 4, as they are so poor and rotten that they will hardly hold together and are absolutely of no value whatever.

We herewith inclose statement and our check to balance account for these two cars.

Yours very truly,
Dennis Lumber Company.

The plaintiff company immediately replied that it would not consent to any loss on the car, and must have settlement in full. Further correspondence was had between the parties, and finally suit was brought to recover the sum of $50.75, the claimed balance due on the two cars in question, the value of the lumber rejected. Suit was started in the justice's court, which resulted in a judgment in favor of the defendants, and on appeal taken to the circuit court the trial judge directed a verdict of no cause of action.

It is contended here that the circuit judge erred in holding and instructing the jury that the contract in question was severable, and that the defendant had a right to reject part of the lumber in question and accept the remainder. It is the contention of the plaintiff that the defendant had purchased these two cars of lumber, of one quality and grade, and as soon as the cars arrived the defendant had a reasonable time in which to inspect the same and ascertain if they complied with the requirements of the contract as to quality and grade, and after such examination defendant was obliged to either accept or re-

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ject all of the lumber; and if he accepted a part of the lumber, and then used the same, he was obliged to pay the contract price of all of the lumber. Reliance is placed upon the cases of George D. Sesson Lumber & Shingle Co. v. Haak, 139 Mich. 383, 102 N. W. 946, and Columbus & H. Coal & I. Co. v. See, 169 Mich. 661, 135 N. W. 920.

It is true that it is the rule of law in this state that in an executory contract for the sale of personal property, where there is an implied warranty, the warranty does not survive the acceptance of the goods; and it becomes the duty of the purchaser to make an inspection and reject, or pay the contract price, which proposition of law is fully sustained by the two Michigan cases above cited. But the question here is rather whether or not the contract in question is a severable one, and whether or not the defendant could, after inspection, in view of the rule of law here established, reject that part of the lumber which did not meet the specifications. The question of the right of the consignee to reject a portion of the shipment, which is below grade or worthless, while accepting the greater part of the shipment, is not involved in the decision of the George D. Sisson Lumber & Shingle Co. Case, supra, and likewise in the Columbus & H. Coal & I. Co. Case, supra, the entire cargo was of an inferior quality, and the consignee accepted the shipment of coal and attempted to make a settlement upon a reduced price, because of the alleged inferior quality of the coal. No Michigan case has been called to our attention, nor have we been able to find such a case, in which the precise question here involved was under consideration.

In the case of McFadden v. Wetherbee, 63 Mich. 390, 29 N. W. 881, in which there was under consideration a contract for the delivery to a vendee of pine blocks of a specified quality, and the vendee had failed to reject the blocks at the time of delivery, although advised that they were defective, and paid for the same, this court said: "The defendant had the right, at the time of the delivery, to reject any and all blocks not coming up to the standard of the contract; but if it paid for them at that time or afterwards, without rejecting any, although complaint was made of their being defective, the defendant nevertheless lost thereby the right in this suit to plead a breach of the contract as far as the blocks so paid for were concerned; nor would it authorize the rejection and nonacceptance of blocks thereafter to be delivered under the contract, without a showing that the blocks so offered to be delivered were also defective. No such showing was made."

So, in the instant case, if the defendant had taken into possession the rejected lumber and assumed to dispose of it at a less price, as was done in the Columbus & H. Coal & I. Co. Case, supra, there could be no question that, under the law in this state, the damages thus sustained could not have been recouped in an action to recover for the rejected lumber. But here the defendant moved promptly by notifying the plaintiff the very next day after the inspection, of the rejection of the lumber in question.

In a similar case in Maryland, Canton Lumber Co. v. Liller, 107 Md. 146, 68 Atl. 500, the court held that the plaintiff had a right to accept lumber which was up to the grade contracted for, and that by so doing it did not accept the part which was below grade. In its opinion the court said:

"Unless it measured up to the specifications, it was of no practical value to the plaintiff for the only purpose for which it was ordered, and, not being a dealer equipped for resale, it was of little value to him for any purpose. He was compelled, in order to perform his contract with the railroad company, to purchase without delay other lumber to replace such as should be rejected under proper inspection.

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Can it be supposed then that it was the intention of either of the parties that if one half or one quarter of the lumber passed the inspection, and the remainder was rejected, that the plaintiff could not use the former for the specific purpose for which it was bought, without being required to take also the rejected portion which he could not use? Such a conclusion is as irrational when attributed to the defendant as when attributed to the plaintiff, under all the circumstances of this case. And this construction is supported by the subsequent dealing of the parties with respect to the rejected lumber, which was accepted and removed from Keyser by the defendant. It is true that this alone would not be conclusive, and it would have comparatively little significance if accompanied by a declaration that the acceptance of the rejected lumber was only for the purpose of reducing thereby the damage sustained; but when unexplained, as in this case, the conduct is most significant of the intention of the parties. As illustrative of this view, it was said in Richards v. Shaw, 67 Ill. 222, that the modern rule is that the entirety of a contract of sale is severed by the buyers receiving and retaining a part, after the seller has refused or failed to deliver the residue, of the specific quantity of goods bargained for.

"The case of Holmes v. Gregg, 66 N. H. 621, 28 Atl. 17, relied on by the plaintiff, is directly in point, and meets with our full concurrence. That was a sale of lumber shipped on cars in five lots, three of which were accepted and used by the defendants, and the others, not conforming to the order in quality, were rejected and piled in their yard, where they remained, subject to the plaintiff's order. The defendants seasonably informed the plaintiffs of their action, and tendered the price of the accepted lumber, and the court said: 'Without an express stipulation that the contract was or was not entire, the parties might have understood that it was severable in such a sense that the defendants could accept the lumber that conformed to the contract and reject the rest.' "

We are of the opinion that the trial court was correct in holding that the contract was a severable one, and no error was committed in so charging the jury.

In his reasons for directing a verdict the court also stated that thus severing the contract was in accordance with a custom universal among lumber dealers, and it is contended that this was error because, it is claimed, the testimony in this respect falls far short of establishing such a universal custom as to warrant this conclusion on the part of the court. Being of the opinion that the court arrived at a proper conclusion with respect to the other question, and properly directed a verdict for that reason, it is unnecessary for us to determine whether, under the facts in this case, the testimony was sufficient to justify a conclusion that a universal custom had been established.

Sale—warranty—partial acceptance—divisible contract.

The judgment is affirmed.

Brooke, Ch. J., and **Moore** and **Bird**, JJ., concurred with **Kuhn**, J.

Ostrander, J., dissenting:

The first letter which appears in the record in respect to the matter in controversy was written by the defendant to the plaintiff December 29, 1911, which recites that it confirms a conversation over the phone between plaintiff's representative and defendant's representative, "at which time he booked our order for the two more cars of 4 in. No. 4 pine crating strips D2S to ¾ in., to be same quality as the last shipped us," and inquiring when shipment would be made. In answer the plaintiff on December 30th wrote the defendant: "Your favor of the 29th received, relative to two cars 4 in. pine strips, and we are pleased to advise you we are in position to get these on the way to you at once."

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With this letter went a statement on an order blank of the plaintiff, dated December 30, 1911, describing two cars 1x4 pine crating S2S to ¾ in., $13, upon which was printed: "The above is a copy of your order as we understand it. If incorrect wire us immediately."

The first car was shipped January 6, 1912, on which day the invoice of the car sent to the defendant is dated. The invoice is:

Pine crating S2S to ¾ 1x4 28617 13.00...372.02
Less freight.

The other car was shipped January 11th, the invoice dated that day and sent to defendant, and the invoice describes:

Pine crating S2S to ¾ 1x4 27933 13.00....363.13
Less freight.

These invoices and the cars were received by the defendant, and the cars were placed by them with their customers. They paid $400 on account before the arrival of the cars. Defendant bought the lumber to be sold again. The cars were unloaded by the customers, and defendant wrote plaintiff on February 24th, giving a report of the two cars, showing that out of the first car 1,497 feet, and out of the second car 2,395 feet, had been rejected as worthless culls. Accompanying this report and statement was defendant's check to balance the account as per the statement. On February 28th, plaintiff wrote the defendant acknowledging receipt of the said statement, saying: "Now in reply will say that we did not sell you a No. 4 grade. Our order confirming this deal reads 1x4 pine crating, which means No. 4 and 5 mixed. We cannot stand any loss whatever on these two cars and we must have settlement in full."

Further correspondence followed, defendants refused to pay, and this suit was brought to recover the balance of $50.75. The cause came on for trial in the circuit court, on an appeal from justice's court, and among other testimony offered on the part of the defendant in that court was some which the defendant asserts tended to and did prove a custom of the lumber trade permitting the buyer to accept part of a car without accepting all of it. The testimony further tended to prove the facts above stated, but no point appears to be made by counsel upon plaintiff's denial that it did not sell No. 4 grade. In argument the sale is treated as one upon implied warranty. The circuit court directed a verdict for the defendants, saying, among other things: "I think it satisfactorily appears that the contract in this case was a severable contract, and, further, that according to the custom universal amongst lumber dealers, the conduct of the defendant company was justified, and, when an amount was sent to the defendant covering the contract price of the grade of lumber accepted and the check retained by the plaintiff company, that the defendant had done all it was required to do."

The testimony fails to prove a custom known to plaintiff, and has little tendency to prove a custom in Grand Rapids, where the lumber in question was received. What effect the court gave to the fact that plaintiff kept the check sent by defendant with its statement is not apparent. The money was due to it, and, as it contends, was a partial payment only.

That the court was wrong in holding the contract severable is, I think, clear. It was not, in terms, severable. The sale was a sale of a carload, and a carload was tendered in performance. The tender of a few strips or of half a carload would not have answered the seller's promise. The action of the buyer in accepting a few or many strips, or boards, would not sever the contract. Defendant, with no notice to plaintiff, turned the lumber over to a customer before inspection. Submission or a lawsuit were the alternatives presented by the buyer to the seller, as they would be in every similar case.

The Maryland case cited by my brother Kuhn was not in its facts

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like the case at bar. In that case lumber to conform to blueprint and other specifications was agreed to be delivered—409,943 feet in all. To the knowledge of both parties it was to be used in the construction of a certain building, and plaintiff, the buyer, claimed it was subject to the inspection of the agents of the railroad for which the building was to be constructed. Some 56,000 feet were used, and the remainder rejected, and the seller removed the rejected lumber. The buyer purchased the necessary material elsewhere at a higher price and sued for his damages. The court refers approvingly to a New Hampshire case. Examination discovers that it is a case in which five lots of lumber of different dimensions and prices were sold. Three lots were accepted and used, the others, "not conforming to the order in dimensions, quality, quantity, and price, were rejected," of which the sellers were seasonably informed. The Maryland court also refers to a Maryland case where the sale was of three negroes, warranted to be sound, and it was held that the contract was severable. None of the cases is like the one at bar.

Whether a particular contract is entire or separable is a question of intention, which intention is to be determined by the language used by the parties and the subject-matter of the agreement. I quote, as applicable to the case presented upon this record, the language of the supreme court of Iowa in Pacific Timber Co. v. Iowa Windmill & Pump Co. 135 Iowa, 310, 112 N. W. 771, as follows: "It is very difficult to lay down a rule which will apply to all cases, and consequently each case must depend very largely upon the terms of the contract involved. In this case we think it almost conclusive that the parties did not intend the contract in question to be severable. It is hardly conceivable that the plaintiff, living more than 2,000 miles away from the defendant's place of business, should contemplate the shipment of a carload of lumber, although consisting of pieces of different dimensions, with the understanding or intention that each piece of timber so shipped should constitute the basis of an independent contract, so that the consignee would be at liberty to reject any part of the lumber so shipped and retain the balance; nor is there anything in the contract itself indicating that the defendant had any thought that it was to receive any other than an entire car."

For the reasons stated, I disagree with the conclusion of my brother Kuhn, and think the judgment should be reversed, and a new trial granted.

Stone and Steere, JJ., concur with Ostrander, J.

Petition for rehearing denied September 27, 1916.

ANNOTATION.

Contract for sale of goods as entire or divisible.

I. Scope and introduction, 644.
II. Definition of entire and severable contracts, 645.
III. General rules for determining character of contract, 645.
IV. Where effect of breach by seller involved:
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V. Where effect of breach by buyer involved:
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VI. Time of payment, 677.

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I. Scope and introduction.

This note, as indicated in its title, is confined to the question of construction as to when a contract of sale is to be regarded as entire, and when divisible. With the legal consequences, i. e., the particular rights and remedies of the parties which may depend upon the character of the contract in that regard, the note is not concerned as an independent question. Nevertheless, it has been necessary to take those legal consequences into consideration, and even to allow them in a large measure to control the classification, for the reason that the particular right or remedy which presents the ultimate question in the case exerts a very potent and often a controlling influence over the courts, in determining whether the contract *is* entire or divisible. In other words, instead of considering the question as to the entirety or divisibility of the contract as an abstract question and then deducing the particular rights or remedies of the parties from the character thus assigned to the contract, the courts in many cases ascribe to the parties an intention, based upon reasonable expectation of what their respective rights or remedies would be in the contingency which has happened, and characterize the contract accordingly. The practical result is that the same contract may be regarded as entire for one purpose, and severable for another.

For example, if the question is presented as to whether a contract for the sale of a large quantity of a commodity, deliverable in instalments spread over a considerable period of time, and silent as to payment, is entire in the sense that payment is to be made after complete performance, or severable to the extent that payment is to be made upon the delivery of each instalment, the court, having reference to the natural and evident intent of the parties, may hold the contract to be severable to the extent that payment is to be made as each instalment is delivered. On the other hand, if, under the same contract, the question is presented as to whether or not it is severable or entire as affecting the right of the seller to rescind it as a whole for default of the buyer in paying for instalments delivered, the court, again having reference to the evident intent of the parties in this regard, may hold that, since the contract extends over a long period of time, the parties intended the payment for instalments as delivered to be an essential element of the contract, and therefore hold it to be entire as to the right of the seller to rescind it for the default of the buyer. It is to be noted, however, that while in this note the language used may sometimes place such emphasis upon the matter of remedy as to suggest that this was the primary point under consideration; nevertheless it should be constantly kept in mind that the matter is thus treated because the court has approached it from that standpoint, and has determined the character of the contract as entire or divisible, in view of the relief sought. Hence, notwithstanding so much of the note is apparently devoted to the question of remedy, such reference is merely incidental to the treatment of the real subject of the note, viz., the construction of contracts for the sale of different articles, or of a commodity deliverable in instalments, as to divisibility; and the note is concerned with the rights or remedies dependent upon the character of the contract as entire or severable, only so far as they react upon and influence the determination of the question whether the contract is to be regarded as entire or severable.

It is not intended to include herein cases involving contracts for the sale of machinery, as such cases are treated in a future note. For a specific treatment of the question of the divisibility of a contract to furnish material for certain construction work, see note appended to Kelly Constr. Co. v. Hackensack Brick Co. post, 685. And as to the divisible character of a contract for successive sales, under an agreement for exclusive agency, see Mark v. Stuart Howland Co. post, 678.

In considering the general rules for the interpretation of contracts for the sale of different articles, or for the sale of goods or commodities to be delivered in instalments, it is to be noted that the determinative test as to the

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severable character of the contract is the intention of the parties, which is to be ascertained from the contract itself, construed in the light of the surrounding circumstances.[1] Hence, while rules for construction may apparently be stated dogmatically as principles of law, they are not hard and fast rules for the construction of the contract, but are merely aids to the ultimate object,—discovering the intention of the parties. Of course, certain elements or facts may be held to be more helpful or to possess more relative influence or weight than others in this regard, but, after all, they perform only the subsidiary purpose of ascertaining the intention of the parties.

II. Definition of entire and severable contracts.

The construction of contracts of this character does not depend solely or necessarily upon the nature of the articles which are the subject-matter thereof, or upon the price affixed to each article, but rather upon the nature of the contract itself. The contract is entire if it is one bargain, and it matters not whether there is one article, or many, each having an apportioned price.

On the other hand, a severable contract is one in its nature and purposes susceptible of division and apportionment, having two or more parts in respect to the matters and things contemplated and embraced by it, not necessarily dependent upon each other, the consideration not being single or entire as to all of its several provisions, as a whole.[2]

III. General rules for determining character of contract.

Whether a contract is entire or severable has been held to depend upon the character of the consideration. The consideration to be paid, and not the subject or thing to be performed, is said to determine the character of the contract. Its entirety or severableness is held to depend not upon the singleness of its subject or the multiplicity of the items composing it, but upon the entireness of the consideration, or its express or implied apportionment to the several items constituting its sub-

[1] Los Angeles Gas & E. Co. v. Amalgamated Oil Co. (1909) 156 Cal. 776, 106 Pac. 55; Bearden Mercantile Co. v. Madison Oil Co. (1907) 128 Ga. 695, 58 S. E. 200; Morris v. Wibaux (1895) 159 Ill. 627, 43 N. E. 887; Pacific Timber Co. v. Iowa Windmill & Pump Co. (1907) 135 Iowa, 308, 112 N. W. 771; Morrison v. Baechtold (1901) 93 Md. 319, 48 Atl. 926; Wooten v. Walters (1892) 110 N. C. 251, 14 S. E. 734, 736; Shinn v. Bodine (1868) 60 Pa. 182, 100 Am. Dec. 560; Producers Coke Co. v. Hillman (1914) 243 Pa. 313, 90 Atl. 144.

Canton Lumber Co. v. Liller (1908) 107 Md. 146, 68 Atl. 500, holding that whether or not a contract for the sale of lumber is entire or severable is a question of construction, and depends upon the intention of the parties, to be gathered from the language and subject-matter of the contract.

Fullam v. Wright & C. Wire Cloth Co. (1907) 196 Mass. 474, 82 N. E. 711, holding that the situation of the parties may be considered to ascertain their intention and to interpret the contract.

Ming v. Corbin (1894) 142 N. Y. 334, 37 N. E. 105, holding that whether a contract is entire or distributive is often a question of intention, and frequently one of fact.

[2] Quarton v. American Law Book Co. (1909) 143 Iowa, 517, 32 L.R.A.(N.S.) 1, 121 N. W. 1009; Wooten v. Walters (1892) 110 N. C. 251, 14 S. E. 734, 736; Oliver v. Oregon Sugar Co. (1902) 42 Or. 276, 70 Pac. 902, citing Tenny v. Mulvaney (1879) 8 Or. 129, in defining divisible contract.

Coleman v. Hudson (1854) 2 Sneed (Tenn.) 463, holding that an entire contract is an unconditional agreement for the sale of several articles, or a number or quantity of goods contracted for, which precludes by its terms, and equally by the plain intention of the parties, all idea of divisibility. And see Bradford v. Montgomery Furniture Co. (1906) 115 Tenn. 610, 9 L.R.A.(N.S.) 979, 92 S. W. 1104.

Widman v. Gay (1899) 104 Wis. 277, 80 N. W. 450, holding that an entire contract is one where, in the intention of the parties, full and complete performance on one side constitutes a consideration for performance on the other.

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ject. If the consideration is single, the contract is entire, whatever the number or variety of the items embraced in the subject; but if the consideration is apportioned, expressly or impliedly, to each of these items, the contract is severable.[3]

This doctrine is narrower than the cases, as a whole, would seem to justify. In this regard, the legal principle governing does not depend either solely or necessarily on the nature of the articles which are the subject-matter of the contract, or on the price affixed to each, but rather on the nature of the contract itself. The contract is entire if it is one bargain, and it matters not whether there is one article, or many, each having an apportioned price. If the seller was unwilling to sell one portion without selling the whole, and the buyer unwilling to take a part unless he could have the whole, the contract in its nature is entire.[4]

For example, ordinarily, when two or more articles are sold together for a gross sum, or the purchase price is not apportioned to the different articles, the contract is entire.[5] So, where it is for the sale of a quantity of goods as a particular lot, although the price is to be ascertained by some manner of computation based upon weight or measure and the price can be apportioned to each article;[6] or where the taking of the whole is essential, either from the char-

[3] Rugg v. Moore (1885) 110 Pa. 236, 1 Atl. 320.

Kein v. Tupper (1875) 42 How. Pr. (N. Y.) 437, holding that a contract for the sale of different articles at different prices at the same time is severable as to each article, unless the taking of the whole is rendered essential by the nature of the subject-matter of the contract, or by the act of the parties; but when the contract relates to a specific commodity at a fixed price for each article, and there is no intention, express or implied, of a severable performance, complete fulfilment is a condition precedent.

Buckeye Buggy Co. v. Montana Stables (1906) 43 Wash. 49, 117 Am. St. Rep. 1032, 85 Pac. 1077, stating the general rule that if several articles are sold for a single and entire consideration, without an apportionment of the purchase price to the several articles, the contract of sale is entire; but if the several articles are sold and a separate price is agreed upon for each, although a single instrument of conveyance is executed, reciting a single consideration for the whole, yet, for a sufficient cause shown, the contract may be rescinded as to a portion of the articles and enforced as to the remainder.

It has been said that contracts of sale are entire only when the agreements go to the whole of the consideration on both sides. Indian Mountain Jellico Coal Co. v. Asheville Ice & Coal Co. (1904) 134 N. C. 574, 47 S. E. 116.

[4] Rugg v. Moore (1885) 110 Pa. 236, 1 Atl. 320; Providence Coal Co. v. Coxe Bros. (1896) 19 R. I. 380, 35 Atl. 210.

[5] Boyd v. Second Hand Supply Co. (1912) 14 Ariz. 36, 123 Pac. 619; Young & C. Mfg. Co. v. Wakefield (1876) 121 Mass. 91; Wooten v. Walters (1892) 110 N. C. 251, 14 S. E. 734, 736; Petersburg Fire Brick & Tile Co. v. American Clay Machinery (1914) 89 Ohio St. 365, L.R.A.1915B, 536, 106 N. E. 35; Burckhardt v. Burckhardt (1880) 36 Ohio St. 261.

Banks v. Crow (1869) 3 Or. 477, holding that a contract for the sale of land and personal property for a gross sum is entire, and if void in part it is void in whole. Scheland v. Erpelding (1877) 6 Or. 258.

Taplin v. Clark (1915) 89 Vt. 226, 95 Atl. 491, holding that a contract for the sale of several horses and a piece of uncut oats for a gross sum is entire (action by purchaser against the seller for conversion of one of the horses included in the contract).

[6] Barrow v. Pennick (1903) 110 La. 572, 34 So. 691; Young & C. Mfg. Co. v. Wakefield (Mass.) supra.

J. M. Ackley & Co. v. Hunter-Benn & Co's Co. (1909) 166 Ala. 295, 51 So. 964, holding to be entire a contract for the sale of standing timber, when sawed and delivered, payments to be made a certain time after each delivery (bill in equity for construction of contract and its rescission in part).

L. Bucki & Son Lumber Co. v. Atlantic Lumber Co. (1901) 48 C. C. A. 455, 109 Fed. 411, holding that a contract is entire where it is for the sale of a large quantity of logs of a certain quality and size, to be delivered in instalments, payment to be made with reference to each delivery; and the claims of the party for breach of the contract constitute indivisible de-

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acter of the property or the agreement of the parties;[7] or it reasonably appears, from the terms of the contract or the surrounding circumstances, that it is intended that full and complete performance shall be made with reference to the subject-matter of the contract by the seller, in consideration of the obligation of the buyer;[8] or the contract by its terms, nature, and purpose, shows it to have been the intention that each and all of its parts should be common each to the other, and not independent;[9] or the subject-matter is of such a nature that the failure to obtain a part of the articles would materially affect the object or purpose of the contract, and thus have influenced the sale, had such a failure been anticipated.[10]

As pointed out, a contract of sale severable in its nature and purpose is susceptible of division and apportionment, the different parts not being dependent upon each other, and the consideration being apportionable and not affected by the combination of the different articles, and the contract itself not having been induced by such combination. But the divisibility alone of the subject-matter or consideration, while tending strongly to indicate the severable character of the contract, is not necessarily a conclusive test in this regard.[11] It will not overcome the intention of the parties to make an entire contract, when this is otherwise shown.[12]

The subsidiary terms of a contract for the sale of goods or commodities, as to the delivery and payment in instalments, do not necessarily split up the contract into as many contracts as there are deliveries, provided that it is consistent with the natural meaning of the contract that it is to be single, and to include the designated articles to be delivered at specified times and in a designated manner, for which payment is to be made, based upon such deliveries.[13] As hereinafter more specifically pointed out, contracts for the delivery and payment in instalments are fre-

mands, which are barred by a judgment rendered in a suit between the parties with reference to the contract.

Tompkins v. Haas (1845) 2 Pa. St. 74, holding that a sale by auction of two parcels of sugar of different qualities and at different prices, to be paid for on delivery and to be taken away within a designated time, is entire, and the fact that the purchaser paid for and removed one parcel does not relieve him from the obligation to perform as to the other.

Barker v. Reagan (1871) 4 Heisk. (Tenn.) 590, holding to be entire a contract for the sale of two bales of cotton at different prices per bale (breach by buyer in refusing to pay for and receive both bales).

John Deere Plow Co. v. Shellabarger (1918) 140 Tenn. 123, 203 S. W. 756, holding to be entire a contract for the sale of lumber at a specified price per thousand, to be shipped as specifications were furnished, to be paid for within a certain time after each delivery.

[7] Siebert v. Dunn (1915) 216 N. Y. 237, 110 N. E. 447 (contract for purchase of all the brick which the buyer would need in the construction of certain sewers); Laclede Constr. Co. v. Tudor Iron Works (1902) 169 Mo. 137, 69 S. W. 384; Loudenback Fertilizer Co. v. Tennessee Phosphate Co. (1903) 61 L.R.A. 402, 58 C. C. A. 220, 121 Fed. 298; Pacific Timber Co. v. Iowa Windmill & Pump Co. (1907) 135 Iowa, 308, 112 N. W. 771; Miller v. Leo (1900) 165 N. Y. 619, 59 N. E. 1126, affirming (1898) 35 App. Div. 589, 55 N. Y. Supp. 165; Ross-Meehan Foundry Co. v. Roger Wheel Co. (1904) 113 Tenn. 370, 83 S. W. 167, 68 L.R.A. 829, 3 Ann. Cas. 898. But compare with Canton Lumber Co. v. Liller (1908) 107 Md. 146, 68 Atl. 500, infra, note 37; and see note appended to Kelly Constr. Co. v. Hackensack Brick Co. post, 685.

[8] Los Angeles Gas & E. Co. v. Amalgamated Oil Co. (1909) 156 Cal. 776, 106 Pac. 55; Sterling v. Gregory (1906) 149 Cal. 117, 85 Pac. 305; Norris v. Harris (1860) 15 Cal. 227; Pacific Timber Co. v. Iowa Windmill & Pump Co. (1907) 135 Iowa, 308, 112 N. W. 771.

[9] Norris v. Harris (1860) 15 Cal. 226.

[10] Pacific Timber Co. v. Iowa Windmill & Pump Co. (Iowa) supra.

[11] King v. Corbin (1894) 142 N. Y. 334, 37 N. E. 105.

[12] Shinn v. Bodine (1869) 60 Pa. 182, 100 Am. Dec. 560.

[13] Mersey Co. v. Naylor (1884) L. R. 9 App. Cas. 435, 53 L. J. Q. B. N. S. 497, 51 L. T. N. S. 637, 32 Week. Rep. 989, 23 Eng. Rul. Cas. 504.

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quently construed to be apportionable or severable in some aspects, and entire in others.

The mere fact, however, that several articles are included in one contract of sale, does not necessarily make it severable; and the entirety of the contract is not destroyed by the circumstance that the subject of the sale is of such a uniform character as to be readily divisible or apportionable by weight or measure,[14] nor by the fact that the articles are contained in packages of a uniform quality, and the consideration is apparently apportioned to each article, it further appearing that the purpose was merely to fix the price of each unit, but that the real consideration for the sale was the combination of articles at an aggregate sum.[15] For, even where the purchase price may be expressly or impliedly apportioned to each article covered by a contract of sale, it will be treated as an entirety, where the nature and character of the agreement, as a whole, show that this was the intention of the parties.[16] For example, where the contract recites that all of the articles are sold for a lump sum, thus negativing any intention to sell each article separately, the contract is entire, although the purchase price is also apportioned to each article.[17]

Generally, however, a contract will be construed to be divisible, where it is for the sale of several separate and distinct articles, and the price is apportioned to each, not as one unit in the whole, or as a part of a gross sum.[18] Thus, a contract is divisible, where the part to be performed by one party consists of several distinct and separate items, each independent of the other, and the consideration for one article does not enter into the consideration for another, the price to be paid by the other party being apportioned to each item or left to be implied by law,[19] or where the taking of the whole is not rendered essential, either by the terms

[14] Young & C. Mfg. Co. v. Wakefield (1876) 121 Mass. 91; Prautsch v. Rasmussen (1907) 133 Wis. 181, 113 N. W. 416.

[15] Mansfield v. Trigg (1873) 113 Mass. 350.

Clark v. Baker (1843) 5 Met. (Mass.) 452, holding that a contract of sale is not severable merely because the several articles comprising the subject-matter thereof are sold by weight or measure, and the value is ascertained by a price fixed for each pound, yard, or foot.

Coleman v. Hudson (1854) 2 Sneed (Tenn.) 463, holding that a severable contract in its terms implies an apportionment.

Baldey v. Parker (1823) 3 Dowl. & R. 220, 2 Barn. & C. 37, 107 Eng. Reprint, 297, 1 L. J. K. B. 229, 26 Revised Rep. 260, holding that a contract for the sale of different articles at a price apportioned to each, although separately negotiated, is nevertheless entire, where it was all entered upon the same bill, and negotiations were had for a cash discount on the gross amount; hence, where the gross amount exceeds the limit of the Statute of Frauds, prohibiting oral contracts for the sale of articles of more than a limited amount, the transaction is invalid as a whole.

[16] Los Angeles Gas & E. Co. v. Amalgamated Oil Co. (1909) 156 Cal. 776, 106 Pac. 55.

[17] Solomon v. Corbett (1899) 38 App. Div. 262, 57 N. Y. Supp. 18.

[18] Barlow Mfg. Co. v. Stone (1908) 200 Mass. 158, 86 N. E. 306; West End Mfg. Co. v. P. R. Warren Co. (1908) 198 Mass. 320, 84 N. E. 488.

Mark v. Stuart, Howland Co. (Mass.) post, 678, holding that a contract for the exclusive agency of certain goods and an agreement to sell from time to time, at prices to be fixed by the parties, such of the goods as the buyer may require, is divisible as to the successive sales of goods.

Potsdamer v. Kruse (1894) 57 Minn. 193, 58 N. W. 983, holding that a contract is severable where it is for the sale of different kinds and styles of goods, at separate prices for each kind, if there is nothing to indicate that the price of one kind was fixed with reference to the price of others, or that the acceptance by the purchaser of all of the articles was a consideration for the undertaking by the seller to sell any of them.

[19] Los Angeles Gas & E. Co. v. Amalgamated Oil Co. (Cal.) supra; Ming v. Corbin (1894) 142 N. Y. 334, 37 N. E. 105.

Alwart Bros. Coal Co. v. Royal Colliery Co. (1914) 127 C. C. A. 529, 211 Fed. 313, holding that a contract for

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of the agreement, the nature of the subject-matter, or acts of the parties.[20]

The main distinguishing mark of a divisible contract is that it admits of the apportioning of the consideration on the one side so as to correspond to the consideration on the other side.[21] This feature of the contract, however, is not conclusive as to its character, for there may be other terms which more clearly indicate it to be the intention of the parties to make an entire contract, or the acceptance of all the articles may be essential because of their peculiar nature, or by the express terms of the contract.[22]

IV. Where effect of breach by seller involved.

a. Failure to deliver in whole or in part.

As pointed out, a contract of sale may be divisible, or at least apportionable, in some of its aspects, and entire in others, and this is particularly true, where the remedies of the parties for the breach of such a contract are involved. The cases are, therefore, classified with reference to the construction of the contract for the purpose of giving certain relief to one of the parties thereto.

In this connection, it is to be noted that subsidiary provisions relative to the delivery of and the payment for goods to be delivered in instalments do not necessarily have the effect of splitting the contract of sale into as many distinct contracts as there are to be separate deliveries or payments. Nor is the contract of sale necessarily severable because it covers different classes of property, and the price is apportioned to each article. For example, a contract for the sale of several distinct articles is entire, where the promise by the purchaser is conditioned upon complete performance by the seller.[23] A contract is also entire where the pur-

the sale of a quantity of coal, to be delivered in monthly instalments, is severable as to performance.

Bearden Mercantile Co. v. Madison Oil Co. (1907) 128 Ga. 695, 58 S. E. 200, holding to be severable a contract for the sale of a quantity of cottonseed hulls at a designated price per ton, to be delivered in instalments, and also for a quantity of cotton seed at a designated price per ton, and that a provision in the contract as to one article did not apply to the other.

Barlow Mfg. Co. v. Stone (1908) 200 Mass. 158, 86 N. E. 306, holding that a contract for the sale of store fixtures is divisible, where the price is apportioned to each article, although they were all ordered at the same time and a partial payment made on the aggregate amount due for them.

Carleton v. Woods (1854) 28 N. H. 290, holding that a contract for the sale of different kinds of goods, including spirituous liquors, the price being apportioned to each article, is severable, and hence, although the contract as to the spirituous liquors is illegal and void, such invalidity does not affect the other articles.

Charles Wissman Co. v. Halstead & Co. (1909) 119 N. Y. Supp. 211, holding that a contract for the sale of different articles, to be delivered in instalments to be of a certain average weight, is not entire in the sense that the average weight of all the articles delivered is to be as stipulated; but each instalment delivered must be of the average weight stipulated.

Seymour v. Davis (1848) 2 Sandf. (N. Y.) 239, holding that a contract for the sale and delivery in instalments of a designated number of barrels of cider is severable, and each delivery and acceptance constitutes a separate and distinct contract.

[20] Norris v. Harris (1860) 15 Cal. 226, holding that a contract for the sale of animals is severable, where provision is made for compensation per head for any deficiency in the number contracted for.

De Graff & Palmer v. Mayper (1909) 65 Misc. 185, 119 N. Y. Supp. 657, holding that a contract for the sale of goods of different quality and description, deliverable and payable in instalments, terms for each item being separately arranged, although all are entered upon the same memorandum, is divisible, especially where the parties have so construed it.

[21] Producers Coke Co. v. Hillman (1914) 243 Pa. 313, 90 Atl. 144.

[22] Producers Coke Co. v. Hillman (Pa.) supra (stating rule).

[23] Ming v. Corbin (N. Y.) supra; Clark v. West (1910) 137 App. Div. 23, 122 N. Y. Supp. 380, affirmed in (1911) 201 N. Y. 600, 95 N. E. 1126.

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chase price is based upon the articles taken as a whole, and failure to receive the whole would be a material matter to the purchaser.[24] In such case a contract for the sale of different articles, at prices apportioned to each, imposes upon the seller the duty of making complete delivery, in order to cast upon the buyer the duty of accepting the property and paying the contract price. As to the seller's duty in this regard, the contract will be construed to be entire, and the buyer need not accept less than complete performance; and, unless the whole of the subject-matter is tendered, the buyer is under no duty to accept a portion thereof.[25]

An interesting question in this regard arises with reference to contracts for the sale of goods or commodities to

[24] Peycke v. Shinn (1906) 76 Neb. 364, 107 N. W. 386 (holding that a contract for the sale of several carloads of potatoes at a certain price per bushel, to be delivered in instalments, is entire in the sense that either party has the right to full performance); Wolfert v. Caledonia Springs Ice Co. (1909) 195 N. Y. 118, 21 L.R.A. (N.S.) 864, 88 N. E. 24; Norrington v. Wright (1884) 115 U. S. 188, 29 L. ed. 366, 6 Sup. Ct. Rep. 12.

[25] N. L. Willett Seed Co. v. Kirkeby-Gundestrup Seed Co. (1916) 145 Ga. 559, 89 S. E. 486, holding that contract for the sale of specified quantities of different kinds of articles, at specific prices for each article is entire (action for breach of contract).

Smith v. Lewis (1872) 40 Ind. 98, holding that a contract is entire, where it is for the sale of different lots of men's clothing for retail trade, at separate prices for each grade, and that the purchaser is not bound to take any of the goods unless all are tendered.

Hausman v. Nye (1878) 62 Ind. 485, 30 Am. Rep. 199, holding that a contract is entire, where it is for the sale of different kinds of stoves for retail trade, at separate prices for each stove, and hence the purchaser may refuse to accept any of the stoves if all are not tendered.

Bamberger Bros. v. Burrows (1910) 145 Iowa, 441, 124 N. W. 333, holding that an order for a quantity of boys' clothing of different grades is an entire contract, although separate prices are apportioned to each lot, where the object and purpose of the purchase, as made known to the seller, were to enable the purchaser to open a retail clothing department, so that the entire order was necessary; and that, for a failure to deliver all of the articles within the time specified, the purchaser might refuse to receive any of them.

Laclede Constr. Co. v. Tudor Iron Works (1902) 169 Mo. 137, 69 S. W. 384, holding that a contract for the sale by the hundred pounds, of sufficient spikes and bolts to lay 300 miles of rail, and enough angle spikes to lay 100 miles, is entire (action for breach of contract for failure to furnish).

Gray v. Walton (1887) 107 N. Y. 254, 14 N. E. 191, holding that where a sale is at public auction, although comprising different articles at different prices, it will be regarded as an entirety, where it is so treated by the parties; and hence, where, by reason of the default of the seller, the purchaser is unable to take and remove the goods within the time specified, it is immaterial as affecting his rights that he might have removed some of them; and where he thereafter paid the purchase price, his measure of damages for the failure of the seller to turn all the goods over to him is the value thereof.

Tobey Furniture Co. v. MacMaster (1902) Rap. Jud. Quebec 12 B. R. 34, holding to be entire a contract for the purchase of different articles of furniture, constituting a suite of furniture for a cottage; and hence the buyer was entitled to rescind the contract as a whole, where some of the articles tendered by the seller did not correspond to the description by which they were sold.

And see Roberts v. Beatty (1830) 2 Penr. & W. (Pa.) 63, 21 Am. Dec. 410, holding that under an executed contract for the sale of different articles, to be delivered at a designated time, or, in lieu thereof, a certain sum of money, to be paid if the seller fails to deliver the articles on the date agreed, he loses his right to pay with such articles, and becomes liable for the stipulated sum of money. Such a contract is entire, and the purchaser is not bound to accept a portion of the articles, tendered upon the date specified; the purchaser, however, may treat the contract as severable, and accept the articles tendered.

Snyder v. Loy (1897) 4 Pa. Super. Ct. 201, 40 W. N. C. 333, holding that

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be delivered in instalments. The cases are not agreed in construing the character of the contract as affecting the rights of the buyer, where the seller fails to deliver an instalment. If the circumstances surrounding the execution of the contract, the terms thereof, and the nature of the subject-matter indicate it to have been a material inducement to its execution by the buyer that there should be full and complete performance by the seller, then the contract is construed to be entire to the extent that the failure of the seller to deliver an instalment constitutes a breach going to the essence of the contract, and entitles the buyer to rescind it as a whole.[26]

a contract to purchase a number of head of cattle located at different places, and at different prices per hundred pounds, to be delivered at different times, is entire, where it appears that the price was based upon the different grades of cattle, taken as a whole; and the purchaser is not bound to take part of the cattle after the seller, by selling the balance, has placed himself in a position where he cannot deliver all of them.

Pratt v. Frazier (1905) 72 S. C. 368, 51 S. E. 983, holding to be entire a contract for the sale of different articles at different prices, and also a show case in which to exhibit them. The buyer may rescind the entire contract for failure to deliver the show case with the other articles.

Compare with Streeper v. Frieberg (1887) 3 Tex. App. Civ. Cas. (Willson) 292, holding that a contract is severable, where it is for the sale of different kinds of whisky by the gallon in case lots, and the failure of the seller to furnish all of the different kinds does not relieve the purchaser from the obligation of accepting such as correspond to the contract.

Reuter v. Sala (1879) 48 L. J. C. P. N. S. (Eng.) 492, L.R. 4 C. P. Div. 239, 40 L. T. N. S. 476, 27 Week. Rep. 631, holding that a contract for the sale by the pound of a quantity of paper, to be shipped by different vessels, is entire, and the purchaser is not compelled to accept less than the full amount.

See also Thompson v. Conover (1863) 30 N. J. L. 329, holding that a contract is entire, where it is for the sale of all the seller's corn, at different prices per bushel for white and yellow corn; and where the buyer, after receiving the white corn, refuses to receive the yellow, the title to the white remains in the seller as against the creditors of the buyer.

[26] Camden Iron Works v. Fox (1887) 34 Fed. 200.

Norrington v. Wright (1884) 115 U. S. 188, 29 L. ed. 366, 6 Sup. Ct. Rep. 12, holding that, under a contract for the sale of 5,000 tons of rails to be delivered in monthly instalments, for a breach by the seller in failing to deliver, the buyer may repudiate the entire contract, although without knowledge of the breach he had accepted one instalment.

Followed in Cleveland Rolling Mill Co. v. Rhodes (1887) 121 U. S. 255, 30 L. ed. 920, 7 Sup. Ct. Rep. 882, holding that a breach of the contract by the seller as to one instalment entitled the buyer to rescind as to the entire contract remaining unperformed.

Loudenback Fertilizer Co. v. Tennessee Phosphate Co. (1903) 61 L.R.A. 402, 58 C. C. A. 220, 121 Fed. 298, holding to be entire a contract for the sale of all the phosphate rock which should be needed for the ordinary requirements of the buyer's factory, it to be furnished on orders by the buyer (action for breach of contract).

Consumers' Bread Co. v. Stafford County Flour Mills Co. (1917) 152 C. C. A. 527, 239 Fed. 693, holding to be entire a contract for the sale of flour by the barrel, to be shipped in instalments (action against the seller for failure to deliver.)

Roach v. Lane (1917) 226 Mass. 598, 116 N. E. 470, holding to be entire a contract for the sale of several carloads of potatoes, to be paid for as delivered (action by buyer against seller for breach of contract).

Wolfert v. Caledonia Springs Ice Co. (1909) 195 N. Y. 118, 21 L.R.A. (N.S.) 864, 88 N. E. 24, holding that, in a contract for the sale of goods to be delivered in instalments, the failure of the seller to deliver or the buyer to accept one instalment constitutes such a breach of the contract as to give the party not in default the right to rescind it as a whole.

Seibert v. Dunn (1915) 216 N. Y. 237, 110 N. E. 447, holding that a contract is entire, where it is for the sale, at a designated price per thousand, of all of the brick of a certain quantity which the buyer would need in the con-

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On this point, in Norrington v. Wright, [27] it is said that "the contract sued on is a single contract for the sale and purchase of 5,000 tons of iron rails shipped from a European port, or ports, for Philadelphia. The subsidiary provisions as to shipping in different months, and as to paying for each shipment upon its delivery, do not split up the contract into as many contracts as there shall be shipments or deliveries of so many distinct quantities of iron. . . . The seller is bound to deliver the quantity stipulated, and has no right either to compel the buyer to accept a less quantity, or to require him to select part out of a greater quantity; and when the goods are to be shipped in certain proportions monthly, the seller's failure to ship the required quantity in the first month gives the buyer the same right to rescind the whole contract that he would have had if it had been agreed that all the goods should be delivered at once."

Many of the cases cited to this proposition sustain it without expressly holding that complete performance by the seller was a material inducement to the execution of the contract by the buyer. In cases hardly distinguishable as to the facts, it has been held that contracts for the sale of a commodity to be delivered in instalments are severable, to the extent, at least, that the failure of the seller to deliver an instalment does not entitle the buyer to rescind the contract as a whole,[28] unless

struction of certain sewers, to be delivered in instalments, and settlements to be made monthly, based upon such delivery. The court said that the payments were merely advances on the whole price, and not ratable payments for each performance of distinct parts (counterclaim of damages for failure to deliver).

In White v. Wolf (1898) 185 Pa. 369, 39 Atl. 1011, the seller wrote the buyer it would have to have an extension of time in which to make the deliveries contracted for, including the first deliveries, and it was held that this admission on the part of the seller entitled the buyer to cancel the entire contract.

Hoare v. Rennie (1859) 5 Hurlst. & N. 19, 157 Eng. Reprint, 1083, 29 L. J. Exch. N. S. 73.

In Simpson v. Crippen (1872) L. R. 8 Q. B. (Eng.) 14, 42 L. J. Q. B. N. S. 28, 27 L. T. N. S. 546, 21 Week. Rep. 141, the court said that it was hard to understand upon what principle Hoare v. Rennie was decided. In Honck v. Miller (1887) L. R. 7 Q. B. Div. (Eng.) 92, Hoare v. Rennie was expressly approved, and it is said that "one may express a respectful agreement with what the learned judges said in Simpson v. Crippen, that they did not understand Hoare v. Rennie."

[27] (1884) 115 U. S. 188, 29 L. ed. 366, 6 Sup. Ct. Rep. 12, cited in preceding note.

[28] Hanes v. Kentucky Distilling Co. (1884) 6 Ky. L. Rep. 451 (abstract); Saunders v. Short (1898) 30 C. C. A. 462, 58 U. S. App. 689, 86 Fed. 225; Pratt v. Metzger (1906) 78 Ark. 177, 95 S. W. 451; Duffie v. Pratt (1905) 76 Ark. 74, 88 S. W. 842; Decker v. Braverman (1915) 196 Ill. App. 387; Howard v. Bellows (1883) 49 Mich. 620, 14 N. W. 570; Oliver v. Oregon Sugar Co. (1902) 42 Or. 276, 70 Pac. 902; Costigan v. Hawkins (1867) 22 Wis. 74, 94 Am. Dec. 583; Sawyer v. Chicago & N. W. R. Co. (1868) 22 Wis. 403, 99 Am. Dec. 49.

And see Johnson v. Allen (1884) 78 Ala. 387, 56 Am. Rep. 34, holding that under a contract for the sale by the ton of a quantity of coal, to be delivered monthly as ordered, not exceeding a stated number of tons per month, each successive order and delivery is a separate and distinct contract, and a failure to deliver an instalment, or a part thereof, as ordered, does not terminate the contract unless the purchaser elects to terminate it; and where he accepts a partial delivery he cannot carry the deficiency over to the next month, and the damages for failure to deliver the quantity ordered are to be based on the separate deliveries.

Maryland Fertilizing & Mfg. Co. v. Lorentz (1876) 44 Md. 218, holding that a contract for the sale of a number of carboys of vitriol, to be delivered in monthly instalments and paid for according to such deliveries, is divisible, and a default by the seller in failing to deliver in one month the amount required does not relieve the purchaser from liability for breach of contract in failing to accept subsequent deliveries. In this case the purchaser accepted some deliveries after the breach complained of.

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the default of the seller is of a character to, or the circumstances are such as, evince an intention upon his part to abandon the contract.[29] Of course, if the contract of sale consists of several distinct items, having no relation to each other, the contract is severable, and the failure to deliver all the articles does not entitle the purchaser to rescind the contract as a whole.[30]

In any event it would seem that a contract of this character is apportionable to the extent that failure by the seller to deliver an instalment constitutes a breach of the contract, which will entitle the buyer to maintain an action to recover damages for the breach.[31] And it has been held that such a contract is severable to the extent that the buyer cannot offset his damages for the failure of the seller to deliver one instalment, in an action by the latter upon a note given by the former for a prior instalment.[32] But where both parties are in default, one in delivery and the other in paying for

McGrath v. Cannon (1893) 55 Minn. 457, 57 N. W. 150, holding that a contract for the sale of a stock of hardware and a stock of lumber, at designated prices for each, is severable, and the failure of the seller to deliver the stock of lumber does not entitle the buyer to rescind the contract for the purchase of the stock of hardware, although he may offset against the amount due therefor the damages for breach of contract as to the lumber.

Krebs Hop Co. v. Livesley (1911) 59 Or. 574, 114 Pac. 944, 118 Pac. 165, Ann. Cas. 1913C, 758, holding that a contract for the sale of a quantity of hops, to be delivered in yearly instalments at a designated price per pound, is severable to the extent that the failure of the seller to deliver one instalment does not relieve the purchaser of the obligation to accept subsequent instalments, where properly tendered.

Morgan v. McKee (1875) 77 Pa. 228, 3 Mor. Min. Rep. 128, holding that a contract for the sale of a quantity of oil to be delivered in instalments is severable, and the failure of the seller to deliver one of the instalments at the time agreed upon does not authorize the purchaser to rescind the contract as a whole.

Streeper v. Frieberg (1887) 3 Tex. App. Civ. Cas. (Willson) 292, holding that a contract is severable where it is for the sale of different kinds of whisky by the gallon in case lots, and the failure of the seller to furnish all of the different kinds does not relieve the purchaser from the obligation of accepting such as correspond to the contract.

[29] Gerli v. Poidebard Silk Mfg. Co. (1894) 57 N. J. L. 432, 30 L.R.A. 61, 51 Am. St. Rep. 611, 31 Atl. 401, holding that where the sellers of a quantity of silk to be delivered in bales, by instalments, are unable to deliver the first instalment as agreed, owing to the failure to receive the crop of silk they were depending upon, but they do not evince any intention to abandon the contract, such failure does not relieve the purchaser of his obligation to receive and pay for subsequent instalments delivered on time.

Millar, K. & J. Co. v. Weddel (1908) 100 L. T. N. S. (Eng.) 128, 14 Com. Cas. 25, 11 Asp. Mar. L. Cas. 184, holding that the tender of goods defective in quality, under circumstances indicating that the seller could not or would not deliver in subsequent instalments, goods of the required quality, entitled the buyer to rescind the entire contract.

[30] Bamberger Bros. v. Burrows (1910) 145 Iowa, 441, 124 N. W. 333.

[31] Burgie v. Hicks (1913) 203 Fed. 340, holding to be divisible a contract for the sale of a specified number of barrels of vinegar to be shipped in carload lots, a portion within a certain time and the balance upon order, each shipment to be paid for thirty days after its receipt (action to recover damages for failure to deliver).

Gallun v. Seymour (1890) 76 Wis. 251, 45 N. W. 115, holding a contract for the sale by the cord of a quantity of tanner's bark, to be delivered in instalments, to be severable, to the extent that each failure to deliver an instalment constitutes a breach, for which an action will lie.

[32] Loomis v. Eagle Bank (1859) 10 Ohio St. 327, holding that a contract for the sale of a designated number of kegs of powder at a certain price per keg, to be delivered in two instalments, is severable, and the purchaser cannot offset against a note given for the first instalment, his damages for the breach of the contract by the failure of the seller to deliver the second instalment.

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deliveries made, the buyer is not entitled to maintain an action to recover damages for the seller's breach.[33]

The terms of the contract of sale may so clearly indicate the intention of the parties as to control the construction of the contract as to its divisibility as affecting the right of the buyer, where the seller makes default in delivering an instalment. For example, the failure of the seller to deliver an instalment of the quantity required by the contract has been held to entitle the buyer to rescind, where the contract contains a provision to the effect that, if the seller fails to deliver the quantity called for at the times agreed upon, such failure shall not work a forfeiture of the contract, providing it is due to strikes, unavoidable stoppages, etc., since such a provision clearly indicates the intention of the parties to be that the default of the seller, not within such exception, shall warrant the buyer in rescinding.[34]

b. As affecting the right of the buyer to reject articles tendered.

Assuming that there exists in the purchaser a right to rescind a contract of sale for breach of warranty of the quality of articles sold, or for failure to answer the description by which they were sold, the question is here raised as to construction of the contract with reference to this remedy, where the contract is for the sale of more than one article. May the purchaser rescind as to one article, and affirm the contract as to other articles included therein? Of course, if the contract is divisible as to the subject-matter, it logically follows, and, as hereinafter pointed out, the courts as a rule hold, that if the purchaser has grounds for rescission as to one article he may rescind as to it, and affirm the contract as to the other article. This is not the rule, however, where the contract is entire. In such case full force and effect is given the general principle of law, applicable alike to contracts of sale and other contracts, that if a party would rescind a contract he must rescind in toto; he cannot disaffirm it in part and enforce it in part; and he must also place the other party in statu quo. If this cannot be done, the contract cannot be rescinded.[35]

In general, where a portion of the

[33] McFarlan Carriage Co. v. Connersville Wagon Co. (1911) 49 Ind. App. 318, 96 N. E. 400.

Harber Bros. Co. v. Moffat Cycle Co. (1894) 151 Ill. 84, 37 N. E. 676, holding that where the purchaser of a number of bicycles, to be delivered in instalments, accepted a portion of them delivered after the agreed time, he cannot retain the amount to be paid on such instalments and maintain against the seller an action for damages for a breach of the contract, based upon the failure to deliver; for his retention of the purchase price constitutes a default on his part, precluding him from maintaining an action on the contract.

Maney Mill. Co. v. Baker-Wignall & Co. (1914) 186 Ill. App. 390, holding that a contract is severable where it is for the sale of a quantity of flour by the barrel, to be delivered in instalments, and a cancelation of a portion of the order by the seller does not relieve the purchaser as to the balance, where the cancelation is due to the default of the purchaser.

See Kingdom v. Cox (1848) 5 C. B. 522, 136 Eng. Reprint, 982, 12 Jur. 336, 17 L. J. C. P. N. S. 155, holding that a contract for the purchase of a quantity of iron girders of different sizes, at a designated price per ton, is entire in the sense that where the seller has not furnished drawings of the girders in accordance with his contract, as a guide for the buyer, except as to a few girders, he cannot hold the seller responsible in damages for refusing to furnish the girders for which he furnished the drawings.

[34] United States Iron Co. v. Sloss-Sheffield Steel & I. Co. (1904) 71 N. J. L. 1, 58 Atl. 173, holding that a contract for the sale of a quantity of iron ore may be rescinded by the purchaser for failure of the seller to deliver instalments according to the contract, where it provides against rescission for failure to deliver under certain circumstances not included within the excepted causes.

[35] Miner v. Bradley (1839) 22 Pick. (Mass.) 457, holding that, where a cow and a quantity of hay are sold at auction for a gross sum, the contract is entire, and where the purchaser receives the cow and pays for both articles, upon the refusal of the seller to

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subject-matter of a contract of sale, tendered by the seller as in compliance therewith, is inferior in quality, the buyer must reject or accept the articles as a whole; he cannot accept such of them as are of a quality meeting the requirements of the contract, and reject those of an inferior quality, if the contract as to the subject-matter is entire; that is, if the sale of all of the articles covered by the contract, at an aggregate sum, was an inducement to the execution of the contract by the seller.[36]

deliver the hay, he cannot retain the cow and maintain an action to recover the purchase price or any part thereof, since such an action is based upon the theory of rescission of the contract, and, to rescind, the contract must be rescinded as a whole.

[36] Continental Jewelry Co. v. Pugh Bros. (1910) 168 Ala. 295, 53 So. 324, Ann. Cas. 1912A, 657, holding that the purchaser of different articles of jewelry for retail trade, after using and disposing of a portion of them, cannot rescind the contract for a breach of warranty as to quality.

Perry v. Ayers (1911) 159 Cal. 414, 114 Pac. 46, holding that the buyer cannot rescind as to some of the articles, and affirm the contract as to the balance.

De Vaughn's Son v. Ohio Pottery & Glass Co. (1912) 12 Ga. App. 50, 76 S. E. 793, holding that a contract for the sale of a quantity of enamel ware and crockery is entire, to the extent that the buyer cannot accept part and reject part.

Williams, B. & Co. v. Leslie (1896) 66 Ill. App. 246, holding that a contract for the sale of several cars of raisins of different kinds is entire, and the purchaser cannot accept such of the goods as he claims comply with the contract, and reject those which he claims do not.

Harzfeld v. Converse (1883) 105 Ill. 534, holding that a contract for the sale of several boxes of furs, to be according to sample, is entire, and the purchaser cannot accept part of the articles and reject the balance, and his acceptance of a part renders him liable for the purchase price of all.

Converse v. Harzfeldt (1882) 11 Ill. App. 173, affirmed in (1883) 105 Ill. 534, holding to be entire a contract for the sale of several cases of goods, to the extent that the buyer cannot keep part and reject part of them.

Pacific Timber Co. v. Iowa Windmill & Pump Co. (1907) 135 Iowa, 308, 112 N. W. 771, holding that a contract is entire where it is for the sale of a quantity of lumber to be shipped more than 2,000 miles, although the dimensions of the lumber are specified, and the price apportioned by the thousand feet. Hence, a purchaser cannot accept that portion of the lumber which he claims complies with the contract, and reject the balance; but an acceptance by him of part constitutes an acceptance of the whole.

Clark v. Baker (1843) 5 Met. (Mass.) 452, holding that a contract for the sale of a cargo of grain on board a schooner, although by the bushel, is entire, and the purchaser cannot accept a portion thereof and rescind the contract for a breach of warranty as to the balance.

Morse v. Brackett (1867) 98 Mass. 207, holding that a contract is entire, where it is for the sale of specific bags of wool at a designated price per pound, and the purchaser cannot accept a portion thereof and rescind the contract for a breach of warranty of quality as to the balance.

Mansfield v. Trigg (1873) 113 Mass. 350, holding that a contract is entire, where it is for the sale of a specified number of barrels of fish, at a designated price per barrel according to the different grades, and the purchaser cannot accept such portion of them as he claims complies with the contract, and reject the balance.

And see also Rubenstein v. Grossman Winfield Millinery Co. (1915) 110 Miss. 213, 70 So. 210, holding, where a job lot of goods in quantity is more than represented, the purchaser may reject them all on this ground, but he cannot accept a part and reject the balance.

Sigerson v. Harker (1851) 15 Mo. 101, holding that the purchaser of a quantity of pork by the barrel cannot select such portion as he claims complies with the warranty, and reject the balance for breach of warranty of quality.

Poshkoff v. Lieberman's Millinery (1917) 167 N. Y. Supp. 291, holding to be entire a contract for the sale of different lots of goods at different prices. The purchaser cannot accept part and reject part.

Woodruff v. Peterson (1868) 51

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On the other hand, if the contract is construed to be severable as to different articles, the right of the buyer to reject those not of a quality conforming to the requirements of the contract is not affected by his acceptance of such

Barb. (N. Y.) 252, holding that a contract for the sale by the cord of a quantity of wood in different piles is entire, and the purchaser cannot rescind it as to part of the wood, on the ground that it does not correspond with the contract, where he retains the balance of the wood.

Mason v. Smith (1890) 55 Hun, 607, 5 Silv. Sup. Ct. Rep. 346, 8 N. Y. Supp. 301, holding that, where the purchaser of a quantity of gloves of different styles, at a designated price per dozen, upon inspection, claims the gloves do not comply with the contract, he must reject them as a whole; if he fails to return all of them, and accepts a portion of them, he becomes liable for the entire lot.

Levy v. John C. Dettra & Co. (1915) 91 Misc. 41, 154 N. Y. Supp. 176, holding that a contract for the sale of two piles of lumber for a lump sum, the lumber to be delivered at the same time, is entire, and the purchaser cannot accept part, and reject the remainder on the ground that the part rejected does not meet the requirements of the warranty.

Mendetz v. Wood (1914) 86 Misc. 52, 148 N. Y. Supp. 92, holding that a single order for several lots of clothing to be delivered at one time is an entirety, and a purchaser cannot return one lot and portions of the other lots on the ground that the portions returned do not meet the requirements of the contract.

Hermann Lumber Co. v. Heidelberg (1905) 46 Misc. 465, 92 N. Y. Supp. 256, holding that the purchaser of a number of boards of a certain kind and quality cannot accept part of them, and reject the balance, on the ground that those rejected do not meet the requirements of the contract.

Simon v. Wood (1896) 17 Misc. 607, 75 N. Y. S. R. 78, 40 N. Y. Supp. 675, holding that a contract is entire where it is for the sale of a quantity of caps according to the sample, and the purchaser cannot accept a part of the caps tendered, and reject the balance, on the ground that they do not correspond with the sample.

And see Babcock v. Hutchinson (1871) 4 Lans. (N. Y.) 276, holding that where gloves of different kinds and styles are sent to a retail dealer without any agreement as to their price, except that they are accompanied by an invoice showing the price of different articles, the purchaser, by selling one pair of the gloves and marking others at their selling price, accepts them at the invoice price, and becomes liable therefor to the seller, and he cannot reject what remains on the ground of objections to the price.

Simonoff v. Parsons (1915) 52 Okla. 600, 153 Pac. 152, holding that a contract for the sale of a quantity of ladies' and misses' dresses and skirts, for retail trade, is entire, and the purchaser cannot accept a portion of them, and reject the balance on the ground that he has reserved the right to countermand the order.

Elzea v. Brown (1915) 59 Pa. Super. Ct. 403, holding that the purchaser of a quantity of eggs of a certain quality, at a designated price per dozen, for retail trade, where eggs are tendered of a poorer quality than he is bound to accept, may refuse to receive the entire lot; but he cannot accept part of them and reject the balance, and if he does so he obligates himself to pay for them as a whole.

Williams v. Wenger (1912) 48 Pa. Super. Ct. 497, holding that the purchaser of a quantity of dress trimmings for a lump sum, based upon the gross amount of the price as apportioned to the different articles, all of which are to be delivered at the same time, cannot reject a portion of the goods, and retain the balance on the ground that they were not delivered at the time specified in the contract; but, to rescind on this ground, it is his duty to reject all of the goods.

Carpenter v. Brainard (1864) 37 Vt. 145, holding that a contract for the sale of all the lumber sawed from a certain piece of land is entire, and the purchaser cannot accept a portion of it, and reject the balance on the ground that it was improperly measured. And see cases supra, note 26.

Charles Syer & Co. v. Lester (1914) 116 Va. 544, 82 S. E. 122, holding that the purchaser of a quantity of lemons by the box must accept or reject the lemons as a whole; he cannot, with knowledge that they are inferior in quality to the requirements of the contract, accept a part of them and reject the balance. If he accepts a

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of the articles as do conform thereto.[37] While it is possible to distinguish many of the cases holding a contract to be entire as affecting the right of the buyer to accept part of the goods and reject the balance, from cases holding the entire or divisible. And holding that, where the seller tendered hats and caps of sizes different from those called for by the contract, the purchaser might return them, although he accepted and retained those which did comply with the contract.

Spring v. Slayden–Kirksey Woolen Mills (1903) 106 Ill. App. 579, same case on subsequent appeal in (1904) 116 Ill. App. 27, holding that a contract for the sale by the dozen of a quantity of pants of different kinds is divisible, and the purchaser may accept those lots of pants which in quality comply with the contract, and reject such lots as do not.

Rothschild Bros. v. Wise (1899) 81 Ill. App. 95, holding that a contract for the sale of different lots of hats, at a designated price for each lot, is severable, and the purchaser may accept such lots as comply with the contract and reject those which do not.

Weil v. Stone (1904) 33 Ind. App. 112, 104 Am. St. Rep. 243, 69 N. E. 698, holding that a contract is severable, where it is for the sale of several different and distinct items, and the price is apportioned to each item, and to rescind such a contract as to some of the articles, it is not necessary for the purchaser to return all of them.

Bushnell v. Geo. E. King Bridge Co. (1908) 140 Iowa, 405, 118 N. W. 407, holding that the purchaser of a quantity of lumber at a designated price per thousand feet, the lumber to be shipped in carload lots and to be of certain dimensions and quality, can reject such portions of the lumber as fail to comply with the specifications. The question as to the character of the contract, whether entire or severable, is not discussed.

Huntington v. Lowe (1848) 3 La. Ann. 377, holding that the purchaser of hogsheads of pork may reject unsound hogsheads and retain those which are sound.

Canton Lumber Co. v. Liller (1908) 107 Md. 146, 68 Atl. 500, holding that where a contract for the sale of lumber of different dimensions by the thousand feet is accompanied by specifications, showing that the purchaser is to use the lumber for certain building purposes, and it must conform to the specifications annexed to the order, and the lumber is to be shipped some

portion of them, he renders himself liable for the full amount purchased.

Manss-Bruning Shoe Co. v. Prince (1902) 51 W. Va. 510, 41 S. E. 907, holding that the purchaser of a lot of shoes, to be manufactured, in order to rescind the contract on the ground that some of the shoes in quality are not according to its requirements, must rescind the contract as a whole; he cannot accept part of the goods and rescind the contract as to the balance.

Harnor v. Groves (1855) 15 C. B. 667, 139 Eng. Reprint, 587, 3 C. L. R. 306, 24 L. J. C. P. N. S. 53, 3 Week. Rep. 168, holding that a purchaser of a quantity of flour by the sack cannot accept a portion of it, after he has discovered that it does not meet the requirements of the contract, and then rescind the contract as to the balance.

And see Champion v. Short (1809) 1 Campb. (Eng.) 53, 10 Revised Rep. 631, holding that, where the buyer accepts a portion of the articles tendered, he cannot assert that the contract was entire as to all the articles.

[37] Rubin v. Sturtevant (1897) 26 C. C. A. 259, 51 U. S. App. 286, 80 Fed. 930, holding that a contract for the sale of a stated number of fur capes at separate prices, the capes to be perfect and like certain samples, is divisible, and the purchaser is entitled to accept the articles which correspond to the warranty, and reject those which do not.

Ward Furniture Mfg. Co. v. Isbell (1907) 81 Ark. 549, 99 S. W. 845, holding that, although a contract for the sale of lumber of specified grades, at designated prices per thousand feet according to the grade, is ordinarily an entire contract, and hence the purchaser must accept or reject the property tendered as a whole, yet, where the parties elect to treat the contract as severable, the purchaser may accept such portions of the lumber as conform to the contract, and reject the balance.

Cohen v. Pemberton (1885) 53 Conn. 221, 55 Am. Rep. 101, 2 Atl. 315, 5 Atl. 682, refusing to pass upon the question as to whether or not a contract for the sale of hats and caps of different sizes, at specified prices per dozen or a fractional part of a dozen, was

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contract to be severable in this regard, many of them cannot thus be distinguished, the courts having apparently reached different conclusions as to the intention of the parties, with reference to very similar contracts. The general tendency of the courts, however, is apparently to construe contracts of this character to be entire, to the extent of requiring the buyer either to take all of the goods included therein, or reject them all, unless the contract in its nature is clearly apportionable.

Where the subject-matter of the sale is different articles, each independent of the other, and the value thereof is not increased or diminished by the aggregate, the contract is divisible, and the buyer cannot reject all of the articles for a breach of the warranty of

distance, the contract will be construed to be severable, and the purchaser may accept such portions of the lumber furnished as comply with these specifications, and reject such as do not, the seller having knowledge of the purpose for which the lumber was being purchased, and that, unless it could be used in the construction of such buildings, the purchaser had no use for it.

Miner v. Bradley (1839) 22 Pick. (Mass.) 457, declaring that where a number of articles are bought at the same time and separate prices agreed upon for each, although they are all included in the same instrument of sale, yet the contract, for sufficient cause, may be rescinded as to part and the price be recovered back, and it may be enforced as to the residue of the property.

Young & C. Mfg. Co. v. Wakefield (1876) 121 Mass. 91, holding that a contract is severable where it is for the sale of a quantity of coats at a designated price, apportioned to each garment, and the sale of one garment is in no way dependent upon that of the others; hence, the purchaser may rescind as to one lot which does not correspond with the warranty, and accept other lots which do.

The reported case (STEARNS SALT & LUMBER CO. v. DENNIS LUMBER CO. post, 638) holding that a contract for the sale of two carloads of lumber of specified kinds, dimensions, and quality was divisible, and the purchaser had the right to accept such of the lumber as complied with the contract in quality, and reject such as did not.

Lampson v. Cummings (1884) 52 Mich. 491, 18 N. W. 252, holding that the purchaser of livery stock, including certain carriages specifically described, is entitled to accept such of the stock as corresponds to the description, and, upon a carriage being tendered which does not correspond with any description in the contract, the purchaser may refuse to receive it, and hold the seller liable for failure to deliver the carriage described in the bill of sale. The court said that the plaintiff purchased property which was particularly described and was entitled to have what he bought. He does not propose to rescind the contract or any part of it, he demands the fulfilment of the whole of it, and he brings this suit for the failure on the part of the defendant to perform in one particular." His right is clear.

Molling v. Dean (1902) 18 Times L. R. (Eng.) 217, holding that under a contract for the sale of a large number of books, each of which was to be of a certain standard, the buyer might accept such as were up to the required standard, and reject such as were not.

Edward Thompson Co. v. Schroeder (1915) 131 Minn. 125, 154 N. W. 792, holding that a contract for the sale of two different sets of lawbooks is divisible, to the extent that the buyer can retain one set, and return the other for the fraudulent representations by the seller's agent with reference to the set returned.

Potsdamer v. Kruse (1894) 57 Minn. 193, 58 N. W. 983, holding that a contract is severable where it is for the purchase of neckties of different kinds, and the purchaser is entitled to accept such as comply with the contract, and reject those which do not.

Holmes v. Gregg (1889) 66 N. H. 621, 28 Atl. 17, holding that, in the absence of express stipulations to the contrary, a contract for the sale by the thousand feet of different lots of lumber of different dimensions, to be shipped from Chicago to a point in New Hampshire, is severable in the sense that the purchaser can accept the lots that conform to the contract, and reject the rest.

Freeman v. Skinner (1848) 31 N. C. (9 Ired. L.) 32, holding that under a contract for the sale of several articles of the same kind, to be manufactured, the price being apportioned to each article, the purchaser may ac-

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quality as to one or more of them.[38] And this is the rule, although the articles are sold together for a lump sum.[39] If, however, the consideration is not apportionable, and the subject-matter not subject to division, without thereby making a material modification in the consideration which induced the execution of the contract, it is entire in so far as concerns the right of the buyer in this regard. He may rescind it as a whole, where the seller defaults in partial performance, by tendering goods some of which are in quality inferior to the requirements of the contract.[40]

Where goods or commodities are sold to be delivered in instalments, the parties are generally held to have entered into the contract in contemplation of full performance; hence, if the seller, in violation of the contract, tenders an instalment of goods in quality inferior to the requirements thereof, the contract will be construed to be entire to the extent that the buyer may not only refuse to accept the inferior instalments, but he may also rescind the con-

cept those which correspond with the contract, and reject those which do not, and his acceptance of a part of the articles does not obligate him to accept or pay for those which do not comply with the contract, and which he rejects.

Mueller v. Simon (1916) — Tex. Civ. App. —, 183 S. W. 63, holding that the buyer may accept such of the articles, separately priced, as comply with the contract, and reject such as do not.

Schiller v. Blyth & F. Co. (1907) 15 Wyo. 304, 8 L.R.A.(N.S.) 1167, 88 Pac. 648, holding that a purchaser of a number of hats, each of a separate pattern separately priced, and the price of one being in no way dependent upon the price of another, is entitled, upon inspection, to accept such hats as comply with the contract and reject those which do not.

[38] Camp v. Dill (1855) 27 Ala. 553, holding that where slaves are sold separately at auction, although all are bought by the same person, under an agreement with the seller that the purchaser was to have all, the contracts are separate and distinct, and a breach of warranty as to one slave will not entitle the purchaser to rescind as to the others.

Michoud v. Marquet (1849) 4 La. Ann. 51, holding that the purchaser of a flock of sheep cannot rescind on the ground of the diseased condition of some of the flock.

Ledoux v. Armor (1843) 4 Rob. (La.) 381, holding that the purchaser of a number of bales of rope, at a designated price per pound, is not entitled to rescind the entire contract and reject all of the bales of rope, on the ground that some of the bales contain defective rope, where by the Code it is provided that a redhibitory vice in one of the several things sold together gives a right to redhibition of all if the things were matched, since the bales of rope were independent of each other, and did not form a whole.

[39] Montan v. Whitley (1857) 12 La. Ann. 175, holding that, although a family of slaves were sold together for a lump sum of money, the avoidance of the sale as to a child on the ground that it was diseased affords no ground for the avoidance of the contract as to the other slaves.

[40] Behrman v. Newton (1893) 103 Ala. 525, 15 So. 838, holding that under a contract to sell a stock of goods at a certain per cent of the original cost, for breach by the seller, the purchaser is entitled to reject the goods and repudiate the contract in toto.

Ferguson v. West Coast Shingle Co. (1910) 96 Ark. 27, 130 S. W. 527, holding that a contract for the sale of two cars of shingles at a certain price per thousand, each car to contain a specified number of shingles, is entire, and where the seller makes default as to one car the purchaser may refuse to receive the other car.

Main v. Simmons (1907) 2 Ga. App. 821, 59 S. E. 85, holding that a contract for the sale of different articles of jewelry for a gross sum is entire, and the purchaser may rescind it as to all the articles, where some of the articles tendered by the seller do not, in quality, comply with the contract.

Bryant v. Thesing (1895) 46 Neb. 244, 64 N. W. 967, holding that an order for nursery stock of a certain kind and quality, at a designated lump price, is entire, and the purchaser may refuse to receive any of the stock, where a portion of it, when tendered, was not of the agreed quality.

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tract in toto;[41] for the purchaser is under no obligation to accept part performance in the inverse order of his contract, and the right to rescind or abandon the contract belongs to him, and necessarily must apply to the whole contract remaining unperformed.[42]

If, however, the buyer accepts instalments of goods tendered, although he complains of the quality, he cannot on this ground thereafter refuse to receive further instalments which are of the agreed quality.[43] In this regard, acceptance by the buyer constitutes an admis-

[41] Clark v. Wheeling Steel Works (1893) 3 C. C. A. 600, 3 U. S. App. 358, 53 Fed. 494, asserting that a contract for the sale and delivery of steel billets is entire to the extent that the buyer may rescind the same for a defect in the quality of the instalments tendered to him. This case, however, holds that the buyer waived the defect, and hence could not rescind, where the balance tendered complied with the contract.

Moran v. Wagner (1906) 28 App. D. C. 317, holding that a contract is entire where it is for sale of several carloads of grain at a designated price per bushel, to be delivered at different times, payment to be made with reference to the different deliveries, and, for a breach by the seller in tendering grain in quality not complying with the contract, the purchaser may rescind the contract as a whole, and refuse to receive further deliveries.

Newton v. Bayless Fruit Co. (1913) 155 Ky. 440, 159 S. W. 968, holding a contract to be entire where it is for the sale of several carloads of oranges for a designated price per box, the cars to be delivered at different times; hence, the purchaser may rescind the entire contract, where the first instalment tendered, in quality, does not comply therewith.

Fullam v. Wright & C. Wire Cloth Co. (1907) 196 Mass. 474, 82 N. E. 711, holding that a contract is entire where it is for the sale of a large quantity of cordwood at an agreed price per cord, to be delivered in carload lots, payment to be made as delivered; and where the seller delivers wood not in quality complying with the contract, the buyer may refuse to accept it, and rescind the entire contract.

Morrison v. Leiser (1898) 73 Mo. App. 95, holding to be entire a contract for the sale of gloves, to be shipped in two instalments, and the purchaser may rescind the contract where the first instalment, in quality, does not meet the requirements thereof. In this case the purchaser retained such of the goods as he claimed corresponded with the contract, but no point is apparently made of this fact.

Schwartz v. Hirsch (1907) 56 Misc. 618, 107 N. Y. Supp. 796, holding to be entire a contract for the sale of merchandise, deliverable in instalments (rescission for breach, as to quality, of the first instalment).

King Philip Mills v. Slater (1878) 12 R. I. 82, 34 Am. Rep. 603, holding that the tender of instalments of goods, which do not comply with the contract as to quality, entitles the buyer to rescind the unperformed part of the contract. In this case the contract was regarded as entire.

[42] Pope v. Porter (1886) 102 N. Y. 366, 7 N. E. 304, holding that a contract for the sale of a quantity of iron at different prices according to the kind, to be delivered at different times, is entire to the extent that, where the seller makes default in delivering the kind to be first delivered, the purchaser is entitled to refuse to accept the second instalment of the other kind, and this is true, although, had the seller delivered the first kind according to the contract, and it had been accepted by the purchaser, this would have rendered the latter liable for the price thereof, even though the seller thereafter made default in the second delivery.

[43] Harding, W. & Co. v. York Knitting Mills (1905) 142 Fed. 228, holding that under a contract for the sale of a quantity of different kinds of yarn, to be delivered in instalments, if the purchaser retains and uses instalments of the yarn with knowledge that it is defective, he cannot, on the ground of such defects, refuse to receive other instalments which comply with the contract, since the contract is entire, and cannot be abrogated if there has been a partial, although defective, performance, of which the purchaser has knowingly accepted the benefit.

Clark v. Wheeling Steel Works (1893) 3 C. C. A. 600, 3 U. S. App. 358, 53 Fed. 494, holding that where steel billets were sold at a stated price per ton, to be delivered in instalments, the contract is entire, and where defective billets were delivered and the defects were visible, if the purchaser accepted,

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sion on his part that the goods accepted comply with the description of the con-

retained, and used them, with knowledge of such defects, their existence affords no ground for thereafter rescinding the contract.

Guernsey v. West Coast Lumber Co. (1890) 87 Cal. 249, 25 Pac. 414, holding that under a contract for the sale of all merchantable lumber manufactured by the seller during a certain period of time, to be delivered in instalments, where the purchaser accepted and paid for the lumber delivered, without reserving the right subsequently to object to it or to return it, any ground for objecting to it cannot be made the basis for refusing to receive further deliveries which comply with the contract.

Stelwagon v. Wilmington Coal Gas Co. (1896) 2 Marv. (Del.) 184, 42 Atl. 449, holding that a contract for the sale of a number of gallons of coal gas at a certain price per gallon, to be delivered at different times, is entire, and where the purchaser receives and uses a large portion thereof, although before knowledge that in quality it does not comply with the contract, he cannot, for such defect, rescind the contract and recover the purchase price paid.

Henderson Elevator Co. v. North Georgia Mill. Co. (1906) 126 Ga. 279, 55 S. E. 50, holding that a contract is entire where it is for the sale of a designated number of bushels of corn of a certain quality, at a specified price per bushel, to be delivered in instalments; and, where the purchaser receives and uses a portion of it, he cannot thereafter rescind the contract on the ground that the corn thus received and used was inferior in quality to that required by the contract.

Maynard v. Render (1895) 95 Ga. 652, 23 S. E. 194, holding that where a purchaser of a quantity of wood at a certain price per cord accepts a portion thereof, he cannot thereafter assert that the portion accepted was defective, and on this ground avoid liability for refusing to accept the balance.

Morris v. Wibaux (1895) 159 Ill. 627, 43 N. E. 837, holding that a contract for the sale of cattle at a designated price per head, to be delivered in instalments and paid for according to such delivery, is severable to the extent that each delivery is to be paid for as delivered, and it is entire to the extent of imposing upon the purchaser the duty of receiving all deliveries contemplated by the contract, at contract prices; and, where cattle are included in the delivery which do not comply with the contract, the purchaser may accept them without obligating himself further than to pay their reasonable value, and the inclusion of such cattle does not entitle the purchaser to refuse further deliveries of cattle which comply with the contract.

Blackburn v. Reilly (1885) 47 N. J. L. 290, 54 Am. Rep. 159, 1 Atl. 27, holding that under a contract for the sale of a quantity of bark by the thousand, to be delivered in instalments, the fact that the seller tendered as in performance of the contract carloads of bark in quality inferior to the requirements thereof, but which were accepted and paid for by the purchaser, does not indicate an intention by the seller not to be bound by or to abandon the contract, by disregarding the obligation thereof, and hence this conduct does not discharge the purchaser from his obligation under the contract.

Cahen v. Platt (1877) 69 N. Y. 348, 25 Am. Rep. 203, holding that the purchaser of a quantity of glass, to be delivered in instalments, after accepting a portion of it, cannot rescind the contract as to subsequent instalments, on the ground that the portion accepted was inferior in quality to the requirements of the contract.

Scott v. Kittanning Coal Co. (1879) 89 Pa. 231, 33 Am. Rep. 753, 3 Mor. Min. Rep. 159, holding that a contract is entire where it is for the sale of a quantity of coal to be delivered in instalments, payments to be made with reference to delivery, and the receipt by the purchaser of coal inferior in grade to that called for by the contract does not entitle him to rescind the contract as to further deliveries of coal, in quality complying with the contract.

And see J. W. Ellison, Son, & Co. v. Flat Top Grocery Co. (1911) 69 W. Va. 380, 38 L.R.A.(N.S.) 539, 71 S. E. 391, holding that a contract for the sale of a quantity of hay, to be delivered in instalments and payment to be based upon such deliveries, is severable to the extent that the purchaser, after having accepted a large quantity of the hay, cannot rescind the contract on the ground that some of the hay tendered in performance thereof was

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tract.[44] And the buyer cannot rescind for failure of the seller to tender sufficient goods, where he accepts an instalment substantially less in quantity than the seller was required to tender by the terms of the contract.[45] But the acceptance of instalments which comply with the contract does not render it obligatory upon the buyer to accept other instalments which do not comply therewith.[46] And the fact that the buyer saw fit to accept an instalment of goods in quality inferior to the requirements of the contract does

poorer in quality than the contract called for, where the seller did not insist upon acceptance of the inferior hay, and offered to take it back and replace it with hay of good quality.

But see Lindsborg Mill. & Elevator Co. v. Danzero (1917) — Mo. App. —, 193 S. W. 606, and Ungerer & Co. v. Lewis Maull Cheese & Fish Co. (1911) 155 Mo. App. 95, 134 S. W. 56, holding that the buyer may rescind a contract for the purchase of goods in instalments, for defects in quality of the instalments delivered and accepted by him, although subsequent instalments comply with the contract as to quality.

[44] Williams v. Robb (1895) 104 Mich. 242, 62 N. W. 352, holding that a contract for the sale of several carloads of posts, to be delivered in instalments, is severable and by accepting instalments, the purchaser precludes himself from objecting as to their quality, in the absence of a warranty, and he cannot refuse to accept further instalments on the ground of the poor quality of those received and accepted by him.

Shields v. Pettee (1848) 2 Sandf. (N. Y.) 262, holding that under a contract for the sale of a quantity of No. 1 pig iron, where iron is tendered as being of that grade, if the purchaser accepts it, he accepts it as being in compliance with the contract; he cannot accept it and claim it to be of an inferior grade.

[45] Craig v. Lane (1912) 212 Mass. 195, 98 N. E. 685, holding that a contract is entire where it is for the sale of three carloads of potatoes; and a deficiency as to the quantity in one car, if accepted by the purchaser, affords no ground to rescind the contract and refuse to receive the other cars, and this is true, although the cars were shipped at different times, and each car was accompanied by a draft to cover the purchase price of that particular car.

Victor Mfg. Co. v. Regina Trading Co. (1913) — Sask. —, 14 D. L. R. 801, holding that, where the buyer retains a portion of the goods, he cannot rescind the contract for failure of the seller to deliver the entire quantity bargained for. The court expressed the opinion that the contract was entire, but did not decide the matter.

[46] Russell v. Lilienthal (1899) 36 Or. 105, 58 Pac. 890.

Duffie v. Pratt (1905) 76 Ark. 74, 88 S. W. 842, holding that a contract for the sale of a quantity of goods, to be delivered at different times and at different prices, according to samples exhibited, and warranted separately, is severable, and the acceptance of one article does not affect the right of the purchaser to reject another article for breach of warranty.

Duluth Log Co. v. John C. Hill Lumber Co. (1910) 110 Minn. 124, 124 N. W. 967, holding to be divisible a contract for the sale of three carloads of shingles, at a designated price apportioned to each car, and that the buyer, by accepting two cars, does not obligate himself to accept the third where the shingles in quality do not meet the requirements of the contract.

Pierson v. Crooks (1889) 115 N. Y. 539, 12 Am. St. Rep. 831, 22 N. E. 349, holding that a contract for the sale of iron sheets and hoops, at designated prices for each, is divisible, where there is nothing on the face of the contract or in the evidence to indicate that the price of one was fixed with reference to the price of the other, or that the acceptance of both kinds was the consideration for the undertaking by the seller, although the shipments and payments were severable; hence, acceptance by the purchaser of the sheets does not preclude him from rescinding the contract as to the hoops, on the ground that in quality they do not meet the description of the contract.

Jackson v. Rotax Motor & Cycle Co. (1910) 2 K. B. (Eng.) 937, 80 L. J. K. B. N. S. 38, 103 L. T. N. S. 411, 20 Ann. Cas. 523, holding that the acceptance of one instalment did not preclude the buyer from rejecting subsequent instalments for defects therein.

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not affect his right to rescind the contract, where subsequent instalments are tendered which are likewise of inferior quality.[47] So, where deliveries are to be made from day to day, the buyer is entitled to rescind the contract as a whole, if the seller persists in furnishing inferior goods.[48] While the receipt of personal property in part performance of an executory contract of sale is not a bar to a subsequent rescission of the contract, when the amount received is divisible and is complete in itself, nevertheless when part only of an instalment is tendered, and there is then a refusal to deliver all of the instalment, the purchaser cannot accept such part performance, and at the same time claim a rescission of the contract for failure to deliver the balance.[49]

c. As affecting right of seller to recover for goods delivered.

The general rule that a person who has breached a contract cannot maintain an action thereon has been applied to contracts for the sale of different classes of articles, or of a quantity of goods or other commodities, to be delivered in instalments, on the theory that these contracts are entire, at least, to the extent that the seller cannot maintain an action on the contract for the contract price of a portion of the property which he has delivered, and the buyer has accepted, while he is in default in the delivery of the balance.[50]

Where, however, the buyer receives and makes use of a portion of the goods or other commodity under a contract of this character, according to the great

[47] United States Printing Co. v. H. O. Wilbur Co. (1901) 98 Ill. App. 20, holding that a contract for the sale of a designated number of wrappers of a certain brand, to be shipped in instalments, is severable in the sense that the acceptance of one instalment of poor quality does not bind the buyer to accept the balance, of the same quality.

Russell v. Clark (1914) 112 Me. 160, 91 Atl. 602, holding that a purchaser of a quantity of lumber of different dimensions, at designated prices per thousand feet, is entitled to rescind the contract, where the seller tenders, as in compliance therewith, lumber of a poorer grade than the contract permits, although the purchaser had previously received under the contract lumber of this grade.

And see Deming v. Kemp (1850) 4 Sandf. (N. Y.) 147, holding that a contract for the sale of an article to be delivered in instalments is severable, and where the purchaser accepts one instalment, in an action to recover the contract price for another instalment delivered to and accepted by him, he cannot offset his damages for breach of warranty as to the former instalment.

[48] Grafeman Dairy Co. v. St. Louis Dairy Co. (1902) 96 Mo. App. 495, 70 S. W. 390.

[49] Wolfert v. Caledonia Springs Ice Co. (1909) 195 N. Y. 118, 21 L.R.A. (N.S.) 864, 88 N. E. 24.

[50] Loudenback Fertilizer Co. v. Tennessee Phosphate Co. (1903) 61 L.R.A. 402, 58 C. C. A. 220, 121 Fed. 298, holding that a contract is entire where it is for the sale of all the phosphate rock which shall be needed for the ordinary requirements of the purchaser's factory, for a stated period of time, and a breach of the contract, by the purchaser's failing to specify any route for the shipment of a portion of the rock, goes to the whole consideration, and relieves the seller from delivering subsequent instalments, although ordered by the purchaser.

Batre v. Simpson (1842) 4 Ala. 305, holding that a contract for the sale of a number of bales of cotton at different prices is entire, and the destruction of the cotton before delivery of all of it relieves the purchaser of liability as to that portion delivered.

Rodgers v. Wise (1913) 106 Ark. 310, 43 L.R.A.(N.S.) 1009, 153 S. W. 253, holding to be entire a contract for the sale of a set of books for a lump sum, to be delivered in instalments and paid for as delivered, and that, where the seller refuses to make further deliveries on the ground of the default of the buyer in paying for an instalment delivered, he cannot sue for the purchase price, although entitled to recover damages for a breach of the contract.

Karales v. Los Angeles Creamery Co. (1918) — Cal. App. —, 171 Pac. 821, holding to be entire a contract for the sale of a quantity of milk at a designated price per hundred pounds, to be delivered daily, settlement to be made monthly (failure of seller to complete the contract precludes re-

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weight of authority, the seller is entitled to recover from him, on an implied contract, the reasonable value of the goods thus received and used, although the seller is in default in completing the performance of the con-

covery of contract price for amount delivered).

Walti v. Gaba (1911) 160 Cal. 324, 116 Pac. 963, holding that the seller cannot recover for one instalment until the entire delivery has been made.

Kelso & Co. v. Ellis (1918) 224 N. Y. 528, 121 N. E. 364.

Nightingale v. Eiseman (1890) 121 N. Y. 288, 24 N. E. 475, holding that under a contract for the sale of a number of pieces of silk goods at a designated price per piece, to be delivered in instalments and settled for when delivered, where the seller did not deliver the number of pieces contracted for, he cannot maintain an action for goods sold and delivered, to recover for the pieces actually delivered, since the contract is entire and no recovery can be had until complete performance.

Mount v. Lyon (1872) 49 N. Y. 552, holding that a contract for the sale by the thousand of a quantity of brick, to be delivered in instalments, is entire and not divisible, and the delivery of the entire quantity is a condition precedent to the right of the seller to demand payment for any of them. Where no time for payment is fixed by the contract, the failure to deliver the whole amount renders the seller responsible to the purchaser for damage, although the purchaser had not paid for the instalments of brick delivered, at the time the seller refused to make further deliveries.

Baker v. Higgins (1860) 21 N. Y. 397, holding to be entire a contract for the sale by the thousand of a quantity of brick of different grades, at different prices for each grade; failure of the seller to deliver the entire amount precludes recovery of the contract price for amount delivered.

Champlin v. Rowley (1837) 18 Wend. (N. Y.) 187; Pratt v. Gulick (1851) 13 Barb. (N. Y.) 297; Soloman v. Neidig (1862) 1 Daly (N. Y.) 200.

Corrigan v. Sheffield (1877) 10 Hun, (N. Y.) 227, holding that a contract for the purchase of designated bales of cotton to be delivered at one time is entire, and, where payment is to be made on delivery, no action will lie to recover any portion of the purchase price until such delivery has been made. The delivery of a portion of the articles gives no right of action against the purchaser; and where a portion thereof are delivered, and accepted by the purchaser, they remain at the risk of the seller, and where destroyed by fire their loss falls upon him. The general rule is asserted that if a contract for the sale and delivery of goods is entire, and part of the goods are delivered, or put in transit for delivery, and are lost or destroyed, no action accrues to the seller against the purchaser with reference thereto.

Compare with Hall v. New Hartford Canning Co. (1912) 153 App. Div. 562, 138 N. Y. Supp. 866, holding that where a contract for the sale of different kinds of seed peas, at different prices per bushel, is entire, and the purchaser waives full performance by the seller, in an action by the latter to recover for the seed delivered, the former can recoup damages for the seller's breach of the contract in failing to deliver the entire amount purchased.

Hilton & D. Lumber Co. v. Robert R. Sizer & Co. (1910) 137 App. Div. 661, 122 N. Y. Supp. 306, holding that a contract for the sale of a large quantity of lumber at a designated price per thousand feet is entire, and, unless the lumber is delivered at the place and within the time specified in the agreement, the purchaser is not bound to accept it, nor is he required to pay for lumber which he had accepted under the contract, which was delivered within the time designated therein.

Dula v. Cowles (1859) 52 N. C. (7 Jones, L.) 290, 75 Am. Dec. 463, holding that a contract for the sale of a quantity of pork at a designated price per pound is entire, and the seller cannot recover for a portion thereof which he has delivered, where he has failed to deliver the balance.

Elliott Supply Co. v. Green (1917) 35 N. D. 641, 160 N. W. 1002, holding to be entire a contract for the sale of merchandise, and a show case in which to exhibit the same (seller cannot maintain an action for the purchase price until complete delivery has been made).

In Producers Coke Co. v. Hillman (1914) 243 Pa. 313, 90 Atl. 144, it is held that a contract for the sale of all the coke produced in a certain plant during a certain period of time is entire, in the sense that, where the

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tract.[51] And it has been held that the contract price may be the measure of recovery.[52] But contracts for the sale and delivery of goods in instalments, to be paid for at the time of delivery, or within a certain time thereafter, are quite generally held to be severable, to the extent of entitling the seller to recover the purchase price for articles delivered and actually received by the buyer.[53]

V. Where effect of breach by buyer involved.

a. Rescission by seller.

In many cases, at least, the severable character of a contract for the sale of goods to be delivered in instalments di-

seller refused to deliver his entire output, he could not recover for the portion which he did deliver.

And see Prautsch v. Rasmussen (1907) 133 Wis. 181, 113 N. W. 416 (contract to furnish stone by the cubic yard, to be used in a certain construction).

[51] United States use of River Stone Supply Co. v. Molloy (1904) 62 C. C. A. 585, 127 Fed. 953; Watson v. Kirby (1895) 112 Ala. 436, 20 So. 624; Cole v. Swanston (1850) 1 Cal. 51, 52 Am. Dec. 288; Leonard v. Johnson Forge Co. (1900) 8 Penn. (Del.) 104, 50 Atl. 541; Shimp v. Siedel (1881) 6 Houst. (Del.) 421; W. H. Purcell Co. v. Sage (1902) 200 Ill. 342, 65 N. E. 723; George H. Hess Co. v. Dawson (1893) 149 Ill. 138, 36 N. E. 557; Defenbaugh v. Weaver (1877) 87 Ill. 132; Evans v. Chicago & R. I. R. Co. (1861) 26 Ill. 189; Landeche v. Sarpey (1885) 37 La. Ann. 835; Commercial Realty & Constr. Co. v. Dorsey (1910) 114 Md. 172, 78 Atl. 1099; Gage v. Meyers (1886) 59 Mich. 300, 26 N. W. 523; Chapman v. Dease (1876) 34 Mich. 375; Wilson v. Wagar (1873) 26 Mich. 452; Clark v. Moore (1853) 3 Mich. 55; Robson v. Bohn (1876) 22 Minn. 410; Rickey v. Zeppenfeldt (1876) 64 Mo. 277; Flanders v. Putney (1878) 58 N. H. 358; Kokomo Strawboard Co. v. Inman (1892) 134 N. Y. 92, 31 N. E. 248.

United States use of Hudson River Stone Supply Co. v. Molloy (1906) 11 L.R.A.(N.S.) 487, 75 C. C. A. 283, 144 Fed. 321, holding that notwithstanding the breach by the seller he may recover the value of articles received by the purchaser under an apportionable contract.

And also Bowker v. Hoyt (1836) 18 Pick. (Mass.) 555, holding that if the purchaser receives a portion of the goods he is liable therefor, although the seller fails to deliver the balance, but he may offset against the purchase price his damages for the breach of contract by the seller.

Goodwin v. Merrill (1861) 13 Wis. 659.

National Knitting Co. v. Bouton & G. Co. (1909) 141 Wis. 63, 123 N. W. 624, holding that a contract for the sale of a quantity of gloves of different kinds at a fixed price is not entire, and hence the seller may recover the purchase price of gloves actually received by the purchaser, although he has failed to make delivery of the entire lot contracted for.

Emack v. Woods (1908) 39 N. B. 111, holding that a seller in default is entitled to recover the purchase price of goods actually delivered, subject to the right of the buyer to offset his damages for the seller's breach of the contract.

[52] Defenbaugh v. Weaver (1877) 87 Ill. 132; Ricky v. Zeppenfeldt (1876) 64 Mo. 277.

Campbell & C. Co. v. Weisse (1904) 121 Wis. 491, 99 N. W. 340, holding that a contract for the sale of a quantity of bark by the cord is severable, and the seller is entitled to recover for the amount delivered and accepted by the purchaser, although he has failed to deliver the entire amount contracted for. In such action the purchaser is entitled to recoup the damages suffered by him from the failure of the seller to complete the deliveries.

In Oxendale v. Wetherell (1829) 9 Barn. & C. 386, 109 Eng. Reprint, 143, the rule is thus stated: "Where there is an entire contract to deliver a large quantity of goods, consisting of distinct parcels, within a specified time, and the seller delivers part, he cannot, before the expiration of that time, bring an action to recover the price of that part delivered, because the purchaser may, if the vendor fail to complete his contract, return the part delivered. But if he retain the part delivered after the seller has failed in performing his contract, the latter may recover the value of the goods which he has so delivered."

[53] Pittsburgh Plate Glass Co. v. Kerlin Bros. Co. (1903) 58 C. C. A. 648, 122 Fed. 414, holding that, where the

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rectly affects the rights of the parties, where the buyer defaults in receiving or paying for an instalment of goods. The fact that the goods are to be delivered in instalments and paid for in the same manner, while making the contract apportionable as to the payments, does not necessarily have the effect of making the contract severable rather than entire for other purposes. Ordinarily, if it is a severable contract in other aspects, the failure of the buyer to pay for one instalment does not entitle the seller to breach another severable part of the contract by refusing to deliver another instalment.

But a contract may be single, and yet be divisible or apportionable. The fact that the contract is apportionable as to the articles and the payments does not

seller of a quantity of pipe delivers a portion thereof and fails to make subsequent deliveries, he may recover the value of the portion delivered, less the damage to the purchaser for his failure to deliver the balance.

Georgia Pine Lumber Co. v. Central Lumber & Timber Co. (1912) 6 Ala. App. 211, 60 So. 512, holding to be severable a contract to deliver a designated number of thousand feet of lumber at a stipulated price per thousand feet, and the seller is entitled to recover for the lumber actually delivered, although he defaulted in other deliveries.

California Sugar & W. P. Agency v. Penoyar (1914) 167 Cal. 274, 139 Pac. 671, holding that a contract is entire where it is for the sale of a quantity of lumber at a stated price per thousand feet, and hence the refusal of the purchaser to pay for the lumber delivered will justify the seller in refusing to make further deliveries, unless he was also in default at the time of the purchaser's refusal.

Gomer v. McPhee (1892) 2 Colo. App. 287, 31 Pac. 119, holding that a contract for the sale and delivery in instalments of different articles, at a price specified for each, to be paid according to their delivery, is severable in the sense that the seller may recover the price of articles delivered and accepted by the purchaser, although he has made default in subsequent delivery; but in such case the purchaser may recoup his damages for such default of the seller.

Branch Sons & Co. v. Palmer (1880) 65 Ga. 210, holding that a contract for the sale of a number of bales of cotton is entire, and the purchaser's failure to pay for instalments as delivered entitled the seller to rescind the whole contract.

Compare with Robidoux v. Baltz (1910) 153 Ill. App. 100, holding that a contract is severable where it is for the sale of a quantity of cheese, to be delivered at different times, payment to be made according to such deliveries, and, upon the failure of the purchaser to pay for instalments when due, the seller has a right to cancel the contract as to further deliveries, and recover the purchase price for the cheese delivered.

Barrie v. Jerome (1904) 112 Ill. App. 329, also holds that while a contract to purchase a set of books, to be paid for at a certain price per volume at designated times, based upon deliveries, in one sense is entire, nevertheless it is apportionable to the extent that the seller is entitled to recover for the volume actually delivered, although he has not fully performed.

Jennings v. Shertz (1909) 45 Ind. App. 120, 88 N. E. 729, holding that a contract for the sale of staves at a designated price per thousand, to be delivered at different times, is severable, and the fact that the seller did not deliver all of the staves does not bar his recovery for those properly tendered, where his failure in this regard was due to the request of the purchaser.

Tipton v. Feitner (1859) 20 N. Y. 423, holding that a contract for the sale of dressed and live hogs at different prices, to be delivered at different times, is severable, and the purchaser, after receiving the dressed hogs, cannot escape payment therefor on the ground of the breach by the seller of his contract to deliver the live hogs, although he can recoup against the purchase price for the dressed hogs the damages for the breach as to the live ones.

Equitable Trading Co. v. Stoneman (1909) 131 App. Div. 376, 115 N. Y. Supp. 285, holding to be divisible a contract for the sale of different qualities of the same kind of goods at different prices, delivery to be made at different times (breach by the seller as to subsequent delivery does not defeat his right to recover for deliveries made).

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prevent it from being single so that the default of the purchaser in paying for instalments will release the seller as to the balance of the contract, at his election.[54] In other words a contract to deliver goods in instalments to be paid for in instalments may have a double aspect. In its general features it may be entire, and yet as to the time of delivery and payment it

Azema v. Levy (1889) 25 N. Y. S. R. 859, 5 N. Y. Supp. 418, holding that a contract for the sale of a quantity of beans by the bag at a designated price per bushel, the beans to be delivered in two instalments, is severable, and a delivery of the second instalment is not a condition to the right to recover for the first instalment; but the purchaser can recoup against the amount due therefor his damages for failure of the seller to deliver the second instalment.

Swift v. Opdyke (1865) 43 Barb. (N. Y.) 274, holding that a contract for the sale of bales of blankets of different weights, to be shipped by different vessels and delivered at different times, is severable as to each shipment, and the right of the seller to recover for the first instalment actually delivered and accepted by the purchaser is not defeated by his default in delivering the second instalment.

Talmage v. White (1873) 3 Jones & S. (N. Y.) 218, holding that different orders for coal at different times are severable contracts, and the right of the seller to recover for instalments delivered and accepted is not lost by his failure to deliver other instalments.

Sherman v. Holmes (1882) 16 Jones & S. (N. Y.) 534, holding that a contract for the sale of lumber and timber, to be delivered and settled for in cargo lots, is severable as to each cargo; and where the purchaser, after receiving a cargo, refused to settle as agreed, and insisted that the seller should make the further deliveries, and while thus in default notified the seller not to make further deliveries, his conduct constituted a rescission of the contract, entitling the seller to recover for the lumber and timber delivered and accepted.

Willis v. Jarrett Constr. Co. (1910) 152 N. C. 100, 67 S. E. 265, holding that a contract for the sale of a number of piles, to be delivered in instalments, a portion of the purchase price to be paid with reference to each delivery, is severable, to the extent that the seller is entitled to recover the purchase price for piles delivered and accepted by the purchaser, although full delivery has not been made.

Indian Mountain Jellico Coal Co. v. Asheville Ice & Coal Co. (1904) 134 N. C. 574, 47 S. E. 116, holding that a contract for the sale of all of the coal the purchaser would need within a certain time, to be delivered in instalments, payment to be made by the ton with reference to such deliveries, is severable, and the seller is entitled to recover for the coal actually delivered, although he subsequently breached the contract; the purchaser, however, may recoup his damages, if any were caused him by such breach.

Oliver v. Oregon Sugar Co. (1902) 42 Or. 276, 70 Pac. 902, holding to be divisible a contract for the sale of several cars of produce, to be delivered at different times (breach by seller as to one instalment does not relieve the buyer of further obligation).

McLaughlin v. Hess (1894) 164 Pa. 570, 30 Atl. 491, holding that a contract is severable where it is for the sale of all of the seller's milk for a designated period of time at a certain price per gallon, and the seller may recover for milk delivered, although he had breached the contract as to subsequent deliveries.

And see Vaughan v. Howe (1866) 20 Wis. 497, holding that under a contract for the sale by the thousand feet of a quantity of logs, the delivery by the seller of some logs of a poorer quality than permitted by the contract does not preclude his recovery of the purchase price for the logs delivered, which comply with the contract.

Goodwin v. Merrill (1861) 13 Wis. 659, holding that a contract for the sale by the bushel of a quantity of grain is entire, where payment is to be made only after delivery of the whole amount contracted for; but if payment is to be made as instalments are delivered, the contract is severable, and the seller can recover for instalments actually delivered, although he has not delivered the full amount called for by the contract.

[54]North Shore Lumber Co. v. South Side Lumber Co. (1912) 176 Ill. App. 96.

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may partake of a severable character. Applying this rule to the right of the seller to rescind for failure of the buyer to accept and pay for an instalment, the majority of the cases hold that the buyer's breach of the contract in failing or refusing to receive or pay for an instalment of goods entitles the seller to refuse to make further deliveries or to rescind the contract, the two remedies apparently being treated, in a majority of the cases, as practically equivalent; since a refusal to make further deliveries generally leads to a rescission of the contract.[55] However, the distinction be-

[55] George H. Hess Co. v. Dawson (1894) 149 Ill. 138, 36 N. E. 557, holding that the seller may abandon the contract and sue for the value of the property furnished thereunder, upon failure of the buyer to pay for instalments delivered (sale of castings by the pound).

Johnson Forge Co. v. Leonard (1902) 3 Penn. (Del.) 342, 57 L.R.A. 225, 94 Am. St. Rep. 86, 51 Atl. 305, holding to be entire a contract for the sale of scrap iron by the ton, to be delivered in instalments and paid for at a certain time after delivery, and that the seller is entitled to rescind the contract upon the failure of the buyer to pay for an instalment.

Dudley v. Wye (1918) 230 Mass. 350, 119 N. E. 790, holding that failure of the buyer to pay for instalments of sweaters delivered justified the seller in rescinding the contract for the manufacture of the sweaters in instalments.

Smith v. Keith & P. Coal Co. (1889) 36 Mo. App. 567, holding that a contract is entire where it is for the sale of a designated number of tons of hay of a specified kind at a certain price per ton, and, where the purchaser refuses to receive an instalment when tendered, the seller is entitled to rescind the contract, and refuse to make further deliveries.

Laswell v. National Handle Co. (1910) 147 Mo. App. 497, 126 S. W. 969, holding that, under a contract for the manufacture and sale of different kinds of handles, the failure of the purchaser to take a certain kind of handles, the sale of which was necessary to render the contract valuable to the seller, constitutes a breach of the contract, entitling the latter to refuse further deliveries of handles of other kinds.

Miller v. Leo (1900) 165 N. Y. 619, 59 N. E. 1126, affirming (1898) 35 App. Div. 589, 55 N. Y. Supp. 165, holding that a contract for the sale of all the brick, lime, and cement required by the buyer in constructing a certain building was entire, although the brick was sold by the thousand, and cement and lime by the barrel (refusal of buyer to order one article justified the seller in refusing to deliver other articles, and did not affect his right to recover value of articles delivered).

Raabe v. Squier (1895) 148 N. Y. 81, 42 N. E. 516, holding that the refusal to make further deliveries until instalments already delivered have been paid for does not constitute a breach of the contract.

Nichols v. Scranton Steel Co. (1893) 137 N. Y. 471, 33 N. E. 561 (refusal of buyer to pay for instalment delivered justifies rescission of the contract by the seller).

Kokomo Strawboard Co. v. Inman (1892) 134 N. Y. 92, 31 N. E. 248, holding that a contract for the sale of strawboard by the ton, to be delivered in instalments, is entire in the sense that the seller may refuse to make further deliveries, where the buyer breached the contract to execute his notes to cover the purchase price of instalments as delivered, although the seller may also recover the value of such instalments.

Contractors & Builders Supply Co. v. Alta Portland Cement Co. (1904) 26 Ohio C. C. 49, holding a contract for the sale by the barrel of cement, to be delivered in instalments and paid for within a certain time following each delivery, is divisible or distributive as to performance. It is, however, entire in its formation and obligation; hence, if the buyer fails to pay according to the terms of the contract, the seller may refuse to make further deliveries.

McKeefry v. United States Radiator Co. (1906) 31 Pa. Super. Ct. 263, holding to be entire a contract for the sale of a quantity of goods to be delivered in instalments, to be settled for a certain time after each delivery (breach by buyer in refusing to receive and settle for instalments tendered entitles the seller to dispose of remaining articles, and hold the buyer for the loss).

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tween the two remedies has been pointed out.[56]

This general rule is also sustained by cases which do not specifically designate the character of the contract, it being assumed either that the contract was entire, or that its character as to severability was immaterial.[57] In this con-

Providence Coal Co. v. Coxe Bros. (1896) 19 R. I. 380, 582, 35 Atl. 210, holding that a contract is entire where it is for the sale of a quantity of coal of a designated kind at a specified price per ton, to be delivered in instalments and paid for within thirty days thereafter, and the failure of the purchaser to take instalments, when tendered according to the contract, relieves the seller of further performance.

Ross-Meehan Foundry Co. v. Royer Wheel Co. (1904) 113 Tenn. 370, 68 L.R.A. 829, 83 S. W. 167, 3 Ann. Cas. 898, holding that a contract is entire where it is for the manufacture and delivery of all of the castings of a certain description required by the purchaser within a stated time, to be delivered in instalments and paid for within a designated time after each delivery; and, where the purchaser fails to make a payment as specified, the seller is entitled to rescind the entire contract.

Honck v. Muller (1881) L. R. 7 Q. B. Div. (Eng.) 92, 50 L. J. Q. B. N. S. 529, 45 L. T. N. S. 202, 29 Week. Rep. 830 (sale of iron to be delivered in instalments; refusal of buyer to receive the first instalment).

And see W. K. Henderson Lumber Co. v. Stilwell & Co. (1902) 130 Mich. 124, 89 N. W. 718, holding that a contract for the sale of a quantity of lumber, to be shipped in instalments in carload lots, is severable as to each shipment, and the failure of the purchaser to settle for instalments as agreed precludes him from recouping damages for the refusal of the seller to make further shipments.

Uniform Sales Act: In Ambler v. Sinaiko (1919) — Wis. —, 170 N. W. 270, construing the Uniform Sales Act, which provides in substance that where there is a contract for the sale of goods to be delivered and paid for in instalments, and there is a defective delivery of an instalment, the question whether the breach is so material as to justify the injured party in refusing to go on with the contract, and suing for his entire damages at once, depends in each case "on the terms of the contract and the circumstances of the case,"—it is held that the refusal of the buyer of coal, deliverable and payable in instalments, to pay the amount of an instalment, and his insistence upon depositing the amount thereof in a bank, to be paid only after the seller made further deliveries, was so material a breach of the contract as to justify the seller in refusing to make further deliveries.

[56] Potsdamer v. Kruse (1894) 57 Minn. 193, 58 N. W. 983, declaring that while it is not uncommon to speak of the act of the purchaser of articles, in rejecting such as do not comply with the contract, as a rescission, yet, accurately speaking, it does not stand on the ground of a rescission. The act of refusing to accept an article, as not being in accordance with the terms of a previous executory contract, is one of acceptance on condition, and not a rescission of the contract.

Ex parte Chalmers (1873) L. R. 8 Ch. (Eng.) 289, 42 L. J. Bankr. N. S. 37, 28 L. T. N. S. 325, 21 Week. Rep. 349, holding that the failure of the buyer to pay for instalments justified the seller in refusing to make further deliveries, but did not entitle him to rescind the contract.

[57] **United States.**—McFarland v. Savannah River Sales Co. (1918) 157 C. C. A. 554, 247 Fed. 652 (lumber); Youghiogheny & O. Coal Co. v. Verstine, H. & Co. (1910) 176 Fed. 972 (coal to be paid for by notes of the buyer, which he did not execute according to agreement); Demarest v. Dunton Lumber Co. (1907) 88 C. C. A. 310, 161 Fed. 264, affirming (1907) 151 Fed. 508 (lumber to be delivered as ordered); Hull Coal & Coke Co. v. Empire Coal & Coke Co. (1902) 51 C. C. A. 213, 113 Fed. 256 (coal); Union Pressed Brick Co. v. Fultonham Brick & Drain Tile Co. (1902) 50 C. C. A. 615, 112 Fed. 920 (sale of brick by the thousand); Scully Steel & I. Co. v. Old Meadow Rolling Mill Co. (1901) 47 C. C. A. 646, 108 Fed. 732 (buyer of Bessemer steel sheets refused to pay, denied indebtedness, and asserted an unfounded claim for damages).

California.—Minaker v. California Canneries Co. (1902) 138 Cal. 239, 71 Pac. 110 (fruit to be delivered during the season); Wood C. & Co. v. Seurich (1907) 5 Cal. App. 252, 90 Pac. 51

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nection it is to be noted that it has also been held that, even though the contract is severable, the seller is entitled to refuse to make further deliveries, while the buyer is in default in paying for deliveries made.[58]

The general basis for the rule permitting the seller to rescind the contract for breach by the buyer in failing or refusing to accept or pay for an instalment of goods is that, where such instalments are to be paid upon delivery or within a designated time after delivery, the contract is entire, in the sense that the seller is entitled to demand payment for unpaid instalments as a condition precedent to the duty to make further deliveries.[59] And that,

(buyer refused to receive and pay for a shipment of apples).

Delaware.—Walton v. Black (1876) 5 Houst. 149 (ice by the ton); Johnson Forge Co. v. Leonard (1876) 3 Penn. 343, 57 L.R.A. 225, 94 Am. St. Rep. 86, 51 Atl. 305 (buyer refused to pay for a shipment of scrap iron, purchased by the ton, until further deliveries had been made).

Florida.—Stokes v. Baars (1882) 18 Fla. 656 (timber).

Georgia.—Savannah Ice Delivery Co. v. American Refrigerator Transit Co. (1900) 110 Ga. 142, 35 S. E. 280 (ice).

Illinois.—Burt v. Garden City Sand Co. (1909) 237 Ill. 473, 86 N. E. 1055 (season's output of cement to be delivered in carload lots); W. H. Purcell Co. v. Sage (1902) 200 Ill. 342, 65 N. E. 723 (coal by the ton, to be delivered as required); Dwyer v. Duquid (1873) 70 Ill. 307 (coal); Metz v. Albrecht (1869) 52 Ill. 491; Bradley v. King (1867) 44 Ill. 339 (lumber); Patten v. Iroquois Furnace Co. (1905) 124 Ill. App. 1.

Indiana.—Ohio Valley Buggy Co. v. Anderson Forging Co. (1907) 168 Ind. 593, 81 N. E. 574, 11 Ann. Cas. 1045.

Kansas.—Southwestern Stage Co. v. Peck (1875) 17 Kan. 271 (hay by the ton).

Louisiana.—Sitman v. Lindsey (1909) 123 La. 53, 48 So. 646 (lumber); Landeche v. Sarpy (1885) 37 La. Ann. 835 (hogsheads and barrels).

Maryland. — Webster v. Moore (1908) 108 Md. 572, 71 Atl. 466; Baltimore v. Schaub Bros. (1903) 96 Md. 534, 54 Atl. 106 (coal).

Massachusetts.—National Contracting Co. v. Vulcanite Portland Cement Co. (1906) 192 Mass. 247, 78 N. E. 414 (cement by the barrel, payable on delivery); King v. Faist (1894) 161 Mass. 449, 37 N. E. 456.

Minnesota.—Palmer v. Green (1885) 34 Minn. 39 (granite curbing by the foot).

New York.—Kokomo Strawboard Co. v. Inman (1892) 134 N. Y. 92, 31 N. E. 248 (failure to pay notes given for strawboard sold by the ton); Price v. New York (1905) 104 App. Div. 198, 93 N. Y. Supp. 967 (coal by the ton, buyer retained purchase price in anticipation of breach by seller); Liebel v. Light (1900) 30 Misc. 434, 62 N. Y. Supp. 535 (steel clippings, to be removed weekly); Bright v. Dean (1888) 18 N. Y. S. R. 1019, 2 N. Y. Supp. 658 (coal by the ton, to be delivered in boatload lots); Soltau v. Goodyear Vulcanite Co. (1895) 12 Misc. 131, 33 N. Y. Supp. 77 (rubber by the ton).

Oregon.—J. K. Armsby Co. v. Grays Harbor Commercial Co. (1912) 62 Or. 173, 123 Pac. 32 (withholding of payment by the buyer as indemnity as against breach by the seller).

Pennsylvania. — Pittsburg Steel Foundry v. Pittsburg Steel Co. (1909) 223 Pa. 430, 72 Atl. 813 (steel ingots); Reybold v. Voorhees (1858) 30 Pa. 116 (crop of apples, to be delivered from day to day); Goodman v. Whiting Lumber Co. (1916) 62 Pa. Super. Ct. 230 (lumber; unreasonable refusal by buyer to pay).

See Pipe & Contractors Supply Co. v. Mason & H. Co. (1918) 181 App. Div. 317, 168 N. Y. Supp. 740, holding that demand for payment and notice to the buyer of the seller's intention to rescind, if it is not complied with, is necessary in order to entitle the seller to rescind the contract for failure of the buyer to pay instalments, where the seller has waived payment in accordance with the terms of the contract.

[58] Harris Lumber Co. v. Wheeler Lumber Co. (1909) 88 Ark. 491, 115 S. W. 168, holding that a contract for the sale of a quantity of lumber at a designated price per thousand feet, to be shipped in instalments and paid for at a certain time after delivery of each instalment, is severable as to each shipment, to the extent that the seller may rescind for refusal of the buyer to pay for instalments delivered.

[59] John A. Gauger & Co. v. Sawyer & A. Lumber Co. (1908) 88 Ark. 422,

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where payment according to the deliveries is expressly or impliedly contracted for, it is one of the essential elements of the contract, and the failure of the buyer to perform in that regard entitles the seller to terminate the contract as a whole.[60]

The right of the seller to rescind a contract of this character has also been sustained without expressly designating the character of the contract, although the breach of the buyer in failing to pay the demand was sought by the latter to be cured by making a tender of the amount on the following day.[61]

It has been held that the fact that the amount which the buyer refused to pay as a balance due upon an instalment delivered is a small sum does not affect the right of the seller to rescind the contract and refuse to make full deliveries, based upon such breach by the buyer.[62]

In other jurisdictions it is denied that as a usual thing the mere failure of the buyer to pay for an instalment of goods, as contemplated by the contract, will entitle the seller to rescind it as a whole.[63] According to this rule, the default of the buyer in paying for

115 S. W. 157, holding that the failure of the buyer to take certain cases of goods, deliverable by instalments, entitles the seller to rescind the entire contract.

National Contracting Co. v. Vulcanite Portland Cement Co. (1906) 192 Mass. 247, 78 N. E. 414; Canda v. Wick (1895) 100 N. Y. 127, 2 N. E. 381 (wrongful refusal to receive goods when tendered entitles seller to rescind). And see also cases cited in preceding note. Bailey v. Western Vermont R. Co. (1864) 18 Barb. (N. Y.) 112 (a sale of iron rails by the ton).

[60] McGrath v. Gegner (1893) 77 Md. 331, 39 Am. St. Rep. 415, 26 Atl. 502, holding that the seller of a quantity of shells by the bushel, to be delivered in equal instalments, and the purchase price to be paid according to such deliveries, is entitled to rescind the contract as a whole for the failure of the purchaser to pay for instalments delivered, when due and payable, since this portion of the agreement goes to the essence of the contract.

[61] Bennett v. Taylor (1906) 72 Kan. 598, 84 Pac. 533, holding that under a contract providing that the buyer shall pay for each carload of grain on demand by the seller, and the presentation of a draft with bill of lading attached, if the buyer upon such presentation refuses to make the payment, the seller is entitled to rescind the contract, although the buyer tenders the amount upon the day following the demand.

[62] Genesee Fruit Co. v. Barrett (1896) 67 Ill. App. 673.

Compare with Taussig v. Southern Mill & Land Co. (1907) 124 Mo. App. 209, 101 S. W. 602, holding that where the buyer wrongfully retained a balance of over $4 out of about $250 due on an instalment, the breach was not of a character entitling the seller to rescind the contract as a whole.

[63] And see Monarch Cycle Mfg. Co. v. Royer Wheel Co. (1900) 44 C. C. A. 523, 105 Fed. 324, holding to be entire a contract for the sale of a large number of bicycles, at designated prices for each wheel, to be shipped monthly (failure of buyer to pay for shipment did not constitute a renunciation of the contract, authorizing the seller to treat it as abandoned).

Rock Island Sash & Door Works v. Moore & H. Hardware Co. (1906) 147 Ala. 581, 41 So. 806, holding that a contract for the sale of several different articles by the carload, to be delivered at different times, is severable, the price being apportioned to the different articles and to be paid on delivery of the different instalments; hence, although the buyer breaches the contract as to the first car, such breach does not release the seller as to other cars.

Herzog v. Purdy (1897) 119 Cal. 99, 51 Pac. 27, holding that a contract for the sale of salt hides, calfskins, pelts, and tallow of animals slaughtered and to be slaughtered, at a designated price for the different articles, is severable as to each of the different classes of articles, and hence the refusal of the purchaser to receive and pay for the hides does not relieve the seller from tendering the other articles.

Tuttle-Chapman Coal Co. v. Coaldale Fuel Co. (1907) 136 Iowa, 382, 113 N. W. 827, holding to be severable a contract for the sale of practically all the coal mined by the seller for a given period, for a stated price per ton, and hence the seller has no right

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an instalment does not have the effect of releasing the seller from further performance, unless the circumstances of the default indicate the intention of

to cancel the contract for the buyer's failure to pay for the coal as delivered, according to the terms of the contract.

Iowa Brick Mfg. Co. v. Herrick (1905) 126 Iowa, 721, 102 N. W. 787, holding to be severable a contract for the sale by the thousand of a quantity of brick to be delivered in instalments, and settled for in accordance with such deliveries (failure to pay for one instalment does not entitle the seller to rescind the contract as to subsequent instalments. To the same effect see Tuttle-Chapman Coal Co. v. Coaldale Fuel Co. (1907) 136 Iowa, 382, 113 N. W. 827, as to the output of a mine).

Osgood v. Bauder (1888) 75 Iowa, 550, 1 L.R.A. 655, 39 N. W. 887.

Hansen v. Consumers' Steam Heating Co. (1887) 73 Iowa, 77, 34 N. W. 495, holding that a contract is divisible where it is for the sale, at a designated price per ton, of all the coal the purchaser should need in his business during a certain period of time, the purchase price to be paid monthly according to the amount delivered; and hence the contract cannot be rescinded by the seller for default by the buyer in paying for instalments delivered.

Myer v. Wheeler (1884) 65 Iowa, 390, 21 N. W. 692, holding that a contract is severable where it is for the sale of a stated number of carloads of grain at a designated price, to be paid as each carload is delivered, the cars to be delivered at different times; hence the seller is not relieved of performance by the refusal of the purchaser to pay for the carload which has been delivered.

Collins v. Swan-Day Lumber Co. (1914) 158 Ky. 231, 164 S. W. 813, holding that the failure to pay for an instalment of logs according to the contract does not entitle the seller to rescind.

Longfellow v. Huffman (1909) 55 Or. 481, 104 Pac. 961, holding that a contract for the sale of the increase of sheep for a series of years at a certain price per head, to be paid as they are taken, is severable, and the failure of the purchaser to tender the purchase money and take the lambs does not relieve the seller from performance in a subsequent year.

Tucker v. Billing (1881) 3 Utah, 82, 5 Pac. 554, holding that under a contract for the sale of all the lumber the purchaser required within a designated time, and all slabs sawed by the seller during a certain season, at a price apportioned to the different articles to be delivered in instalments, and payments to be made with reference to such deliveries, the seller cannot rescind the contract as to undelivered slabs for the failure of the purchaser to pay for instalments of lumber which had been delivered, since the contract is severable as to the lumber and the slabs.

R. C. Bowers Granite Co. v. Farrell (1894) 66 Vt. 314, 29 Atl. 491, holding that a contract by which the seller agrees to furnish monuments to the buyer as ordered, the buyer furnishing specifications, and the purchase price being agreed upon, is severable as to each monument ordered, and hence the failure of the purchaser to pay for one monument, according to the contract, does not relieve the seller from his obligation to furnish other monuments as ordered, after the purchase price has been agreed upon.

Campbell & C. Co. v. Weisse (1904) 121 Wis. 491, 99 N. W. 340, holding to be apportionable a contract for the sale of a quantity of bark, to be delivered in instalments, payment to be made within a certain time following its delivery; hence, the default of the buyer in paying for an instalment, while it entitled the seller to enforce payment therefor, yet did not release him from the obligation to make further deliveries.

Simpson v. Crippen (1872) L. R. 8 Q. B. (Eng.) 14, 42 L. J. Q. B. N. S. 28, 27 L. T. N. S. 546, 21 Week. Rep. 141, holding that the failure of the buyer to receive and pay for the first instalment of coal, which he was to take monthly, did not relieve the seller of the obligation to complete the contract as to subsequent instalments.

Mersey Steel & I. Co. v. Naylor (1884) 9 App. Cas. 434, 53 L. J. Q. B. N. S. 497, 51 L. T. N. S. 637, 32 Week. Rep. 989, 28 Eng. Rul. Cas. 504; Ex parte Chalmers (1873) L. R. 8 Ch. (Eng.) 289, 42 L. J. Bankr. N. S. 37, 28 L. T. N. S. 325, 21 Week. Rep. 349; Bloomer v. Bernstein (1874) L. R. 9 C. P. (Eng.) 588, 43 L. J. C. P. N. S. 375, 31 L. T. N. S. 306, 23 Week. Rep. 238.

Doner v. Western Canada Flour

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the buyer to repudiate the entire contract.[64] In this regard, however, it has been held that the refusal of the buyer to make payments for instalments delivered until the full completion of the contract, being in direct violation of the express or implied terms thereof, is equivalent to a refusal to be further bound by the terms of the contract, and hence authorizes the seller to cease making deliveries thereunder; and such refusals may also furnish a basis from which the conclusion may be drawn that the contract has been rescinded by the parties.[65] And even the mere refusal of the buyer to accept or pay for the goods tendered to him may, in some circumstances, justify the inference that he repudiates the entire contract, and thereby entitles the seller to rescind the contract as a whole.[66] And even though a contract of this character is severable, nevertheless where the buyer was to settle for instalments

Mills Co. (1917) — Ont. —, 41 D. L. R. 476, holding to be severable a contract for the sale of different grades of flour, to be delivered in instalments, such portion of each grade to be delivered at any particular time as the buyer subsequently designated, payment to be made at a certain time after each delivery, with the right reserved to the seller to require cash if the buyer did not pay according to agreement. The failure of the buyer to pay for a portion of an instalment was held not to entitle the seller to rescind the contract. Approved in Sierichs v. Hughes (1918) — Ont. —, 43 D. L. R. 297.

[64] Midland R. Co. v. Ontario Rolling Mills (1884) 10 Ont. App. Rep. 677, holding that the refusal of the buyer to pay for an instalment of goods did not entitle the seller to rescind, unless the refusal amounted to a repudiation of the contract.

Mersey Steel & I. Co. v. Naylor (Eng.) supra, holding that a contract for the sale of a quantity of steel, payment to be made as delivered, to be delivered in monthly instalments, was entire, and the provision as to payment did not constitute such payment a condition precedent of the entire contract; hence, failure to pay for instalments as required by the contract did not relieve the seller of the duty of making further deliveries, where the failure did not indicate any intention to repudiate the contract by the buyer.

Welsh v. Michigan Maple Co. (1910) 161 Mich. 16, 125 N. W. 692, holding that a contract for the sale of a quantity of lumber, to be delivered in instalments and paid for according to such delivery, is severable as to each shipment, and the failure of the purchaser to pay for one instalment according to the contract does not relieve the seller from furnishing subsequent instalments, it not appearing that the purchaser intended by such default to abandon the contract.

[65] Stevens v. Forrest (1914) 183 Mich. 223, 149 N. W. 982, holding that a contract is severable where it is for the sale of a quantity of coke, to be delivered in carload lots, settlement to be made by the carload as delivered, and the persistent refusal of the purchaser to make such settlements, and his attempt to change or modify the contract, entitled the seller to rescind the contract.

State, Skillman Hardware Mfg. Co., Prosecutor, v. Davis (1890) 53 N. J. L. 144, 20 Atl. 1080, holding that under a contract for the sale of iron castings by the ton, to be delivered in instalments, in the absence of an express stipulation as to time of payment, payment is to be made as the instalments are delivered, and the contract is apportionable in respect to such payments. The court said that the question whether the contract is entire or divisible, in respect of the question of payment of the consideration, cannot be solved by the application of any fixed legal standard, but it depends upon the intention of the parties, to be gained from all the circumstances surrounding the agreement, and from the face of the contract, if in writing.

[66] Wm. Knapp & Co. v. San Joaquin Cigar Co. (1909) 10 Cal. App. 325, 101 Pac. 929.

In Freeth v. Burr (1874) L. R. 9 C. P. (Eng.) 208, 43 L. J. C. P. N. S. 91, 29 L. T. N. S. 773, 22 Week. Rep. 370, it is said that the true question in this class of cases is whether or not the acts and conduct of the parties indicate an intention no longer to be bound by the contract. Nonpayment on the one hand, and nondelivery on the other, may amount to such an act, or may be evidence of an intention wholly to abandon the contract.

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by his note, and he refused to execute his note on the claim that he would not execute any more notes, this amounted to a repudiation of the contract as a whole, and entitled the seller to rescind it.[67] So, where the refusal by the buyer to pay a small balance on an instalment of lumber was based upon an untenable claim that he was obliged only to pay for lumber according to the measurements at his mill, delivery having been made at another point, it constituted such a repudiation of the contract as a whole as to entitle the seller to rescind it.[68]

It has also been held that the fact that an article sold by the ton was to be delivered in instalments and settled for within a designated time after its delivery does not split the contract into as many contracts as there are to be deliveries, and that the failure of the buyer to accept and pay for one delivery did not relieve the seller of the obligation of making subsequent deliveries, payment not being a condition precedent to the entire contract.[69]

In this regard it has been held that a contract of this character is not indivisible, and hence that the mere failure of the buyer to pay for an instalment delivered does not entitle the seller to rescind, where by affirmative action the buyer indicates his intention and desire to keep the contract alive; nor can the seller refuse to make further deliveries and recover the contract price, since under such circumstances both of the parties have breached the contract, and neither can sue thereon.[70]

However, such a contract is entire in the sense that the buyer cannot insist upon further delivery while in default for deliveries already made thereunder.[71] Nor can he, while thus in default, successfully base a claim for breach of contract on the seller's refusal to make further deliveries.[72]

[67] Nichols v. Scranton Steel Co. (1893) 137 N. Y. 471, 33 N. E. 561.

[68] Murphy v. Sagola Lumber Co. (1905) 125 Wis. 363, 103 N. W. 1113.

[69] Mersey Steel & I. Co. v. Naylor (1884) 9 App. Cas. 434, 53 L. J. Q. B. N. S. 497, 51 L. T. N. S. 637, 32 Week. Rep. 989, 23 Eng. Rul. Cas. 504.

[70] Rodgers v. Wise (1913) 106 Ark. 310, 43 L.R.A.(N.S.) 1009, 153 S. W. 253.

[71] Walton v. Black (1876) 5 Houst. (Del.) 149.

Crane Co. v. Columbus Constr. Co. (1896) 20 C. C. A. 233, 46 U. S. App. 52, 73 Fed. 984, writ of error dismissed in (1899) 174 U. S. 600, 43 L. ed. 1102, 19 Sup. Ct. Rep. 721, holding that where the purchaser repudiates in part a contract for the sale of articles to be delivered in instalments, each instalment to be paid for in cash when delivered, he cannot insist upon performance as to the other instalments (sale of pipe of a certain quality at a designated price; action by purchaser to recover damages for breach of warranty of quality).

Harris Lumber Co. v. Wheeler Lumber Co. (1909) 88 Ark. 491, 115 S. W. 168, holding that a contract is severable to the extent that it is for the sale of several cars of lumber, to be shipped at different times, each car to be billed separately and the purchase price thereof to be due and payable according to the time of delivery, and that it is entire to the extent that each party is entitled to complete performance; hence, the purchaser cannot insist upon further shipments when he is in default in payment for prior deliveries.

Kingdom v. Cox (1848) 5 C. B. 522, 136 Eng. Reprint, 982, 17 L. J. C. P. N. S. 155, 12 Jur. 336, holding that a contract for the sale of a designated number of tons of iron girders, to be delivered in instalments after the purchaser has furnished drawings for the different girders, is entire; and where he fails to furnish drawings within a reasonable time he cannot maintain an action, based upon the refusal of the seller to furnish a small portion of the girders.

Faber v. Hougham (1900) 36 Or. 428, 15 Pac. 547, 1111, holding that the buyer cannot sue for the seller's breach of the contract, while he is in default in paying for instalments of goods delivered to him.

[72] Los Angeles Gas & E. Co. v. Amalgamated Oil Co. (1909) 156 Cal. 776, 106 Pac. 55, holding that an agreement to furnish all of the oil used by another in his business, and the agreement of the latter to purchase all of such oil, are necessarily reciprocal. Each goes to the essence of the agreement. Hence, the contract is an entirety, although deliveries are in in-

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b. Recovery of purchase money by seller.

The question as to the effect of the divisible character of the contract on the right of the seller to recover for instalments of goods furnished, where he has refused to furnish further instalments on the ground of default of the buyer in paying for instalments delivered, is very similar to that already considered as to the right of the seller to rescind the contract for the default of the buyer in this regard; and the cases heretofore cited, which sustain the right of the seller to rescind, are likewise authority for his right to recover for instalments actually delivered.

But, as already pointed out, in some jurisdictions the rule obtains that, even though a seller is in default in delivering a portion of the goods sold, he may nevertheless recover for the goods actually delivered, subject to the buyer's right to recoup his damages for a breach of the contract, based upon the seller's refusal to make further deliveries; hence, it follows that, where this latter rule obtains, even though a case may deny the right of the seller to rescind the contract for failure of the buyer to pay for the instalments of goods delivered thereunder, it might nevertheless sustain the seller's right to recover the goods actually delivered, subject to the buyer's right to recoup. In addition to the cases cited on the seller's right to rescind, reference is also made to the cases which hold that a contract for the sale of goods to be delivered in instalments, and paid for in accordance with such deliveries, is apportionable, in the sense that the seller may maintain an action to recover the value of the goods delivered, although refusing to make further deliveries, on the ground of the default of the buyer in paying for deliveries theretofore made.[73]

But upon the theory that contracts for the sale of a quantity of goods at

stalments at certain prices per barrel, to be paid for with reference to the instalments delivered, and payments of the instalments may be enforced separately. The purchaser therefore cannot hold the seller for failure to deliver instalments of oil, where he was at the time in default in payment of instalments theretofore delivered.

Badger State Lumber Co. v. G. W. Jones Lumber Co. (1909) 140 Wis. 73, 121 N. W. 933, holding that a contract for the sale by the thousand feet of a quantity of lumber, to be taken in carload lots, is not entire, and the acceptance of one carload by the purchaser does not change the executory contract into an executed one so that the seller can maintain an action to recover the purchase price for the balance of the lumber, where the purchaser repudiated the contract and refused to take more lumber.

Withers v. Reynolds (1831) 2 Barn. & Ad. 882, 109 Eng. Reprint, 1370, 1 L. J. K. B. N. S. 30, holding that where the purchaser of a quantity of straw at a certain price per load, to be delivered in instalments, refuses to pay for it as delivered, he breaches the contract, and cannot recover damages for the failure of the seller to deliver the balance of the instalments, although the contract is silent as to the time of payment; since the circumstances raise an implication that payment is to be upon delivery.

Masters v. Barreda (1856) 18 How. (U. S.) 489, 15 L. ed. 466; Union Pressed Brick Co. v. Fultonham Brick & Drain Tile Co. (1902) 50 C. C. A. 615, 112 Fed. 920; Minaker v. California Canneries Co. (1902) 138 Cal. 239, 71 Pac. 110; Southwestern Stage Co. v. Peck (1875) 17 Kan. 271; Webster v. Moore (1908) 108 Md. 572, 71 Atl. 466; Baltimore v. Schaub Bros. (1903) 96 Md. 534, 54 Atl. 106; Jenness v. Shaw (1876) 35 Mich. 20; Barnes v. Denslow (1890) 56 Hun, 640, 9 N. Y. Supp. 53, affirmed in (1892) 130 N. Y. 687, 30 N. E. 67; Price v. New York (1905) 104 App. Div. 198, 93 N. Y. Supp. 967, appeal dismissed in (1905) 182 N. Y. 516, 74 N. E. 1124; Bright v. Dean (1888) 18 N. Y. S. R. 1019, 2 N. Y. Supp. 658; Partridge v. Gildermeister (1864) 3 Abb. App. Dec. (N. Y.) 461; Granite Mills v. Keystone Oil Cloth Co. (1899) 15 Montg. Co. L. Rep. (Pa.) 36; Easton v. Jones (1899) 193 Pa. 147, 44 Atl. 264.

And see cases cited in note 47.

[73] Richards v. Shaw (1873) 67 Ill. 222; Waldschmidt v. Marsh & B. Co. (1917) 203 Ill. App. 365.

Mound Oil Co. v. F. W. Heitmann Co. (1912) — Tex. Civ. App. —, 148 S. W. 1187, holding that where no time is fixed for delivery of a quantity of

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a designated price, which is apportionable, the goods to be delivered in instalments, are entire, it has been held that there can be no recovery for the purchase price of any instalment delivered unless and until the seller has delivered the entire amount called for by the contract.[74] And in one jurisdiction the court has taken this view, even upon the assumption that the contract was severable.[74a]

c. Recovery by seller for breach of contract.

A contract for the sale of an indefinite number of cattle at a designated price per hundred pounds, to be delivered in instalments, while said to be entire in a sense, was nevertheless held to be divisible into several contracts, as regards the remedy, for each of which a separate action would lie in favor of the seller, without tendering full performance.[75] But in other cases contracts somewhat similar have been held entire so as to enable the seller to maintain an action for breach of the contract as a whole, upon the refusal of the buyer to receive or pay for an instalment.[76]

pipe, although the contract is entire, the seller may nevertheless recover for the portion of the pipe delivered, which the buyer refuses to accept on the untenable ground that it is of a poor quality.

See Fleisher v. Abbott (1915) 137 C. C. A. 529, 222 Fed. 211, holding that, under a sale by the pound of different qualities of wool to be graded by the purchaser, the seller cannot accept the grading by the purchaser as to some qualities, and reject it as to the other qualities, but he must either accept or reject it as a whole. This decision was influenced by proof of a custom among wool buyers to accept or reject as a whole the grading of wool.

[74] William P. Kelley Brick Co. v. Clay Product Supply Co. (1907) 32 Pa. Super. Ct. 408, holding to be entire a contract for the sale of a quantity of brick by the thousand, to be delivered in instalments (denying right of seller to recover for balance due for deliveries made, after refusal to make further deliveries).

And see Campbell & C. Co. v. Weisse (1904) 121 Wis. 491, 99 N. W. 340, supra, note 63.

[74a] Magnolia Compress Co. v. Smith (1905) 75 Ark. 503, 88 S. W. 563, holding that a contract for the sale of a designated quantity of an article, with the provision that the buyer should purchase at the same price any more of the same article which he might need in constructing a certain building, is severable, and the failure of the buyer to purchase the balance of his needs of the seller does not entitle the latter to rescind the contract and sue on a quantum meruit for the quantity delivered. Rodgers v. Wise (1913) 106 Ark. 310, 43 L.R.A.(N.S.) 1009, supra, note 70.

[75] Coleman v. Hudson (1854) 2 Sneed (Tenn.) 463.

[76] Harper v. Baird (1900) 3 Penn. (Del.) 110, 50 Atl. 326, holding that a contract for the sale of a quantity of goatskins of a particular designation, for a lump sum, is entire (action by the seller for breach of contract by the purchaser in refusing to receive subject-matter of the sale).

Robson v. Hale (1913) 139 Ga. 753, 78 S. E. 177, holding that a contract is entire, where it is for the sale of a quantity of grain at a designated price per bushel, to be delivered at different times, and the purchaser is liable for breach of the contract, by notifying the seller that he will refuse to receive the remaining instalment. Bullard v. Eames (1914) 219 Mass. 49, 106 N. E. 584, holding that a contract is entire where it is for the manufacture of a number of sets of automobile controllers or regulators, to be delivered in weekly instalments, and paid for according to such deliveries (action by seller for breach of contract).

Salomon v. Corbett (1899) 38 App. Div. 262, 57 N. Y. Supp. 18, holding that a contract is entire where it is for the sale of a phaeton, brougham, and sleigh, although the price of each vehicle is specified, the aggregate price being also specified, and the payments provided for being to apply generally on the whole sum; and where the purchaser takes one of the vehicles and fails to take the others, it constitutes a breach of the contract for which damages may be recovered by the seller.

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V. Time of payment.

Contracts for the sale of a commodity to be delivered, although the purchase price is apportioned or capable of apportionment, have been construed to be entire, and hence, where the contract is silent in that regard, payment is not to be made according to the time of delivery, but only after complete performance;[77] but very similar contracts have been construed to be severable, and, where silent as to the time of payment, held to imply that the goods are to be paid for on delivery.[78] And while conceding that a contract for the sale of several articles or a quantity of goods at a specified apportioned price was in a sense entire, it has been held that nevertheless it was severable as to the remedy for its enforcement and the seller might commence an action against the purchaser to recover for its breach, upon the latter's refusal to receive an instalment when tendered him, without waiting for the expiration of the entire period for the complete performance of the contract.[79]

[77] Central Georgia Brick Co. v. Carolina Portland Cement Co. (1911) 136 Ga. 693, 71 S. E. 1048, holding that a contract is entire, where it is for the sale of a quantity of brick at a designated price per thousand, to be delivered in instalments, and, where the contract is silent in that regard, payment is not to be made until the delivery is completed, hence, the seller breaches his contract by refusing to deliver further instalments until instalments already delivered have been paid for.

Kelly Constr. Co. v. Hackensack Brick Co. (1918) — N. J. —, 103 Atl. 417, holding to be entire a contract for the sale of all the brick to be used in the construction of a certain building, and that hence a failure to pay for one instalment does not entitle the seller to rescind, there being no time for payment fixed by the contract.

Mount v. Lyon, supra, note 50.

And on this point see also Shinn v. Bodine (1869) 60 Pa. 182, 100 Am. Dec. 560, holding that a contract for the sale of a certain quantity of coal by the ton, to be delivered on board vessels as sent for during certain months, is entire, and where nothing is said with reference to payment, it is to be made on complete delivery, and need not be made as each cargo is delivered.

And see Winchester v. Newton (1860) 2 Allen (Mass.) 492, holding that where the purchaser of property to be delivered in instalments, under a mistaken claim that payments are not to be made until complete delivery, refuses to make any payments as the property is delivered, such refusal does not indicate the intention on his part to abandon the contract, and hence does not relieve the seller from making further deliveries. In this case a subsequent agreement between the parties was held to have severed the contract as to the deliveries and payments thereunder.

[78] North Shore Lumber Co. v. South Side Lumber Co. (1912) 176 Ill. App. 96, holding to be severable a contract for the sale of a quantity of lumber, to be delivered in instalments, and hence where a contract is silent in that regard the contract price is to be paid in accordance with each delivery, and not after delivery of the whole.

Tenny v. Mulvaney (1879) 8 Or. 129, holding that a contract for the sale of a quantity of merchantable logs by the thousand feet, to be delivered in instalments, is severable, and where the contract is silent as to the time of payment it will be implied that the logs are to be paid for as delivered.

[79] Mixer v. Williams (1845) 17 Vt. 457, holding that a contract for the sale by the pound of a quantity of starch to be delivered in instalments for a period of two years, while entire in a sense, is nevertheless severable to the extent that for the failure of the buyer to accept and pay for instalments, according to the contract, the seller may maintain an action without waiting for the expiration of the entire period. A. G. S.

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CYRUS MARK et al., Doing Business as Mark Manufacturing Company,

v.

STUART-HOWLAND COMPANY.

STUART-HOWLAND COMPANY

v.

CYRUS MARK et al., Doing Business as Mark Manufacturing Company.

Massachusetts Supreme Judicial Court—January 24, 1917.

(226 Mass. 35, 115 N. E. 42.)

Sale — goods — divisible contract.

1. A contract for sales from time to time of goods manufactured by the seller is, so far as the successive sales are concerned, severable, and each a contract by itself.

[*See note on this question beginning on page* 684.]

Pleading — abandonment of contract — necessity.

2. Instructions as to the effect of abandonment of a contract should not be given in an action for its breach if abandonment was not pleaded, since abandonment is a distinct ground of defense, which must be pleaded to be available.

Same — general denial — effect.

3. A general denial puts in issue only those facts which plaintiff must aver and prove in order to establish a prima facie case.

Appeal — new issues in instructions.

4. To suggest for the first time in the charge a ground of exoneration for breach of contract, which is not open under the pleadings and is not suggested by the evidence, is reversible error.

Trial — instructions — absence of evidence.

5. An instruction should not be given to which there is no evidence applicable.

Contract — abandonment.

6. A contract cannot be regarded as abandoned if both parties in good faith continue to assert contrary rights arising out of a diversity of opinion as to its construction.

Trial — answer and cross action — elections.

7. A defendant who pleads in recoupment and brings a cross action for the same matters should be required to elect, at the close of the evidence, whether he will proceed on the answer or the cross action.

Contract — breach — recovery.

8. One who breaks a contract to be performed for an entire price cannot recover on the contract nor on a quantum meruit, except where there has been a genuine intention to go by the contract.

Sale — breach of agency contract — effect.

9. Breach by a manufacturer of his contract, employing an agent to sell his goods, will not prevent the recovery for the purchase price of goods already sold and delivered to the agent.

Trial — instructions — question of fact.

10. The court cannot instruct that one suing for the purchase price of goods has not sustained the burden of showing that he had performed his contract, if the question of performance depends upon whether or not defendant complied with the terms of the contract in giving his order, which is a question for the jury.

Sale — acceptance of order.

11. One contracting to sell his product for prices to be raised or lowered according to market conditions is not bound to accept an order not needed for immediate use, but which is an attempt to make a price for the ensuing year, where the seller has served a notice that outstanding prices are canceled, but the orders received before a specific date will be accepted at former prices.

Evidence — opinion — admissibility.

12. Opinion evidence is not admissible as to whether or not an order for

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goods at the time when the price was about to change was reasonable under the terms of the sales contract.

Contract — interpretation — effect.

13. A statement by one party to a contract, about which there is a disagreement as to its terms, that he will accept "your" interpretation, makes such interpretation binding on both parties, no matter what its real meaning may be thought to be.

Appeal — petition to establish exceptions—denial.

14. The petition of one whose exceptions are sustained, for the establishment of exceptions which relate to matters not likely to arise on another trial, will be denied.

CROSS EXCEPTIONS to rulings of the Superior Court for Suffolk County made during the trial of consolidated actions brought to recover damages for breach of a written agency contract, and for other relief, which resulted in a verdict for plaintiff in each case. Defendant's exceptions sustained in the main action; plaintiffs' exceptions sustained in the cross action.

The material evidence appears in the opinion.

The contract in question on which the actions were brought was as follows:

Memorandum of agreement made and entered into this 25th day of May, 1908, by and between the Mark Mfg. Company, a copartnership (composed of Clayton Mark, Cyrus Mark, and Anson Mark), having its regular place of business in Chicago, party of the first part, and the Stuart-Howland Company, a corporation duly organized under the laws of the state of Maine, and having its regular place of business in Boston, party of the second part.

Witnesseth:

That for and in consideration of one dollar ($1) by each to the other paid, receipt for which is hereby acknowledged, and the covenants and conditions herein contained, the parties hereto agree as follows:

The party of the first part appoints the party of the second part its exclusive selling agent for its entire line of rigid iron conduit for the six New England states, and agrees to refer to it all orders and inquiries emanating from that territory.

The party of the first part quotes the party of the second part a discount of 50, 4/10s & 5 from its regular published list in any quantity in free delivery territory, with the understanding that price shall be raised or lowered according to market conditions, but that the party of the first part will at all times during the life of this contract allow the party of the second part a 5 per cent better price than that quoted by the so-called 'associated manufacturers.'

The party of the first part agrees to ship as promptly as possible the orders of the party of the second part, to furnish such printed matter bearing the imprint of the party of the second part as may be mutually deemed desirable, and to aid the said party of the second part in every reasonable way in marketing the goods in the above-mentioned territory.

The party of the second part agrees to push the sale of the above-mentioned material manufactured by the party of the first part in preference to all others, and to pay all bills on or before the 10th of the month succeeding date of shipment less 5 per cent, and, should any payments be delayed beyond that date, to pay interest thereafter at the rate of 6 per cent per annum.

This agreement to remain in force for two years from this date and thereafter until canceled by sixty days' written notice of either party. It is, however, hereby understood and agreed that the party of the second part shall have the privilege of cancelation by giving the party of the first part notice in writing at any time during the life of this contract.

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In witness whereof we have hereunto set our hands and seals the day and year first above written.

Mark Manufacturing Co.
Copartnership.

Sadie A. Phelan
Witness.

D. L. Markle,
Stuart-Howland Co.
By G. M. Stuart.

Sadie A. Phelan
Witness.

Messrs. **H. Parker** and **J. M. Hoy** for defendant.

Messrs. **Dunbar, Nutter,** and **McClennen, J. Butler Studley,** and **Jacob J. Kaplan,** for plaintiffs;

The petition to establish exceptions should be dismissed.

Shepley v. Henry Siegel Co. 208 Mass. 43, 88 N. E. 1095; Re Horan, 207 Mass. 258, 93 N. E. 581.

No exception lies to remarks of the judge concerning certain portions of the defendant's evidence.

Moseley v. Washburn, 165 Mass. 418, 43 N. E. 182.

If any exception lies, it was waived by the defendant.

Roberts v. Boston, 149 Mass. 352, 21 N. E. 668; Mester v. Zaiser, 143 Iowa, 623, 120 N. W. 466; Anderson v. Louisville & N. R. Co. 134 Ky. 343, 120 S. W. 298, 20 Ann. Cas. 920.

Defendant was liable for the goods already received by it.

Bowker v. Hoyt, 18 Pick. 555; Knight v. New England Worsted Co. 2 Cush. 271; Tipton v. Feitner, 20 N. Y. 423.

Under the contract of May 25, 1908, or any modification of it which appeared on the evidence, the plaintiffs were not bound to accept any order from the defendant. The contract contemplated that orders for goods should be the subject of later contracts.

Ashcroft v. Butterworth, 136 Mass. 511; Lincoln v. Erie Preserving Co. 132 Mass. 129; Oakman v. Rogers, 120 Mass. 214; Smith v. Gowdy, 8 Allen, 566; Montgomery Ward & Co. v. Johnson, 209 Mass. 89, 95 N. E. 290; Beaupre v. Pacific & A. Teleg. Co. 21 Minn. 155; Johnson v. Rogers, 30 Ont. Rep. 150.

There was an abandonment of the contract of May 25, 1908.

Ballou v. Billings, 136 Mass. 309; Lowe v. Harwood, 139 Mass. 133, 29 N. E. 538; Gormley v. Kyle, 137 Mass. 189; Hanson v. Wittenberg, 205 Mass. 319, 91 N. E. 383; Anvil Min. Co. v. Humble, 153 U. S. 540, 38 L. ed. 814, 14 Sup. Ct. Rep. 876, 18 Mor. Min. Rep. 98; Frost v. Knight, L. R. 7 Exch. 111, 41 L. J. Exch. N. S. 78, 26 L. T. N. S. 77, 20 Week. Rep. 471; Hobbs v. Columbia Falls Brick Co. 157 Mass. 109, 31 N. E. 756; State, Skillman Hardware Mfg. Co., Prosecutor, v. Davis, 53 N. J. L. 148, 20 Atl. 1080; Robson v. Drummond, 2 Barn. & Ad. 303, 109 Eng. Reprint, 1156, 9 L. J. K. B. 187; Williston, Repudiation of Contracts, 14 Harvard L. Rev. 317.

Plaintiffs' exceptions should be sustained, and judgment ordered for the larger amount claimed by them.

Paine v. M'Intire, 1 Mass. 69; Brockett v. Bartholomew, 6 Met. 396; O'Brien v. Peck, 198 Mass. 50, 84 N. E. 325; Menage v. Rosenthal, 175 Mass. 361, 56 N. E. 579.

Rugg, Ch., J., delivered the opinion of the court:

The action of Mark and others, who hereafter will be called the plaintiffs, was brought first. The declaration is in two counts, the first to recover damages for breach of a written contract dated May 25, 1908, and the second upon an account for goods sold and delivered to the Stuart-Howland Company, who will hereafter be called the defendant. The defendant answered, pleading, first, a general denial, and second, in recoupment, that, although the defendant had complied with the terms of the contract of May 25, yet the plaintiffs on December 12, 1908, had violated the terms of that contract by refusing to fill an order given by it to the plaintiffs, and thereafter had refused to carry out the contract, and had repudiated it to the great loss of the defendant. The second is a cross action brought by the defendant against the plaintiffs. The declaration in this action contains one count for damages arising from the general breach of the contract of May 25, 1908, one for loss of profits from December 12, 1908, to the end of the contract term, and a third for damages for delays in shipments of its orders given to the plaintiffs

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under the contract. The cases were tried together.

The contract provided in substance for the appointment of the defendant as the exclusive agent for the New England states for the plaintiffs' entire line of rigid iron conduit for a period of two years, with a privilege of written cancelation by either party on sixty days' notice, and an absolute privilege of cancelation on the part of the defendant by giving written notice. The plaintiffs quoted "a discount of 50, 4/10s & 5" from its regular published list, the price, however, to be raised or lowered according to market conditions, but the defendant always to be allowed a 5 per cent preference below the price quoted by the "associated manufacturers." The controversy centers about an order given by the defendant to the plaintiffs on December 12, 1908, for twenty-five carloads of conduit, to be shipped to Boston, unless otherwise directed, "prices not to be higher than last shipment." There was evidence tending to show that the order was not intended for immediate delivery, nor delivery before January 1, 1909. On October 27, 1908, the plaintiffs had written the defendant, withdrawing all outstanding prices on conduit, and submitting a schedule of higher prices for goods to be shipped after December 31, 1908. The chief issue between the parties was whether, upon all the evidence, the plaintiffs were bound to accept the defendant's order of December 12 at lower price, or whether they were justified in refusing to accept it unless at the higher price. There was much correspondence over this order, and there were efforts at compromise of the differences. These were without avail, and in May, 1909, the plaintiffs brought their action.

The plaintiffs asserted at the outset, and continued constant in the position, that they were not obliged to accept the order except at the higher price. The defendant, on the other hand, persistently maintained its position that the plaintiffs were obliged to accept the order at the lower price. There is nothing in the auditor's report, in the reported testimony, in the correspondence as printed in either brief, nor in the conduct of the parties, to indicate that either ever receded from the initial position taken. On the contrary, although there were offers of concession, the evidence seems plain that each continued to assert the soundness of the original contention put forward.

Under these circumstances the jury were instructed, subject to the defendant's exception, that if, while the parties were considering their disagreement as to the meaning and interpretation of the contract and the rights and obligations arising from it, "they both got sick of the bargain, and there was a mutual abandonment of the contract, then neither is from that time further bound by it . . . then one cannot be said to have violated the contract more than the other."

As an abstract proposition of law this is correct. There are two objections to giving it as an instruction. The first is that abandonment of the contract had not been pleaded by either party. A general denial puts in issue only those facts which the plaintiff must aver and prove in order to establish a prima facie case. Friedenwald Co. v. Warren, 195 Mass. 432, 434, 81 N. E. 207; Amsinck v. American Ins. Co. 129 Mass. 185, 188. Abandonment of a contract as a defense is by way of confession and avoidance and not a direct denial of any element essential to the proof of the plaintiffs' main case. Where the defense rests on a rescission or mutual abandonment of a contract, the issue is whether the contract has ceased to have legal existence or has been terminated by reason of events occurring subsequent to the inception of the contract. It is a distinct and substantive ground of defense

Pleading—abandonment of contract—necessity.

Same—general denial—effect.

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which "must be alleged in the answer according to the provisions of the Practice Act, if a defendant seeks to avail himself of it in order to defeat a recovery on a contract. Fogg v. Griffin, 2 Allen, 1, 8. See Parker v. Lowell, 11 Gray, 353, 358; Pike v. Witt, 104 Mass. 595, 598; Wheation v. Nelson, 11 Gray, 15; Grinnell v. Spink, 128 Mass. 25; Hight v. Bacom, 126 Mass. 10, 30 Am. Rep. 639.

Appeal—new issues in instructions.

It is reversible error for the judge in his charge, for the first time so far as appears, to suggest a ground of exoneration for breach of contract, which was not open under the pleadings, as to which the course of the trial does not seem at all to have been directed, and to permit the jury to surmise, in the absence of evidence, whether this might not be a good way to dispose of the case. Plummer v. Boston Elev. R. Co. 198 Mass. 499, 516, 84 N. E. 849.

Trial—instructions—absence of evidence.

The second objection to the instruction is that there was no evidence to which it was applicable. The plaintiffs have argued that the defendant must have known that it had no right to demand, under the contract, the acceptance and fulfilment of its order of December 12, and expected that the plaintiffs would refuse it, and that, by insisting upon the filling of that order, it abandoned the contract. There is nothing to indicate that the trial proceeded upon this basis, or that the defendant did not give its order of December 12 in good faith. A contract may be abandoned by conduct as well as by words. There is no basis for contending that an abandonment has arisen when both parties continue in good faith to assert contrary rights arising from a diversity of opinion as to the construction of the contract. It cannot be said to have been harmless error to permit the jury to speculate as to an abandonment, when there was no evidence to warrant a finding that the contract had been abandoned. Kerr v. Shurtleff, 218 Mass. 167, 171, 105 N. E. 871.

Contract—abandonment.

It is necessary to consider questions which may arise on a new trial. Where a defendant pleads in recoupment and also brings a cross action for the same matters, it is the correct practice for the judge to require him to elect, at the close of the evidence, whether he will proceed on the answer in recoupment, or on the cross action (Cox v. Wiley, 183 Mass. 410, 413, 67 N. E. 367; Hebert v. Dewey, 191 Mass. 403, 407, 77 N. E. 822), although the earlier practice seems to have been to permit him to rely on both. Cook v. Castner, 9 Cush. 266; Star Glass Co. v. Morey, 108 Mass. 570. Against the exception of the defendant, the court hardly would have the right to direct that he should proceed upon the cross action rather than upon the answer in recoupment.

Trial—answer and cross action—elections.

There was no error in the denial of the defendant's requests 10 and 32, to the effect that, if the refusal by the plaintiffs to accept the defendant's order of December 12, 1908, was a breach of the contract between the parties, then the plaintiffs could not recover for goods sold and delivered. It is a general rule that, where one breaks a contract to be performed for an entire price, he cannot recover on the contract, because he has not performed it, nor on a quantum meruit, because his voluntary failure to complete his agreement prevents recovery, save in restricted instances where there has been an honest intention to go by the contract. Homer v. Shaw, 177 Mass. 1, 58 N. E. 160, 212 Mass. 113, 98 N. E. 697. A wilful default in the performance of a stipulation, not going to the essence of the whole contract, bars recovery. Sipley v. Stickney, 190 Mass. 43, 5 L.R.A.(N.S.) 469, 112 Am. St. Rep. 309, 76 N. E. 226, 5 Ann. Cas. 611; Douglas v.

Contract—breach—recovery.

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Lowell, 194 Mass. 268, 273, 80 N. E. 510; Bowen v. Kimbell, 203 Mass. 364, 371, 133 Am. St. Rep. 302, 89 N. E. 542; Hennessey v. Preston, 219 Mass. 61, 106 N. E. 570. But this principle is not applicable to the facts here disclosed. The instant contract has a double aspect; one was exclusive agency by the defendant for two years for one kind of goods manufactured by the plaintiffs; the other was sales of goods from time to time by the plaintiffs to the defendant at prices to be fixed by agreement of the parties, but in any event with at least a 5 per cent preference over other manufacturers. So far as the successive sales are concerned, they are severable, and each is a contract of sale by itself. Young & C. Mfg. Co. v. Wakefield, 121 Mass. 91; West End Mfg. Co. v. P. R. Warren Co. 198 Mass. 320, 326, 84 N. E. 488; Badger v. Titcomb, 15 Pick. 409, 26 Am. Dec. 611; Raphael v. Reinstein, 154 Mass. 178, 28 N. E. 141; Bowker v. Hoyt, 18 Pick. 555; Barlow Mfg. Co. v. Stone, 200 Mass. 158, 86 N. E. 306; Knight v. New England Worsted Co. 2 Cush. 271, 290; John Hetherington & Sons v. William Firth Co. 212 Mass. 257, 98 N. E. 797. Breach of the agency aspect of the contract, arising from failure to honor orders for goods sent by the defendant to the plaintiffs in accordance with the contract, would not alone prevent recovery by the plaintiffs for goods already sold and delivered.

Sale—goods—divisible contract.

Same—breach of agency contract—effect.

The defendant's twenty-fifth request for an instruction, to the effect that the plaintiffs had not sustained the burden of showing that before December 15, 1908, they had performed their part of the contract, was refused rightly. Whether they had performed their part of the contract depended upon the further question whether they were bound to accept the defendant's order of December 12. The decision of that question required the determination of the fact whether, rightly interpreted in the light of all the circumstances, that order was given in compliance with the prices and other terms which the plaintiffs justly demanded. It might have been found that the order was not at the prices quoted, was unreasonable in quantity, and in other respects was not upon terms which the plaintiffs were required to accept. These were questions for the jury.

Trial—instructions—question of fact.

There was no error in the instruction that the plaintiffs were not required to accept the defendant's order of December 12, 1908, if it was thereby "attempting to make the price at that time for the whole of the following year," nor unless the goods ordered were for immediate use and sale. Under the contract, the price was to be raised or lowered with market conditions. On October 27, the plaintiffs notified the defendant in substance that outstanding prices were canceled, except that orders to be "shipped prior to December 31st" would be accepted at former price, but that an advance price would prevail "for material to be shipped beyond December 31st." There is nothing in the letters of December 2, or in the subsequent correspondence, which modified or enlarged the plaintiffs' obligation beyond the limits fixed on October 27.

Sale—acceptance of order.

The evidence of the expert, to the effect that the defendant's order of December 12 was reasonable, rightly was excluded. So far as that question did not depend upon correct rules of law, it was purely for the determination of the jury, as to which expert testimony could afford no real help. Whalen v. Rosnosky, 195 Mass. 545, 547, 122 Am. St. Rep. 271, 81 N. E. 282.

Evidence—opinion—admissibility.

The plaintiffs' exceptions raise a question as to the interpretation of these clauses of the contract. "The party of the first part quotes the party of the second part a discount of 50, 4/10s & 5 from its regular published list . . . with the un-

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derstanding that price shall be raised or lowered according to market conditions, but that the party of the first part will at all times during the life of this contract allow the party of the second part a 5 per cent better price than that quoted by the so-called 'associated manufacturers.' . . . The party of the second part agrees . . . to pay all bills on or before the 10th of the month succeeding date of shipment less 5 per cent, and, should any payments be delayed beyond that date, to pay interest thereon at the rate of 6 per cent per annum." These two clauses of the contract seem to us to mean that the prices shown on all the bills to be rendered by the plaintiffs to the defendant should at all times be at least 5 per cent lower than the prices quoted by the "associated manufacturers," and that, in addition to the discount thus given on the face of the bills, there should be a further 5 per cent deducted for cash payments made on or before the 10th of the month succeeding the date of shipment, but that this last deduction was to be allowed only in case payments in cash were so made. According to the terms of the contract, the defendant would not be entitled to this final discount in the event of a failure to make a cash payment. But the contract is not expressed with clearness. If the parties had intended that the contract should mean what we interpret it to mean, it would have been simple to have added, at the end of the last clause quoted, the words "on the face of the bill," or some similar phrase, or otherwise have expressed their intent by unequivocal words. The contract as written is one about the significance of which intelligent men might disagree. These parties did disagree on that point. The defendant did not pay for the June shipments on July 10, and there was correspondence touching the meaning of this clause in the contract. The defendant contended that it was entitled to this additional 5 per cent discount even though it did not pay the bill on the 10th of the succeeding month, while the plaintiffs took the opposite position. Finally the plaintiffs wrote the defendant, after setting out their views: "However, we do not wish to appear critical in this matter, and will accept your interpretation of the contract." This amounted to an agreement between the parties as to the meaning of a doubtful clause in a contract, for the purpose of avoiding further controversy, by which both are bound, no matter what its real meaning may be thought to be. The case presented is quite different from a written contract, plain on its face, which cannot be modified by custom or conduct, and of which Menage v. Rosenthal, 175 Mass. 358, 361, 56 N. E. 579, and O'Brien v. Peck, 198 Mass. 50, 56, 84 N. E. 325, are illustrations.

Contract—interpretation—effect.

Since the defendant's exceptions, with the alterations made and allowed by the judge under Rev. Laws, chap. 173, § 110; Re O'Connell, 174 Mass. 253, 53 N. E. 1001, 54 N. E. 558, must be sustained, its petition for the establishment of exceptions, which relates to matters not likely to arise on a new trial, need not be considered, and is denied.

Appeal—petition to establish exceptions—denial.

In action of Mark et al. v. Stuart-Howland Company:

Defendant's exceptions sustained.

Plaintiffs' exceptions overruled.

Defendant's petition to establish exceptions denied.

In action of Stuart-Howland Company v. Mark et al.:

Plaintiff's exceptions sustained.

NOTE.

The general question as to the divisibility of contracts of sale is discussed in a note appended to Stearns Salt & Lumber Co. v. Dennis Lumber Co. ante, 638, while in Kelly Constr. Co. v. Hackensack Brick Co. post, 685, the question is discussed as to the divisible character of a contract

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to furnish material for a certain construction.

As appears from the note first referred to, the courts construe contracts of sale to be divisible or entire in accordance with the intention of the parties thereto, as such intention is gathered from the terms of the contract and the surrounding facts and circumstances.

No cases have been found other than the reported case (MARK v. STUART-HOWLAND CO. ante, 678), passing upon the divisibility of a contract for successive sales under an agency agreement. In this case the court held that the contemplation of such a contract is double in the sense that it creates an exclusive agency for a definite period of time, and also provides for a sale of goods from time to time, as the agent orders the same, the price to be fixed by a subsequent agreement of the parties. The court said that, so far as successive sales were concerned, the contract was severable, and the agency was a contract by itself.

KELLY CONSTRUCTION COMPANY
v.
HACKENSACK BRICK COMPANY, Appt.

New Jersey Court of Errors and Appeals — March 4, 1918.

(91 N. J. L. 585, 103 Atl. 417.)

Sale — of material for specific construction — divisibility.

1. Where the sale is of a specified quantity of brick (i. e., sufficient to complete a building according to stated specifications), the contract is entire, and a failure to pay when a part delivery has been made does not excuse the seller from completing delivery, no time for payment being stated in the contract.

[*See note on this question beginning on page* 687.]

Same — payment with each delivery.

2. Section 42 of the Sale of Goods Act (4 Comp. Stat. 1910, p. 4657), enacting that "unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions," does not require payment with each delivery, where such deliveries are made pursuant to an entire contract for goods the quantity and character of which necessitate delivery in instalments.

Same — failure to pay instalment — effect.

3. Where, by the contract of sale, the buyer is not required to pay for a partial delivery until the whole delivery is complete, the seller cannot complain of the buyer's failure to pay for a partial delivery until threatened with suit, nor can the seller be relieved of his obligation to complete delivery by the fact that the buyer paid pro rata for a partial delivery, when threatened with such suit, and to avoid litigation.

Principal and agent — authority to modify contract.

4. The fact that a contracting company's foreman in charge of mechanics and laborers on the job was accustomed to buy trivial things needed in an emergency does not show, nor tend to show, that he had authority to modify a contract for upwards of $5,000 worth of brick, already entered into by the duly authorized officials of the company by which he was employed.

Headnotes by TRENCHARD, J.

(Minturn, J., dissents.)

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APPEAL by defendant from a judgment of the Supreme Court, Bergen Circuit, on direction of a verdict for plaintiff, in an action brought to recover damages for refusal of defendant to perform a contract to deliver brick. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **Mackay & Mackay** for appellant.

Messrs. **Vredenburgh, Wall, & Carey** for appellee.

Trenchard, J., delivered the opinion of the court:

The plaintiff below brought this action to recover damages for the refusal of the defendant to perform a contract to deliver brick. A verdict was directed for the plaintiff at the Bergen circuit and the defendant appeals. We are of the opinion that the judgment must be affirmed.

No objection is made to the *amount* of the verdict directed. The defendant's contention is that it was legally justified in its refusal to complete its contract. We think that contention is unsound, and we find no error in record.

Sale—of material for specific construction—divisibility.

The plaintiff had a contract for the building of a high school at Englewood. It placed a written order with the defendant for the "furnishing and delivering and stacking on the job all the common hard brick required by the plans and specifications for the Englewood High School at $7 per thousand; brick to be delivered as required by us and sufficient brick to be kept on the job so that we will always have approximately 50,000 brick stacked until the completion of the job." This order the defendant accepted in writing. Neither the order nor the acceptance fixed any time for payment. The defendant, after delivering some of the brick, refused to complete the contract, and a verdict was directed on the basis of the difference between the contract price and that which the plaintiff was required to pay in the market for the remainder of the brick contracted for. The defendant's contention is that it was legally justified in refusing to complete its contract by reason of the admitted fact that the brick already delivered in part performance of the contract had not been paid for. But that contention is unsound in law. Where, as here, the sale is of a specified quantity of brick (i. e., sufficient to complete a building according to stated specifications), the contract is entire, and a failure to pay when a part delivery has been made does not excuse the seller from completing delivery, no time for payment being stated in the contract. Baker v. Higgins, 21 N. Y. 397.

And this is so notwithstanding § 42 of the Sale of Goods Act (Comp. Stat. p. 4657), enacting that "unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions," etc. This section does not require payment with each delivery where, as here, such deliveries are made pursuant to an entire contract for goods the quantity and character of which necessitate delivery in instalments.

Same—payment with each delivery.

Since by the contract the plaintiff was not required to pay for a partial delivery until the whole delivery was complete, the defendant cannot complain of the plaintiff's failure to pay for a partial delivery until threatened by suit, nor can it be relieved of its obligation to complete delivery by the fact that the plaintiff paid pro rata for a partial delivery when threatened with such suit and to avoid litigation.

Same—failure to pay instalment—effect.

The defendant, however, claimed that after the original contract was made it was modified by a supplemental parol agreement by the terms of which payments were to be made not later than the 10th of the following month, and in default of any such payment the contract was

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terminated. But a sufficient answer to that claim is that there was no evidence to support it. The evidence of O'Keefe, by which the defendant hoped to show such a modification of the original contract, was properly overruled. O'Keefe was merely a foreman in charge of mechanics and laborers on the job, and the fact that he was accustomed to buy trivial things needed in an emergency did not show, nor tend to show, that he had authority to modify a contract for upwards of $5,000 worth of brick, already entered into by the duly authorized officials of the company by which he was employed. We think these considerations in effect dispose of every question argued.

Principal and agent—authority to modify contract.

The judgment will be affirmed, with costs.

Minturn, J., dissents.

ANNOTATION.

Divisibility of contract to furnish material for a specific construction.

The general question as to the divisibility of contracts for the sale of different articles, or articles to be delivered in instalments, is discussed in a note appended to Stearns Salt & Lumber Co. v. Dennis Lumber Co. ante, 638.

In that note it is pointed out that the divisible character of a contract is to be determined with reference to the intention of the parties making the same. It is further pointed out that, ordinarily, a contract will be construed to be entire where the taking of the entire subject-matter of the sale is essential, either from the character of the property or the agreement of the parties, or it reasonably appears from the terms of the contract or the surrounding circumstances that it is intended that there shall be full and complete performance of the subject-matter by the seller, in consideration of the obligation of the buyer, or the nature and purpose of the contract shows it to have been the intention of the parties that there should be full performance, the subject-matter being of such a nature that the failure to obtain a part of the articles would materially affect the object or purpose of the contract.

This doctrine is applicable to the question under consideration, and, without specifically stating the rule, the cases construing contracts of this character uniformly hold that the contract is entire, and not divisible, although the subject-matter is to be delivered in instalments and the purchase price is to be paid in the same manner. Laclede Constr. Co. v. Tudor Iron Works (1902) 169 Mo. 137, 69 S. W. 384; KELLY CONSTR. CO. v. HACKENSACK BRICK CO. (reported herewith) ante, 685; Seibert v. Dunn (1915) 216 N. Y. 237, 110 N. E. 447; Miller v. Leo (1898) 35 App. Div. 589, 55 N. Y. Supp. 165, affirmed in (1900) 165 N. Y. 619, 59 N. E. 1126.

Thus, in Seibert v. Dunn (1915) 216 N. Y. 237, 110 N. E. 447, supra, the contract construed to be entire was in effect for the sale of all the brick required for the construction of designated sewers, deliverable as the contractor ordered the same, at a designated price per thousand, the buyer agreeing to pay a certain amount each month, but retaining a small percentage until the final completion of the contract. The court, speaking of this contract, says: "The contract discloses with clarity and certainty that it was an entire, and not a divisible, contract. Full and complete performance on the one side constituted the consideration for performance on the other. The corporation was bound to deliver all the vitrified brick which the construction required. The subsidiary stipulations as to delivering them as ordered and as to paying for the quantity laid monthly do not split the contract into as many distinct parts or contracts as there shall be shipments or payments.

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The payments were merely advancements upon the whole price, and not ratable payments for the performance of distinct parts."

The contract construed to be entire in Laclede Constr. Co. v. Tudor Iron Works (Mo.) supra, was for the sale by the hundred pounds of sufficient spikes and bolts to lay a designated number of rails and enough angle spikes to lay a certain number of miles of rails.

In Miller v. Leo (1898) 35 App. Div. 589, 55 N. Y. Supp. 165, affirmed in (1900) 165 N. Y. 619, 59 N. E. 1126, supra, the contract was for the sale of all the brick, lime, and cement required by the buyer in constructing a certain building; notwithstanding the fact that the brick was sold by the thousand and the cement and lime by the barrel, the contract was construed to be entire, and hence the seller was held to be justified in refusing to continue deliveries of brick and cement, where the buyer refused to order any lime. The court said of this contract that "the plain meaning of it is that the delivery was to be of all the material necessary to complete the buildings, and that was what Miller was bound to deliver; and it is equally clear, in our judgment, that that was what he was entitled to have demanded. It was either a contract which bound both parties in its entirety, or it was a mere proposal which bound neither. Either Miller was bound to deliver all the material of that nature necessary to be used upon those buildings, or he was bound to deliver none, and was at liberty to stop whenever he saw fit. If he was bound to deliver all the material, it is clear that there must have been a corresponding obligation on the part of Leo to order from Miller the material which Miller was bound to furnish. The word 'require' here must be construed in view of that reciprocal obligation, and thus construed, it seems plain that the contract not only bound Miller to furnish whatever brick, lime, and cement were necessary to finish the buildings, but it bound Leo reciprocally to order all those things from him. Therefore, when Leo refused to order the lime from Miller, he had violated the contract, and, so far as Miller was concerned, he was not in fault for refusing to deliver any more brick."

The contract construed in the reported case (KELLY CONSTR. CO. v. HACKENSACK BRICK CO. ante, 685) was for the sale of all the brick to be used in the construction of a designated building. It was silent as to time of payment; and the court construed it to be entire, notwithstanding the brick was to be delivered in instalments, and held that payment was not to be made until the final completion of the contract, and hence, the buyer was not in default for failing to pay for instalments as delivered, and therefore the seller was not entitled to rescind the contract for such default. These questions as to the construction of contracts of this character as to time of payment, and as to the right of the seller to rescind for failure of the buyer to pay for the instalments as delivered, are covered in the note appended to Stearns Salt & Lumber Co. v. Dennis Lumber Co., already referred to.

As shown by the foregoing cases, ordinarily contracts for the sale of all the material to be used in certain construction work will, agreeably to the supposed intention of the parties, be construed to be entire. There may, however, be special circumstances of sufficient weight to indicate that the intention of the parties was to execute a severable, and not an entire, contract. For example, where the buyer understood that the seller was buying lumber to be used in certain buildings, the lumber to be shipped a long distance, and to be of a grade which should pass an inspection stipulated for in the contract for the erection of the buildings, a copy of which was attached to the contract for the purchase of the lumber, the contract was construed to be severable to the extent that the buyer was entitled to accept such as passed inspection and reject such as did not, without disentitling himself to claim damages for the seller's breach. Canton Lumber Co. v. Liller (1908) 108 Md. 174, 68 Atl. 500. The court reasoned thus: "Putting ourselves as far as may be into the situation of the parties when this contract was entered into, we see that the business of the defendant was

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the purchase of lumber for sale to others, while that of the plaintiff was contracting for the building of the various structures into which lumber so largely enters. The plaintiff did not agree to purchase this lumber for sale to others. He had no business place for its storage or deposit, no customers resorting to him to buy, and no salesmen skilled to secure such customers. He contracted for this lumber to be put by him into the tipple and sand house which he had come under a legal obligation to erect for the Baltimore & Ohio Railroad within a prescribed time, and out of material suitable for those particular structures. It was to be used at a distant point,—most of it in a structure requiring, from its nature, extraordinary capacity for carrying weight, and corresponding strength and durability. He could not put into these structures such lumber as he might choose, but only such as should pass the inspection stipulated for in the specifications accompanying his order for this lumber; and every fact thus recited was known to the defendant as fully as to the plaintiff. Unless it measured up to the specifications, it was of no practical value to the plaintiff for the only purpose for which it was ordered; and, not being a dealer equipped for resale, it was of little value to him for any purpose." A. G. S.

SAMUEL A. EDLESON, Appt.,

v.

ESTHER R. EDLESON.

Kentucky Court of Appeals—February 15, 1918.

(179 Ky. 300, 200 S. W. 625.)

Divorce — collusion to defraud courts — effect.

1. An agreement between married people that one shall bring an action for divorce and the other fail to defend it, and especially upon a ground that is not the real one, is a collusion to defraud the courts.

[*See note on this question beginning on page* 699.]

Same — agreement for costs and attorneys' fees — right to disregard.

2. Costs and attorneys' fees may be awarded in a divorce proceeding in excess of the amount provided in the agreement between the parties, if both parties ignore the portion of the agreement in which such matters were provided for, and proceed in absolute violation of it.

Same — cause not contemplated in agreement.

3. A contract fixing the amount of costs to be awarded in a divorce proceeding does not apply in case the wife is compelled to defend against a cause of divorce not contemplated in the agreement.

Contract — for divorce — validity.

4. A contract between husband and wife for separation and an unopposed suit for divorce for abandonment at the expiration of the necessary time is void, and a provision therein, fixing the amount to be allowed for costs and attorneys' fees, cannot be enforced.

Marriage — public policy to protect.

5. The public policy of the state is to favor, protect, and encourage marriage, as it is the foundation of the family relation, without which, an observation of the history of the human family shows, there can be no civilization.

Divorce — agreement for — validity.

6. A husband and wife cannot lawfully enter into a contract for a divorce, and any agreement made by them to facilitate the procurement of a divorce is held to be void and illegal, as contrary to public policy.

Contract — consideration illegal in part.

7. If the consideration for two or more undertakings is legal and one of the promises is legal and the other illegal, the illegal one will not be enforced, but the legal one may be; but if any part of the consideration for the

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promise is illegal, the promise will not be enforced.

Same — provisions for divorce — effect on remainder of contract.

8. That an agreement between husband and wife for separation and division of property contains a void provision for procurement of divorce does not defeat the entire contract if the provision for divorce constitutes no part of the consideration for the other parts of the contract.

Specific performance — contract for separation between husband and wife.

9. A contract between husband and wife, made in contemplation of the continuance of a previous separation, or in contemplation of immediate separation where disagreements have arisen between them, and the contract has for its purpose the adjustment of their respective property rights and the making of provision for the support of the wife, will, even in the absence of a trustee, be enforced in equity if fairly made and just.

Husband and wife — contract affecting property rights — enforcement by husband.

10. A contract between husband and wife with regard to their property rights may be enforced if the circumstances and facts warrant it, for the benefit of the husband.

Parent and child — contract for maintenance of child — validity.

11. A man cannot contract with his wife that she shall maintain their child, so as to prevent the court from requiring him to contribute towards such maintenance.

Same — awarding custody of child — duty of court.

12. The court, in fixing the custody of a minor child, will keep in view primarily the welfare of the child, and in case of a separation of its father and mother, will confide its custody to the parent who is most suitable to the trust, if either, since the right of each to its custody is of equal dignity.

Specific performance — contract to maintain child.

13. A contract between husband and wife, supported by sufficient consideration, committing the custody and maintenance of the child to the mother, who is financially able to maintain it properly, and has received property from the father to assist in so doing, will be enforced against her if it is fair and just to her, and the custody is such that the court approves.

Appeal — facts not before court — assumption of error.

14. The appellate court cannot assume error in requiring a father temporarily to support his child, contrary to the contract between father and mother, committing its maintenance to her, where the evidence is not before it, and the pleadings are not sufficient to apprise the court of what the issues were, or the reasons which moved the court.

APPEAL by defendant from a judgment of the Chancery Branch, Second Division, of the Circuit Court for Jefferson County, in favor of plaintiff in a suit for a divorce. *Affirmed in part.*

The facts are stated in the opinion of the court.

Mr. Charles P. Johnson, for appellant:

Plaintiff was not entitled to alimony. Ahrns v. Ahrns, 160 Ky. 342, 169 S. W. 720.

Any money or property received by the husband or wife from or through the other will be presumed to have been obtained by reason of the marriage.

Pope v. Pope, 148 Ky. 30, 146 S. W. 410.

The settlement made with plaintiff is a binding, legal acquittance of the defendant of the burdens the chancellor has fixed upon him.

Gaines v. Poor, 3 Met. (Ky.) 503, 79 Am. Dec. 559; Moayon v. Moayon, 114 Ky. 875, 60 L.R.A. 415, 102 Am. St. Rep. 303, 72 S. W. 33; Hite v. Hite, 136 Ky. 529, 124 S. W. 815, second appeal in 142 Ky. 283, 134 S. W. 138; 6 R. C. L. § 176.

Mr. Burwell K. Marshall for appellee.

Hurt, J., delivered the opinion of the court:

The appellant, Samuel A. Edleson, and the appellee, Esther R. Edleson, were married in Louisville on February 19, 1899, and have since that time continued to reside there. A daughter, Edith H. Edleson, and

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who is now thirteen years of age, was born to them. On October 23, 1914, the appellant was the owner of two houses and the lots upon which they stood, and a parcel of unoccupied land, in the city of Louisville, and was also the owner of the business of a shoe merchant, in which he engaged. He was the joint owner with the appellee of a residence situated in Belgravia court, of the value of between $6,000 and $7,000, and upon which there was a mortgage lien of over $2,000. The appellee was conducting a business as a milliner, in her name, as the proprietor, connected with the department store of Kaufman-Straus Company. In September, 1914, they became estranged and ceased to live together as husband and wife. Appellant claimed that he was the owner of the millinery business conducted in the name of the appellee at Kaufman-Straus Company, which the appellee denied. The appellee claimed that she had paid for the house in Belgravia court, which was jointly conveyed to her and appellant, and that in addition thereto that she had paid the family expenses, including those of appellant, for many years, and had furnished him money of her own, and that he had persistently refused to contribute to her support or that of her child, while, upon the other hand, he claimed that he had furnished her very large sums of money, which she had spent in extravagance of dress and otherwise, and had paid all that had been paid for the Belgravia court residence and all of its contents, and had largely paid for the millinery business, which was conducted in her name.

On the 23d day of October, 1914, with the assistance and advice of counsel, they entered into a written agreement, which both signed, and it seems to have been fairly and understandingly made between them, and now neither makes any claim that the contract was not fairly understood and agreed upon, but each one charges the other with having violated and refused to keep it. The writing contains 10 separate articles, and the preamble to it is as follows:

Agreement.

This agreement made and entered into this 23d day of October, 1914, by and between Samuel A. Edleson, party of the first part, and Esther R. Edleson, of Louisville, Kentucky, party of the second part, witnesseth: That whereas, said first and second parties are husband and wife and have heretofore ceased to live together, and irreconcilable difference having arisen, which renders it impossible for them to hereafter live together as husband and wife; and whereas, they have as issue of said marriage a child named Edith H. Edleson, age twelve years; and whereas, the said parties have agreed among themselves on a settlement of all property rights and differences existing between them, and the welfare of the child, and for the purpose of settling all of their differences, and, in consideration of the premises, they have entered into the following agreement with each other, to wit:

It is unnecessary to set out the various articles of the agreement in words, but the substance is to the effect that the appellee agreed to give up claim to and turn over to the appellant all of the household furniture, which, before their separation, was in the house in Belgravia court, except certain knives and forks and a silver tea set, and such articles as had been made as presents by friends to her. She further agreed to pay to him the sum of $500, and he agreed within ten days to abandon the house in Belgravia court, and to remove all of his furniture therefrom, and to execute a deed of conveyance to Samuel Lipnick, the brother-in-law of the appellee, by which he would convey to him his interest in the property for her benefit, and would deliver to her all letters, telegrams, photographs, and private papers and correspondence which were in his possession and belonged to her. She agreed to waive all claims which she

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then had or would in the future have against appellant for alimony or maintenance for herself or for the maintenance of their child, and to sign any deed or other papers that the appellant requested her to sign, and which would not impose any personal liability upon her, affecting any real estate that he owned; and he agreed to sign any paper that was necessary for him to sign and upon her request, affecting any real estate that she then or might thereafter own or in any way affecting her business, provided it did not impose any personal liability upon him. She also agreed, upon request, to surrender any rights that she might have as a beneficiary in a policy of life insurance for $2,000 on his life, in the New England Life Insurance Company, and in which she was named as beneficiary, and permit him to choose another beneficiary, and also agreed that he might change the beneficiary in a benefit certificate for $1,000 held by him in the Knights and Ladies of Security, and in which she was named as beneficiary, and make the certificate payable to such beneficiary as he might select. She also agreed to surrender any right, title, or interest that she had as a beneficiary in a policy of insurance for $1,000 on the life of her father, Isaac Manitsky, the premiums upon which had been paid by appellant, and to permit him to obtain the cash surrender value of the policy or other benefit of it. They mutually agreed that these undertakings were a full satisfaction, settlement, and compromise of all claims and demands which either held against the other, or against any business in which either might be interested, or which was owned by the other, and in full settlement and satisfaction of any claims that he might have against any person or persons connected with her, and that, in the event of the death of either of them before there should be a judgment of divorce, the one surviving waived all claims to curtesy, dower, or distributable share in either the real or personal estate owned by the other, and that neither of them would interfere with, molest, or annoy the other at any time or place. It was further agreed that she should have the custody, control of, nurture, and education of their child, Edith, and that she should bear the expense of the education and maintenance of the child, and that she would not remove her out of the city of Louisville except on a temporary visit, nor longer than sixty days at any time, and would not do anything to create a lack of affection on the part of the child toward him. The sixth article of the contract was as follows: "It is further agreed between the parties hereto that at the expiration of one year from date hereof that either the first or second party may institute an action for absolute divorce against the other party, on the ground of one year's abandonment, and whichever party institutes said action for divorce the other party against whom said action is instituted agrees not to make any defense thereto, but it is distinctly understood, however, that in the event either the first or second party institutes such action, that the second party shall pay the costs thereof and attorneys' fees, not exceeding, however, the sum of $50, and shall also obtain a divorce according to the Jewish custom."

It seems that all the undertakings in this contract, with reference to the property rights of the parties, were carried out and executed, except the execution of the necessary writing by appellee to enable the appellant to secure the cash surrender value of the policy of insurance upon the life of Isaac Manitsky, and which is alleged to have been, at the time of the making of the contract, of the value of about $226. This part of the contract with reference to the property rights she refused to perform, and alleges as her reason for it that the appellant had violated the contract, but in what way she does not suggest. She had the custody of the child at the time of the making of the agreement, and

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continued to have its custody and bore the expenses of its support and education during the year following.

On the 25th day of October, 1915, she instituted this suit against the appellant, in which she sought an absolute divorce from him upon the ground that, without her fault, he had abandoned her, and had, for a period of one year, lived separate and apart from her. This abandonment she alleged, took place on October 23, 1914, which was the day of the date of the written contract of settlement between them. She alleged that she was a proper person to have the control and custody of the child, Edith, and asked for an absolute divorce from the appellant and the control and custody of the child, Edith, and, although by the contract she had agreed to pay the costs of obtaining a divorce, she prayed in her petition to recover her costs against the appellant. On the 4th day of December, after the bringing of her suit, she made a motion for a rule against appellant, returnable on the 8th day of December, to show cause why he should not pay her $75 a month for the support and maintenance of the child, although, in accordance with the written contract, she had agreed, in consideration of its custody and other considerations, to bear the expenses of its maintenance and education. On the 3d day of December she filed an amended petition, in which she set up, as an additional cause of action, the allegation that the appellant had behaved toward her for not less than six months theretofore in such a cruel and inhuman way as to indicate a settled aversion toward her and to destroy permanently her peace and happiness. In this amended petition she further alleged that the income of appellant from his business was $200 per month, and that he was well able to pay her the sum of $75 per month for the maintenance of their child, and in the prayer to this amended petition she prayed for a judgment for her costs, including a reasonable attorney's fee, against appellant.

On the 15th day of December, 1915, the appellant filed his answer, which he made a counterclaim, and in this he denied all the affirmative allegations of the petition and amended petition, and alleged his willingness to resume marital relations with her, and in addition thereto denied the fitness of the appellee to have the custody of their daughter, and alleged his own fitness for the trust, and asked that the child be confided to him. He furthermore set up the contract of October 23, 1914, between him and appellee, and pleaded that as a defense against any requirement of him to pay for the maintenance of the child or for the recovery of any costs against him. He further asked that the court enforce the equitable settlement embraced in the contract, and require the appellee to comply with it, or otherwise to release him from any compliance with it, and to restore to him the property which had been obtained from him under that settlement, and especially to enforce the provision of it in which the appellee agreed to take such steps as were necessary to enable him to secure the cash surrender value of the policy upon the life of her father, amounting to $226; and he further sought to recover the sum of $5,000, which he alleged he had invested for her in the millinery business conducted in her name with Kaufman-Straus Company. Afterward he filed an amended answer, which he made a counterclaim, and charged that appellee had been guilty of such lewd and lascivious conduct as showed that she was unchaste, and upon that ground asked a divorce a mensa et thoro. The affirmative averments in his pleadings were denied. On the 22d day of December the court overruled his response to the rule against him, and ordered that he pay her $25 per month for each of two months for the maintenance of their child, which he paid. After the proof had been taken and filed, the court ren-

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dered a judgment by which a divorce from the bonds of matrimony was granted to the appellee, the custody and control of the child awarded to her, with opportunity for appellant to see her at seasonable times. She was further adjudged to recover of appellant the costs of the action, and the further sum of $300, attorneys' fees, for the benefit of her attorneys. The judgment contained the further provision: "It is further considered and adjudged by the court that each party shall restore to the other such property not disposed of at the commencement of this action as either may have obtained, directly or indirectly, from or through the other during marriage, in consideration or by reason thereof."

The appellant, complaining that the court was in error when it adjudged him to pay the costs of the action and $300 in attorneys' fees for the benefit of appellee's attorneys, and failing to require the appellee to pay him the cash surrender value of the policy upon the life of Isaac Manitsky, her father, and in requiring him to pay $50 for the maintenance of the child pending the litigation, has appealed to this court.

(a) The judgment of the court with reference to the payment of the costs of the suit and the attorneys' fees allowed for appellee's attorneys might be very well sustained and rested upon the ground that both parties ignored that portion of the contract, and each proceeded in absolute violation of it. She violated it in seeking a judgment for costs in her original petition, and in her amended petition by seeking a divorce upon the ground of cruel treatment, maintenance of the child, and a judgment for her attorneys' fees and costs. He violated it when he denied, by answer, the grounds of divorce set up in the original petition, and sought a divorce upon the ground that his wife had been guilty of such lewd behavior as showed her to be unchaste. The costs of the action, including the attorneys' fees, were mostly incurred upon the cause of action set up in the amended petition, and in defending against the charge of unwifely conduct made by him in his answer. Of course, it was not contemplated in the making of the contract that the wife would pay the costs, including attorneys' fees, in defending herself against a cause of divorce, other than was stipulated by the contract should be made, and against taking the custody of the child from her, which the contract gave to her. It is very clear that the parties, at the time of the making of the contract, intended and understood that the divorce should be sought upon the ground of abandonment, against which no defense would be offered, and it was considered that a fee of $50 for an attorney would be ample in a proceeding of that kind, and was limited to that sum for the benefit of the wife, in the event the husband should bring the suit, as she was undertaking by the contract to pay the costs and attorneys' fees. She, however, first violated the terms of the agreement, as above stated; and if the appellant had contented himself, in making his defense, to a reliance upon the contract, and had adhered to it himself, there would exist just grounds for complaint upon his part that he had been required to pay the costs and attorneys' fees, if that provision of the contract was a valid one; but the provision of the contract relied upon by him to escape the payment of the costs and attorneys' fees labors under a serious difficulty, which is not adverted to by the counsel. It is void and unenforceable, because opposed to sound public policy, and neither party was bound by it, and the knowledge of which fact was, doubtless, the reason that neither party gave any heed to its provisions in the conduct of the litigation, and

Divorce—agreement for costs and attorneys' fees—right to disregard.

Same—cause not contemplated in agreement.

Contract—for divorce—validity.

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the reason that the court ignored it. The public policy of this state, as well as that of all others, so far as we know, is to foster, protect, and encourage marriage, as it is the foundation of the family relation, without which, an observation of the history of the human family shows, there can be no civilization. The state is interested in the permanency of the marriage relation, and its interest finds expression in the various statutes which prescribe the grounds for which divorces may be granted, and the requirement that the county attorney should examine the record of a proceeding for divorce and resist its granting unless the applicant is entitled to it under the laws of the state, and in the requirement that the grounds for divorce must be proven, whether there be a defense or not. Hence, a husband and wife cannot lawfully enter into a contract for a divorce, and any agreement made by them to facilitate the procurement of a divorce is held to be void and illegal, as contrary to public policy. The contract to facilitate the granting of a divorce is a fraud upon the courts, as they are the only tribunals which are authorized to dissolve the marriage relation, when it has once been established, and then only upon the grounds and for the reasons provided for by law. An agreement between married people, that one shall bring a suit for divorce and the other fail to defend it, and especially upon a ground which is not the real one, is a collusion to defraud the courts. Johnson v. Johnson, 122 Ky. 13, 121 Am. St. Rep. 449, 90 S. W. 964; 6 R. C. L. 772, 9 R. C. L. 254.

Marriage—public policy to protect.

Divorce—agreement for—validity.

Same—collusion to defraud courts—effect.

Hence the provisions of the contract did not constitute any defense against the requirement of the statute, which provides that in actions for divorce and alimony the husband shall pay the costs of each party, unless it appears that the wife is in fault and has ample estate to pay the costs. Ky. Stat. § 900; Schneider v. Schneider, 23 Ky. L. Rep. 1154, 64 S. W. 845; Turner v. Turner, 23 Ky. L. Rep. 370, 62 S. W. 1022; McMakin v. McMakin, 27 Ky. L. Rep. 1211, 87 S. W. 1140, and many others.

(b) The provision in the contract relating to the procurement of the divorce and the payment of the costs of same being void, as opposed to public policy, a serious question then arises as to whether or not, such provision being vicious, it poisons all the provisions of the agreement and renders them unenforceable. It is evident that the general meaning and purpose of the contract, taken as a whole, was to make a settlement and adjustment of their respective property rights and the custody of their child, in contemplation of their continued separation, and such purpose is expressed in the preamble as the consideration for the various undertakings and covenants in the contract, all of which were legal except the one heretofore held void. It is an old principle of the common law that if the consideration for two or more undertakings is legal, and one of the promises is legal and the other illegal, the illegal one will not be enforced, but the legal one will be enforced; but if any part of the consideration for a promise is vicious and illegal, the promise will not be enforced. Hence, if the provision relating to the procurement of the divorce constitutes any part of the consideration for any other covenant in the contract, such covenant will also be void. Newport Rolling Mill Co. v. Hall, 147 Ky. 598, 144 S. W. 760; Brown v. Langford, 3 Bibb. 497; Stratton v. Wilson, 170 Ky. 61, 185 S. W. 522, Ann. Cas. 1918B, 917; Johnson v. McMillion, 178 Ky. 707, L.R.A.1918C, 244, 199 S. W. 1070. If a promise has several considerations, and one of them is illegal, it renders the promise void. McLane

Contract—consideration illegal in part.

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v. Dixon, 30 Ky. L. Rep. 683, 99 S. W. 601; Swan v. Chandler, 8 B. Mon. 97; Collins v. Merrell, 2 Met. (Ky.) 163. Where a contract, however, consists of several covenants and agreements with regard to different subjects, and one of the covenants is illegal and vicious, the general rule which prevails is that, if the illegal covenant of the contract can be eliminated from it without impairing its symmetry as a whole, the courts will adopt that view and eliminate the obnoxious feature and enforce the remainder of the contract, and, as was said in Newport Rolling Mill Co. v. Hall, supra: "But if the good and bad are so interwoven that they cannot be separated without altering or destroying the general meaning and purpose of the contract, the good must go with the bad and the whole contract be set aside."

It cannot be said that the vicious provision in the contract in question constitutes any consideration for any other provision of that contract, as all the other provisions relate to a settlement and adjustment of their property rights and the custody of the child, and consists of covenants to do certain things with regard to their property and child, and mutual concessions and waivers upon each side. The vicious provision seems to carry within it its own consideration, and has no special reference to the consideration for any other provision of the contract. Its elimination will not impair the contract as a whole, or in any wise affect any other provision of it, and hence might be properly considered an independent covenant, carrying with it the relief for its breach independently of the performance or nonperformance of any other covenant in the contract. Hence we are disposed to hold that this provision is severable from the remainder of the contract, and may be eliminated because void, and the remainder of the contract be held valid and enforceable.

Same—provisions for divorce—effect on remainder of contract.

(c) The contract in question, with its obnoxious feature eliminated, was one between husband and wife, and not enforceable, according to the common law. Simpson v. Simpson, 4 Dana, 140. It has, however, long since been thoroughly established, as an equitable doctrine, that a contract between husband and wife, made in contemplation of the continuance of a previous separation, or in contemplation of immediate separation, where disagreements have arisen between them, and the contract has for its purpose an adjustment of their respective property rights, and the making of a provision for the support of the wife, will be enforced in equity, if fairly made and just; or, in other words, it is such provision as the court would have made for the wife under the circumstances of the case. A good while ago it was required, to make such a contract enforceable in equity, that a trustee for the wife should be created and the contract made with him for the benefit of the wife. Since then, however, the doctrine has been established that, where a contract has been made between husband and wife which would have been good at law if it had been made with a trustee for the wife, it will be sustained in equity, though there was no trustee, if it does not affect the rights of third persons. One or more of the cases here cited will be found to support each of the views above expressed. Gaines v. Poor, 3 Met. (Ky.) 507, 79 Am. Dec. 559; Evans v. Evans, 93 Ky. 510, 20 S. W. 605; Loud v. Loud, 4 Bush. 453; Hendricks v. Hendricks, 4 Ky. L. Rep. 724; Hite v. Hite, 136 Ky. 529, 124 S. W. 815; Siddens v. Siddens, 31 Ky. L. Rep. 66, 101 S. W. 377; Woodruff v. Woodruff, 121 Ky. 784, 90 S. W. 266, 91 S. W. 265; Rash v. Hart, 28 Ky. L. Rep. 264, 89 S. W. 192; Ward v. Crotty, 4 Met.

Specific performance—contract for separation between husband and wife.

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(Ky.) 59; Bohannon v. Bohannon, 29 Ky. L. Rep. 143, 92 S. W. 597; Moayan v. Moayan, 114 Ky. 855, 60 L.R.A. 415, 102 Am. St. Rep. 303, 72 S. W. 33; Maraman v. Maraman, 4 Met. (Ky.) 87; Dance v. Dance, 6 Ky. L. Rep. 740; Stroud v. Ross, 118 Ky. 630, 82 S. W. 254; Bohannon v. Travis, 94 Ky. 59, 21 S. W. 354. Before the Act of March 15, 1894 (Laws 1894, chap. 76), regarding the property rights of married women and their powers to contract was enacted, it was held in Bohannon v. Travis, supra, that a contract between the husband and wife would not be enforced, in equity, unless it was "fair and just, founded on a valuable consideration, and reasonably certain as to its stipulations and the circumstances under which it was made;" and in Stroud v. Ross, 118 Ky. 630, 82 S. W. 254, since the enactment of the Statute of March 15, 1894, it was held that such act did not enlarge the powers of a married woman with reference to contracting with her husband. In the case of Bohannon v. Travis, supra, however, the contract was not one for a settlement or adjustment of property rights in contemplation of a previous separation or of an immediate separation of the parties. Nearly all of the contracts between husband and wife, which have been enforced in this jurisdiction, have been enforced in favor of the wife; but in other jurisdictions, and occasionally in this, such agreements have been enforced in favor of the husband when the facts and circumstances clearly showed that it was equitable that it should be done. Stroud v. Ross, supra. Such was done in the case of Stroud v. Ross, supra, and the doctrine that a contract between husband and wife, with regard to their property rights, might be enforced, if the circumstances and facts warranted it, for the benefit of the husband, was referred to in the case of Bohannon v. Travis, supra, and there substantially approved, with a reference, with approval, to the cases of Livingston v. Livingston, 2 Johns. Ch. 537; More v. Freeman, Bunbury, 205, 145 Eng. Reprint, 648; Hendricks v. Isaacs, 117 N. Y. 411, 6 L.R.A. 559, 15 Am. St. Rep. 524, 22 N. E. 1029; Haussman v. Burnham, 59 Conn. 117, 21 Am. St. Rep. 74, 22 Atl. 1065,—wherein the same doctrine was upheld.

Husband and wife—contract affecting property rights—enforcement by husband.

The contract in the present instance was one made in contemplation of the continuance of a separation which had already occurred, or in contemplation of an immediate permanent separation, and its purpose was to definitely settle and adjust between the parties their property rights. It was made by the appellee with the assistance of counsel, and there is no pretense that it was not fairly made or fairly understood, and the appellee does not yet complain of any injustice done to her by the terms of the contract. It has been executed by the appellant by performing the undertakings in the contract which he undertook to perform, with reference to all legal provisions of the contract, and the conveyance of the property as there covenanted, and a release of all claims that he had, in compliance with the contract. It seems that it would be inequitable, after he having executed the contract, wherein a settlement such as was fair and just to the appellee was made, that it should not be complied with by the appellee on her part, with reference to the covenants of the contract which were legal, and hence we are of the opinion that the court was in error in failing to require the appellee to perform the covenant in the contract which required her to execute the necessary writings to enable him to receive the cash surrender value of the policy upon the life of Isaac Manitsky, he having paid all the premiums upon the policy, or else to require her to account to him for the amount of the cash surrender value of the policy at the time the contract was entered into.

(d) With reference to the complaint of appellant that, in view of the contract, he should not have

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been required to pay $50 for the maintenance of the child pending the litigation, it is evident that a husband and wife, with each other, cannot make a contract regarding the maintenance or custody of their child, which the court is compelled to enforce, nor can the husband relieve himself of his primary liability to maintain his child by entering into a contract with someone else to do so, and thus forever relieve himself from such liability, as between him and the child. The chancellor, in fixing the custody of a minor child, will keep in view primarily the welfare of the child, and, in case of a separation of father and mother, will confide its custody to the parent who is most suitable to the trust, if either, as the right of each to its custody is of equal dignity. It is, however, not illegal for the parents, who have separated, to enter into a contract with each other for the custody and maintenance of their child, but the court will not recognize such contract unless it is one which insures the proper care and maintenance of the child. If the contract is such a one as the court would approve, keeping the welfare of the child in view, it may recognize the contract, but such contract will not be enforced longer than it appears to be for the best interests of the child, and parents entering into such a contract are presumed to do so in contemplation of their obligations under the law and the rights of the child. So long, however, as the court recognizes the contract which has been entered into between the parents, its provisions should be enforced. The court, however, may confide the custody of the child to the mother, and require the father to contribute to its maintenance, if their respective suitability for its custody and financial circumstances render such a disposition necessary to the proper care of the child.

Parent and child—contract for maintenance of child—validity.

Same—awarding custody of child—duty of court.

Where, as in the instant case, a contract, supported by a sufficient consideration, has been entered into between the parents for the custody and maintenance of the child, and the mother, under the contract, is to have custody and maintain it, and has a financial ability to properly do so, and the contract is thus fair and just to her, and the custody is such that the court will and does approve of it, she should be required to comply with the contract, as between her and the father, especially where it appears that the father has made a settlement, in the way of property, sufficient to enable the mother to maintain the child in a proper way. The court seems to have recognized the contract in its final judgment, by confiding the custody of the child to the mother, without any requirement that the father should contribute to its maintenance.

Specific performance—contract to maintain child.

The evidence heard upon the motion for the allowance for the maintenance of the child during the pendency of the suit is not before us, nor were the pleadings upon the motion sufficient to apprise us of what were the issues, nor the particular reason which moved the court, and hence we cannot assume that the court was in error in its determination to require a contribution from the husband temporarily.

Appeal—facts not before court—assumption of error.

It is therefore ordered that the judgment be affirmed as to requiring the appellant to pay the costs of the litigation, including the attorneys' fees, and the $50 allowance for the maintenance of the child pending the litigation, but the judgment is reversed because of the failure of the court to require appellee to carry out her contract with reference to the surrender value of the policy of insurance upon the life of Isaac Manitsky, of which she was the beneficiary, or to reimburse the appellant to the extent of the cash surrender value at the time of the making of the contract, and the action is remanded for proceedings consistent with this opinion.

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ANNOTATION.

Collusion as bar to divorce.

I. What constitutes collusion:
a. Generally, 699.
b. Illustrations:
1. Mutual desire for divorce, 702.
2. Consent to commission of offense, 704.
3. Voluntary appearance, 705.
4. Failure to appear and defend, 705.
I. b—continued.
5. Agreement not to defend, 706.
6. Agreement relating to alimony or adjustment of property rights, 708.
7. Suppression of evidence, 711.
II. Effect of collusion:
a. Generally, 712.
b. Vacation of decree, 714.

I. What constitutes collusion.

a. Generally.

The term "collusion," as applied to divorce proceedings, has been defined to be "an agreement between a husband and wife to procure a judgment dissolving the marriage contract, which judgment, if the facts were known, the court would not grant." Doeme v. Doeme (1904) 96 App. Div. 284, 89 N. Y. Supp. 215.

In McIntyre v. McIntyre (1894) 9 Misc. 252, 30 N. Y. Supp. 200, collusion in the matrimonial law was defined as "an agreement between husband and wife for one of them to commit, or to appear to commit, or to be represented in court as having committed, a breach of matrimonial duty, for the purpose of enabling the other to obtain the legal remedy of divorce as for a real injury."

In Griffiths v. Griffiths (1905) 69 N. J. Eq. 689, 60 Atl. 1090, the court said: "Collusion in cases of this class is not only a corrupt agreement between the parties whereby one shall commit the matrimonial offense, or under the terms of which evidence of an offense not committed is fabricated, but also includes any agreement whereby evidence of a valid defense is suppressed; and, in my judgment, such an agreement, if not expressed, may be implied from the acts of the parties." See to the same effect, Pohlman v. Pohlman (1901) 60 N. J. Eq. 28, 46 Atl. 658; Hayes v. Hayes, 1 West. Week. Rep. (Can.) 85.

In Crewe v. Crewe (1800) 3 Hagg. Eccl. Rep. (Eng.) 123, Lord Stowell said: "Collusion, as applied to this subject, is an agreement between the parties for one to commit, or appear to commit, a fact of adultery, in order that the other may obtain a remedy at law as for a real injury. Real injury there is none, where there is a common agreement between the parties to effect their object by fraud in a court of justice." See to the same effect, Todd v. Todd (1866) L. R. 1 Prob. (Eng.) 121, 35 L. J. Prob. N. S. 34, 12 Jur. N. S. 237, 13 L. T. N. S. 759, 14 Week. Rep. 350; Jessop v. Jessop (1861) 2 Swabey & T. (Eng.) 301, 30 L. J. Prob. N. S. 193, 7 Jur. N. S. 609.

In Butler v. Butler (1890) L. R. 15 Prob. Div. (Eng.) 66, the court, in defining collusion, said: "An agreement between the parties to a divorce suit to withhold from the court pertinent and material facts, which might have been adduced on the trial in evidence in support of a countercharge against the respondent or corespondent, amounts to collusion, even though the suppressed facts might not have been sufficient to have established the countercharge."

In Scott v. Scott, L. R. [1913] P. (Eng.) 52, 82 L. J. Prob. N. S. 39, 108 L. T. N. S. 49, 57 Sol. Jo. 227, 29 Times L. R. 206, the court said: "Collusion is misconduct. Like conspiracy, it takes two persons to collude. It must be an act done with an improper intention. I venture to think that collusion may be said to be an improper act done or an improper refraining from doing an act for a dishonest purpose." See to the same effect, Churchward v. Churchward, L. R. [1895] P.

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(Eng.) 7, 64 L. J. Prob. N. S. 18, 11 Reports, 626, 71 L. T. N. S. 782, 43 Week. Rep. 380.

In Rapp v. Rapp (1912) 162 Mo. App. 673, 145 S. W. 114, the court said: "Collusion is a conspiracy of the husband and wife to obtain a decree of divorce by false or manufactured testimony." See to the same effect, Bowe v. Bowe (1907) 55 Misc. 403, 106 N. Y. Supp. 608; Wiemer v. Wiemer (1911) 21 N. D. 371, 130 N. W. 1015; Lyon v. Lyon (1904) 13 Pa. Dist. R. 623; Loomis v. Loomis (1909) 20 Pa. Dist. R. 731.

In Sheehan v. Sheehan (1910) 77 N. J. Eq. 411, 140 Am. St. Rep. 566, 77 Atl. 1063, the court, in construing the term "collusion," as used in the New Jersey Divorce Act of 1907, said: "Parties may not be permitted to make agreements with respect to divorce suits which would be perfectly proper to be made in other litigations. In divorce suits public policy requires that certain agreements shall not be made between the parties and when such interdicted agreements are made they are termed 'collusive.' What is termed 'collusion' in divorce suits is a definite kind of agreement of parties concerning the divorce. If collusion is to be limited (as some of the definitions would limit it) to 'a corrupt bargain to impose a case upon the court,' that is, either by the suppression of evidence or by the manufacture thereof, then, each case where there was an agreement between the parties would have to be investigated to see whether such an agreement came within the interdiction of the definition of collusion. But if collusion is given an ampler definition, so as to include any agreement between the parties as a result of which no defense shall be made, then the case will not be investigated after the ascertainment that there is such an agreement, because that agreement itself would be within the definition of collusion and would defeat the suit. I cannot escape the conviction that our statute which requires an affidavit by the petitioner that 'the said petition is not made by reason of any collusion' . . . indicates that with us 'collusion' must be given the broader and ampler definition. It seems to me to be perfectly clear that if a man and wife agree that one of them shall bring a suit for divorce against the other, and that no defense shall be made, such an agreement should be included in the definition of collusion. And it also seems clear to me that when they have thus agreed, the party making the petition certainly makes it by collusion. This definition, of course, would not include cases in which the defendant was willing the suit should be brought, or was even anxious or desirous that it should be brought, but would include cases where the defendant and the petitioner agreed that it should be brought and that no defense shall be made; a fortiori, where he not only agrees that it should be brought and be undefended, but advances money to induce its bringing. My reason for thinking that the definition should be the broader one is that it would then be clearly and consistently in keeping with the public policy which we maintain in this respect. Because, if we limit the term 'collusion' to the narrow definition (which only includes the suppression of evidence or the manufacture thereof), and permit agreements that suits shall be brought in which no defense shall be made, we are creating by such permission a situation in which the chances of our ever finding out the truth concerning the matter are almost zero. If parties agree that one of them shall bring a suit and the other will not defend, it is impossible to escape the conviction that the court will have practically no opportunity to ascertain whether evidence is suppressed, or manufactured evidence is offered. I do not wish to be understood as including within the definition of collusion agreements by which the husband contracts to pay a certain amount of alimony to his wife without the intervention of the court. I do think, however, that within the definition of collusion should be those cases in which the husband agrees with the wife that he will furnish a sum of money with which she is to procure a divorce against him. I think

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that what has been done in some courts should be done in such cases; that is, where the court is convinced that there is not manufactured testimony or suppressed evidence, but that the suit is collusive because of the agreement, the suit should be dismissed without prejudice to the right to bring another suit which shall not be collusive. I am clearly of opinion that if it be held that an agreement between husband and wife that suit shall be brought and no defense entered is within the definition of collusion, the court should infer such an agreement from the fact that the husband has, before the suit was begun, advanced money to the wife, or to a lawyer for the wife, for the purpose of bringing the suit."

In Dodge v. Dodge (1904) 98 App. Div. 85, 90 N. Y. Supp. 438, it was said that the collusion which is fatal to a valid decree of divorce is "collusion in procuring or conniving at the act or acts of adultery."

Although collusion and connivance are closely related, it has been held that the distinction between them is that collusion is a corrupt agreement, while connivance is a corrupt consenting. Rogers v. Rogers (1830) 3 Hagg. Eccl. Rep. (**Eng.**) 57; Crewe v. Crewe (1800) 3 Hagg. Eccl. Rep. (**Eng.**) 129; Phillips v. Phillips (1844) 1 Rob. Eccl. Rep. (**Eng.**) 144; Dennis v. Dennis (1896) 68 **Conn.** 186, 34 L.R.A. 449, 57 Am. St. Rep. 95, 36 Atl. 34; Morrison v. Morrison (1886) 142 **Mass.** 361, 56 Am. Rep. 688, 8 N. E. 59; Rapp v. Rapp (1912) 162 **Mo.** App. 673, 145 S. W. 114.

While the courts have not always been careful to distinguish between connivance and collusion, it seems to be well settled that, to constitute collusion, there must be an agreement between husband and wife, looking to the procuring of a divorce.

Michigan.—Thompson v. Thompson (1888) 70 Mich. 62, 37 N. W. 710.

Missouri.—Gentry v. Gentry (1896) 67 Mo. App. 550; Rapp v. Rapp (1912) 162 Mo. App. 673, 145 S. W. 114.

Nebraska.—Branson v. Branson (1906) 76 Neb. 780, 107 N. W. 1011.

New Jersey.—Drayton v. Drayton (1896) 54 N. J. Eq. 298, 38 Atl. 25; Pohlman v. Pohlman (1901) 60 N. J. Eq. 28, 46 Atl. 658; Griffiths v. Griffiths (1905) 69 N. J. Eq. 689, 60 Atl. 1090; Sheehan v. Sheehan (1910) 77 N. J. Eq. 411, 140 Am. St. Rep. 566, 77 Atl. 1063.

New York.—Doeme v. Doeme (1904) 96 App. Div. 284, 89 N. Y. Supp. 215; McIntyre v. McIntyre (1894) 9 Misc. 252, 30 N. Y. Supp. 200; Bowe v. Bowe (1907) 55 Misc. 403, 106 N. Y. Supp. 608.

North Dakota.—Wiemer v. Wiemer (1910) 21 N. D. 371, 130 N. W. 1015.

Oregon.—Phillips v. Thorp (1882) 10 Or. 494.

Pennsylvania.—Latshaw v. Latshaw (1901) 18 Pa. Super. Ct. 465; Wilhelmi v. Wilhelmi (1900) 9 Pa. Dist. R. 685; Taylor v. Taylor (1908) 17 Pa. Dist. R. 642; Baturin v. Baturin (1910) 20 Pa. Dist. R. 43; Loomis v. Loomis (1909) 20 Pa. Dist. R. 731.

Texas.—Erwin v. Erwin (1897) — Tex. Civ. App. —, 40 S. W. 53.

England.—Crewe v. Crewe (1800) 3 Hagg. Eccl. Rep. 129; Gray v. Gray (1862) 2 Swabey & T. 559, 31 L. J. Prob. N. S. 83, 6 L. T. N. S. 336, 10 Week. Rep. 863; Gethin v. Gethin (1861) 31 L. J. Prob. N. S. 43; Todd v. Todd (1866) L. R. 1 Prob. & Div. 121, 35 L. J. Prob. N. S. 34, 12 Jur. N. S. 237, 13 L. T. N. T. 759, 14 Week. Rep. 350; Butler v. Butler (1890) L. R. 15 Prob. Div. 66, 59 L. J. Prob. N. S. 25, 62 L. T. N. S. 344, 38 Week. Rep. 390; Scott v. Scott L. R. [1913] P. 52, 82 L. J. Prob. N. S. 39, 108 L. T. N. S. 49, 57 Sol. Jo. 227, 29 Times L. R. 206; Bacon v. Bacon (1877) 25 Week. Rep. 560.

Thus, in Wiemer v. Wiemer (1910) 21 N. D. 371, 130 N. W. 1015, it was said: "The representation of such acts as having been committed, when made to the court, must, to constitute collusion, be a misrepresentation; that is, an agreement to misrepresent the facts; or, more clearly, misrepresentation in court by agreement, which makes it appear that acts constituting a cause for divorce have been committed by the defendant when such acts have not been committed." And in Drayton v. Drayton (1896) 54 N. J.

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Eq. 298, 38 Atl. 25, the court said: "Collusion does not exist without an agreement or understanding between the parties to the suit."

It has been held that it is collusive to apply for a divorce based on an offense which the other has condoned, the court in the same case doubting whether it is collusive not to make a defense of recrimination when it can be made. Wilhelmi v. Wilhelmi (1900) 9 Pa. Dist. R. 685.

Where a bill for divorce charges cruelty and adultery, collusion cannot be inferred from a stipulation made to abandon the charge of adultery and to strike it from the bill, where, on the trial, the charge of adultery is vigorously defended. Holcomb v. Holcomb (1894) 100 Mich. 421, 50 N. W. 170.

It has been held that where there is no absolute proof of collusion, but the conduct of the parties is such as to excite the suspicion of the court that collusion exists, it will refuse to grant a decree of divorce, and will either dismiss or continue the action without prejudice to the parties. Wolf v. Wolf (1833) Wright (Ohio) 243; Friend v. Friend (1834) Wright (Ohio) 639.

To be available in divorce actions, "collusion between the parties must relate to the causes assigned for divorce." Erwin v. Erwin (1897) — Tex. Civ. App. —, 40 S. W. 53. And in cases of collusion "the law conclusively presumes that a good defense might have been presented if there had been no collusive action." Belz v. Belz (1889) 33 Ill. App. 105. See to the same effect, Rosenfeld v. Rosenfeld (1896) 67 Mo. App. 29.

b. Illustrations.

1. Mutual desire for divorce.

The mutual desire of both parties to be divorced has been held to be no reason why a divorce should not be granted, if the facts warrant a decree, and there is no agreement between the parties for the purpose of making evidence in favor of the divorce. Drayton v. Drayton (1896) 54 N. J. Eq. 298, 38 Atl. 25; Pohlman v. Pohlman (1901) 60 N. J. Eq. 28, 46 Atl. 658; McCauley v. McCauley (1918) 88 N. J. Eq. 392, 103 Atl. 20; Preston v. Preston (1901) 11 Pa. Dist. R. 97; Taylor v. Taylor (1908) 35 Pa. Co. Ct. 385; Erwin v. Erwin (1897) — Tex. Civ. App. —, 40 S. W. 53.

Thus, in McCauley v. McCauley (1918) 88 N. J. Eq. 392, 103 Atl. 20, the court said: "The master reports that there is no doubt in his mind that both petitioner and defendant are extremely anxious to be divorced. This may be true, but, in and of itself, this is not objectionable, because it does not amount to collusion."

And in Erwin v. Erwin (1897) — Tex. Civ. App. —, 40 S. W. 53, the court said: "Mere willingness to a judicial separation would not be collusion as to the granting of a divorce. If so, willingness might be evidence by a failure to answer; and, willingness being collusion, the most effective way to meet divorce proceedings would be to ignore them. . . . A party to a marital contract might be not only willing, but anxious, that a divorce should be granted, and yet not have entered into collusion with the other party as to the means for accomplishing the divorce."

In Drayton v. Drayton (1896) 54 N. J. Eq. 298, 38 Atl. 25, it was said: "It is not collusion for both husband and wife to wish their matrimonial relation dissolved."

In Preston v. Preston (1901) 11 Pa. Dist. R. 97, the court said: "The mutual desire of both persons to be divorced is no reason why a divorce should not be decreed, if the facts of the case warrant the court in granting a divorce, and there is no collusion between the parties for the purpose of making evidence in favor of the divorce." See to the same effect, Taylor v. Taylor (1908) 35 Pa. Co. R. 385.

In Pohlman v. Pohlman (1901) 60 N. J. Eq. 28, 46 Atl. 658, it appeared that a matrimonial offense was committed by the wife without the knowledge or consent of her husband, and was persisted in for years against his will. It further appeared that both parties were desirous of a divorce. The court, in granting the decree, said that the husband had a vested right to the remedy of divorce, and that "he cannot be deprived of that right by

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the mere fact that his wife also wishes to have a divorce; and it cannot defeat the injured party's cause for the defendant to facilitate his proceedings."

In Belz v. Belz (1889) 33 Ill. App. 105, it appeared that a husband and wife entered into an agreement that she should file a bill for divorce, and he gave her written authority for that purpose, although no valid ground existed for a divorce. The trial court dismissed the bill on the ground of collusion; and the appellate court, in affirming the decision, said: "The court dismissed the bill, the order being in form the usual order dismissing for want of equity. The real ground, however, for the action of the court, was the apparent collusion between the complainant and defendant. The first arrangement they entered into was that the wife should file the bill, and the husband, so far as he could make the proceedings effectual, sought to accomplish the desired end by giving her written authority for that purpose. Why the wife was chosen as the moving party when she had, as now claimed, no cause of complaint, is known only to the persons interested. So long as she was intended as the ostensible complainant, they were evidently of one mind, both actually seeking the same end. The change of front which made him take the place was not followed by any adverse action on her part, or even by merely passive acquiescence. She directed him to the solicitor's office. She was served with process in the office of the same solicitor on the day the bill was filed, and was probably waiting there for that purpose. She immediately executed a written authority for the entry of her appearance, and for an immediate default by consent. In the usual course the default could not have been taken until the 23d of January, but by the accommodating assistance of the defendant the cause was actually heard eighteen days earlier than that. We are of opinion that the evidence warranted the court in finding that there was collusion or conspiracy between the complainant and defendant for the purpose of procuring a divorce."

But where the evidence on the part of one party clearly shows a willingness to allow a divorce, and there is equally convincing evidence on the part of the other of an intention to collude to the extent of arranging between themselves the provisions of the decree of divorce, such facts present circumstances of suspicion, lack of good faith, and attempted collusion which bar a decree. Goewey v. Goewey (1913) 42 Pa. Co. Ct. 568.

The readiness of one of the parties, or of their relatives, to assist the other in the legal proceedings, is not of itself collusive, though it invites scrutiny into the facts to ascertain whether they are untrue, or, if true, prepared or committed to procure a divorce. Scott v. Scott, L. R. [1913] P. (Eng.) 52, 82 L. J. Prob. N. S. 39, 108 L. T. N. S. 49, 57 Sol. Jo. 227, 29 Times L. R. 206; Barnes v. Barnes (1867) L. R. 1 Prob. & Div. (Eng.) 505, 37 L. J. Prob. N. S. 4, 17 L. T. N. S. 286, 16 Week. Rep. 281; Malley v. Malley (1909) 53 Sol. Jo. (Eng.) 617, 25 Times L. R. 662; Dodge v. Dodge (1904) 98 App. Div. 85, 90 N. Y. Supp. 438; Lyon v. Lyon (1904) 13 Pa. Dist. R. 623; Whitney v. Whitney (1905) 14 Pa. Dist. R. 161.

Thus, in Barnes v. Barnes (1867) L. R. 1 Prob. & Div. (Eng.) 505, it was held that the mere fact that a husband gave his wife money both before and after the institution of a divorce action does not prove collusion. The court said: "I see no impropriety in a husband making his wife a reasonable allowance whilst a suit is pending, in order to save the expense of an application to the court for alimony."

In Malley v. Malley (1909) 53 Sol. Jo. (Eng.) 617, 25 Times L. R. 662, the fact that a wife received financial assistance from her husband's sister to aid her in procuring a divorce was held not to constitute collusion.

And in Scott v. Scott, L. R. [1913] P. (Eng.) 52, 82 L. J. Prob. N. S. 39, 108 L. T. N. S. 49, 57 Sol. Jo. 227, 29 Times L. R. 206, it was held that where a wife received financial aid from her husband's brother to assist her in a divorce, the transaction was not such collusion as would bar a decree.

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2. Consent to commission of offense.

The commision of a matrimonial offense, or the creation of the appearance of having committed it, with the consent or privity of the other party, or under an arrangement between the spouses, has been held to be collusion. Todd v. Todd (1866) L. R. 1 Prob. (Eng.) 121, 35 L. J. Prob. N. S. 34, 12 Jur. N. S. 237, 13 L. T. N. S. 759, 14 Week. Rep. 350; Barnes v. Barnes (1867) L. R. 1 Prob. & Div. (Eng.) 505, 37 L. J. Prob N. S. 4, 17 L. T. N. S. 286, 16 Week. Rep. 281; Winship v. Winship (1863) 16 N. J. Eq. 107; Sheehan v. Sheehan (1910) 77 N. J. Eq. 411, 140 Am. St. Rep. 566, 77 Atl. 1063; Huntley v. Huntley (1893) 73 Hun, 261, 26 N. Y. Supp. 266; Cowan v. Cowan (1898) 23 Misc. 754, 53 N. Y. Supp. 93; Goldner v. Goldner (1900) 49 App. Div. 395, 63 N. Y. Supp. 431; Dodge v. Dodge (1904) 98 App. Div. 85, 90 N. Y. Supp. 438; Wilhelmi v. Wilhelmi (1900) 9 Pa. Dist. R. 685.

Thus, in Wilhelmi v. Wilhelmi (Pa.) supra, the court said: "It is collusive for the parties to agree that one shall give an offense which the other may set up as a cause for divorce. . . . To constitute collusion, both parties must agree that the offense may be committed, for, if one party commits the offense with the desire of being divorced, so as to give the other a cause for divorce, and the other acts upon that cause, there is no collusion; for the injured party ought not to be deprived of his or her rights simply because the other party desires to be divorced."

In Huntley v. Huntley (1893) 73 Hun, 261, 26 N. Y. Supp. 266, a divorce was refused a wife where it appeared that the acts proved by her and relied on as evidence of her husband's adultery were performed by him with her privity and procurement, and that she colluded with him to perform them so that she might procure a divorce. The court said: "Applying the principle of the case cited to the question before us, it becomes quite manifest that much of the evidence stricken out was admissible as tending to show that the defendant was not guilty of the act of adultery charged, and of which the defendant has been found guilty. His evidence, which was quite strongly corroborated by the evidence of other witnesses, was to the effect that the plaintiff desired a divorce from the defendant so that she could marry another man who could maintain her in idleness and dress her more extravagantly; that she requested her husband to go into a room with some other woman in the presence of witnesses, so that she might prove that fact by them and thus obtain a divorce; that she finally induced him to consent to such plan upon her agreeing to pay the expenses of obtaining a divorce; that he went with her to see her lawyer; that he procured two witnesses, one a Mr. Miller, a cousin of the plaintiff, to go with him to a house of ill fame; that he went into a room with one of the inmates, but had no criminal intercourse with her; that he then left the house; that the witness Miller, who was with him, immediately reported the fact to his wife; that the next day she went to the house and got his meals, and the following day they amicably divided their household goods; and many other facts and circumstances tending to show that what was done by the defendant was done at the request of the plaintiff and by her procurement, for the purpose of getting evidence upon which she could base an action for divorce. If this evidence was true, we have not only the evidence of the defendant denying that he committed adultery on that occasion, but the other facts and circumstances testified to by him which tend to show the purpose of his action, to corroborate his statement that he was not guilty of the offense charged, and to explain the circumstances which, unexplained, might tend quite strongly to show that he was guilty of the offense. We think the learned referee erred in striking out this evidence, and that for such error the judgment should be reversed, as it cannot be said his ruling was harmless to the defendant."

In Todd v. Todd (1866) L. R. 1 Prob. & Div. (Eng.) 121, a diyorce was refused, it appearing that the husband agreed with his wife to commit adul-

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tery so that she might obtain a divorce, and furnished the evidence. The court said: "When, as in this case, the husband promises his wife to commit adultery, in order that she may obtain a divorce, and the wife follows out the course the husband has indicated, in order to watch him; supposing adultery to take place subject to that understanding, and evidence be obtained accordingly, I think the parties are playing into one another's hands, and that there is collusion. It is my duty to dismiss this petition."

In Cowan v. Cowan (1898) 23 Misc. 754, 53 N. Y. Supp. 93, a divorce was refused a wife, it appearing that the husband committed adultery for the avowed purpose of furnishing grounds for a divorce, and in collusion with her son, who informed her of the facts.

In Winship v. Winship (1863) 16 N. J. Eq. 107, the complainant in an action for divorce admitted in her testimony that she was living in adultery with the defendant for two years prior to, and at the time of, her marriage, and the evidence further showed that she was guilty of adultery after her marriage. It further appeared that since her husband discovered her adultery, he had been living in adultery with another woman, but alleged that he did so with his wife's consent. In refusing a decree of divorce, the court said: "It is apparent that the marriage relation was entered into by the parties as a mere matter of convenience, and is sought to be dissolved from no higher motive. The answer alleges that the bill was filed by collusion; the husband suggesting the course to be pursued, and agreeing not to make any opposition. He opposes the divorce, not because he has any objection to being discharged from his marital obligations, but because, as he insists, the wife is attempting, contrary to their agreement, to subject him to the costs of the proceeding. The wife qualifies without denying the substance of the charge of collusion to obtain the divorce. It is apparent from the evidence that both before and since the filing of the bill, the parties have had interviews with each other on the subject of the divorce. The conduct of the parties has been such as naturally to arouse suspicion, and justify extreme vigilance on the part of the court in guarding against gross imposition."

In Goldner v. Goldner (1900) 49 App. Div. 395, 63 N. Y. Supp. 431, a divorce was refused on the ground that it appeared that the adultery had been arranged for and witnesses had been provided and were at hand, so that there could be no difficulty in discovering facts to at least raise an inference of adultery.

3. Voluntary appearance.

The voluntary appearance by a defendant who contests the action in good faith cannot be considered as collusive. Dusenberry v. Dusenberry (1910) 20 Pa. Dist. R. 678.

In English v. English (1902) 19 Pa. Super. Ct. 586, the court said: "Neither upon principle nor upon authority can it be declared as an unvarying rule that an appearance, in the absence of due legal services of the subpœna, is conclusive evidence of collusion." But in such cases the evidence should be carefully examined. Lyon v. Lyon (1904) 13 Pa. Dist. R. 623.

The fact that a defendant in a divorce action voluntarily comes within the jurisdiction of the court has been held not to show collusion, although the complainant was thereby enabled to obtain personal service. Loomis v. Loomis (1909) 20 Pa. Dist. R. 781. Compare Wheeler v. Wheeler (1910) 20 Pa. Dist. R. 723, wherein a decree was refused because it appeared that the defendant in a divorce voluntarily went to the office of the plaintiff's attorney in order that process might be served on him.

4. Failure to appear and defend.

It has been held that the failure of a defendant to appear and defend an action of divorce is not of itself collusion, though it may, in connection with other circumstances, be evidence of collusion. Hudson v. Hudson (1914) 176 Mo. App. 69, 162 S. W. 1062; Cummins v. Cummins (1896) 47 Neb. 872, 66 N. W. 858; Drayton v. Drayton (1896) 54 N. J. Eq. 298, 38

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Atl. 25; Pohlman v. Pohlman (1901) 60 N. J. Eq. 28, 46 Atl. 658; Galloway v. Galloway (1904) 92 App. Div. 300, 86 N. Y. Supp. 1078; Latshaw v. Latshaw (1901) 18 Pa. Super. Ct. 465; Preston v. Preston (1901) 11 Pa. Dist. R. 97; Taylor v. Taylor (1908) 35 Pa. Co. Ct. 385; Magurn v. Magurn (1884) 11 Ont. App. Rep. 178.

Thus, in Preston v. Preston (1901) 11 Pa. Dist. R. 97, it was said: "It is not collusive to abstain from making a defense, and the guilty party may facilitate the proofs and smooth the asperities of the litigation without injuring the cause." See to the same effect, Taylor v. Taylor (1908) 35 Pa. Co. Ct. 385.

In Hudson v. Hudson (1914) 176 Mo. App. 69, 162 S. W. 1062, the court, in referring to the failure of a defendant to appear and answer a divorce proceeding, said: "No inference of collusion should be drawn from the mere fact of nonresistance, although such fact may be regarded as an important element in circumstantial evidence from which such an inference would be permissible."

In Galloway v. Galloway (1904) 92 App. Div. 300, 86 N. Y. Supp. 1078, while the defendant in a divorce action interposed an answer denying the averments of the complaint respecting the commission of adultery, yet it was unverified, and on the trial no cross-examination of witnesses was made by the defendant's attorney save in slight particulars which tended to strengthen the plaintiff's case rather than to show a defense. The defendant offered no testimony. The court held that the circumstances were sufficiently strong to show collusion and to justify the court in refusing to grant a decree of divorce.

In Cummins v. Cummins (1896) 47 Neb. 872, 66 N. W. 858, it was held that although in an action for divorce there is no appearance by the defendant, the court "should be satisfied that there is no collusion, that the case is prosecuted in good faith, and that a cause of action exists."

And in Menzies v. Farnon (1909) 18 Ont. L. Rep. 174, it was held that the defendant's failure to enter an appearance, followed by his furnishing the plaintiff's counsel with an affidavit to aid the plaintiff in obtaining a decree of divorce, was evidence of collusion, which, if established, barred the plaintiff's relief.

The withdrawal of a defendant's answer has been held not sufficient of itself to constitute collusion. Erwin v. Erwin (1897) — Tex. Civ. App. —, 40 S. W. 53.

In Leavitt v. Leavitt (1865) 13 Mich. 452, it was said that the withdrawal of an answer "should at least be closely scrutinized; and under such circumstances no decrees should be granted without some satisfactory evidence showing that the withdrawal was voluntary, and at the same time not collusive."

5. Agreement not to defend.

It has been held that an agreement between the parties to an action for a divorce that the defendant shall withdraw opposition to, or not defend the action, is collusive and bars a decree of divorce. Barnes v. Barnes (1867) L. R. 1 Prob. & Div. (Eng.) 505, 37 L. J. Prob. N. S. 4, 17 L. T. N. S. 268, 16 Week. Rep. 281; Danforth v. Danforth (1883) 105 Ill. 603; Sebastian v. Rose (1909) 135 Ky. 197, 122 S. W. 120; Gentry v. Gentry (1896) 67 Mo. App. 550; Donohue v. Donohue (1911) 159 Mo. App. 610, 141 S. W. 465; Rapp v. Rapp (1912) 162 Mo. App. 673, 145 S. W. 114; Hudson v. Hudson (1914) 176 Mo. App. 69, 162 S. W. 1062; Griffiths v. Griffiths (1905) 69 N. J. Eq. 689, 60 Atl. 1090; Sheehan v. Sheehan (1910) 77 N. J. Eq. 411, 140 Am. St. Rep. 566, 77 Atl. 1063; McIntyre v. McIntyre (1894) 9 Misc. 252, 30 N. Y. Supp. 200; Latshaw v. Latshaw (1901) 18 Pa. Super. Ct. 465. And see the reported case (EDELSON v. EDELSON, ante, 689).

In Danforth v. Danforth (1883) 105 Ill. 603, the court said: "It is conceded, and such is the unquestioned law, that if there is an agreement in a divorce case that the defendant will not defend against a decree, or the parties collude to obtain a divorce, or so as to produce that result, the relief will not be granted. It is upon the principle that the parties do not have the only interest, but the public also.

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has an interest in the marriage relation, and in its proper maintenance; and the courts have ever been vigilant in preventing divorces from being obtained by fraud or collusion of the parties."

In McIntyre v. McIntyre (1894) 9 Misc. 252, 30 N. Y. Supp. 200, it was said: "There are three parties to every application for divorce. Not only the parties to the record, but the public also, have an interest in marriage and its dissolution. . . . Growing out of this twofold interest, we have the doctrine, running through all matrimonial suits, and bringing into subserviency all other law on the subject, that the proceeding, though upon its face a controversy between the parties of record only, is, in fact, a triangular suit, sui generis, the government, or public, occupying the position of a third party, without counsel, it being the duty of the court to protect its interests."

In Sebastian v. Rose (1909) 135 Ky. 197, 122 S. W. 120, it was held that although the defendant in a divorce action may refuse to defend, under an agreement with the plaintiff, though he may have a defense, yet the decree of divorce cannot be made the subject of any agreement.

In Rapp v. Rapp (1912) 162 Mo. App. 673, 145 S. W. 114, the court, in speaking of an agreement relating to alimony or a division of property rights, made pending a divorce action, held that such an agreement, if unaccompanied by an understanding "that one of the parties shall have a divorce or be unresisted at the trial, is not collusive."

In Latshaw v. Latshaw (1901) 18 Pa. Super. Ct. 465, it appeared that the wife, when on the stand, testified in answer to questions put by the court, that after her separation from her husband, she met him upon the street and told him of her intention to apply for a divorce. The court asked: "Did you have any agreement with him that you would get it?" To which she replied: "Yes, sir, I told him I was going to get it on nonsupport and abuse. Q. What did he say? A. All right. Q. Did he furnish you any money? A. No, sir. Q. Did he agree before you brought the proceedings that he wouldn't make any defense? A. Yes, sir. . . . Q. He said he would not make any objection? A. He said I could go ahead and get it." The court, in refusing a decree of divorce, said: "If it appear that the purpose of the application for its annulment is simply that the parties may be freed and separated from each other, or that the libel is not founded upon motives of sincerity and truth, but demanded for light reason, or in a manner smacking of collusion, the decree must be invariably refused."

In Barnes v. Barnes (1867) L. R. 1 Prob. & Div. (Eng.) 505, a decree nisi was rendered. It appeared that the petitioner for a divorce had in substance said to his wife: "If you don't oppose, I shall get a divorce cheaper than if you do; therefore, keep quiet, and I will give you some money when the decree is obtained, and I will do no harm to the corespondent." The decree was rescinded and the petition dismissed, the Judge Ordinary remarking: "If that is not collusion, I do not know what is."

In Griffiths v. Griffiths (1905) 69 N. J. Eq. 689, 60 Atl. 1090, wherein it appeared that it was agreed that the defendant in a divorce action was to make no defense, and on the obtaining of a decree by default, the petitioner was to be paid a certain sum, the court said: "If arrangements between parties providing for the institution of divorce suits, in consideration of the payment of a large sum of money, are to receive the sanction of this court, every legal restriction against the voluntary dissolution of the marriage tie can readily be avoided by designing and unprincipled parties." See to the same effect, Peleaumoku v. Makaneole (1908) 19 Haw. 68.

In Donohue v. Donohue (1911) 159 Mo. App. 610, 141 S. W. 465, it appeared that before marriage the parties entered into an agreement providing that the wife should have a divorce, and that her husband would not contest the action. The court refused a decree.

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But in Wiemer v. Wiemer (1911) 21 N. D. 371, 130 N. W. 1015, it was said: "Usually the fact of an agreement not to make a defense is only evidence tending to show collusion, and is not collusion, and whether collusion does exist must usually be determined by a consideration of such agreement and the other facts and circumstances surrounding it."

In Wilhelmi v. Wilhelmi (1899) 9 Pa. Dist. R. 685, it was said: "It is not collusive to abstain from making a defense, and the guilty party has been allowed to facilitate the proofs and smooth the asperities of the litigation without injuring the cause."

Where the defense to a divorce action was withdrawn at the suggestion of the trial judge, the appellate court held that the clear presumption was that the judge, when he suggested a compromise, was satisfied that a divorce must be granted. The court said: "It is not for a moment to be supposed that the judge had reference to the granting of a divorce, or that he desired that the withdrawal of opposition to it should be made a matter of compromise and agreement. The clear presumption must therefore be that the suggestion of the judge had reference to other incidental matters in issue between the parties, and the presumption is confirmed by the fact that the custody of the children and a provision for their support were the principal elements of the compromise agreement. Under these circumstances, although a withdrawal of opposition was also an element in the agreement, that fact was not stated to the court, and we cannot hold that there was anything collusive or illegal in the agreement which can affect the rights of these parties. We must presume that the divorce would have been granted had no compromise been effected." McCarthy v. McCarthy (1869) 36 Conn. 177.

6. Agreement relating to alimony or adjustment of property rights.

According to the weight of authority, agreements relating to alimony or the adjustment of property rights, which do not directly induce the procurement of a divorce, do not constitute such collusion as will bar a decree. Although such agreements may contemplate the possibility of a divorce, and depend for effectiveness on its being obtained, they will not bar a decree, provided they are made in good faith, with no undue influence or imposition by one party on the other, and are fair and equitable. In other words, there seems to be no presumption that a contract for the settlement of property rights, made in contemplation of a possible divorce, is necessarily collusive, but the court will look to all the facts and circumstances of the case to determine whether the contract has that effect in each particular case. Doose v. Doose (1916) 198 Ill. App. 387; Martin v. Martin (1884) 65 Iowa, 255, 21 N. W. 595; Rapp v. Rapp (1912) 162 Mo. App. 673, 145 S. W. 114; Hudson v. Hudson (1914) 176 Mo. App. 69, 162 S. W. 1062; Daggett v. Daggett (1835) 5 Paige (N. Y.) 509, 28 Am. Dec. 442; Doeme v. Doeme (1904) 96 App. Div. 284, 89 N. Y. Supp. 215; Wilhelmi v. Wilhelmi (1899) 9 Pa. Dist. R. 685.

Thus, in Doeme v. Doeme (1904) 96 App. Div. 284, 89 N. Y. Supp. 215, the court said: "It has never before, so far as I know, been claimed that the settlement of financial transactions between a husband and wife at or about the time a divorce is granted is a badge of fraud or collusion, or even a suspicious circumstance requiring investigation. The court, by its decree, in a majority of actions where a divorce is granted, makes some provision for the support of the wife, but that a husband voluntarily does so, of itself, no more constitutes evidence of collusion than does the court's decree. There is a moral as well as a legal obligation resting upon a husband to support his wife, and even if she errs, the fact that he sees fit to make provision for her support, at the time a divorce is granted, cannot deprive him of the right which § 1756 of the Code of Civil Procedure gives him, to dissolve the marriage contract, nor does it furnish ground of suspicion that the judgment is the result of collusion and conspiracy between the parties, or that the court,

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had that fact been known, would not have granted the judgment. The same rule is equally applicable to the wife. If she has means and the husband has none, there is no impropriety upon her part in making some provision for his future support and maintenance, however indelicate it may be for him to accept it."

In Hudson v. Hudson (1914) 176 Mo. App. 69, 162 S. W. 1062, it was held that a compromise and settlement of the pecuniary and property issues in a divorce suit is not denounced by law as immoral or against public policy, but a bargain that there shall be no defense is collusion.

In Doose v. Doose (1916) 198 Ill. App. 887, the court said: "It is also urged that the decree should be reversed because it appears that an arrangement existed between the parties as to a division of the property in the event a decree of divorce should be granted. We do not think that it can be inferred from the fact of the existence of such an arrangement as to property that there was collusion to obtain a divorce."

In Rapp v. Rapp (1912) 162 Mo. App. 673, 145 S. W. 114, the court said: "An agreement between the parties concerning alimony or a division of their property is not prohibited by law, and, if unaccompanied by an agreement or understanding that one of the parties shall have a divorce or be unresisted at the trial, is not collusive. All of the facts and circumstances before us show that the scope of the understanding reached by the parties was confined to the subject of alimony, and that defendant's failure to appear at the trial was an act of his own volition, doubtless prompted by consciousness of the justice of his wife's cause. As soon as defendant perceived the disfavor of the court towards plaintiff he was ready enough to appear, and defended the action with the utmost vigor. His entire conduct was that of a husband whose silence had not been purchased, but of one who was trying to extricate himself from a bad predicament with as little pecuniary loss as possible, and when he discovered a chance to escape without loss, availed himself of the chance regardless of the settlement he had made. We hold there was no collusion."

In Daggett v. Daggett (1835) 5 Paige (N. Y.) 509, 28 Am. Dec. 442, a wife filed a bill for divorce on the ground of the defendant's adultery, which was clearly proved. The counsel for the complainant, on the hearing of the cause ex parte, suggested that a satisfactory agreement had been made between the parties as to alimony, and that no decree for alimony would be asked. The court, in granting the decree, said: "So long as the marriage contract remained in force, the wife was not legally competent to make a valid contract with her husband in relation to her right to alimony; and that such agreements made in advance, if sanctioned by the court without examination, would have a tendency to produce collusion between parties, with a view to the dissolution of the marriage contract between them. That such agreements, therefore, if the parties wished them to receive the sanction of the court, must be shown to be perfectly fair and equitable in regard to the wife's right to a support out of the estate of the adulterer, or must be made after the bond of matrimony had actually been dissolved, as to the wife, by a decree of the court."

It has been held that, in the absence of fraud or collusion, a settlement as to alimony, made while a motion for a new trial or an appeal could have been entered, will be sustained. Blake v. Blake (1858) 7 Iowa, 46.

But in some cases it has been held that agreements relating to alimony, allowances, and a division of property rights, conditioned on the granting of a divorce, or made in contemplation thereof, are collusive, and will bar a decree of divorce.

Thus, in Thompson v. Thompson (1888) 70 Mich. 62, 37 N. W. 710, it appeared that before a bill for divorce was filed, the complainant made offers to his wife to induce her to release all interest in his property; and he testified: "I told her I would not pay her the $500 unless she would get a di-

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vorce, or let me,—I did not care which; that I was going to have, and have things solid, or I would not pay anything; that I was going to get clear if I paid that much. I told her if she would make out the writings that way, so that I could get a divorce, or she could,—I did not care which,—I would pay her the $500 just as she wanted it. She wanted I should get the divorce if I paid her for it. She did not want any. I told her I would not pay unless I got one." Subsequently it appeared that she executed a quitclaim deed, and signed an agreement providing that, in case he instituted proceedings to obtain a divorce, she would make no claim to additional costs or alimony, and would support herself after the execution of the agreement. The court, in dismissing the bill, said: "We do not feel called upon to decide whether the complainant had a legal cause for divorce under the testimony. The agreement made was in contravention of the statute. It is immaterial whether complainant had cause for divorce or not. The statute is based upon public policy, which forbids the annulment of the marriage contract by the agreement of the parties. Such an agreement is collusive, and a fraud upon the court, which requires a positive averment that the bill of complainant is not exhibited in consequence of any collusion, agreement, or understanding whatever between the parties thereto."

In Barnes v. Barnes (1867) L. R. 1 Prob. & Div. (Eng.) 505, 37 L. J. Prob. N. S. 4, 17 L. T. N. S. 268, 16 Week. Rep. 281, it was held that the mere fact that the husband gave the wife money for her support, both before and after he instituted the divorce suit, did not prove collusion; but furnishing the support in consideration that the wife would keep quiet, so that he could get a decree cheaper than he otherwise would get it, was collusion.

In Pietz v. Pietz (1910) 38 Pa. Co. Ct. 538, the court refused a decree of divorce because it appeared that the parties had entered into an agreement for a divorce and for the amount to be furnished for the wife's support.

In Costill v. Costill (1890) 47 N. J. Eq. 346, 21 Atl. 35, it appeared that after the testimony before a special master had been taken, and when the matter was ready for the final hearing, without the knowledge of counsel, the petitioner demanded money from the defendant, and secured a sum to be placed in the hands of a mutual friend to be paid to the complainant when a divorce was obtained. The court refused a decree of divorce, saying: "It is claimed that this money was deposited in the compromise of alimony, but the condition that it was not to be paid unless the divorce could be had, and the fact that negotiations concerning it were concealed from petitioner's counsel, exhibit the shallowness of such a pretense."

In Gentry v. Gentry (1896) 67 Mo. App. 550, a divorce was refused on the ground that it appeared that a short time before the action was begun, both parties entered into an agreement stipulating "that they mutually agree to make application for a legal separation, and in consideration of the above agreement, that each one renounce and relinquishes all right, title, and interest and claim acquired under law by marrying, in the property which each one had previous to marrying, and Millie F. Gentry further agrees that she will not apply for alimony, and she waives all right of dower, and it is further mutually agreed that each party will take all the necessary steps, after a legal separation has been granted, without expense to the other party, to carry out this agreement in word and spirit, and it is further mutually agreed that either party may apply for a legal separation, and the other party will not contest the same."

In Branson v. Branson (1906) 76 Neb. 780, 107 N. W. 1011, it appeared that while an action of divorce was pending the wife entered into a written agreement with her husband to the effect that, in consideration of his not testifying against her at the trial she would make no application for alimony, and that in case a divorce was

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granted she should have set apart to her certain property, and should release to her husband all rights in his lands and personal property. The court said that the character of the document as an agreement for a collusive divorce was too evident to require comment, and refused a divorce.

In Donohue v. Donohue (1911) 159 Mo. App. 610, 141 S. W. 465, the court refused to grant a decree of divorce where it appeared that, prior to their marriage, the parties entered into an agreement providing that the wife should have a divorce by default, in consideration of the payment to her of $1,500 in monthly instalments.

In Barturin v. Barturin (1910) 20 Pa. Dist. R. 43, a decree of divorce was revoked because it appeared that, two days before the decree was granted, the parties entered into an agreement by which the wife, in consideration of the payment to her of a stated sum by her husband, released him from payment of the alimony directed to be paid by the court.

7. Suppression of evidence.

It has generally been held that any arrangement or plan between the parties whereby evidence of a valid defense to a divorce action is suppressed constitutes collusion, which bars a decree of divorce. Barnes v. Barnes (1867) L. R. 1 Prob. & Div. (Eng.) 505, 37 L. J. Prob. N. S. 4, 17 L. T. N. S. 268, 16 Week. Rep. 281; Butler v. Butler (1890) L. R. 15 Prob. Div. (Eng.) 66, 59 L. J. Prob. N. S. 25, 62 L. T. N. S. 344, 38 Week. Rep. 390; Hunt v. Hunt (1878) 47 L. J. Prob. N. S. (Eng.) 22, 39 L. T. N. S. 45; Beard v. Beard (1884) 65 Cal. 354, 4 Pac. 229; Winder v. Winder (1910) 86 Neb. 495, 125 N. W. 1095; Pohlman v. Pohlman (1901) 60 N. J. Eq. 28, 46 Atl. 658; Griffiths v. Griffiths (1905) 69 N. J. Eq. 689, 60 Atl. 1090; Sheehan v. Sheehan (1910) 77 N. J. Eq. 411, 140 Am. St. Rep. 566, 77 Atl. 1063; Gentry v. Gentry (1896) 67 Mo. App. 550.

Thus, in Griffiths v Griffiths (1905) 69 N. J. Eq. 689, 60 Atl. 1090, the court said that collusion "also includes any agreement whereby evidence of a valid defense is suppressed, and in my judgment, such an agreement, if not expressed, may be implied from the acts of the parties."

And in Gentry v. Gentry (1896) 67 Mo. App. 550, it was said: "Parties cannot of their own volition rescind the matrimonial contract. The courts are justified in calling for a full and complete disclosure of all the facts, on both sides, before dissolving the relation. And when the parties then institute a pretended suit, under a collusive agreement between themselves to cheat the court by falsifying or concealing the facts, and this collusion is shown to exist at any stage of the proceedings, it is deemed a conspiracy against justice."

In Winder v. Winder (1910) 86 Neb. 495, 125 N. W. 1095, it was said: "There can be no doubt but that, where parties to a divorce proceeding agree that material evidence shall be suppressed, and that the actual facts in the case shall be concealed from the court for the purpose of procuring a decree which would not otherwise be granted to the complainant, such action is collusive in nature, and a court is warranted in setting aside a decree thus procured."

In Young v. Young (1871) 17 Minn. 181, Gil. 153, the court said: "Any course of action upon the part of plaintiff which is designed and tends and operates to deprive or exclude a defendant from setting up and establishing a defense which, if established, would prevent the granting of the divorce, is a fraud upon the administration of justice, as well as a fraud upon the defendant."

In Barnes v. Barnes (1867) L. R. 1 Prob. & Div. (Eng.) 505, 37 L. J. Prob. N. S. 4, 17 L. T. N. S. 268, 16 Week. Rep. 281, it appeared that the petitioner for a divorce said to his wife: "If you don't oppose, I shall get a divorce cheaper than if you do; therefore keep quiet, and I will give you some money when the decree is obtained, and I will do no harm to the corespondent;" and the court dismissed the petition, saying: "If that is not collusion, I do not know what is." See to the same effect, Beard v. Beard (1884) 65 Cal. 354, 4 Pac. 229.

It has been held that where material

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facts are mutually suppressed, there is collusion which bars a divorce, although their production would not have changed the result. Butler v. Butler (1890) L. R. 15 Prob. Div. (Eng.) 66, 59 L. J. Prob. N. S. 25, 62 L. T. N. S. 344, 38 Week. Rep. 390; Gentry v. Gentry (Mo.) supra; Branson v. Branson (1906) 76 Neb. 780, 107 N. W. 1011.

In Peck v. Peck (1887) 44 Hun (N. Y.) 290, it was said: "It is not the policy of the law to allow judgments of divorce to be taken where a valid defense exists, and courts on their own motion interfere to prevent such result where the facts are brought to their knowledge."

In Fisher v. Fisher (1902) 95 Md. 314, 93 Am. St. Rep. 334, 52 Atl. 898, the court said: "If there be reason for the suspicion that important testimony has not been produced, the judge may, of his own motion, elicit such evidence in any manner that the rules of his tribunal allow."

In Moore v. Moore (1858) 22 Tex. 237, it was said: "In decreeing a divorce, the judge does not proceed, as in other cases, upon the verdict of the jury, but upon his own judgment, after the jury, by their verdict, have affirmed the truth of the material allegations of the petition. The mind of the judge must be satisfied, not only of the sufficiency of the causes alleged, but of the truth and sufficiency of the evidence by which they are established, independently of the verdict."

II. Effect of collusion.

a. Generally.

Collusion between the parties to a divorce proceeding will ordinarily bar the granting of a decree of divorce.

Alabama.—Powell v. Powell (1886) 80 Ala. 595, 1 So. 549.

Colorado.—Hubbard v. Hubbard (1893) 19 Colo. 13, 34 Pac. 170.

Hawaii.—Peleaumoku v. Makaneole (1908) 19 Haw. 68.

Illinois.—Danforth v. Danforth (1883) 105 Ill. 603; Belz v. Belz (1889) 33 Ill. App. 105.

Michigan.—Thompson v. Thompson (1888) 70 Mich. 62, 37 N. W. 710.

Minnesota.—Young v. Young (1871) 17 Minn. 181, Gil. 153; Olmstead v. Olmstead (1889) 41 Minn. 297, 43 N. W. 67.

Missouri.—Rosenfeld v. Rosenfeld (1896) 67 Mo. App. 29; Gentry v. Gentry (1896) 67 Mo. App. 550; Torlotting v. Torlotting (1899) 82 Mo. App. 192.

Nebraska.—Branson v. Branson (1906) 76 Neb. 780, 107 N. W. 1011.

New Jersey.—Winship v. Winship (1863) 16 N. J. Eq. 107; Costill v. Costill (1890) 47 N. J. Eq. 346, 21 Atl. 35; Pohlman v. Pohlman (1901) 60 N. J. Eq. 28, 46 Atl. 658; Griffiths v. Griffiths (1905) 69 N. J. Eq. 689, 60 Atl. 1090; Sheehan v. Sheehan (1910) 77 N. J. Eq. 411, 140 Am. St. Rep. 566, 77 Atl. 1063.

New York.—Hanks v. Hanks (1841) 3 Edw. Ch. 469; Huntley v. Huntley (1893) 73 Hun, 261, 26 N. Y. Supp. 266; Goldner v. Goldner (1900) 49 App. Div. 395, 63 N. Y. Supp. 431; Galloway v. Galloway (1904) 92 App. Div. 300, 86 N. Y. Supp. 1078; Dodge v. Dodge (1904) 98 App. Div. 85, 90 N. Y. Supp. 438; Richardson v. Richardson (1906) 114 N. Y. Supp. 912; McIntyre v. McIntyre (1894) 9 Misc. 252, 30 N. Y. Supp. 200; Cowan v. Cowan (1898) 23 Misc. 754, 53 N. Y. Supp. 93; Bowe v. Bowe (1907) 55 Misc. 403, 106 N. Y. Supp. 608.

Ohio.—Wolf v. Wolf (1833) Wright 243; Smith v. Smith (1834) Wright 643; Mansfield v. Mansfield (1833) Wright, 284.

Pennsylvania. — Lyon v. Lyon (1904) 13 Pa. Dist. R. 623; Baturin v. Baturin (1910) 20 Pa. Dist. R. 43; Goewey v. Goewey (1913) 42 Pa. Co. Ct. 568.

Wisconsin. — Hopkins v. Hopkins (1875) 39 Wis. 167.

England.—Crewe v. Crewe (1800) 3 Hagg. Eccl. Rep. 129; Lloyd v. Lloyd (1857) 1 Swabey & T. 567, 30 L. J. Prob. N. S. 97; Shaw v. Gould (1868) L. R. 3 H. L. 55, 37 L. J. Ch. N. S. 433, 18 L. T. N. S. 833; Barnes v. Barnes (1867) L. R. 1 Prob. & Div. 505, 37 L. J. Prob. N. S. 4, 17 L. T. N. S. 268, 16 Week. Rep. 281; Butler v. Butler (1890) L. R. 15 Prob. Div. 66, 59 L. J. Prob. N. S. 25, 62 L. T. N. S. 344, 38 Week. Rep. 390; Hunt v. Hunt (1878) 47 L. J. Prob. N. S. 22, 39 L. T. N. S.

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45; Churchward v. Churchward L. R. [1895] P. 7, 71 L. T. N. S. 782, 64 L. J. Prob. N. S. 18, 11 Reports, 626, 43 Week. Rep. 380; Todd v. Todd (1866) L. R. 1 Prob. & Div. 121, 35 L. J. Prob. N. S. 34, 12 Jur. N. S. 237, 13 L. T. N. S. 759, 14 Week. Rep. 350; Scott v. Scott, L. R. [1913] P. 52, 82 L. J. Prob. N. S. 39, 108 L. T. N. S. 49, 57 Sol. Jo. 227, 29 Times L. R. 206; Farulli v. Farulli, L. R. [1917] P. 28, 86 L. J. Prob. N. S. 35, 116 L. T. N. S. 18, 61 Sol. Jo. 116, 81 J. P. 28.

Canada.—Hayes v. Hayes, 1 West. Week. Rep. 85.

In Rosenfeld v. Rosenfeld (1896) 67 **Mo.** App. 29, it was said: "Proof of collusion prior to the institution of the suit is necessarily fatal to that proceeding. The plaintiff is bound to make oath that the suit is not instituted collusively . . . and, if such collusion existed at the date of the institution of the suit, it is conclusive against the plaintiff's right of action, . . . if it exists at the date of the trial, it is, if established, conclusive against the decree, because both under the decisions and on principle it is a fraud upon the court."

And this is true although there is adequate and sufficient cause for a divorce. Todd v. Todd (1866) L. R. 1 Prob. & Div. (**Eng.**) 121, 35 L. J. Prob. N. S. 34, 12 Jur. N. S. 237, 13 L. T. N. S. 759, 14 Week. Rep. 350; Lloyd v. Lloyd (1858) 1 Swabey & T. (**Eng.**) 567, 30 L. J. Prob. N. S. 97; Butler v. Butler (1890) L. R. 15 Prob. Div. (**Eng.**) 66, 59 L. J. Prob. N. S. 25, 62 L. T. N. S. 344, 38 Week. Rep. 390; Goodwin v. Goodwin (1810) 4 Day (**Conn.**) 343; Thompson v. Thompson (1888) 70 **Mich.** 62, 37 N. W. 710; Rosenfeld v. Rosenfeld (**Mo.**) supra; McDonald v. McDonald (1914) 175 **Mo.** App. 513, 161 S. W. 850; Mansfield v. Mansfield (1833) Wright (**Ohio**) 284.

Thus, in Rosenfeld v. Rosenfeld (1896) 67 Mo. App. 29, it was said: "Cases are numerous in which decrees have been denied, or have been vacated, because collusion was shown to have existed at the date of the institution of the suit or at the date of the trial, and that, regardless as to whether the plaintiff had good ground for divorce."

In Thompson v. Thompson (1888) 70 **Mich.** 62, 37 N. W. 710, the court, in speaking of a collusive agreement between the parties, said: "We do not feel called upon to decide whether the complainant had a legal cause for divorce under the testimony. . . . It is immaterial whether complainant had cause for divorce or not."

In Todd v. Todd (1866) L. R. 1 Prob. & Div. (**Eng.**) 121, 35 L. J. Prob. N. S. 34, 12 Jur. N. S. 237, 13 L. T. N. S. 759, 14 Week. Rep. 350, a decree of divorce was denied, it appearing that a husband committed adultery with the knowledge and consent of his wife, and under an agreement that he should do so for the purpose of furnishing grounds for her divorce.

In Butler v. Butler (1890) L. R. 15 Prob. Div. (**Eng.**) 66, 59 L. J. Prob. N. S. 25, 62 L. T. N. S. 344, 38 Week. Rep. 390, a decree was denied because it appeared that, pending an action of divorce, the parties agreed that the charge of adultery against the husband with four named persons should be limited to but one of the named persons; that the wife would bring forward such evidence as would satisfy the court of his adultery with the one person, and that he would not press the charge of adultery made against his wife.

But a collusive agreement, fully and unequivocally repudiated before the trial, and disclosed to the court on the trial, has been held not to bar a decree of divorce. Loveren v. Loveren (1895) 106 **Cal.** 509, 39 Pac. 801; Rosenfeld v. Rosenfeld (1896) 67 **Mo.** App. 29; Shirk v. Shirk (1898) 75 Mo. App. 573.

Thus, in Loveren v. Loveren (1895) 106 **Cal.** 509, 39 Pac. 801, the court said: "Appellant contends that if the agreement was void, then the whole decree of divorce should be set aside. But the court was not imposed upon. While the pretended agreement was yet wholly executory, and before any further proceeding was taken in the case, the respondent repudiated it and disclosed all the facts to the court. The court was thus put upon its guard,

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and the intended fraud was frustrated. Appellant introduced the letters and photographs referred to in the stipulation; the pleadings were not withdrawn or changed, and all the issues were vigorously contested under the watchful eyes of the judge, who had been informed of all the facts touching the void stipulation."

In Shirk v. Shirk (1898) 75 Mo. App. 573. It was said: "It is not pretended that there was any collusion between the parties at the commencement of the suit. The agreement which it is insisted was collusive was entered into after the plaintiff's suit was commenced. The only evidence adduced which tends to establish the existence of collusion at the trial is to be found in that agreement. While it was executory, and before the trial, the plaintiff fully repudiated it, and by his replication disclosed all the facts to the court. The court was thus put upon its guard and the intended fraud was frustrated. That the collusive agreement was repudiated by both parties long before the trial must be conceded. About a month before the trial the defendant's attorneys demanded of plaintiff the payment of $3,000 in addition to what defendant had already received under the agreement as a condition upon which defendant would file no answer in the plaintiff's action against her. This proposition plaintiff declined, and thereafter both parties repudiated the agreement. The spirit of hostility evinced by the parties both in their pleadings and at the trial conclusively shows that though the element of collusion may have crept into the case after the suit was brought, that it had no existence there when the trial took place. And as it was not present in the case either at the commencement of the suit or at the trial, the case stood and was properly disposed of as if it had never therein existed at all."

In Rosenfeld v. Rosenfeld (1896) 67 Mo. App. 29, the court said: "We are, however, aware of no case which goes to the extent of holding that an attempted and executory collusive agreement, fully and unequivocally repudiated before the trial, and before any preparation for trial, and duly disclosed to the court upon the trial, is fatal to a decree for plaintiff."

It has been held that the effect of collusion is the same in a proceeding to annul a marriage as in an action of divorce; and that in such a proceeding it must appear to the satisfaction of the court that the parties have not acted collusively. Sickles v. Carson (1875) 26 N. J. Eq. 440; E. B. v. E. C. B. (1858) 28 Barb. (N. Y.) 299; Menzies v. Farnon (1909) 18 Ont. L. R. 174.

b. Vacation of decree.

It has been held that where it appears that there was collusion in obtaining a decree of divorce, the court will vacate the decree. Danforth v. Danforth (1883) 105 Ill. 603; Haverty v. Haverty (1886) 35 Kan. 438, 11 Pac. 364; Rosenfeld v. Rosenfeld (1896) 67 Mo. App. 29; McDonald v. McDonald (1913) 175 Mo. App. 513, 161 S. W. 850; Winder v. Winder (1910) 86 Neb. 495, 125 N. W. 1095; Singer v. Singer (1863) 41 Barb. (N. Y.) 139; McIntyre v. McIntyre (1894) 9 Misc. 252, 30 N. Y. Supp. 200; Baturin v. Baturin (1910) 20 Pa. Dist. R. 43.

But a decree of divorce, although procured by collusion of the parties, is not void, and neither of the guilty parties is entitled as a matter of right to have the decree set aside on that ground. Johnson v. Johnson (1913) 182 Ala. 376, 62 So. 706, wherein it was said that it seems, on the ground of public policy, to be the better rule to set aside a collusive decree, if the application is seasonably made in good faith, and not from any expected personal advantage.

In Danforth v. Danforth (1882) 105 Ill. 603, it appeared that a stipulation was entered into between the parties, providing for the granting of a decree of divorce, and that when the wife or her attorney should produce a copy of the decree, she should be paid a certain sum by her husband. In setting aside the decree, the court said: "The effect of this agreement must have been precisely the same as had appellant and appellee agreed that she would do nothing to prevent him from obtaining a divorce, and, if necessary,

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she would assist for the purpose. It is not the mere form of words, but it is the intent—the thing or purpose intended to be accomplished—that constitutes the agreement, when that can be determined from the instrument itself. Here the manifest intention was that complainant should obtain the divorce and appellant to receive the money. It is true an answer was filed, but no evidence was produced, notwithstanding appellant swears that facts existed that would, if proved, have prevented the decree that was obtained; yet the decree was obtained, as was expected and intended when the agreement was executed. There was not improper delay in entering the motion to set aside the decree. It was made at the same term, and whilst the court had control over all proceedings had at the term. The decree had not become an unalterable record. It, with the records of other proceedings of the term, was still in fieri, and under the control of the court to amend, change, or vacate it, as justice might require."

In Baturin v. Baturin (1910) 20 Pa. Dist. R. 43, the court set aside a decree of divorce for the reason that the parties had entered into an agreement before the granting of the decree, whereby the wife, in consideration of a certain sum, released her husband from the payment of alimony directed by the decree.

In Winder v. Winder (1910) 86 Neb. 495, 125 N. W. 1095, it appeared that both parties were desirous of a divorce, and that property settlements in anticipation thereof were made by the husband on the wife. It further appeared that these facts were concealed from the court when a decree of divorce was granted. The court vacated the decree when it learned of the facts.

In McDonald v. McDonald (1913) 175 Mo. App. 513, 161 S. W. 850, a decree of divorce was set aside, it appearing that material facts claimed by both parties to exist were suppressed, and that, but for the suppression by the husband of charges he otherwise would have made against his wife, he would have been unable to procure her signature to the answer, and would have been unable to proceed in the action without a contest.

Where the vacation of a decree of divorce, obtained by collusion, is sought by a participant in the fraud, the court will refuse to disturb the decree; especially where the decree has been acquiesced in for a considerable period of time, or where the opposing party has remarried, and children have been born of the second marriage. Johnson v. Johnson (1913) 182 Ala. 376, 62 So. 706; Hubbard v. Hubbard (1893) 19 Colo. 13, 34 Pac. 170; Simons v. Simons (1881) 47 Mich. 253, 10 N. W. 360; Carlisle v. Carlisle (1893) 96 Mich. 128, 55 N. W. 673; Nichols v. Nichols (1874) 25 N. J. Eq. 60; Singer v. Singer (1863) 41 Barb. (N. Y.) 139; Whittley v. Whittley (1908) 60 Misc. 201, 111 N. Y. Supp. 1078; Wiemer v. Wiemer (1911) 21 N. D. 371, 130 N. W. 1015; Newman v. Newman (1910) 27 Okla. 381, 112 Pac. 1007; Erdman v. Erdman (1914) 43 Okla. 172, 141 Pac. 965; Karren v. Karren (1902) 25 Utah, 87, 60 L.R.A. 294, 95 Am. St. Rep. 816, 69 Pac. 465; Robinson v. Robinson (1914) 77 Wash. 663, 51 L.R.A.(N.S.) 534, 138 Pac. 288.

Thus, in Simons v. Simons (1881) 47 Mich. 253, 10 N. W. 360, wherein it appeared that a wife had obtained a decree of divorce on sworn allegations that there was no collusion, and subsequently filed a bill to set aside the decree on the ground that it was collusively obtained, the court, in dismissing the subsequent bill, said: "Without this sworn allegation in her bill of complaint it would not have been entertained; and she having thereby given the court jurisdiction and permitted the case to proceed to a final decree, she cannot now be permitted to take advantage of her own wrong and show that there was collusion between herself and husband in that case. She was not misled or defrauded therein, but understood well what was being done, and that her husband consented. Indeed, the whole matter was simply a shameless

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bargain, and, whether right or wrong, she must now abide by it."

In Robinson v. Robinson (1914) 77 Wash. 663, 51 L.R.A.(N.S.) 534, 138 Pac. 288, the court refused to set aside a decree of divorce at the instance of a spouse who had testified falsely and suppressed material facts in the trial of the action.

In Hubbard v. Hubbard (1893) 19 Colo. 13, 34 Pac. 170, a former wife brought an action to have a decree of divorce vacated. The court, in refusing the relief sought, said: "It is apparent upon the face of the petition that plaintiff in error was in no way misled or deceived as to the nature of the original action. She was duly served with process of summons and a copy of the complaint, and had at her service able counsel to defend her interests. Thus advised and prepared she entered into a secret, collusive agreement with defendant in error, and for a promised consideration aided him by her silence to impose upon the court and procure a divorce. After the entry of the decree thus obtained she remained silent for more than one year, and only upon failure to realize the consideration promised for her shameless bargain did she apply for relief. She not only permitted the term at which the decree was rendered to pass, but also the six months additional allowed by statute for relief in certain instances, without advising the court of the fraud practised upon it and the law. To entitle her to relief had her petition been filed in apt time, it should have been made to appear affirmatively that she was then acting from good motives and not any expected personal advantage. It is apparent, however, from her petition, that she entertains no feelings of remorse for her base conduct, but is, on the contrary, actuated solely by a desire to obtain a money consideration for the fraud to which she was a party. Plaintiff, under these circumstances, is not in a position to demand favorable action from the court."

In Singer v. Singer (1863) 41 Barb. (N. Y.) 139, the court refused to set aside a decree of divorce, although it was collusively obtained, where it appeared that the decree had been acquiesced in for a period of several years, and the former wife had remarried. The court said: "If the motion was properly made, and in due season, the court would order any judgment of divorce obtained by collusion or fraud to be set aside; not from any regard to the parties concerned, but from motives of public policy. In such a case, however, it should be made apparent that the party so moving was acting from good motives, and not for any expected personal advantage. But where the judgment of divorce has been acquiesced in for the period of several years, and the plaintiff has again been married, some better reason than the mere gratification of personal feeling, or the desire to obtain a further sum of money from the plaintiff, should be made clearly to appear, before the court would be warranted in granting such an application. As I have already said, the ground on which such an order could be made would be one of public policy, but no such reason should suffice where, after the acquiescence of both the parties in the judgment for three years, an innocent person has become involved by marriage, and the opening of the judgment would involve her in distress, and perhaps disgrace. This reason alone would be sufficient to justify me in denying the motion, if there were no other reasons for doing so, and leaving the parties to the consequences of their own acts and agreements, after the long delay that has taken place." See to the same effect, Nichols v. Nichols (1874) 25 N. J. Eq. 60.

In Carlisle v. Carlisle (1893) 96 Mich. 128, 55 N. W. 673, a similar decision was rendered, it appearing that four years had elapsed since a collusive decree of divorce, and the plaintiff had remarried in the meantime.

In Johnson v. Johnson (1913) 182 Ala. 376, 62 So. 706, the court refused to disturb a collusive decree at the suit of a divorced wife. It appeared that it had been acquiesced in for nearly three years and the husband had died. The court said: "And now,

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after acquiescence for nearly three years, her present activity is confessedly due solely to her design to acquire the property of her husband, which would belong to her as widow, but not as divorcee."

In Whittley v. Whittley (1908) 60 Misc. 201, 111 N. Y. Supp. 1078, the court refused to set aside a decree of divorce collusively obtained where it appeared that the plaintiff had delayed bringing the action for five years, that the defendant had remarried and had issue by that marriage, and that her motive was to recover a sum of money which the defendant had failed to pay her under an illegal agreement.

In Karren v. Karren (1902) 25 Utah, 87, 60 L.R.A. 294, 95 Am. St. Rep. 815, 69 Pac. 465, the wife sought to vacate a decree of divorce obtained at the suit of the husband. She alleged, inter alia, that her husband represented to her that he was procuring the divorce because of the insistence of his parents, and in order to get the homestead conveyed to him by his father, and that he represented that, after the divorce was obtained, he would remarry her, and that, to enable him to procure the deed to the homestead, she refrained from appearing and defending the action. In denying the relief, the court said: "The plaintiff, when she gave her consent, must have known that the contemplated divorce could only be procured by a suppression of the facts and false testimony."

In Newman v. Newman (1910) 27 Okla. 381, 112 Pac. 1007, the plaintiff petitioned the court to set aside a decree of divorce, alleging in substance that, prior to the taking of testimony before the referee, the defendant, who was the plaintiff in the divorce action, with intent to defraud her, agreed, in consideration that she would offer no testimony before the referee and make no resistance to the suit, to pay her $500 alimony, which he did, and further agreed that after his father had conveyed to him certain property he would remarry her. A demurrer to the petition was overruled; but, in reversing it on appeal, the court said: "There is nothing in the petition which would justify this court in setting aside the decree of divorce on the ground of fraud. The petition so to do discloses the same to have been obtained as a result of collusion between the parties, and this court will leave them where it finds them." See to the same effect, Erdman v. Erdman (1914) 43 Okla. 172, 141 Pac. 965.

In Wiemer v. Wiemer (1911) 21 N. D. 371, 130 N. W. 1015, the court refused to disturb a decree of divorce for collusion, it appearing that a financial settlement was made on the wife before the decree was entered, and that she was not actuated by good motives in her effort to set aside the decree.

But in McDonald v. McDonald (1913) 175 Mo. App. 513, 161 S. W. 850, it was held that a wife was not precluded from attacking a collusive decree of divorce, although she had colluded in its consummation. The court said: "As between the public, which is a party to every divorce proceeding and is represented by the court, and the parties of record, the fact that the complaining party here was willing to or did collude in allowing the divorce to be granted furnishes no reason why the court, representing the state, should not set aside the decree because of fraud and collusion in a suit of the character of the one now under consideration."

In Greene v. Greene (1854) 2 Gray (Mass.) 361, 61 Am. Dec. 454, the court refused to set aside a decree of divorce though it appeared that the husband had colluded with third persons to obtain false testimony to aid him in fraudulently obtaining a decree. This decision, however, was questioned and practically overruled in Edson v. Edson (1867) 108 Mass. 590, 11 Am. Rep. 393. H. B.

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JOHN P. BUCKELEW, Appt.,
v.
BOARD OF CHOSEN FREEHOLDERS OF MIDDLESEX COUNTY.

New Jersey Court of Errors and Appeals—June 17, 1918.

(91 N. J. L. 517, 104 Atl. 308.)

County — liability for injury.

1. In the absence of a statute imposing liability, an action will not lie in behalf of an individual who has sustained a private injury by reason of the neglect of a public corporation to perform a public duty.

[*See note on this question beginning on page* 721.]

Same — public wrong — liability.

2. In the absence of a statute imposing liability, a public corporation, charged with the performance of a public duty, is not liable to an individual either for neglect to perform, or negligence in the performance of, such duty, whereby a public wrong has been done for which indictment will lie, although such individual has suffered special damage.

Same — notice — effect.

3. When a public corporation is not liable for private injury to an individual, previous notice to the municipal authorities of the condition which caused the injury will not operate to impose liability.

Same — passive wrong.

4. As the plaintiff's injury did not result from any active wrongdoing of the defendant, a public corporation, he cannot recover.

Headnotes by WALKER, Ch.

APPEAL by plaintiff from a judgment of the Supreme Court directing a nonsuit in an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **Edmund A. Hayes and Russell E. Watson**, for appellant:

The county of Middlesex is a municipal corporation, and is responsible to individuals suffering special damage, where the injury is the result of active wrongdoing chargeable to it.

Hart v. Union County, 57 N. J. L. 90, 29 Atl. 490; Kehoe v. Rutherford, 74 N. J. L. 659, 122 Am. St. Rep. 411, 65 Atl. 1046; Bailey v. Osborn, 80 N. J. L. 333, 78 Atl. 9, Ann. Cas. 1912A, 454.

Mr. **Frederick F. Richardson**, for appellee:

The neglect of a municipal corporation to perform, or its negligence in the performance of, a public duty imposed on it by law, such as the proper repair of roads, is a public wrong, to be remedied by indictment, and cannot constitute the basis of a civil action by an individual who has suffered particular damage by reason of such neglect.

Sussex County v. Strader, 18 N. J. L. 108, 35 Am. Dec. 530; Livermore v. Camden County, 29 N. J. L. 245; Pray v. Jersey City, 32 N. J. L. 394; Waters v. Newark, 56 N. J. L. 361, 28 Atl. 717; Bisbing v. Asbury Park, 80 N. J. L. 416, 33 L.R.A.(N.S.) 523, 78 Atl. 196; Hart v. Union County, 57 N. J. L. 90, 29 Atl. 490; Kehoe v. Rutherford, 74 N. J. L. 659, 122 Am. St. Rep. 411, 65 Atl. 1046; Dohrmann v. Hudson County, 84 N. J. L. 689, 87 Atl. 463; Jerolaman v. Belleville, 90 N. J. L. 206, 101 Atl. 244.

Walker, Ch., delivered the opinion of the court:

Plaintiff was injured on the night of February 1, 1915, as the result of an accident caused by an automobile, which he was driving, running into a hole in the road known as the Woodbridge and New Brunswick

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turnpike in Middlesex county, a county road.

The director of the board of chosen freeholders of Middlesex had been notified, about a month before the accident, of the condition of the highway at the point where it happened, and had received three notices of such condition during that month. Each rain caused a washout, and it was the practice of the board of freeholders to repair the holes thus made by filling them up with sand, which would be washed out by the next storm. The board of freeholders had been requested by a person living in the vicinity to erect a retaining wall to prevent these washouts. After the accident to the plaintiff, the highway, at the point of the accident, was cemented, after which the road remained firm, and there were no further washouts.

At the conclusion of plaintiff's case the court directed a nonsuit, to which plaintiff excepted. The contention of the plaintiff is that the conduct of the board of freeholders in repairing this road in the manner in which it did, so that a washout occurred with each successive rainstorm, and with knowledge that such washouts would occur, amounted to active wrongdoing. Unless the facts in the case at bar bring it within the authorities which hold municipal corporations liable for damages to those suffering injury from the active wrongdoing of their agents, the plaintiff cannot prevail, and the nonsuit was right.

In Livermore v. Camden County, 31 N. J. L. 507, Chief Justice Beasley, speaking for this court, said at page 508: "That an action will not lie in behalf of an individual who has sustained special damage by reason of the neglect of a public corporation to perform a public duty I consider the settled law of this state. This was the doctrine approved of by the supreme court, after much research and a careful consideration of the authorities, in the case of Strader v. Sussex County, 18 N. J. L. 108, 35 Am. Dec. 530, and the same principle was reaffirmed in the case of Cooley v. Essex County, 27 N. J. L. 415. These decisions, in my judgment, rest upon the solid foundations of ancient precedent and public policy.

County—liability for injury.

This doctrine has been repeatedly reaffirmed.

In Hart v. Union County, 57 N. J. L. 90, 29 Atl. 490, Mr. Justice Magie, afterwards chief justice and chancellor, speaking for the supreme court, remarked that it has been uniformly held by our courts that, in the absence of a statutory provision, a municipal corporation charged with the performance of a public duty is not liable to an individual for neglect to perform it, or negligence in the performance of such duty, whereby a public wrong has been done for which indictment will lie, although such individual has suffered special damage; and also said that Mr. Justice Garrison had collected all the cases in Waters v. Newark, 56 N. J. L. 361, 28 Atl. 717, in which it was held: "The neglect of a municipal corporation to perform, or its negligence in the performance of, a public duty imposed on it by law, is a public wrong, to be remedied by indictment, and cannot constitute the basis of a civil action by an individual who has suffered particular damage by reason of such neglect. In such a case the circumstance that an individual specially injured gave notice to the municipal authorities is of no avail, if the special injury was, in fact, part of an indictable offense."

Same—public wrong—liability.

And Mr. Justice Magie observed in Hart v. Union County, 57 N. J. L. at page 92, 29 Atl. 490: "The exemption of municipal corporations from liability to such actions has been put by our courts on the ground of ancient precedent and public policy. Livermore v. Camden County, 29 N. J. L. 245, s. c. 31 N. J. L. 507. That public inter-

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est is deemed to be conserved by this exemption from liability seems apparent from the fact that the legislature may at any time impose such liability on municipal corporations, and has failed to do so except in a few instances. The legislation giving to boards of chosen freeholders the right to acquire and maintain public highways, out of which the public duty charged in this count must arise, if at all, does not impose on such boards any liability to such actions."

In Jersey City v. Kiernan, 50 N. J. L. 246, 13 Atl. 170, it was held that the rule that when a public sewer breaks from faulty construction, and private property is injured thereby, an action will not lie; but if the city be notified of such break it then owes a duty to the individual injured, and for the breach of which an action will lie, but only when the break in the sewer occasions a private nuisance; for if a public nuisance be the result the only remedy is by indictment. In the case at bar the plaintiff suffered a private injury, but only as one of the public, for the nuisance was public, and as such was remediable by indictment.

The plaintiff appellant contends that the case at bar is within the doctrine of Hart v. Union County, supra; Kehoe v. Rutherford, 74 N. J. L. 659, 122 Am. St. Rep. 411, 65 Atl. 1046; and Bailey v. Osborn, 80 N. J. L. 333, 78 Atl. 9, Ann. Cas. 1912A, 454, and that these cases sustain his contention and right to recover. The doctrine of Hart v. Union County does not aid the plaintiff, but is an authority the other way, as above pointed out. Kehoe v. Rutherford, in this court, opinion by Mr. Justice Trenchard, is an authority of the same kind, for there the exemption of a municipality from actions by individuals suffering special damage from its neglect to perform, or its negligence in performing, public duties, was expressly recognized and reaffirmed, while it was held, on the particular facts of that case, that an action lay for the diversion of surface water by a municipality from the course it would otherwise take, and casting it in a body large enough to do substantial injury, on land where, but for an artificial drain, it would not go. The lands and property damaged were those of the plaintiff Kehoe; they were not public property in any sense, and the damage, consequently, was that suffered by the owner alone, dissociated from his membership in the general public.

In Bailey v. Osborn, after certain drainage work had been done by commissioners appointed under the statute, the defendants cleaned out a ditch that had been dug, and threw the refuse upon the plaintiff's land. Mr. Justice Swayze, speaking for this court (80 N. J. L. at page 334), observed that there was nothing to show that the borough of Atlantic Highlands had in any way acquired a right to throw refuse from a ditch upon the plaintiff's land; that the parties committing the trespass must answer in damages; and that a municipal corporation is liable for such misconduct is settled in this state, citing Hart v. Union County and Kehoe v. Rutherford, supra.

The highway in question was a public road, the duty of constructing and maintaining which is imposed upon the board of chosen freeholders; but there is no statute imposing upon the board liability for damages incident to the road falling out of repair, and that is this case. Not only the plaintiff, but everyone else using the highway, was liable to suffer the same injury at the same place by reason of the depression caused by the washout resulting from rain. It is true that a person living in the vicinity repeatedly notified the director of the board of freeholders of these washouts, and on at least one occasion requested that a retaining wall be placed there to prevent them. After the accident the road was actually repaired with cement in the

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washout area, and has not since given way; but those things do not operate to impose a liability, which can only be created by statute.

Same—notice—effect.

It is not suggested that the board of freeholders were required by law, statutory or otherwise, to repair the road with any particular kind of material; but even if the board were so required, and it were shown that other material was used, the plaintiff would have to go further and rest upon a statute which enacted that liability for damages would be visited upon the board for failure to repair with the given material, and admittedly there is no such statute. If the repairs were made with material which in and of itself would cause injury, a different question would doubtless be presented; but there is neither proof nor suggestion of anything of that kind in the case. Unless and until the legislature interferes, if it ever sees fit to do so, liability in the class of cases in which that under consideration is one will not attach to public corporations for the result of accidents growing out of a want of repair of public highways.

As the plaintiff's injury did not result from any active wrongdoing of the defendant corporation, he cannot recover. It follows that the nonsuit was right, and the judgment under review should therefore be affirmed, with costs.

Same—passive wrong.

ANNOTATION.

Responsibility of county for injury from defect in highway.

I. Scope, 721.
II. In the absence of statute, 721.
III. Under statute, 723.

I. Scope.

This note treats only the question whether or not a county is bound to respond at all for injuries due to the defective condition of a highway, and is not concerned with cases which, either by virtue of statute or in the absence of statute, assume that a county may be responsible, and consider the question of liability upon the merits and facts of the individual case.

The question of liability for injuries caused by or resulting from defective bridges and approaches thereto, being in a sense distinctive, has also been excluded.

II. In the absence of statute.

The authority is to the effect that, in the absence of statute imposing a liability, counties are not liable for injuries to travelers resulting from roads or highways being in a defective condition, a distinction in this respect generally being drawn between quasi corporations, such as counties, and actual corporations, such as cities and towns. For instance, this distinction between municipal corporations and counties was recognized in Madden v. Lancaster County (1894) 12 C. C. A. 566, 27 U. S. App. 528, 65 Fed. 188, wherein the court, after ruling that while cities that voluntarily accept charters from the state to govern themselves are municipal corporations proper, and generally liable for negligence in the care of streets, counties are but quasi corporations, with limited powers and liabilities, and, in the absence of statute, not liable for such negligence, said: "They [counties] exist only for the purpose of the general political government of the state. They are the agents and instrumentalities the state uses to perform its functions. All the powers with which they are intrusted are the powers of the state, and the duties imposed upon them are the duties of the state; and in as much as the sovereign power is not amenable to individuals for neglect in the discharge of public duty, and cannot be sued for such neglect without express permission from the state itself, so these quasi corporations, its agents, are not liable for such negligence, and no action for damages arising therefrom can be main-

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tained against any of them, in the absence of an express statute imposing the liability and permitting the action." And again, in El Paso County v. Bish (1893) 18 Colo. 474, 33 Pac. 184, in answering the contention that "no valid reason exists for exempting counties from liability for injuries resulting from defective highways and bridges, while holding cities and towns liable for such injuries," the court said: "A sufficient answer to the argument is to be found in the distinction existing between municipal corporations, created by the request and, under our Constitution, by the act of the citizens resident within the territorial limits thereof, for their local advantage and convenience, and counties, which are created by the legislature for the purpose of exercising a part of the political power of the state." Another reason advanced in this case was that cities are confined within small, compact limits, provided with officers authorized to receive notice and to act promptly in all emergencies; while it is more difficult, if not impossible, for counties, with their limited complement of officers and inadequate means, to guard against defects in the highways. And in the following additional cases, which fall within the scope of the present annotation, a distinction was drawn or recognized between municipal corporations and counties, based in substance on the grounds advanced in the preceding cases: Montgomery v. Ross (1916) 195 Ala. 362, 70 So. 634, 13 N. C. C. A. 505; Millwood v. De Kalb County (1899) 106 Ga. 743, 32 S. E. 577; Cones v. Benton County (1893) 137 Ind. 404, 37 N. E. 272; Soper v. Henry County (1868) 26 Iowa, 264; Snethen v. Harrison County (1915) 172 Iowa, 81, 152 N. W. 12; Watkins v. County Ct. (1888) 30 W. Va. 657, 5 S. E. 654.

More specifically, the rule is that, at common law, counties are not liable in a private action, for damages sustained by a person in consequence of failure to keep in repair the highways within their boundaries. Millwood v. De Kalb County (1899) 106 Ga. 743, 32 S. E. 577; Soper v. Henry County (1868) 26 Iowa, 264; Blue Grass Traction Co. v. Grover (1909) 135 Ky. 685, 135 Am. St. Rep. 498, 123 S. W. 264; Schneider v. Cahill (1910) — Ky. —, 27 L.R.A.(N.S.) 1009, 127 S. W. 143; Ockerman v. Woodward (1915) 165 Ky. 752, L.R.A.1916A, 1005, 178 S. W. 1100; Baltimore County v. Wilson (1903) 97 Md. 207, 54 Atl. 71, 56 Atl. 596; Wade v. Gray (1913) 104 Miss. 151, 43 L.R.A.(N.S.) 1046, 61 So. 168; Goes v. Gage County (1903) 67 Neb. 616, 93 N. W. 923; Franklin County v. Darst (1917) 96 Ohio St. 163, 117 N. E. 166; Whitney v. Hamilton County (1915) 21 Ohio C. C. N. S. 273, 4 Ohio App. 208; Templeton v. Linn County (1892) 22 Or. 313, 15 L.R.A. 730, 29 Pac. 795. And that, since there is no common-law obligation resting upon quasi corporations, such as counties, to repair highways, and as they are under no obligation to do so unless by force of statute, they of course, in the absence of a duty to maintain and repair, are not liable for defects, see Barnett v. Contra Costa County (1885) 67 Cal. 77, 7 Pac. 177. In fact, it seems to be well settled that a county is not liable for injuries caused by a defect in a highway, in the absence of a special statutory declaration of liability. The following cases so hold: Madden v. Lancaster County (1894) 12 C. C. A. 566, 27 U. S. App. 528, 65 Fed. 188; Montgomery v. Ross (1916) 195 Ala. 362, 70 So. 634, 13 N. C. C. A. 505; Millwood v. De Kalb County (1899) 106 Ga. 743, 32 S. E. 577; Hubbard v. Fulton County (1915) 144 Ga. 863, 87 S. E. 281, 12 N. C. C. A. 199; Cones v. Benton County (1893) 137 Ind. 404, 37 N. E. 272; Shrum v. Washington County (1895) 13 Ind. App. 585, 41 N. E. 349; Soper v. Henry County (1868) 26 Iowa, 264; Snethen v. Harrison County (1915) 172 Iowa, 81, 152 N. W. 12; Gibson v. Sioux County (1918) — Iowa, —, 168 N. W. 80; Sinkhorn v. Lexington, H. & P. Turnp. Co. (1901) 112 Ky. 205, 65 S. W. 356; Hart v. Union County (1894) 57 N. J. L. 90, 29 Atl. 490; BUCKELEW v. MIDDLESEX COUNTY (reported herewith) ante, 718; Templeton v. Beard (1912) 159 N. C. 63, 74 S. E. 735; Franklin Coun-

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ty v. Darst (1917) 96 Ohio St. 163, 117 N. E. 166; Whitney v. Hamilton County (1915) 21 Ohio C. C. N. S. 273, 4 Ohio App. 208; Templeton v. Linn County (1892) 22 Or. 313, 15 L.R.A. 730, 29 Pac. 795; Schroeder v. Multnomah County (1904) 45 Or. 92, 76 Pac. 772; Hill v. Laurens County (1890) 34 S. C. 141, 13 S. E. 318; Blum v. Richland County (1892) 38 S. C. 291, 17 S. E. 20; Clark v. Lincoln County (1889) 1 Wash. 518, 20 Pac. 576; Watkins v. County Ct. (1888) 30 W. Va. 657, 5 S. E. 654.

The reason most generally assigned for the rule that a county is not liable for injuries caused by a defective highway is, that it is a political division of the state, imposed upon the people merely for the purpose of exercising a part of the sovereign power of the state, and consequently, in the absence of a statute especially imposing liability, liable only to the extent the state itself would be. Millwood v. De Kalb County (1899) 106 Ga. 743, 32 S. E. 577; Cones v. Benton County (1893) 137 Ind. 404, 37 N. E. 272; Shrum v. Washington County (1893) 13 Ind. App. 585, 41 N. E. 349; Soper v. Henry County (1868) 26 Iowa, 264; Snethen v. Harrison County (1915) 172 Iowa, 81, 152 N. W. 12; Blue Grass Traction Co. v. Grover (1909) 135 Ky. 685, 135 Am. St. Rep. 498, 123 S. W. 264; Blum v. Richland County (1892) 38 S. C. 291, 17 S. E. 20; Clark v. Lincoln County (1889) 1 Wash. 518, 20 Pac. 576; Watkins v. County Ct. (1888) 30 W. Va. 657, 5 S. E. 654. In Montgomery v. Ross (1916) 195 Ala. 362, 70 So. 634, 13 N. C. C. A. 505, it was said: "The power and authority which the county exercises in reference to roads and bridges, in its character and nature, is governmental rather than corporate; and, upon principles of the common law, a county cannot be made answerable to private individuals for injury resulting from the failure to exercise the power in the manner most conducive to the public safety."

The rule that a county, in the absence of statutory imposition of liability, is not liable for injury caused by a defective highway, has been held to apply, whether the alleged cause of action arose from the negligent performance of duties which the county authorities were bound to perform, or from a negligent discharge of duties voluntarily assumed in the exercise of a discretion vested in them by law. Millwood v. De Kalb County (1899) 106 Ga. 743, 32 S. E. 577.

III. Under statute.

"There can be no question but that the county can be made liable for an injury directly caused through its negligently allowing defects to remain in a public road." Anne Arundel County v. Collison (1913) 122 Ind. 91, 89 Atl. 325. And see Blum v. Richland County (1892) 38 S. C. 291, 17 S. E. 20.

But the general rule is that a statute does not create a liability in cases of the character under consideration, unless it is express. See Barnett v. Contra Costa County (1885) 67 Cal. 77, 7 Pac. 177; Soper v. Henry County (1868) 26 Iowa, 264; and Snethen v. Harrison County (1915) 172 Iowa, 81, 152 N. W. 12. Applying the rule, it has been held in California that a statutory provision, making a county "responsible for providing and keeping passable and in good repair bridges and all public highways," does not create a liability in damages for a failure to so keep its highways; the theory being that, if the legislature had intended to create so decided a change in the liability of counties, it is presumed that it would have used more appropriate language. Barnett v. Contra Costa County (Cal.) supra. And in Kentucky a similar conclusion was reached in Sinkhorn v. Lexington, H. & P. Turnp. Co. (1901) 112 Ky. 205, 65 S. W. 356, where the statute provided that the named authorities should maintain and keep in repair the roads in question. And in the Iowa case of Snethen v. Harrison County (1915) 172 Iowa, 81, 152 N. W. 12, it was held that a road law, authorizing and requiring counties to establish county roads, etc., did not impose a liability for negligent performance of the work. So, in Schroeder v. Multnomah County (1904) 45 Or. 92, 76 Pac. 772, it was said that it is well settled that merely requiring a coun-

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ty to keep its roads and highways in repair, and giving it ample power to provide means with which to discharge the obligation, does not render it liable for an injury resulting from a defect in a road or highway.

However, it has been said that a statute by necessary implication may create a liability. See Millwood v. De Kalb County (1899) 106 Ga. 743, 32 S. E. 577; Hubbard v. Fulton County (1915) 144 Ga. 363, 87 S. E. 281, 12 N. C. C. A. 199; Cones v. Benton County (1893) 137 Ind. 404, 37 N. E. 272; Anne Arundel County v. Duckett (1864) 20 Md. 468, 83 Am. Dec. 557; Baltimore County v. Wilson (1903) 97 Md. 207, 54 Atl. 71, 56 Atl. 596; and Watkins v. County Ct. (1888) 30 W. Va. 657, 5 S. E. 654. Thus, in Anne Arundel County v. Duckett (1864) 20 Md. 468, 83 Am. Dec. 557, it was held that where county commissioners are incorporated and given "charge and control over the public roads," are authorized "to levy all needed taxes," and "to pay and discharge all claims on or against the county, which have been expressly or impliedly authorized by law," there is a concurrence of all the conditions necessary to constitute legal liability so that the commissioners can be held liable in their official capacity for injuries resulting from allowing a public road to be in bad repair, the court saying that the statute conferred imperative authority upon the commissioners, and that the words "power and authority" could be construed "duty and obligation." To the same effect are Calvert County v. Gibson (1872) 36 Md. 229; Harford County v. Hamilton (1883) 60 Md. 340, 45 Am. Rep. 739; Alleghany County v. Broadwaters (1888) 69 Md. 533, 16 Atl. 223, and Richardson v. Kent County (1913) 120 Md. 153, 87 Atl. 747. It will be noted that in these cases there was a specially corporated body which made it an actual corporation, the same as a city or town, and not merely a county or quasi corporation. On the other hand, however, in applying the rule that a statute may create a liability by implication, it has been held that mere statutory authority to a county to construct free gravel roads, and providing agencies and means for keeping such roads in repair through the direction and control of the board of county commissioners, does not create an implied liability for injuries sustained by reason of defects in the construction and repair of such roads. Cones v. Benton County (1893) 137 Ind. 404, 37 N. E. 272; Shrum v. Washington County (1895) 13 Ind. App. 585, 41 N. E. 349. So, in New Jersey, it has been held that N. J. Pamph. Laws 1889, p. 58, which authorizes counties to improve and maintain public roads, does not render them liable for injuries caused by failure to keep the same in proper repair, at least, in the absence of active wrongdoing. Hart v. Union County (1894) 57 N. J. L. 90, 29 Atl. 490. And see the reported case (BUCKELEW v. MIDDLESEX COUNTY, ante, 718).

But, in fact, the general rule seems to be that statutes imposing a liability on counties, being in derogation of the common law, are not to be extended beyond the plain meaning of their terms. It was so held in Franklin County v. Darst (1917) 96 Ohio St. 163, 117 N. E. 166; Whitney v. Hamilton County (1915) 21 Ohio C. C. N. S. 273, 4 Ohio App. 208, and Schroeder v. Multnomah County (1904) 45 Or. 92, 76 Pac. 772. In the Darst Case the court said that, in the interpretation of a statute seeking to impose a liability on a county in abrogation or modification of the common-law rule, "the statutory terms must clearly import such intention, and, if doubtful or ambiguous, should be resolved against its imposition."

A considerable number of jurisdictions have express statutes imposing liability upon counties for injury caused by defective highways.

For example, in Nebraska, Sess. Laws 1889, p. 77, Consol. Stat. 1891, § 1934, made counties liable for special damages caused by the insufficiency of, or their failure to keep in repair, highways which it was their duty to maintain, provided the action was brought within thirty days after damages were incurred. See Madden v. Lancaster County (1894) 12 C. C. A. 566, 27 U. S. App. 528, 65 Fed. 188,

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holding that the limitation of time within which the action may be brought does not render the statute unconstitutional.

And like provisions were enacted in Nebraska in 1889 (Laws 1889, chap. 7, § 4), and later were incorporated into Neb. Comp. Stat. 1901, chap. 78, § 117; Anno. Stat. § 6135; and Rev. Stat. 1913, § 2995. These provisions are effective except as to such counties as have adopted the Township Organization Act, under which liability for insufficient, or want of, repair of highways, is imposed upon the townships. See Goes v. Gage County (1903) 67 Neb. 616, 93 N. W. 923, and Swift v. Sarpy County (1918) — Neb. —, 167 N. W. 458. And Neb. Anno. Stat. 1911, § 6197, also expressly made a county liable in damages for injuries resulting from a failure to perform its duty to keep its highways in repair. See Beebe v. Scott's Bluff County (1912) 92 Neb. 501, 138 N. W. 737.

And a similar liability was created by Michigan Pub. Acts 1909, No. 283, chap. 4, §§ 19, 21, which in effect provide that county road commissioners shall improve, repair, and maintain county roads, and that the provisions of law governing liability of townships, cities, villages, and corporations for damages shall apply to counties adopting the county road system. See Ferguson v. Muskegon County (1914) 181 Mich. 335, 148 N. W. 212.

And in Ohio, by law enacted in 1894 (Gen. Code, § 2408), a liability was imposed on county commissioners in their official capacity for damages received by reason of their negligence or carelessness in not keeping any public, state, or county road in proper repair. See Whitney v. Hamilton County (1915) 21 Ohio C. C. N. S. 273, 4 Ohio App. 208, holding that the statute must be strictly construed in favor of the county officials.

So, in West Virginia, by Code 1887, chap. 43, § 53, any person injured in person or property by reason of a public road being out of repair could recover all damages sustained by him by reason thereof in an action against the county court. See Watkins v. County Ct. (1888) 30 W. Va. 657, 57 S. E. 654, and Phillips v. Ritchie County (1888) 31 W. Va. 477, 7 S. E. 427.

And in South Carolina, by virtue of a statute enacted in 1874, any person injured or damaged through a defect in the repair of a highway could recover his damages in an action against the county. See Acker v. Anderson County (1884) 20 S. C. 495; Chick v. Newberry & Union Counties (1887) 27 S. C. 419, 3 S. E. 787; Hill v. Laurens County (1890) 34 S. C. 141, 13 S. E. 318; and Blum v. Richland County (1892) 38 S. C. 291, 17 S. E. 20,—all of which quote Gen. Stat. § 1087; and Duncan v. Greenville County (1904) 71 S. C. 170, 50 S. E. 776, which quotes 1 S. C. Code of Laws, § 1347,—all of which apply these express statutory provisions.

And in Oregon, until repealed in 1887, it was provided by Code, § 347, that an action may be maintained against a county for an injury arising from some act or omission of such county, which statute created a liability for injuries from defects in highways. See Templeton v. Linn County (1892) 22 Or. 313, 15 L.R.A. 730, 29 Pac. 795, which held that the repeal of the statute did not violate a constitutional provision that every man shall have a remedy by due course of law for injury done him in person or property, although the statute was in force at the time the Constitution was adopted. But the Oregon law was again changed in the following year by the enactment of Laws 1893, p. 171, § 1 (practically re-enacted by Act 1903, p. 280, § 59, and L. O. L. § 6375), which in effect provided that any individual who is injured or damaged while lawfully and without negligence traveling on a public highway, in consequence of a defect in such highway, is entitled to recover compensatory damages. See Schroeder v. Multnomah County (1904) 45 Or. 92, 76 Pac. 772, and Buttle v. Douglas County (1917) 87 Or. 105, 168 Pac. 1180.

And in Ontario, by Rev. Stat. chap. 184, § 531, every road and highway, control of which is assumed by a county corporation, must be kept in

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repair by such corporation, which, it was declared, shall be civilly responsible for all damages sustained by any person by reason of a default. See Balzer v. Gosfield South Twp. (1889) 17 Ont. Rep. 700. And that the Ontario Highway Improvement Act renders a county liable for injuries resulting from a failure to repair a highway, see Ackersviller v. Perth County (1914) 32 Ont. L. Rep. 423, affirmed in (1915) 33 Ont. L. Rep. 598, and Bateman v. Middlesex County (1911) 24 Ont. L. Rep. 84, 19 Ont. Week. Rep. 442.

In Nebraska, by virtue of Rev. Stat. 1913, § 2995, adjoining counties, traversed by a public highway jointly constructed and maintained, are jointly and severally liable for damages to one injured by reason of the negligence of such counties in failing to keep the highway in a reasonably safe condition for travel. See Ewh v. Otoe County (1915) 98 Neb. 469, 153 N. W. 509. G. J. C.

COMMISSIONERS OF JOHNSTON COUNTY
v.
B. R. LACY, State Treasurer, Appt.

North Carolina Supreme Court—September 26, 1917.

(174 N. C. 141, 93 S. E. 482.)

Constitutional law — requiring a county bond for town debt — cost of highways.

1. The state cannot, in view of the constitutional provisions that no one shall be deprived of his property but by the law of the land, require a county to give bond for payment of interest on money loaned a township for improving a highway of an exclusively local nature.

[*See note on this question beginning on page* 746.]

Bond — to secure repayment of money for road — form.

2. The bond required by statute to be executed by the board of county commissioners, to secure payment to the state of interest on money loaned a township within the limits of the county for road improvements, is a county bond.

Constitutional law — lending county credit.

3. The legislature cannot, in view of the constitutional provision forbidding a county to lend its credit, require a county to give its bond for payment of interest on money loaned a township within its limits, to improve a highway of a purely local nature.

Statute — construction — constitutionality.

4. The principle that, when two constructions of a statute are permissible, that should be adopted which is in accord with the organic law, does not justify a departure from the plain and natural significance of the words employed, and which the meaning and purpose of the law clearly tend to confirm and support.

(Clark, Ch. J., dissents.)

APPEAL by defendant from a judgment of the Superior Court for Wake County in favor of plaintiffs in an action brought to compel defendant to turn over certain funds for a road improvement, pursuant to the provisions of a statute. *Reversed.*

Statement by **Hoke, J.**:

From the facts as presented, it appears that O'Neal township, in Johnston county, having decided by popular vote to apply to the state for a loan of $40,000 to establish and maintain a system of public roads in said township, pursuant to the provisions of chapter 6, Laws 1917, entitled, "An Act to Encour-

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age Road Building in North Carolina by State Aid," and the result having been duly certified to the board of commissioners of said county, that body passed a resolution to levy a special tax in said township at the approaching August meeting in 1917, to meet the obligations imposed by the statute, duly applied for said loan, and prepared and tendered to defendant, the state treasurer, the bond of the county in the sum of $40,000, promising to repay said loan and interest thereon at 5 per cent for forty-one years, payable semiannually, and to be computed at said rate on each instalment of said loan from the date same should be advanced. Said bond contained provision, also, "that, in default of prompt payment of said interest as it accrues, the said county of Johnston promises to pay the penalties prescribed by § 12, said chapter 6, and to observe and be bound by other provisions of the act."

Accompanying the offer of the bond was a request from the board of commissioners that the treasurer presently advance on said loan an instalment of $15,000, etc. The same facts are applicable in case of Selma township, in said county, except the amount voted and total loan applied for was $50,000. The defendant, the state treasurer, declined to accept the bond and advance the money, contending: "(1) That the act was invalid. (2) That the bond tendered was not in proper form. (3) That the proposed tax levy was invalid," etc.

The court, being of opinion with the plaintiff, so entered its judgment, and directed that the state treasurer pay the commissioners the amounts asked for in accordance with the provisions of the law. Defendant thereupon excepted and appealed.

Messrs. James S. Manning, Attorney General, and R. H. Sykes, Assistant Attorney General, for appellant:

All the taxes to be levied under this act must be upon the property alone. Moose v. Alexander County, 172 N. C. 419, 90 S. E. 441, Ann. Cas. 1917E, 1183; Jones v. Person County, 107 N. C. 248, 12 S. E. 69.

Mr. F. H. Brooks for appellees.

Hoke, J., delivered the opinion of the court:

Chapter 6, Laws 1917, is a statute designed to enable the state to lend its aid to road building and maintenance in the counties, townships, and road districts properly applying therefor, under its provisions. In general terms, the scheme and purpose is that the state shall procure the money by issuing its coupon bonds, payable forty-one years from date, bearing interest at 4 per cent and advance the money so obtained to localities applying for the same, on receiving the bond of the respective counties, promising to pay interest on the amount loaned at 5 per cent for said period of forty-one years; this 1 per cent difference in the amount of interest to constitute a road fund to be invested by the state treasurer, the purpose and estimate being that, if continuously and favorably invested for that period, there should be realized an amount sufficient to relieve both the state, counties, and townships from ultimate liability. The loans are to be advanced by the state treasurer in amounts as required, not to exceed the sum of $400,000 semiannually, and this is to continue for the period of forty-one years, involving, if carried out to its full intent and meaning, the incurring of a state indebtedness approximating $32,000,000. Provision is also made that if, at any time, there is any default in payment of the 5 per cent interest, as stipulated, the bond shall be put in suit for the amounts due and penalties attached, and if, at the end of forty-one years, the treasurer has not been enabled to realize the full amount then due, according to the scheme of loans and investment, the respective counties shall make good the deficit in proportion to the amount of the proceeds which such counties may have received. After thus provid-

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ing for obtaining the money in case of counties, the statute, in § 19, establishes a limit on the amount a county may borrow, the same not to exceed, in connection with other county indebtedness, 6 per cent of the assessed valuation of the property in the county, and in § 20 it is enacted as follows: "Townships and road districts created by special act of the general assembly may avail themselves of the benefits of this act upon compliance with the requirements herein set out: Provided, that the bond or undertaking filed with the state treasurer shall be executed by the board or boards of county commissioners of the county or counties in which such township or road district is situated. It shall be the duty of such commissioners to levy and the duty of the sheriff to collect such special taxes and make payment thereof in the manner and under the penalty set out in § 18 of this act."

The application for a loan in this case, being in behalf of two of the townships of Johnston county, comes more directly within the meaning of this § 20, and, considering the same in reference to the terms employed and the other provisions of the statute and the general meaning and purpose of the law, it is clear, we think, that, whether the loan be applied for by county, township, or road district, the bond that is tendered shall be that of the county. No other than a county bond is anywhere mentioned in the statute, and, in § 11, the statute itself says: "Said bond shall obligate said county to pay to the state treasurer the 5 per cent interest per annum on the amount thus loaned."

And when the provisions of the statute were extended to townships and road districts, and the provision formally required that the "bond tendered should be executed by the board of county commissioners," it plainly meant the bond that had been previously referred to, and which the board of county commissioners would naturally give,—the bond of their county. This is evidently the interpretation put upon it by the advocates of the measure, as well as the actors in the present suit, for in this transaction, said to be brought as a test case, though the election and application are by two of its townships, the bonds are obligations of Johnston county. To hold otherwise would not only be a departure from the plain meaning of the language used, but would leave the proviso without substantial significance. And there is, too, controlling reason for such a requirement. A perusal of the statute will disclose that, while the bonds of the state are to be positive obligations so far as the creditor or holder is concerned, it was clearly contemplated that the state should be ultimately reimbursed for its outlay, and, to this end, proper security should be furnished. A county bond, in all probability, would do this; whereas, the bond of a township or road district, without regard to its size or ability to pay, and on which no limit in its indebtedness had been placed by the statute, except that it could only have its proportionate part in case the aggregate amount applied for should exceed semiannual loan of $400,000, might and often would fall far short of affording adequate security. It was for this reason, no doubt, that the proviso was inserted, and both its language and the facts and circumstances show that the framers of the statute intended that, in all cases, a county bond should be required.

Bond—to secure repayment of money for road—form.

This being the correct and, to our minds, the only permissible construction of this § 20, we are of opinion that the legislature is without power to require a county to give its binding obligation to pay the interest on a loan at 5 per cent for forty-one years, on the application and vote of a township or road district for the construction and maintenance

Constitutional law—requiring a county bond for town debt—cost of highways.

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of the roads of the township or district. On the facts here presented, an obligation of this kind imports a liability to taxation, and, in case of a subordinate municipal corporation, it means that payment can be coerced, and that all the taxable values therein may be made available on the claim. As said in People ex rel. Detroit & H. R. Co. v. Salem Twp. 20 Mich. 452, 4 Am. Rep. 400: "The exercise by a municipal corporation of the power to pledge its credit is an incipient step in the exercise of the power of taxation; and unless the object to be promoted be such as may be provided for by taxation, the power to make the pledge does not exist, and the legislature cannot confer it."

And a decision in this court at the last term in Bennett v. Rockingham County, 173 N. C. 625, 92 S. E. 603, is in full recognition of the principle. True, both the levy and apportionment of taxation are very largely in the legislative discretion, and, when the power exists, it is very rarely, if ever, that courts are allowed to interfere.

It is true, also, that a state or county may, as a rule, lend its aid or expend its money in the building and maintenance of public roads anywhere within its borders, when it is being done for the public benefit, or as a part of a state or county system, but, in this instance, the improvement is entirely localized. The roads of the different townships or districts are set apart, and a scheme is entered upon by which they can be planned, constructed, and improved entirely under township governance, and without reference either to state or county benefit; and, when this occurs, the principle is presented that it is not within the legislative power to tax one community or local taxing district for the exclusive benefit of another, a principle which has been directly approved in several recent decisions of this court, and is one very generally accepted. Keith v. Lockhart, 171 N. C. 451, 88 S. E. 640, Ann. Cas. 1918D, 916; Faison v. Duplin County, 171 N. C. 411, 88 S. E. 761; Harper v. New Hanover County, 133 N. C. 106, 45 S. E. 526; Prince George County v. Laurel, 70 Md. 443, 3 L.R.A. 528, 17 Atl. 388; Manistee Lumber Co. v. Springfield Twp. 92 Mich. 277, 52 N. W. 468; People ex rel. Detroit & H. R. Co. v. Salem Twp. supra, citing Lexington v. McQuillan, 9 Dana, 513, 35 Am. Dec. 159; Cooley, Taxn. 3d ed. p. 420; Judson, Taxn. § 254; 37 Cyc. p. 749. In this citation from Cooley on Taxation, speaking to the question, the author says: "The taxing district, through which the tax is to be apportioned, must be the district which is to be benefited by its collection and expenditure. The district for the apportionment of a state tax is the state, for a county tax the county, and so on. Subordinate districts may be created for convenience, but the principle is general, and in all subordinate districts the rule must be the same."

In 37 Cyc., supra, the principle is stated as follows: "The constitutional requirement of uniformity in taxation forbids the imposition of a tax on one municipality or part of the state for the purpose of benefiting or raising money for another."

It is a fundamental principle in the law of taxation that taxes may only be levied for public purposes and for the benefit of the public on whom they are imposed, and to lay these burdens upon one district for benefits appertaining solely to another is in clear violation of established principles of right, and contrary to the express provisions of our Constitution, article 1, § 17, which forbids that any person shall be "disseised of his freehold, liberties or privileges, . . . or in any manner deprived of his life, liberty, or property, but by the law of the land."

On the facts presented by this record, the position is further emphasized and conclusively determined in this jurisdiction by reason of another constitutional provision

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(art. 7, § 7), which provides that no county, city, town, or other municipal corporation shall contract a debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any officers of the same, except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein. True, we have held, in several well-considered decisions, that debts incurred and moneys expended for the building and maintenance of public roads are a necessary expense, within the meaning of this section; but neither the decisions nor the principle on which they rest will sanction or approve the position that the road system of a township or road district, under its local control and constituted for its special benefit, is a necessary county expense, or that a vote of such township or district, made for such purpose, can establish a county obligation importing liability to taxation on the entire county, and to which the voters of the county have not given their consent, and are nowhere permitted and required to give it. On the contrary, it appears from a bare perusal of the relevant facts that such a localized road system can in no sense be considered a necessary county expense, and a statute, or that portion of it, certainly, which undertakes to establish a county liability for its construction and upkeep, is in clear violation of this wholesome constitutional provision, and must be declared invalid.

Same—lending county credit.

Recognizing the conclusive force of this position, it is contended for the applicants that the objectionable proviso in § 20 shall be so construed as to require only the execution of the township bond, and that the county commissioners, for the purpose, shall be held to act only as the representatives or agents of the townships and road districts for which the loan is made, and we are referred to various decisions of the court where the commissioners have so acted—among others, Edwards v. Com. 170 N. C. 448, 87 S. E. 346; McCracken v. Greensboro, N. & A. R. Co. 168 N. C. 62, 84 S. E. 30; Jones v. Person County, 107 N. C. 248, 12 S. E. 69. To give the statute such an interpretation, as we have endeavored to show, would be contrary to the natural import of the language, and to add to the proviso in question words that it does not now contain; and, on the reason of the thing, we deem it well to note again that it is clear, from a perusal of the entire statute, that the state is to be ultimately reimbursed for this outlay, and to that end adequate security is to be furnished for the loans. A county bond, whose boundaries are known and taxpaying ability recognized and established, would very likely do this; whereas a township bond, where size and boundaries are now entirely under control of the commissioners (Revisal, chap. 23, § 1318, subsec. 7), might and no doubt frequently would prove totally insufficient.

In view of these conditions, the only protection the state could prudently rely on was to require, as it has done, that for township and district loans a county bond shall be given; and the authorities cited tend rather to confirm than to antagonize this construction of the law, for, in every one we have examined, the statute construed as plaintiffs contend contained the provision in express terms that, in giving the bond, it should be the "obligation of the township," or that "the commissioners should act only as agents of the township,"—terms that do not appear in the statute before us.

The principle is further urged upon our attention that, when two constructions of a statute are permissible, the courts, in favor of upholding legislation, should adopt that which is in accord with the organic law; but such principle does not justify a departure from the plain

Statute—construction—constitutionality.

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and natural significance of the words employed, and which the meaning and purpose of the law clearly tend to confirm and support. As said in 6 R. C. L. § 77: "There are, however, limitations to the application of these principles, and the courts are not at liberty, in order to sustain a statute, to give to it a forced construction . . . which does not appear in the language enacted by the legislature."

We are not inadvertent to the fact that, thus far, a tax only on the township applying for the loan is contemplated by the county commissioners; but, as we have seen, the bond to be given fixes an obligation on the county for the entire sum, and the statute provides that, if there be default in paying the 5 per cent interest for thirty days, the entire amount due and all penalties shall "at once become due and payable," and enforced by action. And, as we have said in former decisions: "It is no answer to this position that, in the particular case before us, no harm is likely to occur, or that the power is being exercised in a benevolent manner; for, when a statute is being squared to the requirement of constitutional provision, it is what the law authorizes, and not what is being presently done under it, that furnishes the proper test of validity."

Applying these principles, and for the reasons stated, we are of opinion that § 20 of this statute is unconstitutional and void, and that the application for these present loans, which are entirely dependent upon it, was properly refused by the state treasurer. What effect the invalidity of this section may have upon the remaining provisions of the statute, and whether the general principles which forbid that, on the facts of this record, the cost for building and upkeep of a local road system for a township or road district be fixed upon a county, will operate to prevent a state from incurring a large bonded indebtedness in aid of road building in the different counties, are questions of gravest import, which we do not now determine. They are not presented in the record, and we do not consider it proper to decide them by anticipation. Speaking to this course, the Supreme Court of the United States in Baker v. Grice, 169 U. S. 284, 42 L. ed. 748, 18 Sup. Ct. Rep. 323, said: "It is a matter of common occurrence—indeed, it is almost the undeviating rule of the courts, both state and Federal—not to decide constitutional questions until the necessity for such decision arises in the record before the court. This court has followed that practice from the foundation of the government."

And in Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400: "Such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy between individuals."

And in Liverpool, N. Y. & P. S. S. Co. v. Emigration Comrs. 113 U. S. 33, 28 L. ed. 899, 5 Sup. Ct. Rep. 352: "It [the court] has no jurisdiction to pronounce any statute, either of a state or of the United States, void because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies."

In accord with these precedents and in full recognition of their fitness, we purposely refrain from determining the questions suggested, and confine our decision to the controversy actually presented in the record, and dependent, as stated, on the validity of § 20 of the statute.

The suggestion that the state extends its aid in offering educational advantages to the people throughout its territory, and that it is at times made effective in certain designated localities, to our minds is not apposite to the question decided in this appeal, and not helpful to its proper solution. That is recognized and dealt with as a state-wide system, under the control of general

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state officers, made imperative by special constitutional provision, and while aid is at times extended to certain localities, where need is pressing, and through the agency of local officials, they are acting, as stated, in promotion of the general system, and are in fact and truth performing official duties to that end.

There is error, and this will be certified to the court below, and that the action be dismissed.

Reversed.

Walker, J., concurring in result:

I cannot agree that § 20, chapter 6, of the Public Laws of 1917, requires that, where the people of a township, or road district, vote in favor of a loan for road construction and maintenance, the bond shall be issued and tendered by the county as its independent obligation, and that it thereby becomes liable to the state thereon, and must look to the township or road district which applied for the loan, for reimbursement in case of any loss by it. It appears to me to have been intended that the bond should be issued by the county, in behalf of the township or road district to be benefited, as has been done in similar cases mentioned in the dissenting opinion of the chief justice, and others might be added to them. This is the usual and customary method adopted in such cases; and the method held by the majority to be that which was contemplated by the legislature is not the usual one, but, I believe, the solitary instance in which the county has been made to assume solely and independently the obligation of a township or road district, where the entire benefit would accrue to the latter. It is contrary to the spirit, if not the letter, of our Constitution, and also is in violation of every principle of justice and equity, that one should reap the whole benefit, and another be made to pay for it. The statute should be very clear, therefore, before we adopt such a construction of it, and bring about such a result. I agree with the majority that such a law would be unconstitutional and invalid, and we should follow the rule of interpretation that, even where the language is of doubtful meaning, we may call in aid of a proper construction the fact that the statute will be void if a certain meaning is given to it, while it will be valid if it receives another construction. Of course, we cannot force a construction for the purpose of sustaining its validity by avoiding any conflict of its provisions with those of the Constitution; but in this case I do not think we are driven to any such necessity, as the language of the statute will well warrant the construction that the obligation of the county will extend no further than the assumption of the debt or liability of the township, for and in its behalf only, and not as a separate obligation of its own. But if the bond to be issued, where a township or district applies for the loan, is that of the beneficiary alone, and not of the county, which acts merely as an agent in its behalf, it seems to me that, even in such a case, the bond may be void upon grounds not necessary to be now stated, nor until so grave and serious a question is directly and squarely presented, and necessary to be decided. I do not say that a statute cannot be so framed as to avoid the constitutional difficulty, but I will decline to express an opinion upon the subject until a concrete case is presented which requires me to do so. It is sufficient for the present to say that, as the majority are of the opinion, and have so decided, that the bond to be issued and exchanged for a state bond of like amount, at a lower rate of interest, is that of the county, and as that decision must stand until it is changed, and must be taken as correct, unless reversed, my view is that, in this aspect of the case, the statute, at least so far as it affects this particular suit, is invalid, being in direct conflict with the Constitution.

It is a principle which has been deeply rooted in our jurisprudence

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that no man's property shall be taken from him and devoted to private purposes, or uses, except upon fair and just compensation. The great opinion of Chief Justice Ruffin, in Raleigh & G. R. Co. v. Davis, 19 N. C. (2 Dev. & B. L.) 451, established this proposition long ago beyond any question, and it never has been doubted since, but frequently affirmed, in as many, perhaps, as a hundred cases. We have recently said, in Lloyd v. Vanable, 168 N. C. at page 535, 84 S. E. 857, citing State v. Haynie, 169 N. C. 277, 84 S. E. 385: "The right to a just compensation for property taken by the sovereign, or by any corporation possessing a part of the sovereign power, springs from our sense of natural justice, and 'is a principle so salutary to the citizen, and concerns so nearly the character of the state,' that this court, in Raleigh & G. R. Co. v. Davis, 19 N. C. (2 Dev. & B. L.) at page 460, declared it to be an essential restriction upon the exercise of the power of eminent domain, even though no express provision may be found in our Constitution authorizing it or requiring it to be made, when property is so taken for a public purpose; and we have adhered to this rule ever since."

And Chief Justice Ruffin said in Raleigh & G. R. Co. v. Davis, 19 N. C. (2 Dev. & B. L.) at pages 455, 456: "The right of the public to private property, to the extent that the use of it is needful and advantageous to the public, must, we think, be universally acknowledged. Writers upon the laws of nature and nations treat it as a right inherent in society. . . . When the use is in truth a public one, when it is of a nature calculated to promote the general welfare, or is necessary to the common convenience, and the public is, in fact, to have the enjoyment of the property or of an easement in it, it cannot be denied that the power to have things before appropriated to individuals again dedicated to the service of the state is a power useful and necessary to every body politic. Theoretical writers have derived it from the original and full property, in its highest sense, existing in the community or sovereignty of the state before any division among individuals, and they deem the right of resumption for common use to be tacitly reserved by implied agreement. Thus derived, the power has the sanction of compact, which probably furnishes the motive for tracing it to this source as constituting a sanction founded in morals and nature. But, practically, it is immaterial whether the right be supposed to have been impliedly reserved because it ought not to be granted, or because it is a portion of the national sovereignty which is inalienable by the government, or whether the right is created by the public necessity, which at the time calls for its exercise; its existence in every state is indispensable and incontestable."

He then gives different examples of the exercise of this power, in this way: "A familiar instance of the exercise of the power is the levying of revenue, by taking from the citizen, from time to time, such portions of his property as may be requisite to conduct the government, instituted by the nation. Another instance, essentially of the same character, is that of devoting private property to public use as a highway. A nation could not exist, without these powers, and they involve also the welfare of each citizen individually. An associated people cannot be conceived without avenues of intercommunication, and therefore the public must have the right to make them without or against the consent of individuals."

He then further argues in favor of compensation, as an inherent or a sacred right, to be implied from several provisions of our Constitution, as follows: "The principle is, however, so salutary to the citizen, and concerns so nearly the character of the state, that it may well be urged that it must be consecrated by its adoption in some part of the

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free Constitution of this state. We should be reluctant to pronounce judicially our inability to find it in that instrument. If it be not incorporated therein, the omission must be attributed to the belief of the founders of the government that the legislature would never perpetrate so flagrant an act of gross oppression, or that it would not be tolerated by the people, but be redressed by the next representatives chosen."

The clause of the Constitution that "no freeman shall be disseised of his freehold, or deprived of his life, liberty or property, but by the law of the land," seems to have impressed him with the belief that it was intended in general terms, it is true, to protect the citizen from the taking of his property, either directly, by the exercise of the power of eminent domain, or indirectly, by the exercise of the power of taxation, without just compensation, for he also says that the "clause in question is restrictive of the right of the public to the use of private property, and impliedly forbids it, without compensation," though not so obviously as other considerations. "Under the guaranty of this article, it has been held, and in our opinion properly held, that private property is protected from the arbitrary power of transferring it from one person to another," is another clear and emphatic declaration in favor of the citizen and the enjoyment of his property, without fear of having to surrender it, or any part of it, and receiving no just equivalent for the loss he thereby sustains. I could not cite a stronger or more conclusive authority to show that it is a well-recognized principle in our jurisprudence that no citizen can be made to give up what he has for another's exclusive benefit, and not even for the most important public purposes, without receiving a just compensation for it. But the question has been absolutely and forever settled by more recent decisions of this court. Harper v. New Hanover County, 133 N. C. at page 106, 45 S. E. 526; Faison v. Duplin County, 171 N. C. 411, 88 S. E. 761; Keith v. Lockhart, 171 N. C. 451, 88 S. E. 640, Ann. Cas. 1918D, 916. And the cases in the other jurisdictions, and the text-writers, support this position very strongly, and almost, if not quite, unanimously. The Harper Case is sufficiently illustrative of the rule, and has been affirmed in numerous cases. There it is said, quoting two of the headnotes, which accurately report the principle:

"2. Act March 6, 1903 (Pub. Laws 1903, p. 947, chap. 554), if regarded as an act authorizing the imposition of special assessments, is invalid, because it authorizes assessments on the real estate of the entire county, including the real estate of the township withdrawn from the benefits of the Stock Law, and which would receive no benefits from the fences erected by the commissioners."

"4. Code 1883, § 2824, providing that for the purpose of building Stock Law fences the county commissioners may levy a special assessment on all taxable real estate 'within the county, township, or district which may adopt the Stock Law,' does not authorize the imposition of an assessment on the real estate of a township withdrawn from the benefit of the Stock Law by express legislative enactment, for the purpose of raising money to replace the money withdrawn from the general fund to pay the expenses of fences erected by the commissioners."

This righteous principle has been approved by every authority known of, because it is the one that contains the essence of honesty and fairness, and the very germ of the moral law, and especially that of the Golden Rule. If we adopt any other principle, it would lead to intolerable wrong and gross oppression. All the judges now on this bench concurred in this principle of justice as stated in that case, the chief justice and the writer of this opinion in the case itself, and all

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that it decided, and the other members of the court in subsequent cases, by citing that decision and approving it without a dissenting or doubting word. I believe in a strict adherence to those principles which are, or should be, the basis of all laws, without exception, whether they come to us from the body of the common law or the statutes enacted to adjust that great system of jurisprudence to present conditions, or to supplement it by such new provisions as will round it out so that it may be adapted to modern requirements. Any man having a just conception of the rights of his neighbor, using that word in its broadest sense, must accept this doctrine as applicable to any phase of human life, for our laws are founded upon the Decalogue; not that every case can be exactly decided according to what is there enjoined, but we can never safely depart from this short but great declaration of *moral* principles, without founding the law upon the sand, instead of upon the eternal rock of justice and equity. Do not exact from your neighbor what you would most unwillingly give up to him. It is, therefore, manifestly right that our law should have declared that nothing shall be taken from the citizen, whether in the form of seizure directly for public uses, or indirectly by way of taxation, unless he is fairly paid for it, and that is the reason why every man is so deeply jealous of his property rights, for he rebels against an act of injustice. It is an innate principle and easily finds its expression in every Constitution, and generally in every statute, where any invasion of the citizen's property is attempted. The legislature never attempts, except in rare instances, to take from him that for which it does not pay, or for which it does not provide for payment. It cannot resist the united voice of man in a cry for justice and fair play.

So I say that the legislature had no power to declare that the people of the county of Johnston, in this case, should be made to pay for that for which they do not receive, and cannot receive, any benefit. A contrary doctrine would lead to the gravest wrong and imposition, and would put a weapon in the hands of the legislature by which to crush and even to destroy the citizen. We know that the legislature would not consciously or advisedly use it; but that is not the question, which is one of conceding the existence of the power itself. Our system of government was built upon no such foundation. It was intended to stand forever (and we all confidently hope it will), and not to fall by its own iniquities and the weight of its own wrongs against the people. It is just because I firmly believe, and have a confident hope, in the perpetuity of our institutions, that I give expression to these views, so essential to make that belief and that hope assured facts.

Referring once again to the authorities, my clear belief is that the very recent decision of this court (Faison v. Duplin County, 171 N. C. 411, 88 S. E. 761), which was approved by all of us, is decisive of this case. It presented the very question we have here to consider, and none of us *then* doubted, but all *unreservedly* agreed, that taxation of the many for the *sole* benefit of the few was not only unjust, but unconstitutional, and wholly in conflict with our sense of fairness and right. This has been the constant and unchanging view of this court, whenever the question has been presented to us for decision, and I hope it always will be, for whenever we reverse this wholesome doctrine, it will open the gates to a flood of intolerably harsh legislation. The constitutional principle of uniformity, as all the authorities say, forbids the taxation of the many for the sole benefit of the few, or the taxation of the few for the sole benefit of the many. In whatever form this odious system appears, it is wrong, unjust, and burdensome, and opposed to

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every just principle of law and of the Constitution. It must cease, or we can never redeem the promise which, by our compact, we adopted with the sanction of the people; they were assured that this shall be a government founded upon the right, and not one of injustice and oppression. Freedom and security of the weak against the strong and mighty can never exist under any other principle of government.

It appears to me that there is absolutely no analogy between the aid of this state to one township, and that to its great *public* highways, such as the North Carolina Railroad, the Wilmington & Weldon Railroad, and the other great arteries of commerce within our borders, extending across our entire domain, and permeating nearly every section by their lateral branches. These are surely and essentially public highways of the first class, beneficial to the general public, and the very foundation of our hopes for the enlargement and development of our industries of all kinds. They affect the general public in a very material way, and their beneficial effect in promoting the general convenience and welfare and in contributing to the general prosperity cannot reasonably be doubted. It was on this ground that the subscription of the state to their stock was upheld by this court. But here we have the whole county paying for the construction of a neighborhood road within the confines of a single township, and saddling its obligation to pay for this local benefit upon the other sections of the county, which derive no benefit from it. I would not utter one single word against road building in this state. Nothing contributes to the convenience, comfort, and prosperity of the people more than good roads; and, if I entertained any doubt as to the validity of any statute providing for them, it would quickly be resolved in their favor. In many respects they are of greater benefit to the state and her people than even railroads are; but we must not surrender a great principle of right and justice to a single cause, however deserving it may be, lest the concession, once yielded and established, may be recorded as a precedent, and thereby many evils may creep into the state. Better to do right all the time and tread upon the beaten way. It is safe and sound doctrine, and has averted many misfortunes to those who would pursue the other course. A precedent, as Lord Disraeli once so wisely said, embalms a principle, the product of wisdom and experience, and we do well when we follow it, at least as long as it is right. We must pursue this sane policy, even against attack from every side, for it must be remembered that sometimes it is much easier to be critical than to be correct. Jones v. Madison County, 137 N. C. 579, 50 S. E. 291, has no application to this case. There the legislature merely required the county to pay its own legitimate debt. The other cases relied on by plaintiffs are no more in point.

My conclusion is that, if it was intended by this statute that the county should issue its own bond for the debt, the proper obligation of the township, which this court now decides to be the case, the legislature had no power, under the Constitution, to require it of the county, and that in this respect the legislation is void and of no effect. What the legislature may do within its rightful power, and how far it may go without exceeding it, are questions not now before us. I believe that my conclusion is sustained, not only by the cases decided by this court, which I have cited, but also by many decisions in other jurisdictions and the text-writers, which it is not necessary to collate, as our own cases are quite sufficient as authorities.

There is more difficulty in dealing with the larger question involved in the defense, that the entire statute is invalid, and I forbear to discuss it, as I cannot foreshadow in what particular form it

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will be presented, if it ever comes before us, nor upon what special facts. It is much too big a question to be anticipated by me alone, and as the majority have deemed it wise to pretermit any reference to it, I will follow their example and also be silent, though I am not sure that, in a certain phase of the case, we would not be justified in giving expression to our opinion in regard to it. But, as I have said, it is better, perhaps, to wait until we are required to decide it, before doing so, owing to its great importance and the far-reaching consequences of such a decision one way or another. This induces me to withhold my opinion. We all will hail with gladness the day when a great system of highways will penetrate every section of the state, reaching to every city, town, and hamlet, or easily accessible therefrom, producing a larger measure of social and commercial intercourse among our people, and thereby bringing them into closer communion, with a better and ever-increasing understanding of each other and of their common interest, resulting, at last, in a united endeavor to co-ordinate their efforts in behalf of the general welfare and prosperity, so that every citizen may ultimately and fully enjoy the blessings of our free institutions, under our Constitution and laws. This will all come to us, we hope, some time, and we should strive without ceasing to hasten the day of its coming. But we should not begin this great work of internal improvement, except in accordance with the Constitution and the sanction of the law. It may be that this act, in other respects, has such a sanction, and, if not, the voters will soon have, if they see fit to take advantage of it, an opportunity to declare their supreme will concerning it.

Clark, Ch. J., dissenting:

The public policy of the state is vested in the discretion of the legislature, except where the lawmaking body is expressly restricted by some provision of the state or Federal Constitution. The public policy of the state as regards education and public roads is a matter of the closest interest to the people, for upon their development depend the progress and the prosperity of our people.

Up to within less than 100 years the public policy of our state left education solely in the hands of the parents, with the result that the great body of the people were uneducated, and the state suffered accordingly. When the system of public schools was inaugurated, there was strong opposition by those who claimed that such system was socialistic, and compelled the well-to-do to pay for the education of the children of the poor. This argument, now antiquated and entirely discredited, was effective for many decades in halting the system within the narrowest possible limits. It is only in the last few years, and after a systematic education of public sentiment by broad, progressive leaders, that a more adequate system of public education has set the state on the high road of progress.

Under our system of public roads, copied from the English common law, they were worked by the conscription of labor; hence, mostly by the landless, who had no wheels to roll over the roads, while those whose lands were benefited by the roads were largely exempt from working them, either by being residents of the towns, or very often, above the conscript age. This system, known as "corvées" in France, was one of the potent causes of the great revolution in that country. It was not only a thoroughly unjust system, but a most ineffective one, for, the laborers feeling the injustice of being forced to work roads in which they had no personal interest, the roads in England and in France and in this country were a clog upon travel and transportation. The "mud tax" was largely in excess of any benefit accruing to landowners and the property interests

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from their nonpayment of taxes for road building. State v. Covington, 125 N. C. 644, 34 S. E. 272. When public sentiment was awakened to the injustice and inefficiency of this system, gradually we began to authorize counties and townships to work their roads by taxation, or partly by taxation, as they saw fit, and this was held to be a matter entirely for the legislature. State v. Sharp, 125 N. C. 631, 635, 74 Am. St. Rep. 663, 34 S. E. 264.

The state has aided also in the building of a state highway, and received some assistance in this measure from the United States government; the intention being to build such highway from Beaufort to Ducktown, with lateral branches to be built gradually by the state, counties, or townships. It being seen at once that this system would take a long time for development, there was finally proposed for public consideration this measure, by which the most remote counties and most remote townships, even the poorest and those which have always received less benefit from state aid in any way, should have the same opportunity to construct efficient highways as the counties and townships near the large towns and in the wealthier sections. This measure, which was adopted as chapter 6 by the legislature of 1917, has been for many years thoroughly discussed and considered by the people of the entire state, and has recommended itself by its affording equal opportunities to every section of the state, however remote. This bill, after thorough discussion before the people, was presented to the legislature of 1911, passed the house by an overwhelming vote, but was defeated by a small majority in the senate. After the fullest discussion for another two years, and a thorough debate in the legislature in 1913, it passed the house by a unanimous vote, and was again defeated in the senate by a very narrow margin. It was again fully discussed for four years before the people, and in the general assembly of 1917 it passed the house with only two dissenting votes and the senate with only one dissent.

A measure of such wide public interest, setting forth a state policy of prime importance to every section, having thus been discussed for years, having three times received an almost unanimous vote in the house, and defeated by close margins twice in the senate, and having been passed at the last session with only one dissent in that body, must be taken as expressing the will of a self-governing people, and the almost unanimous opinion of the lawmaking department of the government, that its enactment was within their constitutional powers. It should not, therefore, be set aside, unless its unconstitutionality is clear "beyond all reasonable doubt," as the United States Supreme Court held is essential before the court can assume to hold any act unconstitutional. Ogden v. Saunders, 12 Wheat. 213, 6 L. ed. 606, and hundreds of other cases cited in 6 R. C. L. in notes to §§ 81–86, 98–116. In Atkin v. Kansas, 191 U. S. 223, 48 L. ed. 148, 24 Sup. Ct. Rep. 128, it is said, by Harlan J.: "The public interests imperatively demand that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution."

It can hardly be said that a measure which has been so long discussed and which has received the approval of the people of this state, evinced by the votes of their representatives, for three sessions of the general assembly, and which is deemed constitutional by a minority of this court, is unconstitutional "beyond question" and "beyond a reasonable doubt." In fact, there is no line to be found in our Constitution which authorizes the court to hold an act of the legislature unconstitutional, any more than there is any authority in the legislature

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to hold a decision of the court unconstitutional. Neither department has supremacy over the other. The intention of the Constitution was that the legislature should obey the Constitution, and, if it did not, the authority to review its action is not given to the courts, but rests with the people in the election of a new legislature. In a majority of the states they have made this more expeditious by the adoption of the initiative and referendum, which requires, upon a proper petition, any statute to be submitted to the people immediately for approval or disapproval.

A measure of such wide and general importance is entitled to be considered before it is condemned. It does not appropriate, as has been suggested, $32,000,000. It is true that the plan provided for issuing state bonds at 4 per cent, and receiving in exchange from each county receiving a loan from the state, for itself or its townships, a bond bearing 5 per cent interest, is based on the calculation that the difference of 1 per cent, properly handled, will pay off the whole indebtedness at the end of forty-one years, without costing the state or counties anything on the principal. But this does not require that the act shall be in force forty-one years, or shall cease after that date. It provides that "not more than $400,000 shall be issued each six months." The next legislature, or any succeeding legislature, can repeal the act, leaving outstanding only the bonds that have been issued up to that date, and the act does not necessarily stop at the end of forty-one years, but can continue indefinitely, if it proves satisfactory to the people of the state. It proposes to create a state-wide system of modern public roads, without costing the state a cent and costing the counties 5 per cent interest, and no principal to repay.

The county issues no bonds to go on the market, but merely gives to the state its certificate of indebtedness for the amount loaned to the county for itself, or for one or more of its townships, if the people have so voted, for building good roads, and the county is to collect from the whole county, if the county has voted for the loan, or from the township or townships which have voted for such loans from the state, 5 per cent on the loan annually, and pay this over to the state, exactly according to the same plan by which for years the state has loaned money to the township or other local board to build schoolhouses, for which loan the county has collected out of the township, or locality, and remitted the money to the state board of education.

The passage of this bill has been petitioned for by Farmers' Unions, Chambers of Commerce, Good Roads Associations, and many others, for years. If it operates as its friends and the legislature contemplate, the people will be benefited by the immediate spending therein of the money loaned to the counties and townships. The dwellers in the rural districts will be relieved from the bad roads which are now the heaviest incubus upon agriculture in the state. The farmers will be relieved of the isolation which is the greatest drawback to rural life. The state will achieve a state-wide system of modern public roads, extending without exception to every township and county, as they successively adopt the measure; the townships and counties will have the good roads they desire in a short time, by the payment of 5 per cent annual interest on the money borrowed for forty-one years, a moderate rental for the roads; and at the end of that time there will be no principal to pay, either by the state, county, or township, as the investment of the difference between the 5 per cent paid by the counties and townships and the 4 per cent paid by the state on its bonds will, in a sinking fund, amount to enough to pay off the state bonds, which will then return to the counties their bonds to be canceled.

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The secretary of state has already issued license to 50,000 automobiles in the state. With the successful operation of this bill, the number will soon be doubled, and besides motors will be used by farmers, instead of wagons, to carry their farm products to the towns or the nearest railroad station. It is a safe calculation that, if this carefully considered action of the general assembly is not set aside by this court, the increase in farm values and in farm products will, in each township or county adopting this system, far overpay the 5 per cent annual interest which is all that they will be called upon to pay. The same system has been successfully operated by Great Britain to remove the age-long grievance in Ireland of great feudal estates and absentee landlordism. Being able to sell her bonds bearing 2 per cent interest, England thus raised a large sum with which it brought up the vast landed estates in Ireland, which it took over by purchase or condemnation, and, cutting them up into small holdings, sold them to the former tenants at the same price per acre, adding a sum in money to each to furnish the farm, taking from the tenants their notes, bearing 5 per cent interest. The difference between the 2 per cent and the 5 per cent in the course of a few years, at compound interest, paid off the purchase money for the lands and the money loaned, and the government canceled the notes, giving the tenants fee-simple deeds, and all this not costing the taxpayers a penny, and costing the tenants less than the rent would have been. The proposition here adopted by our legislature proposes to abolish the age-long grievance of bad roads and isolation without costing the state a dollar, and at an expense to the counties and townships of 5 per cent interest on the cost for forty-one years. The bonds for the principal, both those given by the state and those given by the counties, are then to be canceled out of the sinking fund.

We already have a statute by which the state loans out of the treasury annually a certain sum of money, aggregating now over $600,000, at the rate of 5 per cent interest, for the purpose of building schoolhouses. These loans are made on long time, with annual instalments, and have assisted in building hundreds of schoolhouses in North Carolina, and the state has never lost a dollar in its numerous transactions with the local school boards. The county boards of education sign a bond in the name of the county to whose local or township board the money is loaned, and the indebtedness thus becomes a county responsibility in precisely the same manner that is proposed in regard to loans to townships for good roads in this bill.

This "Road Law" now before the court applies to good roads exactly the same proposition. The state proposes in effect to lend for the benefit of any township or county that will vote to tax itself for the purpose of building roads, thereby evincing their progressiveness and public spirit, certain sums of money, receiving therefor bonds (just as from local school boards) bearing 5 per cent interest, but not to exceed in the aggregate $400,000 each six months, and the state is to raise the sum thus loaned by the sale of its own 4 per cent bonds. This latter is a detail which does not concern the counties and townships voting to build the roads. As to them it is simply a loan of money by the state—just as to the local school board—and the state will raise the money by the sale of its bonds, which it has a right to do, for the statute was passed for a necessary purpose, with three readings in each house, with the ayes and noes recorded on the journal, as required by Const. art. 2, § 14. The Constitution (art. 5, § 4) authorizes this appropriation, since the state bonds have been at par. The state does not, by this act, "give or lend the credit of the state in aid

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of any person, association, or corporation."

The counties and townships are simply agencies of the state government. The legislature can create, change, or abolish counties at will. It has abolished fourteen counties, and it abolished two others, which it subsequently recreated, and has increased the number of counties to 100. It created the townships in 1868, and since then, under a general statute, has authorized the county commissioners to make others, and the legislature also has created several townships, so that at present there are 1,055 townships in the state. Therefore, in putting money in the hands of the counties and townships to build roads, the state is merely putting its money in the hands of its own agents. In Atkin v. Kansas, 191 U. S. 220, 48 L. ed. 148, 24 Sup. Ct. Rep. 124, it is said: "Such corporations are the creatures, mere political subdivisions, of the state for the purpose of exercising a part of its powers. . . . They are, in every essential sense, only auxiliaries of the state for the purposes of local government. They may be created, or, having been created, their powers may be restricted or enlarged, or altogether withdrawn, at the will of the legislature"—citing many cases, among others quoting from Williams v. Eggleston, 170 U. S. 310, 42 L. ed. 1047, 18 Sup. Ct. Rep. 619, as follows: "A municipal corporation is, so far as its purely municipal relations are concerned, simply an agency of the state for conducting the affairs of government, and, as such, it is subject to the control of the legislature."

The court further said, quoting from Clinton v. Cedar Rapids & M. River R. Co. 24 Iowa, 475, with approval: "Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control."

The court added that the legislature could, if it saw fit, abolish any and all of the municipal corporations of the state in one act, saying: "We know of no limitation on this right so far as the corporations themselves are concerned. They are, so to phrase it, the mere tenants at will of the legislature."

The legislature, therefore, when it advances money for a township to build public roads, at the request of the people of the township, as evinced by a vote of its people (which is not necessary to its validity, Kinston v. Security Trust Co. 169 N. C. 207, 85 S. E. 399; for it is a necessary expense, Hargrave v. Davidson County, 168 N. C. 626, 84 S. E. 1044), can place the money in the hands of the county to be used for such township, requiring the county, as one of its agents, to execute a certificate of indebtedness for the amount loaned to its subagent, the township, by the state, and require the county, through its officers, to collect the tax annually from such township to pay the 5 per cent to the state. This process of loaning the money to the township or other local board, and requiring the county to give its note to the state for such sum, and to collect and transmit the taxes from the township or locality, has been in force since 1903, and has been approved by this court. Brown, J., in Casey v. Dare County, 168 N. C. 285, 84 S. E. 268.

It has long been the policy of the state to give its aid to any local betterment which it has seen fit. It has never been doubted that the legislature could create at the cost of the entire state a local public road, or a canal, of benefit to a restricted area, or a railroad whose benefits were more or less local, or establish any other local enterprise for the public benefit, in its judgment. Long ago the state thus authorized and aided the Clubfoot & Harlowe canal, of almost purely local benefit; the Hyde County canal; the Dismal Swamp canal; also constructed the Quaker road, in

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Jones county, the Pender county highway, the Hickory Nut Gap road, and other local public roads. It has also built, at the state's expense in part, a railroad from Weldon to Wilmington, passing through six counties (now eight, of small interest to the remainder of the 100 counties of the state, which has become, however, of more general importance by reason of the subsequent connections. It also largely built the Raleigh & Gaston Railroad, passing through five counties, the Wilmington, Charlotte, & Rutherfordton Railroad, the North Carolina Railroad, the Western, the Western North Carolina Railroad, and several others. All these enterprises were more or less of local benefit, and of almost infinitesimal benefit to large sections in other parts of the state. These canals, public roads, and railroads were built by virtue of the sovereignty of the state, and were paid for in cash out of the state treasury; the money being raised by taxation, or by the sale of state bonds, as the legislature deemed best. It has never been doubted that the state could build a highway in any one of our 100 counties, or in any one of the 1,055 townships, and pay for it out of the state treasury. Whether the money in the treasury was raised by taxation or by the sale of state bonds, whether it was donated or a loan, or an investment by the state, rested with the general assembly. Frequently, the state has issued its own bonds, and received in exchange the bonds of the company or of the city or county contributing to build the road. This was done in building the Raleigh & Augusta Railroad, the Taylorsville Railroad (sometimes known as the "Junebug" Railroad), and other railroads and turnpikes. All these matters were in the judgment of the self-governing people of this state, as expressed by the action of the law-making body,—our general assembly.

The Road Law now before the court is a carefully devised measure, to give every township and every county that is willing to vote a tax upon itself the same benefit that every school district has obtained by voting an additional tax; but in as much as for building roads a larger sum is needed in the first instance with only a small annual appropriation for interest, and the credit of the townships and counties might not be sufficient to float their bonds at par at a low rate of interest, the state offers to loan the money for the amount each township or county votes, at 5 per cent, and proposes to raise the money for that purpose by selling its own bonds at 4 per cent, with the calculation that the 1 per cent difference in interest, properly invested for forty-one years, will result in returning the entire sum thus loaned to the state treasury; the state in the meantime being benefited by the construction of a state-wide system of public roads in every township and in every county in the state. To avoid a scramble as to what townships and counties shall be first benefited, it is left to them to make the move, and thus select themselves. The result will be that the most progressive and wide-awake townships and counties, those who most feel the need of the good-roads system, will be the first to profit by this beneficent movement. It will not be left, as in the past, for those communities which have the most influence in the legislature to obtain priority in the state aid thus afforded. Successively each county and township will come in, in the order they themselves create, making a completed state-wide road system.

It is suggested that, not denying that the measure is valid, and without passing upon that question, which is of vast importance to the state at large and of the deepest interest to the public welfare, the court (leaving that question undecided) can hold against those claiming aid in these two cases upon the ground that these plaintiffs, in both cases, are claiming under a township election, and that the legislature

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could not authorize a county to give its bonds to the state for a road improvement in a township. Section 20 of the act before us provides: "Townships, and road districts created by special act of the general assembly, may avail themselves of the benefits of this act *upon compliance with the requirements herein set out:* Provided, that the bond or undertaking filed with the state treasurer shall be executed by the board or boards of county commissioners of the county or counties in which such township or road district is situated. It shall be the duty of such commissioners to levy and the duty of the sheriff to collect *such special taxes* and make payment thereof *in the manner* and under the penalty set out in § 18 of this act."

It is apparent that under this section it was intended that the counties in which these townships lay were to give their bonds as agents for the township, as has been done in very many instances where townships have voted appropriations for railroads, or other public or quasi public purposes, as in Jones v. Person County, 107 N. C. 240, 12 S. E. 69; McCracken v. Greensboro, N. & A. R. Co. 168 N. C. 62, 84 S. E. 30 (Alamance), and in numerous other cases. The last lines of this section prescribe after providing that "the bond or undertaking filed with the state treasurer shall be executed by the board or boards of county commissioners of the county or counties in which such township or road district is situated" (evidently including cases in which a road district might lie in two or more counties): It shall be the duty of such commissioners to levy and the duty of the sheriff to collect *such special taxes* and make payment thereof in the manner and under the penalty set out in § 18 of this act."

This places beyond question the intention of the legislature that the county commissioners are to collect the taxes out of the township or road district to remit to the state treasury, and that where the road district is in two or more counties the commissioners of each county shall collect from that part of the district in their respective counties. As it is provided that no county, township, or road district shall receive a loan amounting to more than 6 per cent of the assessed value of the property when added to the other bonded indebtedness thereof, there is no danger of the county not collecting 5 per cent annually on that amount from any township or road district.

An exactly analogous provision has long been in force as to building Stock Law fences (Revisal, § 1685), which provides that the county commissioners may levy a special assessment on all taxable real estate "within the county, township, or district which may adopt the Stock Law." This act has been often held constitutional, and that it does not violate the provision as to uniformity, and "does not authorize the imposition of an assessment on real estate outside of the district." Harper v. New Hanover County, 133 N. C. 110, 45 S. E. 526. It would seem clear that the language of § 20 of this act contemplates that the certificate of indebtedness given by the county commissioners for money loaned by the state to build roads in a township or road district is to be signed by the commissioners as agents for such township or road district, from which it is expressly provided that they shall collect such taxes and remit to the state treasurer.

However, a matter of this importance should not go off on such a technicality. Taking it that the act requires the county commissioners to sign the certificate and make the entire county responsible, as there is the further provision that the county commissioners shall collect such taxes from the township or road district, as in the case of the Stock Law for townships or districts, there is nothing inequitable. But, even if the county commissioners did not exercise such power,

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there is nothing in the Constitution which forbids the legislature to require the county certificate of indebtedness, since the county commissioners have it in their power to collect from the localities. Edwards v. Greene County, 170 N. C. 448, 87 S. E. 346, by Hoke, J. The county of its own motion can appropriate money to build roads in any one township in the county, at its discretion. Patterson v. Swain County, 170 N. C. 503, 87 S. E. 317 (Brown, J.); Edwards v. Greene County, supra. A township whose roads are thus worked by the county can be required to levy a tax to pay for the same, even without a vote, as roads are a public necessity. If so, when the state loans money to be used for building roads in a township, there is no reason the state shall not look to the county, if the legislature so orders, to reimburse the state, providing, as this act does, that the county shall collect the taxes from the township to reimburse itself. Both county and township are agencies of the state government, and this is not a matter forbidden by the Constitution, but purely a method of administration, expressed through the legislature by the people of the state. A case exactly in point is Moss v. Tazewell County, 112 Va. 878, 72 S. E. 945. If the United States government can, as it does, make appropriations out of the funds of the whole Union to make an improvement in a river, a creek, or a harbor, or the state can, as it does, appropriate from the treasury, out of the money of the whole state, to build a local public road or a canal, for a district or township, certainly the legislature can require a county (if it had so chosen) to become responsible for a loan to build a road in one of its townships, especially when § 20 prescribes that the amount to repay it shall be collected by the township officials out of the property of that township.

The system of counties issuing bonds to work the roads in their townships and collecting out of each township the interest and principal as they fall due has often been followed, and a state-wide act to that purport was enacted, Laws 1913, chap. 122, recognized and amended. Laws 1917, chap. 207. If the present act is unconstitutional, the Act of 1913, chap. 122, and all the bonds issued under that and similar acts are rendered invalid, which will be a public calamity.

In the matter of loans by the state to aid in building schoolhouses, it is provided that such loans to any locality shall be evidenced by the note of the county board, and that the county board shall deduct the amount of the annual payment from the district or township receiving the loan. Revisal, §§ 4053-4056. This system has worked well for the last fourteen years, and its legality has never been questioned. In Jones v. Madison County, 137 N. C. 598, 50 S. E. 291 (Hoke, J.), the court held that the legislature could pass an act to require a county to issue bonds for indebtedness incurred for necessary expenses. Roads are a necessary expense, and when a township has thus voted to incur indebtedness for that purpose, and the state has agreed to loan the money, there is no reason why the legislature should not take the obligation of the county (if that is what § 20 of this act means), leaving to the county to collect through its own officers the annual interest from the township, in the meantime executing its own bond to the state for the amount thus loaned to the county, for the benefit of that township. This case, Jones v. Madison County, supra, reversed a former decision on rehearing, and was therefore fully considered.

In Jones v. Stokes County, 143 N. C. 60, 55 S. E. 427, it was held that, where certain townships, by extra taxation, procured the building through their territory of a railroad, the legislature has the power to direct the county commissioners to expend exclusively in those townships the county taxes derived from such railroad property in such townships,

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and that there is no constitutional requirement that the tax rate shall be the same everywhere. It varies in the different counties, and may vary in different townships, parts of townships, districts, towns, and cities in the same county, for they are all legislative creations, mere governmental agencies, subject to be changed, abolished, or divided and controlled, at the will of the general assembly, especially at the control of the legislature since the amendment (§ 14) art. 7. The uniformity of taxation required by the Constitution means a uniform rate for the same object. It does not mean that there shall be the same rate of taxation throughout the state, or throughout a county, or even throughout a township, for there are objects of taxation in some townships, districts and counties, for which tax is not laid in others. Jones v. Stokes County, supra.

The will of the people has been fully gathered and clearly expressed in the passage of this act. It is a matter that closely affects the right of the people to govern themselves. It touches the interest of every section of the state. Heretofore, state appropriations for canals, for public roads and highways, and in the building of railroads, have largely been procured in the interest of the influential and wealthier sections of the state. This act gives to the people of any township or county, however remote or poor it may be, the same opportunity to vote taxation upon themselves, for the benefit of procuring public roads, as is given to wealthier and more influential sections. It gives to the farmers and residents of remote townships and counties the same benefit of using the state credit in exchange for their own as is given to the larger counties and cities; it gives to the denizens of the mountain coves the same opportunity of obtaining good roads that is vouchsafed to the owners of rich river bottoms, and of valuable suburban lands near the cities. It is a case of "equal opportunity to all, without favor to any."

The cases quoted, that one community should not be made to pay the debt of another, have no application. The township is a part of the county. Besides, the county of Johnston does not propose to pay the tax for building the roads in Selma township. The Johnston county commissioners could take the county money for that purpose. They are judges of what roads shall be worked with the county money. Pactolus Twp. v. Pitt County, 169 N. C. 548, 86 S. E. 520. The legislature could, as it does, loan money to Johnston county (which is simply a state agency) to be used, in this instance, exclusively in building roads for Selma township, if that township votes taxes to pay interest on the loan, and the general assembly can require the county of Johnston, as such state agency, to execute its bond to the state for this money, since through its county officers Johnston county will collect the money out of the property of Selma township. The county and the township are alike state agents, and, if the legislature sees fit to adopt this method, it is within the discretion of the lawmaking body.

The judge below (Devin) has properly, in my judgment, sustained both in letter and spirit the enactment by the general assembly of this most just, beneficent, and progressive measure, which was adopted only after the fullest consideration by the people of the state and their representatives.

Petition for rehearing denied.

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ANNOTATION.

Constitutionality of statutory provisions as to political corporations or divisions which shall bear cost of establishing or maintaining highways.

I. Introductory, 746.
II. In general, 746.
III. Taxing city for county or town road, 751.
IV. Taxing county for town road, 755.
V. Taxing state for road in political subdivision, 757.
VI. Changing apportionment by subsequent statute, 758.

I. Introductory.

This note is limited to a discussion of the cases wherein the constitutionality of a statute providing for the establishment and maintenance of a highway was attacked because of the particular political divisions on which the burden of constructing and maintaining the highway was cast, or because of the proportion in which they were required to bear the cost. Cases involving the constitutionality of a highway statute as affected by the title of the act, or by the violation of other constitutional provisions, are excluded, as are cases involving the distribution of the proceeds of a highway tax among various taxing districts or political divisions, unless the authority of the legislature to levy or authorize the levy of such a tax on a particular subdivision was brought into question.

II. In general.

The legislature, in the exercise of the power of providing for the construction and maintenance of public highways, may enact laws apportioning the cost on such political subdivisions as it may see fit. State ex rel. Bulkeley v. Williams (1896) 68 Conn. 131, 48 L.R.A. 465, 35 Atl. 24, 421, affirmed in (1898) 170 U. S. 304, 42 L. ed. 1047, 18 Sup. Ct. Rep. 617; Gilson v. Rush County (1891) 128 Ind. 65, 11 L.R.A. 835, 27 N. E. 235; State ex rel. Hendricks v. Marion County (1908) 170 Ind. 595, 85 N. E. 513; State ex rel. Atty. Gen. v. Shawnee County (1882) 28 Kan. 431; Hill v. Johnson County (1910) 82 Kan. 813, 109 Pac. 163; Stevenson v. Shawnee County (1916) 98 Kan. 671, 159 Pac. 5, on rehearing (1916) 98 Kan. 704, 159 Pac. 8; Hingham & Q. Bridge & Turnp. Corp. v. Norfolk County (1863) 6 Allen (Mass.) 353; Salem Turnp. & C. Bridge Corp. v. Essex County (1868) 100 Mass. 282; Scituate v. Weymouth (1871) 108 Mass. 128; Embee v. Kansas City & L. Boulevard Road Dist. (1914) 257 Mo. 593, 166 S. W. 282; People ex rel. McLean v. Flagg (1871) 46 N. Y. 401; Bowles v. State (1881) 37 Ohio St. 35; Mahanoy Twp. v. Comry (1883) 103 Pa. 362; Meehan v. Shields (1910) 57 Wash. 617, 107 Pac. 835; Lewis County v. Hays (1860) 1 Wash. Terr. 110; Jensen v. Polk County (1879) 47 Wis. 298, 2 N. W. 320.

In Scituate v. Weymouth (1871) 108 Mass. 128, it was said: "It is too well settled to be disputed that it is within the constitutional power of the legislature to make laws for the construction, support, and maintenance of roads and bridges, and for the distribution among the counties and towns of the burdens of maintaining them; and this power may be exercised by the legislature, in its discretion, either by general or special laws."

In Com. v. Newburyport (1869) 103 Mass. 129, wherein a statute, imposing the expense of the construction and maintenance of a bridge between a city and a town on the two, in such proportion as the commissioners should deem just, was held to be constitutional, the court stated the rule as follows: "Although the general law provides for the maintenance of all roads and bridges, by imposing the duty upon each town to support those that are within its limits, yet the legislature may undoubtedly, by general provisions or by special statute, modify this general rule, in particular cases, in order to make the distribū-

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tion of the burden more equal than it might otherwise prove to be in its operation. This it does by authorizing or requiring the county to assume a part of the expense of certain roads or bridges; thus indirectly imposing upon all other towns in the county a part of the burden which, by the general rule, would fall upon the town within which the road or bridge was situate; or by authorizing a part of such expense to be imposed upon particular towns near to or benefited by such road or bridge."

In State ex rel. Hendricks v. Marion County (1908) 170 **Ind.** 595, 85 N. E. 513, it was said: "Highways are the arteries of the state, and the state has never surrendered her right to direct, by legislation, the manner and agencies through which they are created, maintained, and vacated."

In Embree v. Kansas City & L. Boulevard Road Dist. (1914) 257 **Mo.** 593, 166 S. W. 282, it was insisted that because a statute providing for the establishment and maintenance of roads arbitrarily divided the road district into three beneficial zones, and assessed the lands in each at a different percentage without giving the property owners notice thereof and an opportunity to be heard thereon, it deprived them of their property without due process of law. The court said: "In answer to that contention it is sufficient to state that said division of the road district into zones, and the fixing of the percentage of benefits to the lands in each, are legislative acts, which cannot be questioned upon the ground of want of notice to the property owners. The reason for this rule is that the authority to create benefit districts and the percentage of the benefits to be assessed rest solely with the legislature." To the same effect, see Stepp v. Kansas City & L. Boulevard Road Dist. (1914) 257 **Mo.** 624, 166 S. W. 291; Klein v. Kingshighway Road Dist. (1914) 257 **Mo.** 625, 166 S. W. 291.

In the exercise of its taxing power, the legislature may create taxing districts for highway purposes, without regard to the boundaries of counties, townships, or municipalities. State ex rel. Hendricks v. Marion County (**Ind.**) supra.

In Bowles v. State (1881) 37 **Ohio** St. 35, the constitutionality of a statute authorizing the assessment of all property, both real and personal, within a given taxing or road district, to pay for a free turnpike road, was involved. Answering the contention that the legislature had no power to create a taxing district without regard to the political or municipal subdivisions of the state, the court said: "A sufficient answer to the objection is that the power exercised is a legislative one, and there is no express or implied limitation upon the power found in the Constitution. That the power is not expressly inhibited is clear, and we are persuaded that there is no implication against it, from the fact that it has always been exercised without challenge in divers ways for the purpose of promoting local advantages, not only in the exercise of the power of local assessments, where the burden of local improvements has been placed upon property specially benefited, and in proportion to the benefits, but by general taxation upon local districts other than municipal or political subdivisions. Noticeably, special taxing districts have been created for the purpose of supporting and maintaining schools and highways by the subdivision of townships; and we can see no difference in the principle between such legislation and the statute under consideration." However, it was held in the same case that a provision in the statute that, where the road crossed another free turnpike road, the assessment against the property was to be in proportion to the benefits received by the owners, was a violation of the constitutional requirement of uniformity in taxation.

Nor does the fact that the duty of making the apportionment is delegated by the legislature to commissioners or the other bodies acting as the legislative agent, invalidate the statute authorizing the apportionment. Embree v. Kansas City & L. Boulevard Road Dist. (**Mo.**) supra; Higham & Q. Bridge & Turnp. Corp. v. Norfolk County (1863) 6 Allen (**Mass.**) 353;

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Scituate v. Weymouth (1871) 108 Mass. 128. In Higham & Q. Bridge & Turnp. Corp. v. Norfolk County (1863) 6 Allen (Mass.) 353, it was said: "The legislature having the power to determine that the county should bear a proportion of the expense of establishing the turnpike as a highway, and having exercised this power, it was competent for them to delegate to commissioners the authority to determine the share or amount of the whole expense which should be paid by the county."

This power of the legislature is unlimited, except as it may be restricted by the state or Federal Constitution, and, if the tax imposed on the various political divisions is uniform on all property in the taxing district, the courts are without power to disturb it, the remedy for such taxation, if unwise, unjust, or oppressive, being with the legislature. State ex rel. Hendricks v. Marion County (Ind.) supra.

In State ex rel. Atty. Gen. v. Shawnee County (1882) 28 Kan. 431, the act in question established a so-called state road, and cast the cost thereof on the two counties in which the road was to lie. No discretion was given by the act to any county officer in respect to the establishment of the road, but it was provided that after the commissioners named in the act had finished their work and located the road, then the county commissioners of the two counties were to pay the expense thereof out of their respective treasuries. It was insisted that the legislature had no power to establish a state road, and then compel a county to bear the cost and expense thereof. Holding this contention to be unsound, the court said: "If compelling a county to bear the expense of a state road is a violation of the Constitution, it has been a frequent sin. . . . It has been the constant practice ever since the admission of the state, and hitherto unchallenged, to establish state roads, and cast the cost and expense thereof upon the counties through which they ran. It is true, the number of these acts does not determine their constitutionality, but it shows, at least, the general understanding of the scope of legislative power; and after such repeated action by the legislature, and such general acquiescence throughout the state, the courts may well hesitate before declaring such action in conflict with the Constitution. . . . While the road is open to the use of all citizens from all parts of the state, it is yet of special benefit and value to the county upon which the burden of its establishment is cast. There is no casting upon the community the burden of a public enterprise which is specially beneficial to the citizens of some other community. It is not like an attempt to tax the citizens of Topeka with the cost of improving the streets of Lawrence. It simply casts upon the counties of Shawnee and Jefferson the cost of roads wholly within their territorial limits, and it is making each county bear the burden of public improvements within such limits. It is true, it is called a state road, but there is no intrinsic difference between a state road, a county road, and a township road,—nothing which makes one more than the other of value to the public. This road is of none the less value to the people of Shawnee county because it is called a state road than it would be if called a county road. We know of no reason why the legislature might not pass an act declaring all highways state roads, and place the management and control of them in commissioners appointed directly by the state; and yet, if such an act were passed, the special benefit and value of each road to the community in which it is located would be unchanged. We remark that there is in this legislation no usurpation on the province of the judiciary. It does not adjudge any existing claim to be a legal demand against the county. It does not attempt to pass as to the validity of any such claim. It touches no past transaction, but simply orders that certain work shall be done in the future, and provides that public organization shall bear the burden of the work."

Similarly, in Jensen v. Polk County (1879) 47 Wis. 298, 2 N. W. 320, it was held that the legislature had the pow-

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er to apportion the cost of a road between two counties in which it lay.

To the same effect, see Higham & Q. Bridge & Turnp. Corp. v. Norfolk County (Mass.) supra, wherein a similar statute was held to be constitutional.

In State ex rel. Hendricks v. Marion County (1908) 170 Ind. 595, 85 N. E. 513, it was held that a statute authorizing the board of commissioners of one county, on proper petition from the citizens of their county, to construct a road on the boundary line between that county and another, and requiring the commissioners of the county in which the proceedings did not originate to issue bonds for its proportion of the cost, and levy a tax to pay the same, was constitutional, and the objection that the act authorized the commissioners of one county to levy a tax on the property of another county could not be sustained. Pointing out that the tax was levied by the legislature through its duly appointed agents, and not by the authorities of another county, the court said: "The legislature, by the said Act of 1905, not the boards of commissioners of said counties, or either of them, prescribed the rule under and the property upon which the tax should be levied, and how it should be collected. As well claim, . . . that the court of claims or state board of audit, in adjudicating an indebtedness against the state, under a law passed by the legislature that the same 'shall be final, and that the amount awarded shall go into the general levy,' thereby levies a tax against the state, as to claim that the board of commissioners of the county of Hendricks, by ordering the improvement to be constructed, and letting the contract therefor under said Act of 1905, levied a tax against the abutting townships in Marion county."

In Lewis County v. Hays (1860) 1 Wash. Terr. 110, it was held that the legislature had power to establish and open roads and apportion the cost thereof on the various counties through which the road passed, and the fact that the road was termed a territorial road, instead of a county road, did not alter the rule.

So, an act which authorized county commissioners to lay out a highway across a river between two towns, the expense of which was to be borne by said towns in proportion to their respective valuations, has been held a valid exercise of legislative function. Waterville v. Kennebec County (1871) 59 Me. 80.

In Hill v. Johnson County (1910) 82 Kan. 813, 109 Pac. 163, it was held that a statute providing for the improvement of county roads was not unconstitutional because it empowered the board of county commissioners to assess one fourth of the cost of the improvement on any town through which the road might run.

In Gilson v. Rush County (1891) 128 Ind. 65, 11 L.R.A. 835, 27 N. E. 235, the statute under consideration provided for the purchase of toll roads by the county commissioners of any county within the state, on proper petition, and provided for the payment of the price of the road and its maintenance by the assessment of taxes on the property within the township, or townships, through which the road might run, in proportion to the assessed value of the road purchased in each township. The court, applying the well-recognized rule that, if the assessment is equal and uniform throughout the locality or political division in which the tax is levied, it is not open to the constitutional provision against lack of uniformity, said: "The provision of the statute that each township through which the road passes shall pay the appraised value of that part of the road located in the township is not objectionable. It proceeds upon the assumption that the citizens of that township will receive a special benefit, by making the toll road free, equal to the amount paid by them for that purpose. As we have seen, the question of apportionment was one for the legislature, and unless it affirmatively appears that the legislature has so far abused its discretion as to take private property for public use without compensation, the courts have

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no power to interfere. Nothing of the kind appears in this case."

It has been held that it is not necessary that the highway shall be in the limits of the political division required to bear the burden of construction and maintenance, provided such division is benefited thereby. State ex rel. Bulkeley v. Williams (1896) 68 Conn. 131, 48 L.R.A. 465, 35 Atl. 24, 421, affirmed in (1898) 170 U. S. 304, 42 L. ed. 1047, 18 Sup. Ct. Rep. 617, wherein the statute in question required several towns to bear the cost of constructing a highway, although it appeared that the road was without the limits of one of the towns on which a proportionate part of the cost had been placed. Holding the statute to be constitutional, the court stated the rule as follows: "There is no principle of free government or rule of natural justice which demands that the support of highways and bridges shall be imposed only on those territorial subdivisions of the state in which they are situated. . . . It has undoubtedly been the policy of the state to leave the expense of public improvements for highway purposes to the determination of the municipal corporations within the limits of which the highways may be situated, and to charge them only with such obligations as may be incurred in their behalf by officers of their own section. But when the state at large or the general public have an interest in the construction or maintenance of such works, there is nothing in our Constitution, or in the principles of natural justice upon which it rests, to prevent the general assembly from assuming the active direction of affairs by such agents as it may see fit to appoint, and apportioning whatever expenses may be incurred among such municipalities as may be found to be especially benefited, without first stopping to ask their consent." The United States Supreme Court, in affirming the above decision in Williams v. Eggleston (1898) 170 U. S. 304, 42 L. ed. 1047, 18 Sup. Ct. Rep. 617, held that neither the constitutional guaranty of equal protection nor that of due process of law was violated by the statute.

In Peninsula Iron & Lumber Co. v. Crystal Falls Twp. (1886) 60 Mich. 510, 27 N. W. 666, it was held that the mere fact that there were no roads in some of the townships included in a highway assessment, at the time of the vote to levy a tax, did not invalidate the law. The court said: "The evidence shows that in two of the townships there were no roads, at the time of the vote to raise the money for highway purposes, but there was no showing that roads were or might not be needed in such townships during the year for which the taxes were levied, and it clearly appeared that the intention of the township board was to expend the money so levied in the townships where the money was raised, the money assessed upon the lands in any one township to be expended upon the roads in that township. There appears to have been no departure from fair dealing in the levy of this tax, and the fact that there were then no roads in these townships will not invalidate the tax."

But in Manistee Lumber Co. v. Springfield Twp. (1892) 92 Mich. 277, 52 N. W. 468, it was held that the legislature was without power to levy a tax on a township 6 miles distant from the nearest point where any of the money was to be expended, for the benefit of another township, with an organized township intervening. On this point, the court said: "If it be assumed that the taxing district for highway purposes might include these two disconnected pieces of territory, yet a taxation of one portion for the benefit of the other, without at the same time including the property within the limits of the other in the assessment, would violate the constitutional requirement of uniformity. But in no proper sense is this surveyed township an assessing district for highway purposes, which is or can be within the same assessing district as the western township. Clearly, more immediate advantages of the improvement of the highways in township 25–8 would result to the township of Grafield (the intervening township) than to township 25–6, yet this township is not and cannot be included

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within the assessing district. Unless it can be held that an arbitrary selection of an assessing district may be made by those in authority, without regard to the benefits to be derived, and one which excludes from the district territory which admittedly receives greater benefit than that which is included, any attempt to include this in one assessing district for highway purposes would be illegal."

III. Taxing city for county or town road.

It being within the power of the legislature to determine in general, within constitutional limitations, on what persons and property the cost or expense of constructing and maintaining highways shall fall, where a city or an incorporated village lies within a county or town which composes an entire taxing district, a statute authorizing the taxation of the city or village is not unconstitutional because of the fact that the proceeds of the tax are expended on the roads wholly without the city or village limits. Shoshone Highway District v. Anderson (1912) 22 Idaho, 109, 125 Pac. 219; O'Kane v. Treat (1861) 25 Ill. 558; People ex rel. Danville v. Fox (1910) 247 Ill. 402, 93 N. E. 302; Highway Comrs. v. Bloomington (1911) 253 Ill. 164, 97 N. E. 280, Ann. Cas. 1913A, 471; Byram v. Marion County (1896) 145 Ind. 240, 33 L.R.A. 476, 44 N. E. 357; Strange v. Grant County (1910) 173 Ind. 640, 91 N. E. 242; State ex rel. Garrett v. Arnold (1896) 136 Mo. 446, 38 N. W. 79; Elting v. Hickman (1903) 172 Mo. 237, 72 S. W. 700; Lamar Twp. v. Lamar (1914) 261 Mo. 171, 169 S. W. 12, Ann. Cas. 1916D, 740; State ex rel. Moberly Special Road Dist. v. Burton (1916) 266 Mo. 711, 182 S. W. 746; State ex rel. St. Louis County v. Gordon (1916) 268 Mo. 713, 188 S. W. 160; King v. Sullivan (1913) 128 Tenn. 393, 160 S. W. 847; Rinder v. Madison (1916) 163 Wis. 525, 158 N. W. 302.

In Shoshone Highway Dist. v. Anderson (Idaho) supra, the rule was stated as follows: "Where . . . the legislature of the state, exercising its power over the subject of taxation, passes an act which provides for the creation of a municipality such as a highway district, and authorizes such district to tax the property of said district for the purpose of raising funds for the construction and maintenance of highways within such district, and such district organizes as such, and includes an incorporated city, town, or village, which city, town, or village has, by reason of its incorporation as such, power also to levy a tax within such city, town, or village, the taxation made by the highway district under the authority of the legislature is not a double taxation upon the property within the city, town, or village. The construction of highways leading to a city, town, or village from a country district is not only a benefit to the country outside of such city, town, or village, but is a like benefit to such city, town, or village, and such taxation, being one based upon benefits, is not prohibited by any constitutional provision."

In Byram v. Marion County (1896) 145 Ind. 240, 33 L.R.A. 476, 44 N. E. 357, the statute under consideration provided for assessing property in a city by the county board of turnpike directors, for repairing, maintaining, and paying for material for free gravel roads within the county, although situated without the limits of the corporation, when such statute made the taxing district consist of the whole county. The court, holding the statute to be constitutional, laid down the rule that it is for the legislature, and not for the courts, to determine whether or not city property included in a taxing district is benefited by the construction and maintenance of roads situated entirely without the limits of the city.

Similarly, it was held in State ex rel. Garrett v. Arnold (1896) 136 Mo. 446, 38 S. W. 79, wherein a like statute was under consideration, that property in a town incorporated by special charter, and not located in a county under township organization, was not exempt from liability for improvement of county roads outside the town, where its charter did not provide for such exemption.

And in Elting v. Hickman (1903) 172 Mo. 237, 72 S. W. 700, wherein the

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constitutionality of a statute providing for the assessment of a tax on property of cities of a certain class located in a county road district, for the purpose of improving the roads outside the city limits, was in question, the court, holding the statute to be constitutional, stated the rule as follows: "Cities are practically as much interested in public roads beyond their corporate limits, which lead into and enter them, as they are in their own streets, and have heretofore been taxed to keep up such roads. . . . And they had the power to appropriate a sum of money not to exceed 10 per cent of the annual general revenue for that purpose. Rev. Stat. 1889, § 7922. It must follow that if the legislature had the power to permit cities and towns to improve roads beyond their limits, it possesses the power to direct it to be done."

In Lamar Twp. v. Lamar (1914) 261 Mo. 171, 169 S. W. 12, Ann. Cas. 1916D, 740, the court, holding that a statute authorizing a township to levy taxes on property situated within the corporate limits of cities located in the township, for the upkeep of county roads, did not violate the state or Federal Constitution, securing the privileges and immunities of citizens of the United States, due process of law and equal protection of the laws, said: "That is to say, the taxing of the citizens of Lamar, a separate municipality, for the benefit of Lamar township, would be to require the citizens of Lamar to bear this burden without securing any benefit. The court thinks that counsel overlooks the fact that every citizen of Lamar is a citizen of Lamar township, and has the right to participate in the administration of the affairs of the township. The improvement of the public highways is as important to the citizens of Lamar as the citizens living outside of Lamar in the township, but it is not true that the citizens of Lamar township are citizens of Lamar, or have anything to do with or control over the administration of the affairs of the city. The property owners who choose to live in a city or town must bear the burden of taxation for the support of the city government, as well as state, county, and township government. This may not seem fair, but it is the law."

Similarly, in King v. Sullivan (1913) 128 Tenn. 393, 160 S. W. 847, wherein the statute in question authorized the county of Sullivan to levy taxes on all property situated within its limits, including that within the corporate limits of the city of Bristol, it was insisted that the act was in violation of the constitutional provisions as to the uniformity and equality of taxation, in that the county was authorized to tax the city for the support of the road wholly without the city limits, while the city could not tax the property in the county for the support of the city streets. Answering the contention, it was said: "Section 28 of article 2 of the Constitution, requiring that 'all property shall be taxed according to its value, . . . so that taxes shall be equal and uniform throughout the state,' must be construed, in respect of the acts in controversy, in connection with § 29 of the same article, which is as follows: 'The general assembly shall have power to authorize the several counties and incorporated towns in this state to impose taxes for county and corporation purposes respectively, in such manner as shall be prescribed by law; and all property shall be taxed according to its value, upon the principles established in regard to state taxation.' It was determined by this court in Malone v. Taylor (Tenn.) decided in the April term, 1908, that the taxation of property within the corporate limits of the city of Memphis, to build public roads outside the city and within the county of Shelby, is not a contravention of § 8 of article 1 of the Constitution. The tax authorized by chapter 370 of the Acts of 1907, the validity of which was involved in that case, was identical with the tax authorized by the statutes brought in controversy here, and the court held that such a tax 'is clearly for a public county purpose, and leviable on all the property situated within the county, although its expenditure is limited to the im-

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provement of public roads outside of the city of Memphis."

In Rinder v. Madison (1916) 163 Wis. 525, 158 N. W. 302, it was held that a statute imposing a part of the burden for the construction and maintenance of a county road system on a municipality located within the bounds of the county was not rendered unconstitutional by reason of the fact that the streets of the city were not included in the system, while those of towns and villages in the county were.

When a city is part of a town, it is not competent for the legislature to exempt its inhabitants from the payment of town taxes for highway purposes. O'Kane v. Treat (1861) 25 Ill. 558.

In Fletcher v. Oliver (1868) 25 Ark. 289, it was held that, where a constitutional provision prohibits the exemption of any property from taxation except such as is enumerated therein, a provision in a city charter exempting the property within the city from taxation in support of the county roads is invalid.

In Gunnison County v. Owen (1884) 7 Colo. 467, 4 Pac. 795, it was held that a statute exempting property located in cities and incorporated towns from the payment of county road taxes was void, as being in conflict with the constitutional provision prohibiting the exemption of property from taxation, except in the cases enumerated therein. In that case it was said: "But realty and personalty within the corporate limits of a city or town are as much a part of the taxable property of the county as are farms and chattels outside such corporate limits. There seems to be no escape from the conclusion that a legislative declaration entirely exempting the former from payment of the tax in question is in conflict with the constitutional inhibition, and therefore void."

But in Fairplay v. Park County (1901) 29 Colo. 57, 57 Pac. 152, it was held that a statute authorizing the board of county commissioners to levy taxes for road purposes, and leaving it to the discretion of the board as to what amount of the tax collected from cities or incorporated towns should be returned to the city or town from which it was collected, was not unconstitutional as an attempt to exempt towns from the payment of their share of the county road tax, the legislature having the power to vest the board with discretion as to the apportionment of the proceeds of the tax.

However, where an incorporated city or town is not under the township system, but is a distinct and separate road district in itself, the township has no authority to levy a road tax on the property within such city or town, and a statute exempting the city or town from such taxation is constitutional. Cooper v. Ash (1875) 76 Ill. 11.

It was said in Miller v. Kern County (1902) 137 Cal. 516, 70 Pac. 549, that if the statute relieved the property of the incorporated city and town from taxation for its roads or road improvements, such a statute would violate the constitutional provision that "all property shall be taxed in proportion to its value;" but the act involved in that case provided, in substance, that the city or town must maintain its own streets, and, when it so provided, the inhabitants and property might be relieved from taxation for roads outside.

It has been held that a statute which provided for the levy and collection by a county of a road tax on the property situated in an incorporated village or city located in the county, and further provided that one half of such tax collected in the city should be paid over to the city authorities for use of the roads within the city limits, was not in violation of a provision of the Bill of Rights, providing for equality of taxation. Prince George's County v. Laurel (1879) 51 Md. 457; Carroll County v. Westminster (1914) 123 Md. 198, 91 Atl. 412. In the case first cited, it was said: "It has never been decided by this court that the 15th article of the Bill of Rights was applicable to any taxation, except that for the support of the state government, but, if it was to be held as applicable to municipal governments, it is hard to see how inequality of taxation would result from the operation of the 19th section of said Act of Incorporation.

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It only provides that such taxes as are levied on the inhabitants or property in the town of Laurel, for road purposes, shall be expended on particular roads. It by no means establishes unequal taxation, but bestows the taxes collected in a particular locality on the roads of that locality."

See, to the same effect, Duval County v. Jacksonville (1895) 36 Fla. 196, 29 L.R.A. 416, 18 So. 339, wherein a similar statute was upheld by the court.

But where the statute provided that the proportion of the tax returned to the city should be used not only for the upkeep of the streets, but for such other improvements as the city authorities might deem proper, it has been held to be a violation of the requirement of equality of taxation, since it, in effect, exempted the owners of property in the city from contribution, pro tanto, to the necessary expenses of the county government. Prince George's County v. Laurel (1889) 70 Md. 443, 3 L.R.A. 528, 17 Atl. 388.

In People ex rel. Danville v. Fox (1910) 247 Ill. 402, 93 N. E. 302, it was held that a statute providing for the return to all cities having 20,000 or more inhabitants, of the taxes collected on property situated therein, by the township authorities, was unconstitutional, because it made an arbitrary classification of the cities exempted from the tax. In that case it was said: "The legislature may classify cities and enact laws applicable to such cities, according to their classification; but the classification cannot be an arbitrary one. There must be some reason for the classification, based upon differences in circumstances or condition that will justify it. What reason, within the meaning of the rule, can there be for directing that where a city has 20,000 inhabitants, or upwards, all the tax levied and collected under §§ 13 and 14 shall be paid into its treasury for city purposes; but as to cities having a population of 19,900 or any number less than 20,000, only one half of said tax shall be paid to the city treasurer, and that to be appropriated to the improvement of roads, streets, and bridges, either within or without the city, village, or town, and within the township, under the direction of the corporate authorities of the village, town, or city? It seems plain the classification is arbitrary, and is based upon no reasonable difference between cities sought to be favored and cities denied the benefits of the provision. Again, it is an unauthorized discrimination in favor of cities, against villages and towns having an equal or greater population. An incorporated village or town which has attained a population of 20,000, or upwards, is charged with the burden of maintaining its streets, alleys, and bridges just the same as a city that has attained that population; and if the legislature has authority to grant a city the right to receive and control the expenditure of all the tax levied and collected under §§ 13 and 14, on property within its limits, we see no reason why the same privilege should not be granted to a village or town under like circumstances and similarly situated."

That the right of a county to levy taxes on the property of a municipality situated within the county limits the proceeds of the tax to be used exclusively on county roads without the limit of the municipality has been made the subject of constitutional enactment in at least one state. Jefferson County v. State (1910) 172 Ala. 138, 54 So. 757; State ex rel. Tuscaloosa v. Tuscaloosa County (1911) 173 Ala. 724, 54 So. 763; Commissioners Ct. v. State (1913) 180 Ala. 479, 61 So. 431; Montgomery v. Montgomery County (1914) 185 Ala. 281, 64 So. 588; Montgomery County v. Montgomery (1914) 190 Ala. 366, 67 So. 311. It was held in the foregoing cases that a statute requiring the return of a proportion of such a special road tax to the municipality from which it was collected, for use on its streets, was violative of this constitutional provision.

It has also been held that this section of the Alabama Constitution was not repugnant to any provision of the Federal Constitution. Montgomery v. Montgomery County (1914) 185 Ala. 281, 64 So. 588, wherein it was said:

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"Nor are we impressed with the soundness of the suggestion or argument that the construction so placed upon said § 215 of our Constitution renders it repugnant to the Federal Constitution. Cities and towns are benefited as much by rural roads leading thereto as are the people who live upon and travel the said roads. To say that the cities cannot be taxed to help keep up county roads, because not within the limits of the city, would be as narrow and illogical as a holding to the effect that property owners in the country could not be taxed to keep up the roads unless their lands were attingent to said roads."

IV. Taxing county for town road.

A county may, as a rule, be authorized by statute to lend its aid or expend its money in building or maintaining a public road anywhere within its boundaries, when it is being done for the public benefit, or as a part of a county highway system. Washburn v. Shawnee County (1918) 103 Kan. 169, 172 Pac. 997; Carpenter v. Central Covington (1904) 119 Ky. 785, 81 S. W. 919; Norwich v. Hampshire County (1833) 13 Pick. (Mass.) 60; Bladen County v. Boring (1918) 175 N. C. 105, 95 S. E. 43; Re Middletown Road (1900) 15 Pa. Super. Ct. 167; Com. ex rel. Atty. Gen. v. Bowman (1908) 35 Pa. Super. Ct. 410; Meehan v. Shields (1910) 57 Wash. 617, 107 Pac. 835. And see the reported case (JOHNSTON COUNTY v. LACY, ante, 726).

In Com. ex rel. Atty. Gen. v. Bowman (1908) 35 Pa. Super. Ct. 410, it was held that a statute authorizing the maintenance out of the general county fund of a road located in one town did not violate a provision of the Constitution, as to the uniformity of taxation. The rule was stated as follows: "It is a matter of legislative discretion whether a highway shall be maintained by the county or by the local municipal district. It is not a matter of legal concern to the taxpayers of a borough or city that the county assumes the cost of the maintenance of a public road in a township. A county bridge and the approaches thereto are a part of the public highway, often wholly in one township, and are erected and maintained at the charge of the county; but no one contends that the township may not be relieved from the cost of such part of a public highway by proper proceedings in the court of quarter sessions. In such a case, all of the taxpayers of the county are required to contribute to the erection and maintenance of the bridge, which, before it was made a county charge, was a burden upon the local district. Highways are for the use of the public generally, and if, by reason of difficulty of construction or cost of maintenance, it is deemed advisable that one of them be constructed or maintained out of the county fund, taxpayers of another township or borough have no standing to object, on the ground of inequality of taxation. The cost of the maintenance of roads is necessarily greater in some districts than in others, owing to the larger mileage, the quality of the soil, and the topographical conditions. The section of the Constitution under consideration does not forbid the legislature to authorize the construction or maintenance of a part or the whole of a public highway at the expense of the county."

In Norwich v. Hampshire County (1833) 13 Pick. (Mass.) 60, it was held that the objection that an act of legislation which provided that the expense of erecting a particular bridge should be borne by a county, in whole or in part, when by the operation of the general laws of the commonwealth, without such legal provision, the expense would be borne wholly by a town, was for that reason unconstitutional, was without merit.

Similarly, in Re Middletown Road (1900) 15 Pa. Super. Ct. 167, it was held that a statute providing for taxing an entire county, for the construction and maintenance of a road lying entirely within a town in the county, did not violate the constitutional provision as to uniformity of taxation. On that point, the court said: "It is not true that the improvement of the highways contemplated by the act is, in its nature, local to the township or other municipal divi-

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sion of the county in which the particular road to be improved is located. All the people of the county derive benefit from the improvement, of the same kind and in equal degree as from the erection of county bridges. No constitutional provision is violated in imposing the burden of making and maintaining such improvements upon the people of the whole county. The argument against the law is based on the proposition that it is an attempt to impose a township burden upon the county. The error is in assuming that it is, in its nature, a burden which the township or other municipal division of the county ought to bear, whereas the truth is that whether the burden shall be imposed upon them, or upon the county at large, is purely a matter of legislative policy."

In Carpenter v. Central Covington (1904) 119 Ky. 785, 81 S. W. 919, it appeared that the statute under construction made all of a county outside of certain cities a road district for the construction of turnpikes, and empowered the county authorities to create road districts within the county for taxation, and required them to levy taxes for the payment of the cost of construction and maintenance, in the proportion of one half on the property of the county outside of the cities named. It was insisted that the statute violated the provision of the Constitution, requiring that taxes should be uniform with the territorial limits of the authority levying the same. Holding that the constitutional provision required only that the taxes should be uniform throughout the particular district, and that the county authorities acted as the representatives of the district in levying the tax, the court said: "If several districts of a county become indebted and issue bonds, a tax may be levied on these districts to pay the debt which they owe, although a similar tax is not levied on other parts of the county, which do not owe the debt. The reason is that only property in these districts is subject to taxation for the purpose of these debts, and the constitutional requirement is only that taxes should be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax. In levying such a tax the county authorities act as the representatives of the people within the district which created the debt, and the tax is uniform on all of them, and on all property subject to taxation within the limits of the district."

But it has been held that a statute providing that a road passing through several towns and a borough should be maintained at the expense of the county, city or borough, in which the road or any part thereof was located, was unconstitutional, as violating the provision as to uniformity of taxation. Haines Twp. v. Centre County (1907) 33 Pa. Co. Ct. 433, wherein the court, construing the statute, said: "If the word 'county' is interpreted to mean the county proper as in counter distinction with the townships, the act would certainly impose the burden of maintaining the turnpike in question unequally upon the several citizens of the county. For instance, the plaintiff township would be entirely relieved, as a township, from the expense of maintaining the 12 miles within its own limits, and would be liable to an exceedingly slight taxation as a position of the entire county, while the taxpayers of the neighboring borough of Millheim would not only have the burden of maintaining the whole of the said turnpike within its own borders, but would be liable also to whatever taxation would be necessary, through the agency of the county, for maintaining the same turnpike or other portions of the turnpike in plaintiff's township. In other words, the citizens of Millheim borough would be made at once liable to a double taxation for the maintenance of this turnpike, while the citizens of Haines township would be liable in only one capacity. This clearly offends against the Constitution."

While it is true, as a rule, that a county may be taxed in aid of a town road, no taxing district can be taxed for the exclusive benefit of another district. Thus, where roads of the different towns or districts are set

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apart, and a scheme is devised whereby they can be planned, laid out, constructed, or improved entirely under the town's control and management, and without reference either to state or county benefit, it is not within the legislative power to tax the entire county for the exclusive benefit of the town. Bladen County v. Boring (1918) 175 N. C. 105, 95 S. E. 43. To the same effect, see the reported case (JOHNSTON COUNTY v. LACY, ante, 726), wherein it is held that a statute providing for the construction and maintenance of a township road under the control of the township, and not as a part of a state or county system, or for the public benefit, and providing further that the county should issue bonds to cover the costs of the work, in effect amounted to the taxation of the whole county for a purely local township road, and, as such, violated the constitutional provision, prohibiting the taxing of one community for the exclusive benefit of another.

In Bladen County v. Boring (N. C.) supra, the statute held to be unconstitutional was, in effect, the same as that passed on in JOHNSTON COUNTY v. LACY, except that it was provided that the township should issue the bonds and the county indorse them. This, the court held, altered only the nature of the county's liability, and not the fact of its liability, and did not take the case out of the rule laid down in JOHNSTON COUNTY v. LACY.

V. Taxing state for road in political subdivision.

It is within the power of the legislature to tax the entire state to aid in building and maintaining a public highway, situated within any county or township within its borders, when it is being done for the public benefit, or as a part of a state system. Martens v. Brady (1914) 264 Ill. 178, 100 N. E. 266; Bladen County v. Boring (N. C.) supra; Meehan v. Shields (1910) 57 Wash. 617, 107 Pac. 835. And see JOHNSTON COUNTY v. LACY.

In Meehan v. Shields (Wash.) supra, the statute under consideration provided that the cost of construction and maintenance of a state road should be paid in the following manner: One half out of the state highway fund, 35 per cent from the general road and bridge fund of the county, and the remaining 15 per cent out of the district road fund of the district in which the improvement was located. Holding that the act did not violate the constitutional provision as to uniformity of taxation, the court said: "The road is a benefit to the state, to the county, and to the local district. The state raises money in the several counties to expend in the maintenance of those things which are of general benefit to all its citizens. The county reaps a special benefit as distinguished from this general benefit, and the district a still greater and special benefit, and for such benefit each is properly taxed. The money raised by the state being expended for a state benefit, the money raised by the county being expended for a county benefit, and the money raised by the district being expended for a district benefit, there is no violation of the uniformity of taxation rule. Nor is there any diversion of the proceeds of a tax, for the funds so raised by the state, the county, and the district are respectively expended within their own territory, and for the purposes for which they were raised."

But in Sears v. Steel (1910) 55 Or. 544, 107 Pac. 3, wherein it appeared that the statute in question appropriated a certain sum for the construction of a so-called state road, though the road contemplated was, in fact, limited to the confines of two counties, and further provided for an assessment to be levied on the property in each county to aid in the construction of the road. Holding the statute to be a violation of the constitutional provision prohibiting the passage of local laws for the construction and maintenance of highways, the court said: "Applying this rule to the act in question, if the proposed road is a state road, it permits the county courts of Jackson and Klamath to lay a burden upon the taxpayers of those counties not shared equally by the taxpayers of the other parts of the state. If, on the other hand, it is to be regarded as a county road in each

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of the counties through which it passes, it imposes taxes upon the people of the rest of the state for the construction of county roads in Jackson and Klamath counties, and in either case it is local."

To the same effect, see Maxwell v. Tillamook County (1891) 20 Or. 495, 26 Pac. 803, wherein a similar statute was held to be unconstitutional.

VI. Changing apportionment by subsequent statute.

The mere fact that the legislature has fixed by statute the different political divisions which shall bear the cost of a road improvement, and apportioned the cost among them, does not deprive it of the power to enact a statute changing the apportionment. As was said in State ex rel. Bulkeley v. Williams (1896) 68 Conn. 131, 48 L.R.A. 465, 35 Atl. 24, 421, affirmed in (1898) 170 U. S. 304, 42 L. ed. 1047, 18 Sup. Ct. Rep. 617: "The burden is one that the legislature can put on such public agencies as it may deem equitable, and transfer from one to another, from time to time, as it may judge best for the public interest."

In Scituate v. Weymouth (1871) 108 Mass. 128, wherein it appeared that the apportionment, as made pursuant to one statute, was subsequently changed in pursuance of a subsequent statute, the court holding that such a change did not impair the obligation of a contract, said: "That statute, so far as regards the maintenance of the bridges, was not in any sense a contract with the towns affected by it. It was an exercise of the authority of the legislature to distribute public burdens and duties. It is clear that, under the same constitutional power, it had the right to change the law and redistribute these public burdens, if, from a change of circumstances or other reasons, it deemed it just and proper so to do. . . . The obligation of the town of Weymouth, under the Act of 1862, was not founded upon any contract, express or implied. It did not acquire any vested right to require of the other towns the contribution towards the expenses of maintaining the bridges fixed by that act. The argument, therefore, that the amendatory Act of 1870, chap. 265, is unconstitutional because it impairs the obligation of a contract or defeats vested rights, is unfounded.

And it has been held that the legislature has the power to change the apportionment of the cost of a highway improvement, as originally prescribed by statute, even though proceedings have already been instituted under the prior statute. Washburn v. Shawnee County (1918) 103 Kan. 169, 172 Pac. 997, wherein it appeared that, by the original statute, one fourth of the cost of the improvement should be paid by the township, and that the remainder should be charged against the land in a benefit district. By the terms of a statute enacted after proceedings had begun under the original statute, it was provided that the township should bear one fourth, the county one half, and the land in the benefit district the remainder of the cost. Holding that the legislature had the power to make such a charge, the court said: "The owners of the land within the benefit district were not prejudiced by the alteration, because their burden was diminished. The taxpayers of the township were not affected as such. The taxpayers of the county have no legal basis for complaint, for it was competent for the legislature to impose upon the county any part of the cost of the highway." M. B.

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LETTIE MAY BENNER
v.
PHILADELPHIA & READING RAILWAY COMPANY, Appt.

Pennsylvania Supreme Court — October 7, 1918.

(262 Pa. 307, 105 Atl. 283.)

Railroads — crossing — where to stop.

1. The duty to stop, look, and listen before attempting to cross a railroad track requires stopping before crossing any of the tracks, and no recovery can be had for injuries caused by being struck by a train on the main track, if the injured person did not stop until he had driven onto a siding, from which point the only view of the tracks could be obtained without leaving the carriage, and from which he proceeded on his journey because an approaching train was hidden by a curve and failed to signal its approach.

[*See note on this question beginning on page* 767.]

Same — obstruction of view — effect.

2. That the view of one approaching a railroad crossing is obstructed by cars standing upon a siding does not relieve him from the duty to stop, look, and listen before attempting to cross the track.

Trial — jury — negligence — driving on track without stopping.

3. If one drives upon a railroad track without stopping to look and listen for trains, there is no question to submit to the jury in an action to hold the railroad company liable for injuring him by a passing train.

Same — proceeding after stopping.

4. If one stops to look and listen before starting to cross a railroad track, but is injured by a train at the crossing, the jury must determine whether or not he exercised proper care in proceeding to cross, so as to render the railroad company liable for his injury.

Railroad — duty to stop before crossing — rule of law.

5. The rule that a traveler must stop, look, and listen before attempting to cross a railroad track is not a rule of evidence, but a peremptory, absolute, and unbending rule of law.

Proximate cause — injury on railroad — failure to stop.

6. That a traveler who did not stop until he had entered upon the first track of a railroad crossing was not injured on that track, but on another one, does not show that his failure to stop where the law required him to stop was not the proximate cause of his injury.

Same — duty to alight.

7. If one approaching a railroad crossing on a public highway cannot gain a view of the tracks from his carriage before entering upon any track, he must alight and go to a point where such view can be obtained.

(Simpson and Stewart, JJ., dissent.)

APPEAL by defendant from a judgment of the Court of Common Pleas No. 4, for Philadelphia County, in favor of plaintiff in a suit brought to recover damages for the death of her husband, alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion of the court.

Mr. William Clarke Mason, for appellant:

The mere fact that the jury might have found that Benner stopped at a point on the tracks would not be sufficient to relieve him from the charge of contributory negligence, unless the jury should also find that he continued to look and listen as he proceeded further forward from that point.

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Hare v. Railway Co. 65 Pa. Super. Ct. 39; Walsh v. Pennsylvania R. Co. 222 Pa. 162, 70 Atl. 1088; Reigner v. Pennsylvania R. Co. 258 Pa. 257, 101 Atl. 995.

A traveler before attempting to cross the tracks of a steam railroad must stop, look, and listen, and, if necessary in order to see, advance to, or onto, or back of, the tracks.

Kinter v. Pennsylvania R. Co. 204 Pa. 497, 93 Am. St. Rep. 795, 54 Atl. 276; Mankewicz v. Lehigh Valley R. Co. 214 Pa. 386, 63 Atl. 604; Earle v. Philadelphia & R. R. Co. 248 Pa. 193, 94 Atl. 1001.

Failure to obey the rule is contributory negligence.

Siever v. Pittsburgh, C. C. & St. L. R. Co. 252 Pa. 1, 97 Atl. 116.

When a driver assumes a position where he is unable to control his horse if danger follows the signals from a coming train, this is negligence sufficient to bar a recovery.

Potter v. Pennsylvania R. Co. 221 Pa. 550, 70 Atl. 852; Peoples v. Pennsylvania R. Co. 251 Pa. 275, 96 Atl. 652.

Mr. George Demming for appellee.

Fox, J., delivered the opinion of the court:

This suit was brought by the plaintiff to recover damages for the death of her husband, who was killed at a grade crossing of the defendant company at Linfield, Montgomery county, Pennsylvania, on the 1st day of May, 1915. At the time of the accident, Howard S. Benner, the husband of the appellee, was driving across the tracks of the railroad company in a one-horse buggy, about half-past five in the afternoon.

The public road over this crossing is 48 feet wide, and is an old, well-defined road. Just before the public road crosses the railroad tracks, at the right hand, approaching the crossing from the east, there is a spur or sidetrack leading from the freight station, which ends at the road with a bumper. At the time of the accident, two or more box cars were standing close to the bumper, and this, with the freight house and freight shed, obscured the view at that point in the direction from which the train approached. The public highway crosses over five tracks. The first track is another siding, which is known as the cold storage company siding, and runs in front of the station and down to the plant of the cold storage company. The next track is the slow speed, north-bound track. The third track is the fast speed, north-bound track. The fourth track is the fast speed south-bound track. The fifth track is the slow speed, south-bound track. At the time of the accident, according to the testimony, there were several box cars also on the cold storage siding; but the witnesses differ as to the precise location of these cars and the extent of the obstruction of the view.

John I. Riegel, a civil engineer called by the plaintiff, testifies from accurate measurements as to the conditions existing at the point of crossing. He says that, in addition to the box cars which were on the cold storage siding, there was some obstruction of the view by reason of the station and its bay window, the telegraph office, and a tree in front of the telegraph office, as well as some other buildings. The testimony of Mr. Riegel is that, if there were no cars on the cold storage siding, a view of the tracks to the south can first be obtained at a point 16½ feet from the first rail of the cold storage siding, and that a train on the north-bound, slow track could be seen 650 feet away from the center of the crossing, and 550 feet away on the north-bound, fast track, on which the train which caused the accident was approaching.

If, therefore, Benner had stopped at a point 16½ feet from the point of the first track, he would have had some view of the track on which the train approached. The fact that his view was impeded by cars on the cold storage siding did not relieve him from the obligation to stop. It imposed a further duty to proceed with due care, but stopping in the first instance was absolutely essential.

Railroads—obstruction of view—effect.

Two witnesses were produced by the plaintiff, who saw the accident and the action of Benner as he ap-

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proached the crossing. One John Seeler, an intending passenger, was waiting on the station platform, on the southern end. This witness says that Benner drove up to the first track or siding, and that at a point actually on the tracks, with the horse's front feet between the first track and the slow, north-bound track, he stopped for a few seconds. The top of the buggy was up. The witness could not tell just what Benner did after he drove on the track. After stopping for a few seconds, he drove on at a slow walk; and just after he started a fast express train came around the curve, and Benner was struck and killed.

The other witness, James Boyle, was coming from the opposite direction from Benner, and was about 90 feet from the first track on the other side of the railway, facing Benner. He saw Benner drive up on the track and stop, lean forward, look first to the south and then to the north, and, after a few seconds' pause, start to drive towards the witness. The testimony of both these witnesses concurs as to what actually happened. Neither of the witnesses heard any signal given by the train, nor did they hear the noise of the train until the engineer blew several short whistles, indicating the emergency that had arisen.

Same—crossing—where to stop.

It is perfectly clear, therefore, from the testimony offered by the plaintiff that Benner did not stop, look and listen before he crossed any of the tracks. It is true that he stopped on the tracks, but that is not a compliance with the rule.

The learned judge of the court below submitted the case to the jury and entered judgment on the verdict, assigning as a reason therefor that, as the accident did not happen on the cold storage siding, the failure of Benner to stop before he entered on this track was not negligence. He further held that the question of whether or not he was negligent, as he was injured on one of the other tracks, under all the circumstances, was to be submitted to the jury and determined by them. This is not the law. It is an absolute and unbending rule that

Trial—jury—negligence—driving on track without stopping.

a traveler upon the public highway must stop, look, and listen at a point, before he crosses any tracks. If he has done this and then proceeds, the question whether or not he has exercised proper care in crossing the railroad as he

Same—proceeding after stopping.

proceeds, and whether it is necessary for him to stop again, is a question for the jury. But if he fails to stop, look, and listen before he goes on any track, he is thereby convicted of negligence, and, no matter what the other circumstances, he cannot recover.

In Ihrig v. Erie R. Co. 210 Pa. 98, 59 Atl. 686, it is said: "It is argued that the rule that a traveler, before crossing the tracks of a steam railroad, must stop, look, and listen for the approach of a train, is not a fixed rule to be observed under all circumstances, but only a reasonable requirement, the nonobservance of which, while prima facie evidence of negligence, may be explained and excused. That this proposition cannot be sustained under the decisions is clear. There is no break nor wavering in the line of cases extending back nearly forty years, which hold that the rule is inflexible and admits of no exceptions, and that a failure to observe it is not merely evidence of negligence, but is negligence per se. There has been no clearer statement of the rule than that made by the present chief justice in Aiken v. Pennsylvania R. Co. 130 Pa. 380, 17 Am. St. Rep. 775, 18 Atl. 619: 'It is not a rule of evidence, but a rule of

Railroad—duty to stop before crossing—rule of law.

law, peremptory, absolute, and unbending; and the jury can never be permitted to ignore it, to evade it, or to pare it away by distinctions and exceptions.'"

What the appellee asks us to do in the present case is to make an

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exception of this case, and to say that, because Benner was not injured on the first track, his failure to stop before crossing it did not produce the accident. This is bending the rule which has been declared to be unbending. No one can say that, if he had stopped at a point before crossing the first track a sufficient length of time to make proper observation, he would not have discovered the approach of the train, or, if he had stopped and proceeded, would not have reached the scene of the accident soon enough to collide with the train that killed him. The fact that the first track was a siding did not relieve Benner from the obligation of the rule. This is clearly pointed out by the late Mr. Justice Potter in Peoples v. Pennsylvania R. Co. 251 Pa. 275, 96 Atl. 652.

Proximate cause—injury on railroad—failure to stop.

It is further argued that Benner was relieved from the obligation to stop because of the obstructions which prevented his view before crossing the cold storage siding; but, if this be true, another duty was imposed upon him. It was his duty to alight and go to a point where he could make a proper observation.

"When a driver stops at a point where an obstruction prevents a proper view of the railroad he is about to cross, he must descend from his vehicle, and, if necessary, walk to a point where the prospect is clear." Siever v. Pittsburgh, C. C. & St. L. R. Co. 252 Pa. 1, 97 Atl. 116; Earle v. Philadelphia & R. R. Co. 248 Pa. 193, 93 Atl. 1001; Mankewicz v. Lehigh Valley R. Co. 214 Pa. 386, 63 Atl. 604; Kinter v. Pennsylvania R. Co. 204 Pa. 497, 93 Am. St. Rep. 795, 54 Atl. 276.

Same—duty to alight.

We therefore hold that the plaintiff's case develops such evidence of negligence on the part of Benner, the decedent, that, notwithstanding the alleged negligence of the railway company, there can be no recovery.

The fifth, sixth, and eighth assignments of error are therefore sustained, and the judgment is reversed.

Simpson, J., dissenting:

The verdict and judgment below were for the plaintiff. This court now proposes to enter judgment for the defendant non obstante veredicto. In considering whether or not such a judgment ought to be entered, of course every fact and inference of fact favorable to plaintiff, which a jury might find to be true, must be conclusively accepted as true; and every allegation of fact unfavorable to plaintiff, which a jury might reject, must be rejected. Viewed in this light and leaving out of consideration for the present the presumption of law hereinafter considered, the relevant facts of the case are as follows:

At Linfield, Montgomery county, Pennsylvania, a public road crosses the railroad tracks of the defendant company. At the time of the accident there were no safety gates, automatic bells, flagmen, or other devices there to warn those about to cross the tracks. There were six tracks running approximately north and south. Looking from east to west, the first was a siding, which did not cross the road. The second was also a siding, which ran to a near-by private cold storage plant. The other four were the regular railroad tracks, upon which defendant transported passengers and freight to distant points. The second of said four tracks was the fast northbound passenger track. Not far to the south of the crossing, the tracks curved to the west, and were soon lost to view. At the distance of 1,254 feet south was a whistle board, opposite which it was the duty of defendant's engineers traveling northwardly to give warning of the approach of their trains to those about to cross the tracks at said public road. At the time of the accident, there were freight cars upon both sidings, not then being moved, and so placed by defendant as, with buildings, trees, etc., to render it impossible for those traveling on road

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towards the west to see up and down the four regular tracks at any place until a point on or beyond the cold storage siding was reached. The southward view from that point was about 500 feet, and the distance from that point to the nearest rail of the fast north-bound passenger track was about 20 feet. The space between the tracks was 7 feet 4 inches, and between the two rails of the same track, 4 feet 8½ inches. At the time of the accident there was a strong wind blowing from the north, tending to render obscure, if not prevent, the hearing of sounds from the south.

At that time plaintiff's husband was driving westwardly on said road. He was alone in a buggy. The distance from the nose of the horse to the buggy was approximately 9 to 10 feet. No witness saw him stop before he reached and was on or partly over the cold storage siding. Some witnesses say he did not stop before then; some that he did not stop at all; but one said he might have so stopped, but the witness did not see it. His supposed failure to stop before reaching the cold storage siding constitutes the alleged contributory negligence herein charged against him. When he reached the point on or partly over the cold storage siding, which was the first point where, as above stated, he could in fact see up and down the tracks, he stopped, looked, and listened, but, seeing and hearing nothing, drove forward, and was struck and killed by an express train on the fast north-bound passenger track. No whistle was blown or bell rung at the whistle board or thereafter, or any warning given until the train was about 150 feet from the crossing, when, according to the engineer, he "opened the whistle, gave an awful shriek, and applied the emergency brakes," scaring the horse, which was then upon said fast north-bound passenger tracks, causing it to rear and plunge without going forward. He also says the train was traveling at the rate of 59 miles an hour. It struck the horse and buggy midway, throwing the horse to the westward 100 feet north of the crossing, and entirely clear of the tracks, and deceased to the eastward 132 feet north of the crossing, into a ditch between the two sidings. When the train itself was stopped, its last coach was 450 feet north of the crossing.

Under the above facts, it is admitted that the case was for the jury on the question of defendant's negligence; but it is contended, and the opinion of the majority of the court decides, that deceased's alleged failure to stop before crossing the cold storage siding constituted conclusive evidence of his contributory negligence.

I cannot concur in that conclusion. In effect, it holds that a man may be adjudged guilty of contributory negligence, and the defendant who has injured him relieved of all liability, although in fact he was guilty of no negligence which contributed to his injury. The utmost point to which the majority opinion is willing to go is in the statement that "no one can say that, if he had stopped at a point before crossing the first track [thereby meaning the cold storage siding] a sufficient length of time to make proper observation, he would not have discovered the approach of the train, or, if he had stopped and proceeded, would not have reached the scene of the accident soon enough to collide with the train that killed him."

But "if no one can say" whether or not he was guilty of contributory negligence, the law can and does say that he was not; for "he who avers a fact in excuse of his own misfeasance must prove it." Beatty v. Gilmore, 16 Pa. 463, 55 Am. Dec. 514; Coolbroth v. Pennsylvania R. Co. 209 Pa. 433, 58 Atl. 808.

In as much, therefore, as admittedly there was sufficient evidence from which the jury could and did find the defendant guilty of negligence, the syllogism is complete: (a) Defendant was guilty of negligence in killing plaintiff's husband; (b) unless plaintiff's husband was

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guilty of contributory negligence, plaintiff can recover for defendant's negligence; (c) plaintiff's husband was not guilty of contributory negligence, for the reason that "no one can say" that he was. Hence, plaintiff can recover.

Notwithstanding this logical conclusion, the majority opinion says she cannot recover because, as it is alleged, her husband did not "stop" before crossing the cold storage siding, as he was bound to do, in compliance with the "absolute and unbending rule that a traveler upon the public highway must stop, look, and listen before he crosses any tracks." If this case was within the reason and spirit of that rule, which was adopted by this court more than half a century ago, and has been adhered to steadfastly ever since, then must we apply it here, however much we may doubt the propriety of a court (whose only duty is to decide as to the legal rights and liabilities of the particular litigants before it) foreclosing the rights of future unheard litigants by an arbitrary rule, without legislative action, when in the nature of things the rights of those future litigants may be materially different, owing to the varying facts. Since that rule was first adopted and published, the members of thirty-one legislatures and one constitutional convention have been elected, met, and adjourned, leaving it still in force, and because thereof, despite doubts as to the wisdom of making it arbitrary, stare decisis compels our adherence to it now, however much plaintiff may suffer by reason thereof. In these later days, however, when our people have been learning anew to respect the rights and liberties of others, and thereby to preserve our own, we ought not to extend that rule beyond its reason and spirit, to the injury of anyone. In the interests of justice the courts are swift to confine acts of assembly within their reason and spirit. A fortiori should they do so with their own arbitrary and unbending rules, lest those selected to administer justice may be the means of wholly defeating it.

Moreover, the purpose of adopting this rule as a fixed and arbitrary one, and of now enforcing it, is that our people may know that they and those dependent upon them will alone be the sufferers if they do not give heed to it, thereby building up the habit of obedience to its requirements. But to extend it as now proposed would not aid in accomplishing that purpose, for it would run counter to the habits and customs of our people; and a rule which does that would not in practice obtain even a passing currency. He little knows our American people who imagines that they will obey a rule which uselessly attempts to delay them in the ends they seek to accomplish. Tell them they must not cross a siding wherever cars are, or are soon liable, to be shifted, and they will understand and recognize that they should obey it. But tell them that they must not do so, though there is no motive power on the siding with which to move the cars, and they will neither understand nor obey. Over a siding, in the condition the cold storage siding was at the time of this accident, even the proverbial tortoise could have passed in safety. Everyone who then saw the siding knew that was so; and everyone, even all those who adopted, and those who enforce, the rule of "stop, look, and listen," in all human probability, would have acted just as plaintiff's husband did. To say then that plaintiff cannot recover because it is alleged that her husband did not do a useless thing, which no one else ever does, is to punish her, though both she and her husband were innocent, and benefit no one but the defendant, which, the jury has found, did her a most grievous wrong.

The opinion of the majority, after saying that the deceased should have stopped before entering upon the cold storage siding, asserts that if he had done so, and then proceeded, "the question whether or not he has exercised proper care in crossing the railroad as he proceeds, and whether

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it is necessary for him to stop again, is a question for the jury."

That is, the majority opinion concludes that, if he had stopped where he could have seen nothing, the question would have been one for the jury, even though he did not stop between the siding and the main tracks, where alone he could see before entering upon the dangerous part of the crossing. To justify that conclusion, the majority opinion says that if he "had stopped at a point 16½ feet from the first track (the cold storage siding) he would have had some view of the track upon which the train approached," overlooking the fact that the witness relied on for that conclusion had said, as indeed quoted in the majority opinion itself, that this would have been so, only "if there were no cars on the cold storage siding," where in fact there were then such cars; and overlooking also, as testified to by three witnesses, that no view could be obtained anywhere short of the cold storage siding. Moreover, instead of the law being as stated in that excerpt, the precise reverse is true; for it has been repeatedly held that it is negligence per se to stop only at a point where you cannot see. Ely v. Pittsburgh, C. C. & St. L. R. Co. 158 Pa. 233, 237, 27 Atl. 970; Mankewicz v. Lehigh Valley R. Co. 214 Pa. 386, 63 Atl. 604; Bistider v. Lehigh Valley R. Co. 224 Pa. 615, 73 Atl. 940.

There are not less than three answers to the allegation of conclusive contributory negligence in this case:

First. Plaintiff's decedent was killed, and from that fact arises a presumption that he did "stop, look, and listen," at the right place, and continued to perform his duty throughout; and that presumption alone is sufficient to carry the case to the jury, even though there be strong evidence to the contrary. Pennsylvania R. Co. v. Weber, 76 Pa. 157, 18 Am. Rep. 407; Pennsylvania R. Co. v. Weiss, 87 Pa. 447; Blauvelt v. Delaware, L. & W. R. Co. 206 Pa. 141, 55 Atl. 857; Patterson v. Pittsburg, C. C. & St. L. R. Co. 210 Pa. 47, 59 Atl. 318; Hugo v. Baltimore & O. R. Co. 238 Pa. 594, 86 Atl. 482.

In Pennsylvania R. Co. v. Weiss, 87 Pa. 447, it is said: "The presumption of a fact in law, which carries a case to a jury, necessarily leaves them in possession of the case. True, the evidence to rebut the presumption may be very strong, yet it is a matter for the jury and not for the court. The force of the evidence may or may not be sufficient to convince them that the natural presumption arising from human instinct is repelled. But before they can come to this conclusion they must consider the circumstances under which the repelling witnesses testify. They may be such as not to convince a rational mind that the deceased heedlessly rushed into danger, or the character of the witnesses and their appearance before the jury may render them unworthy of belief, consequently the jury only can determine the fact put in issue by the presumption of law."

It is true that, if plaintiff's case had itself overthrown the presumption, the court would have been bound to decide according to the fact thus proved, but such testimony must be "clear and indisputable;" and it may be said here, as was said in Unger v. Philadelphia, B. & W. R. Co. 217 Pa. 106, 109, 66 Atl. 236: "The plaintiff's case rested upon the presumption of care, unrebutted by proof that would have warranted the court in holding that it was overcome, and upon testimony tending to show negligence on the part of the defendant. It was clearly for the jury."

Second. Had deceased stopped at the point suggested in the majority opinion, he could have seen nothing. Three witnesses so testified. But, assuming that he could, the distance he could have seen was 500 feet. The train was traveling at the rate of 59 miles per hour, and to cover the 500 feet would have required less than six seconds. The point where the majority opinion suggests that he might have stopped was 16½ feet east of the east rail of the cold stor-

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age siding. If he had had a flying start and driven his horse at a speed of 5 miles an hour, it would have required over six and one-half seconds to have traversed the distance to the point where he was struck, and during all that time, until too late to avoid the accident, he would have had no view of the oncoming train.

When he approached the crossing, he had the choice of not stopping at all, which from ample evidence the jury found was not what he did do; or of stopping where the majority opinion says he might have stopped, and where, as three witnesses testified, he could have seen nothing if he did; or of stopping at the point where it is alleged he first did stop, and where for the first time he had a view of the tracks. This was on or partly over the cold storage siding. If it be that he took the risk of an injury from a train on that siding, the answer is he received no such injury, and that act in no way contributed to the injury he did receive. If he had stopped where the majority opinion says he should have stopped, or at any point short of the cold storage siding, in view of the fact that he could see nothing, the only thing he could have done would have been to tie his horse, or get someone to hold it—for he would have been guilty of negligence had he left it unfastened, and unattended on the public highway—alight from his buggy, and go forward, risking the imaginary danger of the cold storage siding, and stop, look, and listen at the very place he actually did, then return, untie the horse, enter the buggy, and drive over the same ground he had walked over, and then beyond and across the tracks. Thus to do would have occupied at least three times that required for a train, traveling as this one was, to reach the point where he was killed, even though it was at the farthest visible distance away when he started back.

Obviously, therefore, the only reasonable and sensible thing to do was exactly what he did. Neither in this class of cases, nor any other, does the law require of a man that he do a vain and useless thing; and so we said in Bard v. Philadelphia & R. R. Co. 199 Pa. 94, 99, 48 Atl. 684. Or, as was said in Barthelmas v. Lake Shore & M. S. R. Co. 225 Pa. 597, 601, 74 Atl. 556: "The rule which imposes on the traveler the duty of stopping, looking, and listening before entering on a crossing, implies antecedently that there is a safe place where he may stop, and, by the exercise of his senses of seeing and hearing, inform himself as to the situation with respect to safety."

In this case deceased did stop at the very first place where he could see and hear, and yet the opinion of the majority condemns him because he did not do that which, by the verdict of the jury, founded on the testimony of three witnesses, and by mathematical demonstrations, would have been a vain and useless thing, even if done.

Third. Moreover, the opinion of the majority is in direct antagonism to the reason and spirit of the rule itself. It will hardly be contended that a failure to stop, look, and listen would relieve a negligent defendant from liability, if, for instance, plaintiff would have gotten safely across but for a defect in the crossing itself. At any rate, we held in Baughman v. Shenango & A. R. Co. 92 Pa. 335, 37 Am. Rep. 690, that such a contention is of no avail. What, then, is the reason for the rule? In North Pennsylvania R. Co. v. Heileman, 49 Pa. 60, 88 Am. Dec. 482, it is said that the reason is because "the movement on railroads is necessarily so rapid, and the consequences of collision so disastrous." As those disastrous consequences are the result of the rapid movement, it follows that the reason of the rule is the necessary rapidity of railroad travel. It is for that very reason that we have not required those crossing trolley tracks to stop before so doing, despite the very high speed with which the trolleys run. Carson v. Federal Street & P. Valley R. Co. 147 Pa. 219, 15 L.R.A. 257, 30 Am. St. Rep. 727, 23 Atl. 369; Callahan

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v. Philadelphia Traction Co. 194 Pa. 425, 39 Atl. 225; Haas v. Chester Street R. Co. 202 Pa. 145, 51 Atl. 744.

But the like reason exists in regard to sidings leading only to private plants. Trains move slowly thereover, much slower than the trolley cars on their tracks; and the movement of cars on such sidings is much less frequent than those on trolley tracks. Consequently, a no more stringent rule should be applied, and no case suggests otherwise, unless it be Peoples v. Pennsylvania R. Co. 251 Pa. 275, 96 Atl. 652, cited in the opinion of the majority. If that case applied a more stringent rule, I would be in favor of so modifying it as to conform to reasonable requirements. But it does not do so. There the plaintiff was injured on the siding itself, which was "in frequent and daily use by the railroad company." Had he looked he would have seen that the cars on that siding were then being shifted; but he did not, and his automobile was struck "immediately upon its getting upon the railroad track." In the present case there was no injury upon the siding. That was crossed in safety, as it was plainly to be seen it could be; and stopping on it, in order to look and listen, was the only safe and sensible thing to do before attempting to cross the dangerous main tracks.

Perhaps the case in our reports which is most nearly like the present is Gray v. Pennsylvania R. Co. 172 Pa. 383, 33 Atl. 697. There, as here, there was a siding and main track, the former occupied by freight cars which obstructed a view of the latter until the former was passed. Deceased "stopped on the sidetrack at the end of the freight cars," and was killed while crossing the main track. We permitted a recovery by plaintiff.

In my judgment this case, upon the evidence, was for the jury, and for that reason I dissent from the judgment of the majority.

Stewart, J., joins in this dissent.

NOTE.

The general question whether or not the failure of a traveler to stop, look, and listen before crossing railroad tracks constitutes negligence as matter of law, barring recovery, is treated in the annotation to Elkins v. Western Maryland R. Co. 1 A.L.R. 198. As shown by that note the so-called "absolute and unbending" Pennsylvania rule that a traveler must, under all circumstances, stop, look and listen for approaching trains, engines, or cars before crossing any railroad track, while not adhered to in every instance by the Pennsylvania court, has been so strictly applied as to be almost without exception. This rigidity of application is well illustrated by the reported case (BENNER v. PHILADELPHIA & R. R. Co. ante, 759), wherein, as strongly pointed out in the dissenting opinion, the majority of the court went so far as to hold that a traveler who failed to stop before crossing a private siding was guilty of contributory negligence as matter of law, notwithstanding the fact that had he so stopped the view of the main track upon which he was killed would have been obstructed, and although he did stop before attempting to cross the main track, at the first point where a view of that track for any considerable distance could be had, namely, after partially crossing the sidetrack upon which, as he could see, there was no motive power and no danger of injury.

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WILLIAM W. FERRIS, Admr., etc., of Henry M. Jewett, Deceased,
v.
ALFRED W. PETT.

Rhode Island Supreme Court — January 3, 1919.

(— R. I. —, 105 Atl. 869.)

Executor and administrator — sale of good will — estoppel.

1. An optician who has kept copies of prescriptions which he has filled for an oculist, and who as the latter's administrator sells the good will of his business, is precluded from soliciting trade from former patients of the oculist, whose prescriptions are in his possession, which will involve the re-examination of their eyes and the adaptation of lenses to changed conditions wrought by lapse of time.

[*See note on this question beginning on page* 771.]

Good will — sale — absence of advantage — effect.

2. That one purchasing the good will of a business receives no advantage from the purchase does not relieve him from liability to pay the purchase money due under the contract.

Executor and administrator — sale of good will — interference with contract.

3. An administrator who sells the good will of his intestate's business violates the contract so as to relieve the purchaser from liability to pay for the good will under his contract, by soliciting trade from former customers of the intestate.

EXCEPTIONS by defendant to rulings of the Superior Court for Providence and Bristol Counties made during the trial of an action brought to recover the balance alleged to be due under a written contract to purchase the good will and business of plaintiff's intestate, which resulted in a verdict for plaintiff. *Judgment for defendant.*

The facts are stated in the opinion of the court.

Mr. **Washington R. Prescott** for defendant.

Messrs. **H. J. Williams** and **J. J. Rosenfeld** for plaintiff.

Vincent, J., delivered the opinion of the court:

This is an action of assumpsit, brought by William W. Ferris as administrator upon the estate of Henry M. Jewett, to recover a balance alleged to be due to the plaintiff under a written contract.

Henry M. Jewett was a doctor of medicine, and specialized in matters pertaining to the eye, ear, nose, and throat. The practice of Dr. Jewett, like that of other oculists, comprehended not only the treatment of the diseases incident to these parts, but also the prescription of such glasses or lenses as he might find, from proper tests, were required to correct or assist the vision of the patient under examination. Upon receiving the prescription, or a copy thereof, the patient customarily takes it to an optician, who furnishes the glasses in accordance therewith, and this method appears to have been followed by those who availed themselves of the professional aid of Dr. Jewett in the matter of their eyes. It is more or less commonly known, and it may also be gathered from the testimony in the case before us, that the doctor and the optician each retain a copy of the prescription in their respective offices, for future reference.

The plaintiff, William W. Ferris, was an optician, and the son-in-law of Dr. Jewett. After carrying on

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the optical business for some years, during which he made glasses for customers sent to him by Dr. Jewett, he sold out his business in August, 1914, reserving from such sale copies of prescriptions emanating from Dr. Jewett. After disposing of his business, Ferris was engaged in other occupations for a period of about two years. He then, in August, 1916, resumed the business of an optician.

In February, 1915, Dr. Jewett died, and his son-in-law Ferris was appointed as administrator upon his estate, and took possession of his property and effects, including his office furniture, appliances, copies of prescriptions, etc.

The defendant, Dr. Alfred W. Pett, was also a specialist in the same lines as Dr. Jewett, and for some time prior to the latter's death they had been somewhat associated, but not as copartners, in professional business. They occupied and used the same waiting room and the same operating room, but each had his own private consultation room and his own patients.

After the death of Dr. Jewett, the defendant, Dr. Pett, being desirous of acquiring the business which had been carried on by the former, entered into a contract with the plaintiff, as administrator, to purchase the business, good will, surgical instruments, and furniture for the sum of $1,000. The contract is in writing, and bears date January 26, 1916. It provides for a cash payment of $200, and for the payment of the balance in instalments of $100 each within a year. The contract does not state what part of the consideration is represented by the tangible property, and what part by the business and good will; but there is some testimony to the effect that in the negotiations between the parties they were considered as being of equal value.

After making payments aggregating $500, the defendant refused to make any further payments under the contract, on the ground that the plaintiff had broken the contract on his part by interfering with the defendant's rights, and impairing and injuring the good will, by solicitations addressed to the former patients of Dr. Jewett, and designed to divert them from the defendant and secure to himself their future patronage.

In support of this contention the defendant offered in evidence three letters sent by the plaintiff to patients of Dr. Jewett. It also appears in evidence that other letters to a considerable number were sent out by the plaintiff, presumably similar in tenor to those produced in evidence. We quote one of these letters, as follows:

January 9, 1917.

Mrs. James Blaine,
Arlington, R. I.

Dear Mrs. Blaine:—In going over my files this morning, I found your name and prescription for glasses as made by the late Dr. H. M. Jewett some little time ago.

In most cases like yours, Mrs. Blaine, a change of lenses is advisable after such a period as you have had your glasses, and so I am writing to inquire if you would like to make an appointment with us to reexamine your eyes at your convenience.

In a short note like this I can do no more than invite you to call at our new offices, and acquaint yourself with our modern facilities we have to serve you.

Thanking you in advance for any reply you may care to make, I am

Very truly yours,
W. W. Ferris.

The case was tried to a jury in the superior court, where a verdict was rendered for the plaintiff for the sum of $500 and interest, amounting all together to $531.83. A motion for a new trial was denied by the trial court, and the case is now before us upon the exception of the defendant to that ruling.

There is no conflict of interest between the oculist and the optician, so long as the one prescribes the lenses required, and the other prepares and adjusts them to suitable

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frames, in which they become practically effective. In the present case the plaintiff goes much farther, as his letters of solicitation clearly indicate. In these letters, the plaintiff not only suggests that the party addressed should obtain new glasses from him, but that he or she should undergo, at his hands, a re-examination of the eyes, with a view to adapting future glasses to such changed conditions as may have resulted from the lapse of time.

Executor and administrator—sale of good will—estoppel.

We cannot see how the kind or degree of skill required in determining what lenses were suited to the changed conditions would differ from that demanded in prescribing glasses in the first instance.

The defendant testifies that he received practically no advantage from the purchase of the good will of the business which had been carried on by Dr. Jewett. That fact would not, in itself, have any important bearing upon his liability to pay the balance due under the contract. The mere failure of the defendant to realize his expectations as to future business, in the absence of any fraud or interference on the part of the person from whom he makes the purchase, would not establish a failure of consideration. Smock v. Pierson, 68 Ind. 405, 34 Am. Rep. 269.

Good will—sale—absence of advantage—effect.

In the case at bar, however, there is something more to be considered than a failure of the defendant's expectations. The testimony discloses that the plaintiff, after disposing of the good will of the business carried on by Dr. Jewett, interfered with the defendant's rights, and sought to divert the business from the defendant for his own benefit, which clearly amounted to a violation of the contract on his part.

Executor and administrator—sale of good will—interference with contract.

In Trego v. Hunt [1896] A. C. 7, 12 Eng. Rul. Cas. 442, Lord Macnaghten said: "A man may not derogate from his own grant; the vendor is not at liberty to destroy or depreciate the thing which he has sold; there is an implied covenant, on the sale of good will, that the vendor does not solicit the custom which he has parted with; it would be a fraud on the contract to do so. These, as it seems to me, are only different turns and glimpses of a proposition which I take to be elementary. It is not right to profess and to purport to sell that which you do not mean the purchaser to have; it is not an honest thing to pocket the price, and then to recapture the subject of sale, to decoy it away or call it back before the purchaser has had time to attach it to himself and make it his very own."

The same rule has been adopted in the case of Zanturjian v. Boornazian, 25 R. I. 151, 55 Atl. 199. In that case the respondents entered into a written agreement with the complainant to convey to him their business, together with the good will thereof. The agreement contained no provision that the respondents should not re-engage in a similar business in the same neighborhood. The complainant offered evidence to show that such was really a part of the agreement, although not included in the written instrument; but the court held that such evidence was inadmissible, as tending to vary the terms of a written contract, and that, notwithstanding that the respondents sold the good will of the business, they had, in the absence of an express stipulation, the right to re-engage in a similar business in the same neighborhood; and the court further said that "the respondents clearly have not the right, however, to apply to any of their old customers privately, either personally or by another, to secure their patronage or to induce them not to deal with the complainant; for this would be in plain violation of their written agreement."

The undisputed testimony pre-

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sents a question of law, which was not argued in the court below on the defendant's motion for a new trial. We think that the solicitations of the plaintiff, as evidenced by his letters to former patients of Dr. Jewett, amount to a violation of the contract on his part, and that he is not entitled to recover that portion of the contract price which appertains to the good will.

The plaintiff may, if he shall see fit, appear before this court on Wednesday, January 15, 1919, at 10 o'clock A. M., and show cause, if any he has, why this case should not be remitted to the Superior Court, with direction to enter judgment for the defendant.

NOTE.

An extended search has disclosed no case other than the reported case (FERRIS v. PETT, ante, 768), as to the effect on one personally of his sale of the good will of a business, in his capacity as a personal representative or agent. The court in the FERRIS CASE assumes, without discussion, that the same principle applies that would have governed if the sale had been of the good will of the plaintiff's own business, although, so far as it appears, the plaintiff did not make any use of the decedent's records. It does not appear whether the defendant also argued that the plaintiff had assumed to sell a better good will than belonged to the decedent's estate, and was therefore estopped to deny such assumption.

It is interesting to note in this connection that it has been held that the sale of the good will, forced upon a surviving partner by the administrator of the deceased partner, leaves the former at liberty to enter upon a competing business, and to solicit trade from the customers of the old firm. Hutchinson v. Nay (1905) 187 Mass. 262, 68 L.R.A. 186, 105 Am. St. Rep. 390, 72 N. E. 974.

TEXAS BANK & TRUST COMPANY OF BEAUMONT, Intervener,
v.
GEORGE W. SMITH et al.

Texas Supreme Court — February 28, 1917.

(108 Tex. 265, 192 S. W. 533.)

Water — irrigation — lien — tenant as owner.

1. A tenant in possession of real estate, cultivating a crop, is an owner within the meaning of a statute giving an irrigation company leasing water to any person owning any land subject to irrigation a lien on the crop for compensation superior to any other lien, where the irrigation company has power to make lease contracts with tenants.

[*See note on this question beginning on page* 778.]

Lien — priority — power of legislature.

2. A lien for the rental of water furnished to make a crop may be given priority by the legislature over existing liens upon the property.

CERTIFICATION by the Court of Civil Appeals for determination by the Supreme Court, of questions arising upon appeal by intervener from a judgment of the District Court for Jefferson County, rendered against it in consolidated actions brought to foreclose certain liens. *Affirmative answers returned.*

The facts are stated in the opinion of the court.

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Messrs. Townes, Foster, & Hardwicke, for intervener:

The legislature having provided that the lien on the crop should exist only when the contract to furnish water was made with the person owning the land subject to irrigation, a tenant having no title and only a limited right to the use of the land could not, in the face of the unambiguous wording of the statute, be considered as owning land or as coming within the provisions of the law.

Turner v. Cross, 83 Tex. 218, 15 L.R.A. 262, 18 S. W. 578; Campbell v. Cook, 86 Tex. 630, 40 Am. St. Rep. 878, 26 S. W. 486; Texas & P. R. Co. v. Railroad Commission, 105 Tex. 386, 150 S. W. 878; Michael v. Michael, 34 Tex. Civ. App. 630, 79 S. W. 74; Gross v. Colonial Assur. Co. 56 Tex. Civ. App. 627, 121 S. W. 517; Warner Elevator Mfg. Co. v. Maverick, 88 Tex. 489, 30 S. W. 437, 31 S. W. 353, 499; Cox v. Robinson, 105 Tex. 426, 150 S. W. 1149; Galveston Exhibition Asso. v. Perkins, 80 Tex. 62, 15 S. W. 633; American Woolen Co. v. North Smithfield, 16 Ann. Cas. 1227, and note, 29 R. I. 93, 69 Atl. 293; Re Sherry, 25 Misc. 361, 55 N. Y. Supp. 421; Johnson v. Crookshanks, 21 Or. 339, 28 Pac. 78; McLain v. Maricle, 60 Neb. 353, 83 N. W. 85; Smith v. Improvement Dist. 108 Ark. 141, 44 L.R.A.(N.S.) 696, 156 S. W. 455; West v. Washington & C. River R. Co. 49 Or. 436, 90 Pac. 666; Barclay v. State, 156 Ala. 163, 47 So. 75; Re Riddell, 116 N. Y. Supp. 261; Re Clement, 101 N. Y. Supp. 447; Crary v. Chicago, M. & St. P. R. Co. 18 S. D. 237, 100 N. W. 18.

Rights vested under a valid and subsisting mortgage cannot be avoided or affected by acts of the mortgagor without consent of the mortgagee.

Kennedy v. Davis, 2 Posey Unrep. Cas. (Tex.) 77; H. R. E. B. & B. Asso. v. Cochran, 60 Tex. 620; Brackenridge v. Millan, 81 Tex. 17, 16 S. W. 555; Rogers v. Grigg, — Tex. Civ. App. —, 29 S. W. 654; Austin v. Welch, 31 Tex. Civ. App. 526, 72 S. W. 881; Low v. Troy Laundry & Machinery Co. — Tex. Civ. App. —, 160 S. W. 136; Jones, Liens, 3d ed. ¶ 971; Stott v. Scott, 68 Tex. 302, 4 S. W. 494; Blackford v. Ryan, — Tex. Civ. App. —, 61 S. W. 161; Masterson v. Pelz, — Tex. Civ. App. —, 86 S. W. 56; McGhee v. Edwards, 87 Tenn. 506, 3 L.R.A. 654, 11 S. W. 316; Farney v. Kerr, — Tenn. —, 48 S. W. 103; National Bank v. Jones, 11 Ann. Cas. 1043, note; Roher v. Ross, 53 Colo. 328, 125 Pac. 489, Ann. Cas. 1914B, 315; Jones, Liens, 3d ed. ¶ 691; Jesse French Piano & Organ Co. v. Elliott, — Tex. Civ. App. —, 166 S. W. 29.

Messrs. Carlton, Townes, & Townes also for intervener.

Messrs. Lipscomb, Gordon, & Lipscomb, for Irrigation Company:

The tenant in possession for the year, owning the crop either free of all liens or subject to a landlord's lien, would be deemed the owner.

Stahl Brewing & Malting Co. v. Van Buren, 45 Wash. 451, 88 Pac. 837; Webster City Steel Radiator Co. v. Chamberlin, 137 Iowa, 717, 115 N. W. 504; Peterson v. Johnson, 132 Wis. 280, 111 N. W. 659; Chicago, R. I. & P. R. Co. v. State, 84 Ark. 409, 106 S. W. 199; Iroquois Co. v. Meyer, 80 Ohio St. 676, 89 N. E. 90; Block v. Pearson, 19 Okla. 422, 91 Pac. 714; Robinson v. Schiltz, 135 Mo. App. 32, 115 S. W. 472.

The lien of an irrigating company by statute to secure its reasonable charges for water necessary to grow a crop of rice (to the owners of which it owes a statutory duty of furnishing water) will not be postponed to liens of others on such crop, where the holders of such other liens know of and acquiesce in the creation of the lien for water rates.

Oriental Hotel Co. v. Griffiths, 88 Tex. 581, 30 L.R.A. 765, 53 Am. St. Rep. 790, 33 S. W. 652; Brooks v. Burlington & S. W. R. Co. 101 U. S. 451, 25 L. ed. 1060; Farney v. Kerr, — Tenn. —, 48 S. W. 103.

Mr. George D. Anderson for defendants.

Phillips, Ch. J., delivered the opinion of the court:

The case presents a controversy between an irrigation company, certain landlords, and a mortgagee with respect to the existence and priority of the lien claimed by the irrigation company. In the year 1909 one George W. Smith was in possession of certain lands leased by him from the owners, using the same for a rice farm. To successfully grow rice on the land irrigation was necessary, and the only water accessible for the purpose was that from the canals of the irrigation company. In July, 1909, Smith entered into a contract with the irri-

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gation company, by the terms of which water for irrigation purposes was to be furnished him by the company for an agreed price. Prior to the making of this contract Smith had executed a mortgage to a banking company to secure the payment of money loaned him to be used in growing the rice crop. This mortgage was duly registered before the irrigation contract was made. The owners of the land knew at the time their leases were made to Smith that his purpose was to cultivate the land in rice, as did also the banking company at the time it took its mortgage.

Default having been made by Smith in the payment of rent due by him for some of the land, the owner of such land—one of the landlords—filed suit for the rent due and for foreclosure of the landlord's lien upon the crop of rice thereon grown. Afterward the irrigation company filed a separate suit seeking the recovery of the amount due by Smith under the water contract and a foreclosure of a lien upon the entire crop. The two suits were consolidated. The banking company intervened, setting up its mortgage lien, as did also the other landlords, asserting their landlords' liens.

The questions propounded by the honorable court of civil appeals are as follows:

"1. Smith being a lessee, and not the owner of the land, and the contract for water having been made with him, and not with the landowners, did the irrigating company, by its contract made with Smith and by furnishing water for the irrigation of the crops in pursuance thereof, acquire a lien on the crops so irrigated by virtue of the provisions of art. 3130 of Sayles's Civil Statutes?

"2. If the foregoing question is answered in the affirmative, then we ask, was such lien superior to the mortgage lien of the Texas Bank & Trust Company, and to the liens of the landowners for the rents of their lands?"

The statute in force in 1909 with respect to the lien of an irrigation company upon crops grown on land for the irrigation of which it had furnished water was in these words: "Every person, corporation or association of persons which has heretofore constructed or which may hereafter construct any ditch, canal, dam, lake or reservoir for the purpose of irrigation, and who shall lease or rent water from said ditch, canal, dam, lake or reservoir to any person or association of persons or corporation owning any lands subject to irrigation from any such ditch, canal, lake, dam or reservoir, such person, corporation or association of persons, owning such ditch, canal, lake, dam or reservoir shall have a preference lien, superior to every other lien, upon the crop or crops raised upon the land thus irrigated under such lease or contract." Act of 1895, § 18 (Gen. Laws 1895, p. 25); Sayles's Civ. Stat. 1897, art. 3130; Rev. Stat. 1911, art. 5009.

The term "owner," as generally used, signifies one who has the legal or rightful title. But this is not always the sense in which it is employed. It is not rigid in meaning, and in statutes is not infrequently used to denote one holding for himself and in his own right, but having less than an absolute title. Its meaning depends in a great measure upon the context and the subject-matter to which it is applied. Thus, in statutes defining duties of railroads, and denouncing a penalty against the corporation "owning the railroads," or exacting certain requirements of the companies "owning the tracks," the corporation in control of and operating the railroad, though simply a lessee of the property, is an "owner" within the meaning of such statutes. State use of Ray County v. St. Joseph, St. L. & S. F. R. Co. 46 Mo. App. 466; Baltimore & O. R. Co. v. Walker, 45 Ohio St. 577, 16 N. E. 475; Chicago, R. I. & P. R. Co. v. State, 84 Ark. 409, 106 S. W. 199. In an action to recover the possession of real estate, to main-

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tain which only a possessory title was necessary, a tenant for years properly alleged himself to be "the owner" of the real estate. Parker v. Minneapolis & St. L. R. Co. 79 Minn. 372, 82 N. W. 673. Other cases illustrating like uses of the term are Schott v. Harvey, 105 Pa. 222, 51 Am. Rep. 201; Camp v. Rogers, 44 Conn. 291; Peterson v. Johnson, 132 Wis. 280, 111 N. W. 659. The last case concerned a statute imposing the duty on "the respective occupants of adjoining lands, used and occupied for farming purposes," of maintaining partition fences, unless they should otherwise mutually agree. It then provided: "And owners of lands who do not maintain and keep in repair lawful partition fences shall not be entitled to recover any damages whatever for trespasses by the animals of owners of any adjoining lands with whom partition fences might have been maintained if such lands had been inclosed." The word "owners," as used in the quoted part of the statute, was held to include persons designated by the word "occupants" in the preceding part.

That the term may signify one whom the owner of the title has clothed with the possession and control is recognized by this court. In the opinion of Chief Justice Stayton in Turner v. Cross, 83 Tex. 218, 15 L.R.A. 262, 18 S. W. 578, in speaking of the terms "owner" and "proprietor," this is said: "Both words are doubtless often used to express right to property in a thing less than absolute or exclusive right, but when this occurs it will ordinarily appear from the context, and in all such cases the person holds for himself and in his own right; and, as stated in brief of counsel, 'the right of such a person to the possession and control springs not from an act to which the concurrence or consent of the owner is not required, as in the appointment of a receiver, but from the direct act of the owner or proprietor, who thereby clothes the person placed in the possession and control with the right to operate the same for his own benefit.'"

The sense in which the term "owning" was used in that part of the statute under consideration which requires that the lease of water be to one "owning" the lands to be irrigated, in order for the irrigation company to have the statutory lien upon the crops thereon grown, cannot be accurately determined without consulting the context of the act of which the statute was a part. As already noted, the statute was § 18 of the Act of 1895. Section 11 of the act, as amended at the same session (Gen. Laws 1895, p. 23; Sayles's Civ. Stat. 1897, art. 3125), throws a distinct light upon the question, since it is the part of the act which deals with the duties of irrigation companies chartered under it or the general laws, defines the classes of water rights which may be sold or leased, and designates those entitled to obtain them.

After authorizing the formation of corporations with the powers conferred by the act, this section declares: "All such corporations shall have full power and authority to make contracts for the sale of permanent water rights, and to have the same secured by liens on the land or otherwise, and to lease, rent or otherwise dispose of the water controlled by such corporation for such time as may be agreed upon, and in addition to the lien on the crops hereinafter provided for, the lease or rental contract may be secured by a lien on the land or otherwise."

This is a general provision designating the kinds of water rights which irrigation companies may grant to consumers. They are of two distinct classes: permanent water rights, and those of a limited duration. This distinction is important, and materially aids in the interpretation of § 18. Permanent water rights, this provision contemplates, are to be sold. Other water rights are to be leased or rented. The former are to be evidenced by contracts of sale; the lat-

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ter by contracts of lease. With whom are such respective classes of contracts to be entered into, and how are they to be secured? Contracts for the sale of permanent water rights are to be made, of course, with the owner of the title to the land. As to their security, it is declared that they may be secured by liens on the land, which could be validly given only by an owner of the title, or by means of other security. As to lease contracts, no limitation whatever is imposed in respect to the classes of persons with whom they may be made. The authority to make such contracts is conferred in the broadest terms. There is no hint in the provision of a power to make them with only the owner of the title to the land, to the exclusion of a tenant in rightful control and possession who might need the water for his use. Its language, as well as the spirit of the act, repudiates the view that a tenant in possession is to be dependent upon the owner of the title for his water supply, wholly deprived of the right to contract for it, and altogether excluded from the benefits of the act unless the owner of the title sees fit to lease the water necessary for his use. The only reasonable construction of this provision is that it authorizes the making of lease contracts with either a tenant in possession or the owner of the title.

What security does the act provide for this class of contracts? The answer to this inquiry is to be found both in the provision above quoted and in § 18, constituting the statute under consideration, since both relate to this same subject, and by direct reference one is substantially made a part of the other. The above provision recognizes and declares that such contracts are to be secured, primarily, by the statutory lien upon the crops conferred by § 18, though providing that they may be additionally secured by a lien on the land or otherwise. Its language is that they, "in addition to the lien on the crops hereinafter provided for (the lien conferred by § 18), may be secured by a lien on the land, etc." The express lien upon the land for the security of such contracts could be validly given only by the owner of the title. But was the statutory lien upon the crops when grown by a tenant in possession to be dependent in all cases upon the existence of a water lease contract with the owner of the title? To so assume is either to introduce a conflict between § 18 and the provision above quoted, or to impose a limitation upon the latter not expressed, and which the generality of its terms excludes. The construction to be given the provision quoted in respect to the persons with whom the making of lease contracts is authorized is, as already stated, that they may be made with either a tenant in possession, or the owner of the title. It expressly declares that the security for such contracts shall be, primarily, the statutory lien upon the crops conferred by § 18. Under this provision, therefore, such contracts would stand so secured, whether entered into either by a tenant in possession or the owner of the title. To construe § 18 as meaning that they are to be secured by the statutory lien only when made with the owner of the title would, accordingly, contradict the plain intendment of the above provision. In the construction of the two provisions they are to be harmonized, if their terms reasonably admit of it, so that both may be given consistent effect. This may be done only by either assuming that, in authorizing the making of lease contracts, the legislature intended they should be made with only the owner of the title, thus depriving a tenant in possession of all right in his own behalf to contract for and obtain water for his use, and placing his right to water at the entire disposal of his landlord,—a construction not only opposed by express provisions of the act, as will be later shown, but, which would subject the tenant to an injustice that it is not reasonable to

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believe the legislature intended,—or construing the word "owning," used in § 18, in its broader sense, and as therefore including a tenant in rightful control and possession of the land. The term in legal effect admits of that construction, and, as used in this statute, such meaning should be given it.

Water—irrigation—lien—tenant as owner.

It is difficult to believe that since the legislature, in conferring the authority for the making of lease contracts, did not limit its exercise to only the owner of the title, its purpose was nevertheless to confine the benefits of the statutory lien provided for their security to only such as an owner of the title might make. It is more reasonable to conclude that the intention was that the lien thus furnished for this class of contracts should apply to all authorized contracts of the class.

That the act, in terms, authorizes the making of such contracts directly with the owner of only a possessory title to the land, as distinguished from an owner of the absolute title, and declares it to be the duty of irrigation companies to furnish such an owner water in his own right, is shown by this further provision of amended § 11: "All persons who own or hold a possessory right or title to land adjoining or contiguous to any canal, ditch, flume or lateral constructed and maintained under the provisions of this chapter, and who shall have secured a right to the use of water in said canal, ditch, flume, lateral, reservoir, dam or lake, shall be entitled to be supplied from such canal, ditch, flume, lateral, dam or lake with water for irrigation of such land, and for mining, milling, and stock raising in accordance with the terms of his or their contract."

The declaration that the owners of a possessory title to land adjoining any canal, etc., who shall have secured the right to the use of water in the canal, shall be entitled to be supplied with water "in accordance with the terms of his or their contract," could reasonably contemplate nothing less than their right to make such contracts for themselves.

It thus also appears that in this part of the act the holder of only a possessory right to the land is recognized as the "owner" of a species of title. This serves to explain the meaning of the term "owning" in § 18. It is not to be assumed that the term was used in the latter section in a sense wholly different from that in which it was employed in another section of the identical act with reference to the same subject-matter. The more reasonable view—and such is a primary rule of construction—is that it was used in a consistent sense in both sections.

The second question is settled by the statute. It declares that the lien it provides shall be "superior to every other lien." All liens for which the law then made provision must have been taken into account in the enactment of the statute. Being the later act, this declaration could only mean that all such statutory liens should be subordinate to the lien which it was the purpose of the act to confer, whether in force or not when the latter attached. As to the landlord's lien, this is necessarily true as applied to a water lease contract made with a tenant. In no case could such a contract be well made with the tenant until he had acquired his right to the land by lease from its owner, which, as a rule, marks also the time of the creation of the rental indebtedness, and, accordingly, the inception of the landlord's lien. To hold that the existence of the landlord's lien renders inferior the irrigation company's lien would make meaningless the declaration of the statute that the latter shall be "superior to every other lien."

As applied to contract liens, this is also true. Such liens subsequently created would, without this declaration, be subordinate because inferior in point of time. With respect to contract liens, therefore, this declaration is without force unless it has

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reference to those in existence when the lien of the statute accrues.

Ordinarily, a statutory lien will not be given precedence over an existing and duly registered lien. But there is no question as to the power of a legislature to give a statutory lien such priority where its object is to secure a charge necessary for the preservation of the property. Jones, Chat. Mortg. § 474.

Lien—priority—power of legislature.

An instance of liens having this priority independently of any statute provision is the maritime lien upon vessels for repairs necessary to maintain their seaworthiness. The expenditure for such repairs inures to the benefit of the mortgagee, and is as much to his advantage as to the mortgagor. For this reason the mortgage lien, though prior in time, is made subordinate. Scott v. Delahunt, 65 N. Y. 128; Provost v. Wilcox, 17 Ohio, 359; Hammond v. Danielson, 126 Mass. 294.

For a stronger reason should the lien conferred by the statute under consideration be held superior to a prior mortgage lien. It is to secure indebtedness for the water which helps to create the property upon which the mortgage lien is given, without which the property might not have existence. The theory of the statute is that holders of prior liens upon the crops to be grown on the irrigated land are not prejudiced but aided by the furnishing of the water necessary to their growth. It is for this reason, plainly, that the lien to secure the water charges is given its superior rank.

Cases holding that a lien upon property subsequently moved on rented premises is superior to the landlord's lien furnish no analogy, and do not control the question. In such instances the tenant's indebtedness for rent due the landlord has no possible relation to the preservation of the property, and consequently there could be no reason for holding that it was the purpose of the legislature to displace the existing lien.

Nor does the decision in Blackford v. Ryan, — Tex. Civ. App. —, 61 S. W. 161, by the court of civil appeals for the fifth district, have any bearing upon the question. It was decided there that the lien given by article 3319, Revised Statutes of 1895, to a livery stable keeper for the care of a horse, was subordinate to an existing mortgage lien, duly registered at the time the horse was placed in the stable. That article gave merely "a special" lien upon animals fed and cared for in such stables. It contained no declaration that it should be "superior to every other lien." In addition, it was provided by article 3326 of the same title: "Nothing in this title shall be construed or considered as in any manner impairing, or affecting the right of parties to create liens by special contract or agreement, nor shall it in any manner affect or impair other liens arising at common law or in equity, or by any statute of this state, or any other lien not treated of under this title." The latter article would alone serve to maintain the priority of the existing mortgage in such a case. Masterson v. Pelz, — Tex. Civ. App. —, 86 S. W. 56.

Both questions are answered in the affirmative.

Petition for rehearing denied.

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ANNOTATION.

Scope and import of term "owner" in statutes relating to real property.

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V. In statutes relating to opening or change of grade of streets or highways, 788.
VI. In statutes relating to public improvements:
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It seems proper to caution the reader at the outset that, in view of the virtual impossibility of examining all the various topics in connection with which the question forming the subject of this annotation is likely to arise, he should regard such annotation as treating the question in its general aspect, as indicative of the various interests embraced by the term "owner," rather than as certainly including all the decisions that may have arisen under each particular type of statute.

I. In general.

The word "owner" is nomen generalissimum, and may be applied to any defined interest in real estate. State v. Wheeler (1896) 23 Nev. 143, 44 Pac. 430.

Being one of broad and general signification, it is possessed of varied shades of meaning. Murphy v. Lewis (1908) 56 N. J. L. 141, 69 Atl. 483; Crane v. Elizabeth (1882) 36 N. J. Eq. 339; Peterson v. Johnson (1907) 132 Wis. 280, 111 N. W. 659.

The word "owner" has no technical meaning, and, being nomen generalissimum, should, especially when used in a remedial statute, be construed liberally in favor of the parties whom it is the duty and intention of the legislature to protect. 1 Hare, American Const. Law, 355, cited with approval in Hardin v. Chattanooga Southern R. Co. (1901) 113 Ga. 857, 38 S. E. 839.

But it will be more strictly construed where the statute is of a penal character. Clifton Iron Co. v. Jemison Lumber Co. (1895) 108 Ala. 581, 18 So. 554; Gravlee v. Williams (1896) 112 Ala. 539, 20 So. 952.

The word "owner" is not a legal term having a technical signification, but a word of common parlance, and is ordinarily defined as "one having dominion over a thing." Benjamin v. Wilson (1886) 34 Minn. 517, 26 N. W. 725.

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The word "owner," as applied to land, has no fixed meaning which can be declared to be applicable under all circumstances and as to any and every enactment. It usually denotes a fee-simple estate, but it has been defined to include one who has the usufruct, control, or occupation of land with a claim of ownership, whether his interest be an absolute fee or a less estate. Coombs v. People (1902) 198 Ill. 586, 64 N. E. 1056; Binhoff v. State (1907) 49 Or. 419, 90 Pac. 586; Thompson v. Thompson (1916) 79 Or. 513, 155 Pac. 1190.

Ownership does not necessarily require the absolute title in fee. One may own a much less interest in land than the fee. Bennett v. Seibert (1893) 10 Ind. App. 369, 35 N. E. 35, 37 N. E. 1071.

The word "own" does not necessarily mean ownership of the fee; it may be used to designate any one of the great variety of interests in property, even including a short leasehold. State ex rel. Marshall & I. Bank v. Leuch (1914) 155 Wis. 500, 144 N. W. 1122.

In Baltimore & O. R. Co. v. Walker (1888) 45 Ohio St. 577, 16 N. E. 475, it is said: "The terms 'owner' and 'owning' depend somewhat for their signification on the connection in which they are used. 'To own' is defined 'to hold as property, to have a legal or rightful title to, to have, to possess;' and an 'owner' is 'one who owns,—a rightful proprietor.' An owner is not necessarily one owning the fee simple, or one having in the property the highest estate it will admit of. One having a lesser estate may be an owner, and indeed, there may be different estates in the same property, vested in different persons, and each be an owner thereof."

The common or general acceptation of the term "owner" is understood to be one who has the legal title to the thing claimed. Louisville & N. R. Co. v. Murphree (1900) 129 Ala. 432, 29 So. 592.

The primary meaning of the term "owner" has reference to one who has the title, as distinguished from a mere possessory right to the premises. Barclay v. State (1908) 156 Ala. 163, 47 So. 75.

The significance of the word "owner" is subject to some degree of variance, attendant upon its context and the subject-matter to which it is applied. In common speech, it is doubtless most often used to designate the person in whom the legal or equitable title rests, as distinguished from a mere occupant or tenant. As used in law, it is very often given a wider and more comprehensive meaning.

It will be held to include the owners of any distinct interest or estate in the land less than a fee whenever the connection in which it is used or the apparent purpose of the statute is such as to call for the broader construction. Chiesa v. Des Moines (1912) 158 Iowa, 343, 48 L.R.A.(N.S.) 899, 138 N. W. 922.

The term "owner of the land" in its ordinary acceptation imports the person who is entitled in law to the legal estate in the land. Smith v. Ferris (1876) 6 Hun (N. Y.) 553.

Although the word "owner" has a variety of meanings and may, under certain circumstances, include an equitable as well as a legal ownership, or even a right of present use and possession, it implies something more than a bare legal title, or the possession of land under a title which is void. Hyde v. Shine (1904) 199 U. S. 62, 50 L. ed. 90, 25 Sup. Ct. Rep. 760.

The owner of land is commonly understood to be the person who has the legal title thereto, and not one who, for the time being, has simply the right of possession. Re Sherry (1898) 25 Misc. 361, 55 N. Y. Supp. 421.

The word "owner," while not a technical term, but one of wide application in various connections, primarily means, with respect to land, a person who is seised of a freehold estate therein. American Woolen Co. v. North Smithfield (1908) 29 R. I. 93, 69 Atl. 293, 16 Ann. Cas. 1227.

The term "owner" includes any person having a claim or interest in real property, though less than an absolute fee. Higgins v. San Diego (1901) 131 Cal. 294, 63 Pac. 470; Larimer County Ditch Co. v. Zimmerman (1893) 4 Colo. App. 78, 34 Pac. 1111.

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The law recognizes more than one description of ownership, both in real and personal property. There may be an absolute ownership and a qualified ownership of both descriptions of property, and the one is as fully recognized as the other. Deere v. Chapman (1861) 25 Ill. 610, 79 Am. Dec. 390.

The primary meaning of the word "owners," as applied to land, is one who owns the fee and who has the right to dispose of the property; but the term also includes a person having a possessory right to the land, or the person lawfully occupying and cultivating it, Dunbar v. Texas Irrig. Co. (1917) — Tex. Civ. App. —, 195 S. W. 614.

The word "owner" does not necessarily imply that the person is the holder of a fee simple. It is frequently used as equivalent to "possessor," and to designate the person in actual possession and control of property. Territory v. Young (1881) 2 N. M. 93.

The word "owner" may denote one who has the control of the land, and not merely the holder of the legal title. Tompkins v. Augusta & K. R. Co. (1884) 21 S. C. 420; Lockhart v. State (1912) 6 Ala. App. 61, 60 So. 591.

In common parlance the phrase, "the owner of land," is primarily understood to mean the surface proprietor, having also, more as incidents than otherwise, the mineral and timber interests, and not one who owns only the one or the other, or even both, of these interests, but not the surface. Clifton Iron Co. v. Jemison Lumber Co. (1895) 108 Ala. 581, 18 So. 554.

The word "owner" ordinarily means one who already has a legal or rightful title, and not one who must acquire such a title in the future in order to come within the term. Cox v. Robison (1912) 105 Tex. 426, 150 S. W. 1149.

The term "owner" does not, as a general rule, include the holders of chattels real. Davis v. Cincinnati (1880) 36 Ohio St. 24.

But a tenant may be considered an owner for the purposes of a statute or of a legal obligation if the necessary intention of the statute or the scope of the obligation requires such construction. American Woolen Co. v. North Smithfield (1908) 29 R. I. 93, 69 Atl. 293, 16 Ann. Cas. 1227.

A tenant for years, a tenant for life, and a remainderman in fee, is each an owner. So there may be a legal and equitable estate; and the trustee and the cestui que trust are both owners. Schott v. Harvey (1884) 105 Pa. 222, 51 Am. Rep. 201.

II. Meaning controlled by context and purpose of statute.

The meaning to be given to the word "owner" varies according to the context. Leigh v. Green (1901) 62 Neb. 344, 89 Am. St. Rep. 751, 86 N. W. 1093.

The word "owner" has no technical meaning, but its definition will contract or expand according to the subject-matter to which it is applied. Chan v. South Omaha (1909) 85 Neb. 434, 133 Am. St. Rep. 670, 123 N. W. 464; Schott v. Harvey (1884) 105 Pa. 222, 51 Am. Rep. 201.

In every case where construction is necessary to determine the sense in which the word is used, the object sought to be reached by the statute is the most important consideration. State ex rel. Marshall & I. Bank v. Leuch (1914) 155 Wis. 500, 144 N. W. 1122.

The word "owner," as used in statutes, is given the widest variety of construction, usually guided in some measure by the object sought to be accomplished in the particular instance. It has led some courts to declare that the word has no precise legal signification, and may be applied to any defined interest in real estate. Merrill R. & Lighting Co. v. Merrill (1903) 119 Wis. 249, 96 N. W. 686.

The terms "owning," "owner," and "owned," depend somewhat for their signification upon the connection in which they are used. They are not technical but general terms, and are therefore liberally construed, the precise meaning depending upon the nature of the subject-matter and the connection in which they are used. Miller v. Imperial Valley Water Co. (1909) 156 Cal. 27, 24 L.R.A.(N.S.) 372, 103 Pac. 227.

The extent to which such word was

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used must be determined from a consideration of the whole statute and its subject-matter, aided by certain general rules of statutory construction; such as, that sometimes a statute ought to be construed strictly and at other times liberally. State v. Wheeler (1896) 23 Nev. 143, 44 Pac. 430.

The word "owner" does not always import an absolute owner, as the owner in fee simple of real property. Its meaning is often varied according to the connection in which it is used, and it is to be understood according to the subject-matter to which it relates. Payne v. Sheets (1903) 75 Vt. 335, 55 Atl. 656.

The word "owner," as applied to real estate, may designate the owner of the fee or the owner of a less estate, as a lessee for a term of years, or any rightful proprietor; and its meaning has to be gathered from the connection in which it is used and from the subject-matter to which it is applied; and when used in a statute, the obvious nature and purpose of the statute may indicate its meaning. Guild v. Prentis (1909) 83 Vt. 212, 74 Atl. 1150, Ann. Cas. 1912A, 313.

III. Interest or estate which may constitute one an "owner."

Accordingly, in construing statutes relating to real property, the word "owner" has been given a wide range of meaning.

It is sometimes limited to the fee owner. See Wright v. Bennett (1841) 4 Ill. 258; Merritt v. Kewanee (1898) 175 Ill. 537, 51 N. E. 867.

It may be limited to the person entitled to the legal estate. See Re Riddell (1909) 116 N. Y. Supp. 261; United States v. Hyde (1904) 132 Fed. 545.

On the other hand, it has sometimes been held to include the owner of any interest affected by the operation of the statute. See Sorg v. Crandall (1908) 233 Ill. 79, 84 N. E. 181; Lemmon v. Osborn (1899) 153 Ind. 172, 54 N. E. 1058; Adams v. Beale (1865) 19 Iowa, 61; Smith County v. Labore (1887) 37 Kan. 480, 15 Pac. 577; Steele v. Dye (1909) 81 Kan. 286, 105 Pac. 700; Webber Lumber & Supply Co. v. Erickson (1913) 216 Mass. 81, 102 N. E. 940; Benjamin v. Wilson (1886) 34 Minn. 517, 26 N. W. 725; Moritz v. St. Paul (1893) 52 Minn. 409, 54 N. W. 370; Gerrard v. Omaha, N. & B. H. R. Co. (1883) 14 Neb. 270, 15 N. W. 231; State v. Missouri P. R. Co. (1905) 75 Neb. 4, 105 N. W. 983; Beste v. Cedar Co. (1910) 87 Neb. 689, 128 N. W. 29; Rule v. Sioux County (1913) 94 Neb. 736, 144 N. W. 806; Makemson v. Dillon (1918) — N. M. —, 171 Pac. 673; Watson v. New York C. R. Co. (1872) 47 N. Y. 162; Crutcher v. Block (1907) 19 Okla. 246, 91 Pac. 895, 14 Ann. Cas. 1029; Woodstock Hardwood & Spool Mfg. Co. v. Charleston Light & Water Co. 84 S. C. 306, 66 S. E. 194.

And it may include all persons having an interest of record. See McCotter v. New Shoreham (1898) 21 R. I. 43, 41 Atl. 572.

It may include one claiming under an imperfect title. See Hyde v. Shine (1904) 199 U. S. 62, 50 L. ed. 90, 25 Sup. Ct. Rep. 760; Richards v. Nylka Land Co. (1918) 143 La. —, 79 So. 208; Hillis v. O'Keefe (1905) 189 Mass. 139, 75 N. E. 147.

It may include the owner of a qualified fee. See Bew v. Ventnor City (1911) 81 N. J. L. 207, 80 Atl. 28.

It may include the owner of land subject to an easement, as of a fee in the highway. See Moran v. Gallagher (1908) 199 Mass. 486, 20 L.R.A.(N.S.) 116, 85 N. E. 579, and State, De Groot, Prosecutor, v. Jersey City (1892) 55 N. J. L. 120, 25 Atl. 272 (land dedicated but not accepted).

It has been held to mean the legal owner. See Granite Bituminous Paving Co. v. Parkview Realty & Improv. Co. (1912) 168 Mo. App. 468, 151 S. W. 479.

Or the ostensible owner. See Lopard v. Fritz (1904) 45 Misc. 620, 91 N. Y. Supp. 5.

It sometimes appears to be limited to the holder of the record title. See St. Joseph use of Swenson v. Forsee (1904) 110 Mo. App. 127, 84 S. W. 98.

But in other instances it has been held not to be so limited. See Nation-

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al Bond & Secur. Co. v. Alderson (1906) 99 Minn. 137, 108 N. W. 861; Vogel & B. Co. v. Montgomery (1909) 133 App. Div. 836, 108 N. Y. Supp. 10; Smith v. Rothe (1900) — Tex. Civ. App. —, 55 S. W. 754; Stahl Brewing & Malting Co. v. Van Buren, 45 Wash. 451, 88 Pac. 837.

One claiming under a tax title may be an "owner." See Banchor v. Proctor (1903) 88 Kan. 510, 129 Pac. 526; Rogers v. Lynn (1909) 200 Mass. 354, 86 N. E. 889.

One who has taken up public lands, but who has not yet acquired legal title thereto, may be an "owner." See Miller v. Imperial Water Co. (1909) 156 Cal. 27, 24 L.R.A.(N.S.) 372, 103 Pac. 227; Territory v. Young (1881) 2 N. M. 93; Mahon v. Surerus (1899) 9 N. D. 57, 81 N. W. 64; Thompson v. Thompson (1916) 79 Or. 513, 165 Pac. 1190; Brigham City v. Chase (1906) 30 Utah, 410, 85 Pac. 436.

But one who has taken up public lands will not be considered the "owner" where his claim thereto has a fraudulent basis. See Ex parte Hyde (1904) 194 Fed. 207; Hyde v. Shine (1904) 199 U. S. 62, 50 L. ed. 90, 25 Sup. Ct. Rep. 760.

The word "owner" may (see Rhodes v. Koch (1916) 195 Mo. App. 182, 189 S. W. 641) or may not (see Murphy v. Lewis (1908) 76 N. J. L. 141, 89 Atl. 483) be taken as properly descriptive of one holding an estate by the entirety.

A husband or wife is not the "owner" of real estate belonging to the other. See Smith v. Read (1883) 51 Conn. 10; Re Riddell (1909) 116 N. Y. Supp. 261.

Nor will either be so considered, even though, if he or she survive, he or she will be entitled by law to an interest therein. See McCullough v. St. Edward Electric Co. (1917) 101 Neb. 802, 165 N. W. 157.

Or although the property be a homestead. See Mathewson v. Skinner (1903) 66 Kan. 309, 71 Pac. 580; McLain v. Maricle (1900) 60 Neb. 353, 83 N. W. 85; Davis v. Dodds (1870) 20 Ohio St. 473.

A wife is not the owner of community property during her husband's lifetime. See Fallbrook Irrig. Dist. v. Abila (1895) 106 Cal. 355, 39 Pac. 794.

The word "owner" has been held properly applicable to the owner of an undivided fractional interest in land. See Lockhart v. State (1912) 6 Ala. App. 61, 60 So. 591; Lozo v. Sutherland (1878) 38 Mich. 168; William Cameron & Co. v. Trueheart (1914) — Tex. Civ. App. —, 165 S. W. 58.

And it comprehends all of such owners. See Dyckman v. New York (1849) 7 Barb. (N. Y.) 498.

It may (see Hodges v. Harkleroad (1905) 74 Ark. 843, 85 S. W. 779) or may not (see Re Wenatcee Heights Orchard Co. (1914) 212 Fed. 787) describe one having only an expectant interest.

A vendor under a land contract is, for the purpose of some statutes, regarded as the "owner." See State, National R. Co., Prosecutors, v. Easton & A. R. Co. (1873) 36 N. J. L. 181; Packard v. Sugarman (1900) 31 Misc. 623, 66 N. Y. Supp. 30; Schnaufer v. Ahr (1907) 53 Misc. 299, 103 N. Y. Supp. 195; Edwards & McC. Lumber Co. v. Mosher (1894) 88 Wis. 672, 60 N. W. 264.

But for the purpose of other statutes a vendor under a land contract is not regarded as the "owner." See Loonie v. Hogan (1854) 9 N. Y. 435, 61 Am. Dec. 683; Johnson v. Soliday (1910) 19 N. D. 463, 126 N. W. 99.

Likewise, a vendee in possession under a contract to purchase may be the "owner" within the contemplation of certain statutes. See Wellington v. State (1889) 52 Ark. 266, 12 S. W. 562; Wolfe v. Iowa R. & Light Co. (1915) 173 Iowa, 277, 155 N. W. 324; Wilder v. Haughey (1874) 21 Minn. 101; Shaw v. Goben (1912) 167 Mo. App. 125, 151 S. W. 209; Belmont v. Smith (1853) 11 N. Y. Leg. Obs. 216, 1 Duer, 675; Re Farley (1915) 153 N. Y. Supp. 271; Salzer Lumber Co. v. Claflin (1907) 16 N. D. 601, 113 N. W. 1036; Bowls v. Oklahoma City (1909) 24 Okla. 579, 24 L.R.A.(N.S.) 1299, 104 Pac. 902; Zimmerman v. Cimarron County (1917) — Okla. —, 162 Pac. 489; Ridgeway v. Broadway (1911) 91 S. C. 544, 75 S. E. 132; Bone v. Cowan

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(1904) 37 Tex. Civ. App. 519, 84 S. W. 385; State ex rel. Hall v. Savidge (1916) 93 Wash. 676, 161 Pac. 471.

But for the purpose of other statutes a vendee in possession under a contract to purchase is not the "owner." See Gravlee v. Williams (1896) 112 Ala. 539, 20 So. 952; Fallbrook Irrig. Dist. v. Abila (1895) 106 Cal. 355, 39 Pac. 794; Hardin v. Chattanooga Southern R. Co. (1901) 113 Ga. 357, 38 S. E. 839; Miller v. Mead (1891) 127 N. Y. 544, 13 L.R.A. 701, 28 N. E. 387; Smith v. Ferris (1876) 6 Hun (N. Y.) 553; Hubbell v. Texas Southern R. Co. (1910) 59 Tex. Civ. App. 185, 126 S. W. 313; Eardley Bros. v. Burt (1916) — Tex. Civ. App. —, 182 S. W. 721.

So also, other equitable owners are ordinarily regarded as coming within the description of owner of the land. See Springer v. Kroeschell (1896) 161 Ill. 358, 43 N. E. 1084; Atkins v. Little (1871) 17 Minn. 342, Gil. 320; Carey-Lombard Lumber Co. v. Bierbauer (1899) 76 Minn. 434, 79 N. W. 541; Laird v. Cincinnati (1881) 6 Ohio Dec. Reprint, 479; Allen v. Portland (1900) 35 Or. 420, 58 Pac. 509; Binhoff v. State (1907) 49 Or. 419, 90 Pac. 586; J. F. Anderson Lumber Co. v. Spears (1910) 25 S. D. 624, 127 N. W. 643; William Cameron & Co. v. Trueheart (1914) — Tex. Civ. App. —, 165 S. W. 58; Smith v. Craver (1916) 89 Wash. 243, 154 Pac. 156; Dreutzer v. Bell (1860) 11 Wis. 114.

But this is not invariably the case. See Birmingham & A. A. R. Co. v. Louisville & N. R. Co. (1907) 152 Ala. 422, 44 So. 679.

It has been held that the trustee of an equitable interest is not an owner. See McIntyre v. Easton & A. R. Co. (1875) 26 N. J. Eq. 425.

The owner of all the stock in a corporation having title to real property may be considered as the "owner" of such property. See Staples v. Adams, Payne & Gleaves (1914) 131 C. C. A. 464, 215 Fed. 322.

A mortgagor in possession is generally held to be the "owner." See Hendricks v. Julesburg (1913) 55 Colo. 59, 132 Pac. 61; Tanner v. Bell (1878) 61 Ga. 584; Goodrich v. Atchison County (1891) 47 Kan. 355, 18 L.R.A. 113, 27 Pac. 1006.

But he ceases to be such after foreclosure and sale. See Da Silva v. Turner (1896) 166 Mass. 407, 44 N. E. 532.

A mortgagee is, for the purpose of some statutes, regarded as the owner. See Severin v. Cole (1874) 38 Iowa, 463; Hagerstown v. Groh (1905) 101 Md. 560, 61 Atl. 467, 4 Ann. Cas. 943; Howard v. Robinson (1849) 5 Cush. (Mass.) 119; Morey v. Duluth (1899) 75 Minn. 221, 77 N. W. 829; Morey Engineering & Constr. Co. v. St. Louis Artificial Ice Rink Co. (1912) 242 Mo. 241, 40 L.R.A.(N.S.) 119, 146 S. W. 1142, Ann. Cas. 1913C, 1200; Granite Bituminous Pav. Co. v. Parkview Realty & I. Co. (1918) 199 Mo. App. 226, 201 S. W. 933; Omaha Bridge & Terminal R. Co. v. Reed (1903) 69 Neb. 514, 96 N. W. 276.

And so is a trustee under a deed of trust. See Clark v. McClaugherty (1903) 53 W. Va. 376, 44 S. E. 269.

But in construing other statutes a mortgagee is held not to answer to such description. See Cornell v. Conine-Eaton Lumber Co. (1897) 9 Colo. App. 225, 47 Pac. 914; Griffin v. Seymour (1900) 15 Colo. App. 487, 63 Pac. 811; Whiting v. New Haven (1877) 45 Conn. 303; Mixon v. Stanley (1897) 100 Ga. 372, 28 S. E. 440; Chicago, K. & W. R. Co. v. Need (1896) 2 Kan. App. 492, 43 Pac. 997; Sibbett v. Steele (1911) 240 Mo. 85, 144 S. W. 439; Tompkins v. Horton (1874) 25 N. J. Eq. 284; Crane v. Elizabeth (1882) 36 N. J. Eq. 339; Put-in-Bay v. Stimmel (1896) 18 Ohio C. C. 644, 7 Ohio C. D. 380; Glover v. United States (1896) 164 U. S. 294, 41 L. ed. 440, 17 Sup. Ct. Rep. 95; Central Trust Co. v. Bodwell Water Power Co. (1910) 181 Fed. 735; Allis-Chalmers Co. v. Central Trust Co. (1911) 39 L.R.A.(N.S.) 84, 111 C. C. A. 428, 190 Fed. 700.

And it is not enough to constitute a mortgagee an "owner" within the meaning of such statutes that he holds under a trust deed conveying the legal title. See Chicago v. Sullivan Machinery Co. (1915) 269 Ill. 58, 109 N. E. 696; Ripkey v. Binns (1914) 264 Mo. 505, 175 S. W. 206; Richmond v. Williams (1904) 102 Va. 733, 47 S. E. 844.

The courts have found occasion to hold that neither a judgment creditor

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(see Watson v. New York C. R. Co. (1872) 47 N. Y. 157) nor an attaching creditor (see Leigh v. Green (1901) 62 Neb. 344, 89 Am. St. Rep. 751, 86 N. W. 1093, s. c. on subsequent appeal (1902) 64 Neb. 533, 101 Am. St. Rep. 592, 90 N. W. 255) is, by reason of his interest in the property, an "owner" for the purpose of the statute there in question.

The word "owner" may denote the person in possession or control. See McGowan v. Morgan (1914) 160 App. Div. 588, 145 N. Y. Supp. 787; Allen v. Portland (1900) 35 Or. 420, 58 Pac. 509; Georgia, C. & N. R. Co. v. Scott (1890) 38 S. C. 34, 16 S. E. 185; Peterson v. Johnson (1907) 132 Wis. 280, 111 N. W. 659; Grattan v. Trego (1915) 140 C. C. A. 579, 225 Fed. 705.

But it does not include one failing to make out a title by adverse posession. See Brasher v. Shelby Iron Co. (1906) 144 Ala. 659, 40 So. 80.

It may (see Clarke v. Yukon Invest. Co. (1915) 83 Wash. 485, 145 Pac. 624, Ann. Cas. 1916E, 625) or may not (see Yall v. Snow (1906) 201 Mo. 511, 10 L.R.A.(N.S.) 177, 119 Am. St. Rep. 781, 100 S. W. 1, 9 Ann. Cas. 1161; People ex rel. Williams v. Eno (1909) 134 App. Div. 527, 119 N. Y. Supp. 600), be taken as meaning the owner of a business rather than the owner of the premises upon which such business is conducted.

It may (see St. Paul v. Clark (1901) 84 Minn. 138, 86 N. W. 893) or may not (see State v. Coe (1881) 72 Me. 456; St. Louis v. J. E. Kaime & Bro. Real Estate Co. (1904) 180 Mo. 309, 79 S. W. 140) include an agent.

A receiver may (see Bush v. State (1917) 128 Ark. 448, 194 S. W. 857; State v. Corbett (1894) 57 Minn. 345, 24 L.R.A. 498, 4 Inters. Com. Rep. 694, 59 N. W. 317) or may not (see Turner v. Cross (1892) 83 Tex. 218, 15 L.R.A. 262, 18 S. W. 578) be considered as the "owner" of the property under his control.

An executor or administrator is not ordinarily regarded as the "owner" of his decedent's real estate, within the meaning of statutes relating to real property. See Doke v. Denton County Lumber Co. (1914) 114 Ark. 1, 52 L.R.A.(N.S.) 870, 169 S. W. 227; Price v. Ward (1899) 25 Nev. 203, 46 L.R.A. 459, 58 Pac. 849; People ex rel. Brownell v. Board of Assessors (1908) 109 N. Y. Supp. 991.

But an executor may be such where he is in possession and control. See Chan v. South Omaha (1909) 85 Neb. 434, 133 Am. St. Rep. 670, 123 N. W. 464.

And he may be considered as the "owner" within the meaning of the statute where he has, under the will, a right of possession and power of sale. See Winchester v. Bush (1911) 141 Ky. 709, 133 S. W. 791; Portsmouth Sav. Bank v. Omaha (1903) 67 Neb. 50, 93 N. W. 231; Shannon v. Omaha (1905) 73 Neb. 507, 103 N. W. 55, 106 N. W. 592; Tompkins v. Augusta & K. R. Co. (1884) 21 S. C. 420.

The word "owner" has been held, in the sense in which it was used in various statutes, not to be properly applicable to a county (see Honnold v. Endicott (1908) 170 Ind. 16, 83 N. E. 502), a municipal corporation (see New Union Teleph. Co. v. Marsh (1904) 96 App. Div. 122, 89 N. Y. Supp. 79), or a school district (see Florman v. School Dist. (1895) 6 Colo. App. 319, 40 Pac. 469), or a board of education (see Board of Education v. Volk (1905) 72 Ohio St. 469, 74 N. E. 646, 18 Am. Neg. Rep. 581).

But in other connections, it has been held to apply to a township (see Zumbro v. Parnin (1895) 141 Ind. 430, 40 N. E. 1085) and to a municipal corporation (see Bennett v. Seibert (1893) 10 Ind. App. 369, 35 N. E. 35, 37 N. E. 1071; Providence v. Scituate (1918) — R. I. —, 103 Atl. 993).

One having a perpetual lease is the "owner" of the premises. See St. Bernard v. Kempner (1899) 60 Ohio St. 244, 45 L.R.A. 662, 54 N. E. 267; Laird v. Cincinnati (1881) 6 Ohio Dec. Reprint, 479.

But a lessee under a ninety-nine years' lease may (see Ogburn Gravel Co. v. Watson Co. (1916) — Tex. Civ. App. —, 190 S. W. 205) or may not (see Smith v. Improvement Dist. (1913) 108 Ark. 141, 44 L.R.A.(N.S.) 696, 156 S. W. 455) be regarded as such.

A life tenant is sometimes to be regarded as an owner. See Deere v.

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Chapman (1861) 25 Ill. 610, 79 Am. Dec. 350; Chiesa & Co. v. Des Moines (1912) 158 Iowa, 343, 48 L.R.A.(N.S.) 899, 138 N. W. 922; Cayce Land Co. v. Southern R. Co. (1918) — S. C. —, 96 S. E. 725.

But sometimes he may not. See Baltimore v. Boyd (1885) 64 Md. 10, 20 Atl. 1028; Re Clement (1906) 101 N. Y. Supp. 447.

A lessee or tenant for years, or for a less period, is for some purposes regarded as the "owner." See:

United States.—Grattan v. Trego (1915) 140 C. C. A. 579, 225 Fed. 705.

Arkansas.—Chicago, R. I. & P. R. Co. v. State (1907) 84 Ark. 409, 106 S. W. 199.

Colorado.—Larimer County Ditch Co. v. Zimmerman (1893) 4 Colo. App. 78, 34 Pac. 1111.

Iowa.—Webster City Steel Radiator Co. v. Chamberlin (1908) 137 Iowa, 717, 115 N. W. 504.

Kentucky.—Com. v. Smith (1907) 127 Ky. 171, 105 S. W. 397.

Minnesota.—State v. Corbett (1894) 57 Minn. 345, 24 L.R.A. 498, 59 N. W. 317.

Missouri.—State use of Ray County v. St. Joseph, St. L. & S. F. R. Co. (1891) 46 Mo. App. 466; Robinson v. Schiltz (1909) 135 Mo. App. 32, 115 S. W. 472.

Nebraska.—Beste v. Cedar County (1910) 87 Neb. 689, 128 N. W. 29.

Nevada.—State v. Wheeler (1896) 23 Nev. 143, 44 Pac. 430.

New York.—People v. Thornton (1907) 122 App. Div. 287, 106 N. Y. Supp. 704; Baker v. State (1909) 63 Misc. 549, 118 N. Y. Supp. 618.

Ohio.—Choteau v. Thompson (1853) 2 Ohio St. 114; Baltimore & O. R. Co. v. Walker (1888) 45 Ohio St. 577, 16 N. E. 475; Iroquois Co. v. Meyer (1909) 80 Ohio St. 676, 89 N. E. 90.

Oklahoma. — Block v. Pearson (1907) 19 Okla. 422, 91 Pac. 714; Jarrell v. Block (1907) 19 Okla. 467, 92 Pac. 167.

Pennsylvania. — Schott v. Harvey (1884) 105 Pa. 222, 51 Am. Rep. 201.

Rhode Island.—Gilligan v. Providence (1875) 11 R. I. 258; Poole v. Fellows (1903) 25 R. I. 64, 54 Atl. 772; American Woolen Co. v. North Smithfield (1908) 29 R. I. 93, 59 Atl. 293, 16 Ann. Cas. 1227.

Texas.—TEXAS BANK & T. Co. v. SMITH (reported herewith) ante, 771.

Vermont.—Guild v. Prentis (1909) 83 Vt. 212, 74 Atl. 1115, Ann. Cas. 1912A, 313.

Wisconsin.—Merrill R. & Lighting Co. v. Merrill (1903) 119 Wis. 249, 96 N. W. 686.

England.—Lister v. Lobley (1837) 7 Ad. & El. 124, 112 Eng. Reprint, 417, 6 Nev. & M. 340, 2 Harr. & W. 12, 6 L. J. K. B. N. S. 200.

But for other purposes he has been held not to be the owner. See Louisville & N. R. Co. v. Murphree (1900) 129 Ala. 432, 29 So. 592; Barclay v. State (1908) 156 Ala. 163, 47 So. 75; Florida C. & P. R. Co. v. Judge (1897) 100 Ga. 601, 28 S. E. 379, 3 Am. Neg. Rep. 791; Re Sherry (1898) 25 Misc. 361, 55 N. Y. Supp. 421; Davis v. Cincinnati (1880) 36 Ohio St. 24; Crary v. Chicago, M. & St. P. R. Co. (1904) 18 S. D. 237, 100 N. W. 18; Katzer v. Milwaukee (1899) 104 Wis. 16, 79 N. W. 745, 80 N. W. 41; Douglas County Agri. Soc. v. Douglas County (1899) 104 Wis. 429, 80 N. W. 740.

And this even though he holds under a lease with the privilege of indefinite renewal. See State ex rel. Marshall & I. Bank v. Leuch (1914) 155 Wis. 500, 144 N. W. 1122.

The owner of standing timber has been held not to be the "owner," entitled to recover a statutory penalty for unlawful cutting, where the context shows the landowner to have been within the legislative contemplation. See Clifton Iron Co. v. Curry (1895) 108 Ala. 581, 18 So. 554; Doke v. Peek (1903) 45 Fla. 244, 110 Am. St. Rep. 70, 34 So. 896.

But one having sporting rights may be regarded as the "owner" under the statute imposing a penalty for trespass for the purpose of hunting and fishing. See Payne v. Sheets (1903) 75 Vt. 335, 55 Atl. 656.

IV. In statutes relating to condemnation proceedings.

See caution at the beginning of this note.

The exercise of the right of eminent

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domain being a power delegated by the legislature, statutes conferring such power must be strictly construed. New & Old Decatur Belt & Terminal R. Co. v. Karcher (1896) 112 Ala. 676, 21 So. 825; Birmingham & A. A. R. Co. v. Louisville & N. R. Co. (1907) 152 Ala. 422, 44 So. 679.

The word "owner," as used in statutes relating to condemnation proceedings, may be construed to apply to every person having any interest in the property to be taken. Smith County v. Labore (1887) 37 Kan. 480, 15 Pac. 577 (but compare Mathewson v. Skinner (1903) 66 Kan. 309, 71 Pac. 580, where it is said, with reference to Smith County v. Labore, that "these observations are merely speculative and do not profess to fix the rule"); Gerrard v. Omaha, N. & B. H. R. Co. (1883) 14 Neb. 270, 15 N. W. 231; State v. Missouri P. R. Co. (1905) 75 Neb. 4, 105 N. W. 983.

It embraces not only the owner of the fee, but a tenant for life and a lessee for years, and any other person who has an interest in the property which will be affected by the condemnation. Woodstock Hardwood & Spool Mfg. Co. v. Charleston Light & Water Co. (1909) 84 S. C. 306, 66 S. E. 194.

It has been held on the one hand that the holder of the legal title, who has entered into an agreement to convey the property, is the owner thereof within the meaning of a statute providing for condemnation proceedings (State, National R. Co., Prosecutors, v. Easton & A. R. Co. (1873) 36 N. J. L. 181); on the other, that the vendee under a land contract is the owner of the property within the meaning of such a statute (Wolfe v. Iowa R. & Light Co. (1915) 173 Iowa, 277, 155 N. W. 324).

A lessee for years is an "owner or proprietor" within the meaning of a statute requiring compensation to be made to such person for a compulsory taking. Lister v. Lobley (1837) 7 Ad. & El. 124, 112 Eng. Reprint, 417, 6 Nev. & M. 340, 2 Harr. & W. 12, 6 L. J. K. B. N. S. 200.

The lessee of premises condemned is an "owner" within the meaning of a statutory provision defining an owner as including all persons having any estate, interest, or easement in the property to be taken, or any lien, charge, or encumbrance thereon. People v. Thornton (1907) 122 App. Div. 287, 106 N. Y. Supp. 704; Baker v. State (1909) 63 Misc. 549, 118 N. Y. Supp. 618.

The word "owner," as used in statutes authorizing the condemnation of land for railroad purposes, does not necessarily mean the owner of the legal title, but refers to the person in possession, and having control of the land. Cayce Land Co. v. Southern R. Co. (1918) — S. C. — 96 S. E. 725.

It may denote the occupier. Georgia, C. & N. R. Co. v. Scott (1890) 38 S. C. 34, 16 S. E. 185.

The word "owner," as used in a statute authorizing water commissioners of a city to enter upon land and agree with the owner of any property which may be required as to the amount of compensation to be paid him, means the person or persons who represent a particular piece of property where there is a unity of possession; and it is therefore not necessary that there should have been a separate appraisement of the value of the interest of each of the cotenants. Dyckman v. New York (1849) 7 Barb. (N. Y.) 498, affirmed in (1851) 5 N. Y. 434.

The statutory right of a wife in her husband's property in case she shall survive him does not make her an "owner" thereof within the meaning of a statute requiring the owners of property taken in condemnation proceedings to be compensated therefor. McCullough v. St. Edward Electric Co. (1917) 101 Neb. 802, 165 N. W. 157.

A life tenant is an "owner" within the meaning of a statute fixing the measure of recovery for land taken by a railroad company, upon which it has entered with the consent of the "owner." Cayce Land Co. v. Southern R. Co. (S. C.) supra.

Executors who have, under the will, a power of sale for the purposes of division or of paying debts, are the owners of the decedent's land within the meaning of a statute fixing the measure of recovery by a railroad company which has made entry upon land and

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constructed its roadbed thereon by permission of the "owner." Tompkins v. Augusta & K. R. Co. (1884) 21 S. C. 420.

A mortgagee is not an owner with an interest in the land mortgaged, against whom condemnation proceedings may be instituted. Chicago, K. & N. W. R. Co. v. Need (1896) 2 Kan. App. 492, 43 Pac. 997.

A mortgagee is an owner within the meaning of a statute providing for the taking of land under the power of eminent domain. Omaha Bridge & Terminal R. Co. v. Reed (1903) 69 Neb. 514, 96 N. W. 276.

A mortgagee of realty is an "owner of real estate" within the meaning of a statute providing that if "the owners of any real estate" shall refuse to grant a right of way to a railway company, it may be taken by eminent domain proceedings, where the statute also provides that the word "land" and phrases "real estate" and "real property" shall include land, tenements, and hereditaments, "and all rights therein, equitable as well as legal." thereto and interest therein, equitable as well as legal." Severin v. Cole (1874) 38 Iowa, 463.

A mortgagee is not an owner within the meaning of a statute requiring notice of a resolution pending in a municipal council for the appropriation of land to be given to the owner or owners of every piece of property sought to be appropriated. Put-in-Bay v. Stimmel (1896) 18 Ohio C. C. 644, 7 Ohio C. D. 380.

A mere naked trustee of an equitable interest in land is not an owner thereof within the meaning of the provisions of the charter of a railway company requiring notice of a proceeding to condemn lands to be given to "owners" and "persons interested." McIntyre v. Easton & A. R. Co. (1875) 26 N. J. Eq. 425.

A municipal corporation is not "an owner" within the meaning of a statute requiring notice of proceedings to condemn the right to place telephone poles and lines in a village street the fee of which is in the abutting owner, and defining the term "owners" to include all persons having any estate, interest, or easement in the property to be taken. New Union Teleph. Co. v. Marsh (1904) 96 App. Div. 122, 89 N. Y. Supp. 79.

The term "owner or owners," as used in a statute providing for making parties to eminent domain proceedings all persons interested as owners, tenants, lessees, or encumbrancers, being intended to designate the parties entitled to the compensation which is substituted for the land taken, should be held to embrace all persons having estates in the land, whether in possession, reversion, or remainder. Watson v. New York C. R. Co. (1872) 47 N. Y. 157.

When the term "owner" is employed in statutes relating to eminent domain to designate the persons who are to be made parties to the proceeding, and who are entitled to receive compensation for land taken against their will, it should be held to include all those who have any lawful interest in the property to be condemned. Brigham City v. Chase (1906) 30 Utah, 410, 85 Pac. 436.

The holder of the legal, and not the holder of the equitable, title, is the owner of land within the meaning of a statute requiring that the application for the condemnation of land "must describe the several tracts, and state the names and residences of the owners of each tract." Birmingham & A. A. R. Co. v. Louisville & N. R. Co. (1907) 152 Ala. 422, 44 So. 679.

A mortgagee under a trust deed conveying the legal title of the property is not an owner within the meaning of the local improvement act requiring owners of property to be taken by eminent domain to be named. Chicago v. Sullivan Machinery Co. (1915) 269 Ill. 58, 109 N. E. 696.

A judgment creditor of an owner has no estate or proprietary interest in the land, and is therefore not an owner within the meaning of statutes providing who shall be made parties to condemnation proceedings. Watson v. New York C. R. Co. (1872) 47 N. Y. 157.

A homestead entryman is an "owner" within the meaning of a statute relating to condemnation proceedings, and providing that such proceedings must contain the names of the owners

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of the property. Brigham City v. Chase (Utah) supra.

V. In statutes relating to opening or change of grade of streets or highways.

See caution at the beginning of this note.

The word "owner," as used in a statute relating to the laying out of highways, includes all persons who have an interest of record in the land over which the highway is laid. McCotter v. New Shoreham (1898) 21 R. I. 43, 41 Atl. 572.

In Goodrich v. Atchison County (1891) 47 Kan. 355, 18 L.R.A. 113, 27 Pac. 1006, it was held that for all purposes of establishing and opening highways, under the statute relative thereto, through mortgaged premises, the mortgagor in possession is to be regarded as the owner of the land.

The trustee and beneficiary in a deed of trust, as such, are not owners within the meaning of a statute requiring the petition in a proceeding to establish a road to be accompanied by the names of the resident persons owning lands through which said proposed road is to run. Ripkey v. Binns (1914) 264 Mo. 505, 175 S. W. 206.

A wife occupying with her husband a homestead the legal title to which is in the latter is not an owner of the land within the meaning of a statute requiring notice of proceedings in the establishment of a highway to the owners through whose land such road is supposed to be laid out. Mathewson v. Skinner (1903) 66 Kan. 309, 71 Pac. 580.

A mortgagee of land taken for the extension of a city street is not the owner thereof within the meaning of the provisions of a city charter requiring notice to be given and compensation made to the owner. Whiting v. New Haven (1877) 45 Conn. 305.

The word "owner," as used in statutes providing for the compensation of owners of land through which a highway shall be opened, applies to all persons having an interest in the estate taken or damaged. Beste v. Cedar County (1910) 87 Neb. 689, 128 N. W. 29; Rule v. Sioux County (1913) 94 Neb. 736, 144 N. W. 806.

The vendee under an executory contract for the sale of land is not the "owner" thereof, within the meaning of a statute providing that no highways shall be opened or worked without a release by the owner of the land or an assessment of his damages (Smith v. Ferris (1876) 6 Hun (N. Y.) 553); but the word "owner" means the person entitled to the legal estate (Re Riddell (1909) 116 N. Y. Supp. 261).

A husband is not the "owner" of real estate belonging to his wife within the meaning of such statute. Re Riddell (N. Y.) supra.

The mortgagee of land is not an owner thereof within the meaning of a provision of a municipal charter requiring the municipality to make compensation to the owners of land before their interest can be subjected to the easement of a public highway. Crane v. Elizabeth (1882) 36 N. J. Eq. 339.

But the language of a municipal charter which requires the board of street commissioners, in condemning land for the purpose of making a public improvement, to "ascertain whether any and what amount of damages will be caused thereby for which the owner or occupant of any right or interest claimed in any ground or improvement ought to be compensated over and above the benefits which will thereby accrue to its owner or occupant," is broad enough to include the interests of a mortgagee. Hagerstown v. Groh (1905) 101 Md. 560, 61 Atl. 467, 4 Ann. Cas. 943.

The lessee of state land is the "owner thereof" within the meaning of a statute providing for the compensation of owners of land taken or damaged for highway purposes. Beste v. Cedar County (Neb.) supra.

The words "owner" and "owners," as used in a statute providing for the awarding of damages for injury to property resulting from a change of grade in the street, must be construed in the comprehensive sense as including all persons having an interest in the land, or who are entitled to the compensation to be awarded for the injury to the property. Moritz v. St. Paul (1893) 52 Minn. 409, 54 N. W. 370.

A tenant for life or for years is an

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owner within the meaning of a statute requiring compensation to be made to the owner of improved property injured by change of an established street grade, and defining "real property" as including lands, tenements, hereditaments, and all rights thereto and interests therein. Chiesa v. Des Moines (1912) 158 Iowa, 343, 48 L.R.A. (N.S.) 899, 138 N. W. 922.

A tenant for life or years, or from year to year, of the abutting estate, is an "owner" within the provision of a statute for compensation to abutting owners for damages caused by a change of grade in highways. Gilligan v. Providence (1875) 11 R. I. 258.

VI. In statutes relating to public improvements.

See caution at the beginning of this note.

a. Petitioning for.

The word "owner," as used in a statute requiring a petition by the owners of the majority of the property affected as a condition of making a local improvement, means owner in fee. Merritt v. Kewanee (1898) 175 Ill. 537, 51 N. E. 867.

The owner of a perpetual lease is an "owner" of the property, and so may sign a petition for a local improvement. Laird v. Cincinnati (1881) 6 Ohio Dec. Reprint, 1006.

A lessee in possession under a lease of real property for ninety-nine years, renewable forever, may be considered the owner of such property within the meaning of a statute requiring owners to join in a petition for a street improvement. St. Bernard v. Kemper (1899) 60 Ohio St. 244, 45 L.R.A. 662, 54 N. E. 267.

A lessee under a ninety-nine year lease is not an "owner" who can petition for an improvement under a constitutional provision requiring the consent of a majority in value of the property holders owning property adjoining the locality to be affected. Smith v. Improvement Dist. (1913) 108 Ark. 141, 44 L.R.A. (N.S.) 696, 156 S. W. 455.

A tenant for life of property fronting on a street is not "an owner" within the purview of the statute requiring application to be made by the owners of a majority of the abutting property in order to initiate a street improvement, and declaring that a tenant for ninety-nine years, or ninety-nine years renewable forever, or the executor or administrator of such tenant, or the guardian of an infant owner or a mortgagee in possession, shall be deemed the owner for the purpose of any application authorized by the act. Baltimore v. Boyd (1885) 64 Md. 10, 20 Atl. 1028.

An owner of land which he has dedicated to the public as a street, but which has not been accepted or appropriated, is an owner of land within the meaning of a statutory provision that no petition for any improvement shall be of any force, avail, or effect, unless the same be signed by the owners of one third of the frontage of land along the improvements desired. State, DeGroot, Prosecutor, v. Jersey City (1892) 55 N. J. L. 120, 25 Atl. 272.

One who has a life estate in an undivided half of a lot and the care and management of the other half during a child's minority is "the owner" of the entire lot, in the sense that she shall sign for it in petitioning for a street improvement. Allen v. Portland (1900) 35 Or. 420, 58 Pac. 509.

The equitable owner of property is the owner thereof within the meaning of a statute requiring petitions for street improvement to be signed by a certain proportion of the owners of the abutting property. Ibid.

One who conveys property to secure a loan, and takes back a lease for fifteen years, with the privilege of purchase, is an owner of the property, and as such entitled to sign a petition for a local improvement. Laird v. Cincinnati (Ohio) supra.

An executor who is not the trustee of a valid express trust is not the owner of the real estate of his decedent within the meaning of a statute requiring the signatures of "owners" to a petition for a public improvement. People ex rel. Brownell v. Assessors (1908) 109 N. Y. Supp. 991.

Executors and trustees of an estate to whom jointly it is devised, to be held and managed by them during the

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lifetime of testator's widow, with "full discretion in the management and control of said property with the view of increasing its value and deriving the best possible income therefrom," are "owners" within the meaning of a statute requiring a petition for repaving to be signed by the owners of the majority of the front footage on the street to be repaved. Portsmouth Sav. Bank v. Omaha (1903) 67 Neb. 50, 93 N. W. 231; Shannon v. Omaha (1905) 73 Neb. 507, 103 N. W. 53, 106 N. W. 592.

b. Remonstrating against.

A township whose highways are subject to an assessment for benefits arising from the construction of a public drain is, for the purpose of the proceeding, a landowner within the meaning of a provision of the statute that if, at a time designated, "two thirds in number of the landowners named in such petition, residents," etc., shall "remonstrate in writing against the construction of such drain or ditch, such petition shall be dismissed." Zumbro v. Parnin (1895) 141 Ind. 430, 40 N. E. 1085.

A county is not a "landowner" within a provision of a drainage statute requiring the dismissal of the petition upon remonstrance of two thirds of the "landowners" affected, where the statute does not use the term "landowner" indiscriminately as synonymous with "party" to the proceeding, but differentiates between landowners affected and cities, towns, or other public corporations affected. Honnold v. Endicott (1908) 170 Ind. 16, 83 N. E. 502.

A husband and wife owning an estate by the entirety are each owners within the contemplation of a statute providing for the making of a remonstrance against a proposed street improvement by a majority of the resident owners of property liable to taxation therefor. Rhodes v. Koch (1916) 195 Mo. App. 182, 189 S. W. 641.

One having an equitable title to property as a purchaser thereof, who has paid a portion of the purchase price, is the owner thereof within the meaning of a statute providing for the filing of a protest against the letting of a contract for paving by "a majority of the resident owners of the property liable to taxation therefor, . . . who shall own a majority of the front feet owned by residents of the city abutting on the street, avenue, or alley proposed to be improved." Shaw v. Goben (1912) 167 Mo. App. 125, 151 S. W. 209.

An executor or administrator in the possession of, and exercising complete control over, the real property of his decedent, and whose authority to remonstrate is not challenged by the heirs or devisees of said decedent, is an owner of such real estate within the meaning of a statute authorizing the owner of 50 per cent of the foot frontage of real estate subject to special assessment for local improvements to block a proposed improvement by remonstrating against it. Chan v. South Omaha (1909) 85 Neb. 434, 133 Am. St. Rep. 670, 123 N. W. 464.

c. Giving notice of.

Executors who, by the will, are given full power and control over testator's realty for a period of ten years, with power of sale thereof, the devisees having only a right to the proceeds, are the owners thereof within the meaning of a statute requiring notice to be given of the making of a local improvement to the "owners" of property affected. Winchester v. Bush (1911) 141 Ky. 709, 133 S. W. 791.

Creditors secured by a conveyance of land to a trustee to secure the payment of a debt are not "owners" of the land within the meaning of a statute requiring notice and opportunity first to be given to abutting owners before a local assessment is made. Richmond v. Williams (1904) 102 Va. 733, 47 S. E. 844.

d. Collecting assessments for.

The term "owner," as used in a statute requiring tax bills for local improvements to state the name of the owner of the property, denotes the person whom the public records show to be vested with title, in the absence of knowledge to the contrary. St.

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Joseph use of Swenson v. Forsee (1904) 110 Mo. App. 127, 84 S. W. 98.

A provision of a city charter permitting owners of lands to appear and defend against the entry of judgment for an assessment for a local improvement will include a mortgagee where it is apparent from the provisions of the charter that the word "owner" is not used therein in its strict sense, but that it means persons interested in the land. Morey v. Duluth (1899) 75 Minn. 221, 77 N. W. 829.

The word "owner," as used in a statute providing that tax bills imposed for local improvements shall be and become a lien on the property taxed therewith, "and may be collected of the owner of the land, and in the name of and by the contractor," includes encumbrancers. Morey Engineering & Constr. Co. v. St. Louis Artificial Ice Rink Co. (1912) 242 Mo. 241, 40 L.R.A.(N.S.) 119, 146 S. W. 1142, Ann. Cas. 1913C, 1200.

The term "owner," as used in the provision of a city charter that dues for the enforcement of special tax bills shall be brought in the name of the contractor, against the owners of the land, means the legal owner. Granite Bituminous Paving Co. v. Parkview Realty & Improv. Co. (1912) 168 Mo. App. 468, 151 S. W. 479. But, on rehearing (199 Mo. App. 226, 201 S. W. 933), it was held that the term included beneficiaries under a deed of trust.

A lessee for years is not an owner within the meaning of a statute providing that assessments made for the cost of constructing a sewer may be collected against the owner personally, or by enforcement of a lien upon the property subject thereto. Davis v. v. Cincinnati (1880) 36 Ohio St. 24.

One who is in the possession of property, who was the record owner when assessments for a local improvement were levied, and whose name appears as owner upon the assessment roll and in the certificate of delinquency, is the "owner" of the property within the meaning of a statute requiring notice to be given to the "owner" by the holder of a certificate of delinquency, of his application to the city treasurer for a deed, so as to furnish such owner an opportunity to redeem before the issuance of such deed, notwithstanding after the issuance of the delinquent certificate he had given a mortgage in the form of an absolute deed to another, which was recorded, whereby such other became the apparent record owner. Smith v. Craver (1916) 89 Wash. 243, 184 Pac. 156.

VII. In statutes relating to formation of drainage or irrigation districts.

See caution at the beginning of this note.

The question whether holders of small residence lots in towns and cities are "owners of land" within the meaning of a statute providing for the formation of irrigation districts was referred to but not decided in Fallbrook Irrig. Dist. v. Abila (1895) 106 Cal. 355, 39 Pac. 794.

The holder of a certificate of purchase from the state for certain school lands within the proposed district, upon which he has paid only a portion of the purchase money, is not a "freeholder owning land," within the meaning of a statute providing for the formation of irrigation districts. Ibid.

An occupant of unsurveyed public lands, which he has entered with the intent of procuring the government title thereto, is an "owner" within the meaning of that term in the charter of an irrigation company which is organized to procure a supply of water and distribute it among its stockholders for use upon lands owned by them. Miller v. Imperial Valley Water Co. (1909) 156 Cal. 27, 24 L.R.A.(N.S.) 372, 103 Pac. 227.

It was left an open question in Fallbrook Irrig. Dist. v. Abila (Cal.) supra, whether or not a tenant in common is to be considered as an owner of land within the meaning of a statute providing for the formation of irrigation districts.

The interest which the wife has in community property during her husband's lifetime does not constitute her an "owner" of land within the meaning of a statute providing for the formation of an irrigation district. Ibid.

Mortgagees are not owners within the meaning of the statute requiring

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"a majority in interest of the owners" to join in incorporating a drainage district. Sibbett v. Steele (1912) 240 Mo. 85, 144 S. W. 439.

VIII. In statutes relating to the assessment and collection of taxes.

See caution at the beginning of this note.

A father who, acting as the agent of his son, bought and paid for certain land and took a deed of it, made to his son, as grantee, which he held for the sole benefit of his son, but without the son's knowledge, until his own death, ten years later, is not the "owner" of the land within the meaning of a statute requiring real estate to be assessed "to the person who is either the owner or in possession thereof." Stone v. New England Box Co. (1913) 216 Mass. 8, 102 N. E. 949.

A vendee of realty, in possession under an executory contract of sale, is the "owner thereof" within the meaning of a statute providing that all taxable property shall be listed and assessed each year in the name of the owner thereof. Bowls v. Oklahoma City (1909) 24 Okla. 579, 24 L.R.A. (N.S.) 1299, 104 Pac. 902.

A vendee of school lands of a state, in possession under a contract of sale, is the owner thereof for the purpose of taxation. Zimmerman v. Cimarron County (1917) — Okla. —, 162 Pac. 489; Boone v. Porter (1915) 45 Okla. 615, 146 Pac. 584.

The word "owner," as used in a statute which provides that, in assessing real estate, the assessor shall make out a "complete list of all lands or lots subject to taxation, showing the names and owners, if known to him," signifies the owner of an estate in possession at the time of assessment, and not a prior owner, or the owner of an estate in expectancy, or of any executory or contingent interest. Re Wenatchee Heights Orchard Co. (1914) 212 Fed. 787.

The word "owner," as used in a statute providing for the foreclosure of tax liens, will not include an attaching creditor, where it is apparent that, throughout the Revenue Act, the word is employed in the sense of absolute owner. Leigh v. Green (1901) 62 Neb. 344, 89 Am. St. Rep. 751, 86 N. W. 1093, s. c. on subsequent appeal (1902) 64 Neb. 533, 101 Am. St. Rep. 592, 90 N. W. 255.

A husband is not the owner of real estate belonging to his wife, within the meaning of a statute providing that real estate shall be assessed and taxed in the name of the owner. Smith v. Read (1883) 51 Conn. 10.

IX. In statutes creating exemptions from taxation.

See caution at the beginning of this note.

A lessee is not the owner of property within the meaning of a statute exempting from taxation property "owned" by associations of a certain character. Katzer v. Milwaukee (1899) 104 Wis. 16, 79 N. W. 745, 80 N. W. 41; Douglas County Agri. Soc. v. Douglas County (1899) 104 Wis. 429, 80 N. W. 740.

Land held under lease, even though it be a long-time lease, with privilege of indefinite renewal, is not owned within the meaning of a statute which provides that the assessed value of a building in which a bank conducts its business, "if owned by the bank, including the land on which it is located, if owned by such bank," shall be deducted from the total value of the shares of stock, for the purpose of taxation. State ex rel. Marshall & I. Bank v. Leuch (1914) 155 Wis. 500, 144 N. W. 1122.

Land leased by a street railway company for a term of five years is within a statute providing that where a street railway company pays the license fee therein provided, "all personal property, franchises, and real estate owned and actually and necessarily used" by such company in the operation of its business shall be exempt from taxation. Merrill R. & Lighting Co. v. Merrill (1903) 119 Wis. 249, 96 N. W. 686.

X. In statutes declaring who may redeem from tax sales.

See caution at the beginning of this note.

In construing the redemption laws the courts hold that the word "owner" is a generic term which embraces the

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different species of interest which may be carved out of a fee-simple estate. Hodges v. Harkleroad (1905) 74 Ark. 343, 85 S. W. 779; Adams v. Beale (1865) 19 Iowa, 61.

The "owner," within the meaning of such statute, is anyone who has a substantial interest in the premises. Steele v. Dye (1909) 81 Kan. 286, 105 Pac. 700.

The term "owner," as used in such statutes, has been construed to include mortgagees, judgment creditors, and holders of contingent interests in the land affected by the sale. Lane v. Wright (1903) 121 Iowa, 376, 100 Am. St. Rep. 362, 96 N. W. 902.

The words "owner or any person interested personally," as used in a statute defining the class of persons entitled to redeem property sold for taxes, mean not only one who owns by a perfect title, but also include in their meaning one who possesses as owner. Richards v. Nylka Land Co. (1918) 143 La. —, 79 So. 208.

One in possession under a claim of right, and who has paid a tax on the land assessed to the heirs of a former owner, can be found to be the owner of the land, entitled to redeem it from a tax sale, within the meaning of a statute authorizing redemption by such owner. Hillis v. O'Keefe (1905) 189 Mass. 139, 75 N. E. 147.

One in possession of property as owner when an assessment and tax sale were made is the "owner" within the meaning of a statute authorizing the owner to redeem property sold at a tax sale. Bentley v. Cavallier (1908) 121 La. 60, 46 So. 101.

The word "owner," as used in a statute declaring that the "owner" may redeem from a tax sale, includes the person charged for the taxes as owner. Townshend v. Shaffer (1887) 30 W. Va. 176, 3 S. E. 586.

One who owns a piece of land subject to the life interest of his father, and subject to a reduction of his interest by the birth of other children to his father, who might be living, or their descendants, at the time of the father's death, is the "owner" of the land within the meaning of a statute permitting such owner to redeem from a tax sale. Hodges v. Harkleroad (1905) 74 Ark. 343, 85 S. W. 779.

One who has purchased real estate at a tax sale is the "owner" thereof and therefore entitled to redeem it from taxes assessed in years previous to the time when he became such purchaser, within the meaning of the statute authorizing redemption to be made by the "owner." Rogers v. Lynn (1909) 200 Mass. 354, 86 N. E. 889.

A grantee of a holder of a tax deed in whose favor the five-year Statute of Limitations has run against the original owner, and who has taken possession under the deed, which is good on its face, is an owner within the meaning of a statute providing that "any owner, his agent or attorney, may redeem land sold for taxes." Banchor v. Proctor (1913) 88 Kan. 510, 129 Pac. 526.

A mortgagee of land is not an "owner" of the mortgaged property, and as such entitled to redeem it from a tax sale. Mixon v. Stanley (1897) 100 Ga. 372, 28 S. E. 440.

But a trustee under a deed of trust being a purchaser, and holding the legal title, is an "owner," having a right to redeem from a tax sale. Clark v. McClaugherty (1903) 53 W. Va. 376, 44 S. E. 269.

A mortgagor, after foreclosure and sale, is not the owner of the land, within the meaning of a statute authorizing such owner to redeem from a tax sale. Silva v. Turner (1896) 166 Mass. 407, 44 N. E. 532.

XI. In homestead exemption statutes.

See caution at the beginning of this note.

The word "owner," within the meaning of the Homestead Exemption Law, includes all who have a claim or interest in the property, even though it is an undivided interest, or falls far short of absolute ownership in fee. Lozo v. Sutherland (1878) 38 Mich. 168.

One having the entire equitable estate in property is the "owner" thereof within the meaning of a statute declaring exempt homestead property "owned and occupied by a resident of this state." Dreutzer v. Bell (1860) 11 Wis. 114.

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The equitable owner of land, in possession thereof under a contract of purchase, is the owner thereof within the meaning of the statute exempting "a homestead, consisting of any quantity of land not exceeding eighty acres . . . to be selected by the owner thereof . . . or instead thereof at the option of the owner, a quantity of land, not exceeding in amount one lot, being within an incorporated town, city or village . . . owned and occupied by any resident of this state." Wilder v. Haughey (1874) 21 Minn. 101.

The owner of a life estate in land, as well as the owner of the fee therein, may be considered as the owner within the meaning of the Homestead Act, providing for the exemption from levy and forced sale of the plot of ground and buildings thereon, occupied as a residence and owned by the debtor, being a householder and having a family, to the value of $1,000. Deere v. Chapman (1861) 25 Ill. 610, 79 Am. Dec. 350.

A remainderman who, with his family, resides on a farm of which his mother is the life tenant, and nonresident, may be considered the "owner" of the land within the meaning of a statutory provision that a homestead of 160 acres of farming land, occupied as a residence by the family of the owner, shall be exempted from sale under any process of law. Grattan v. Trego (1915) 140 C. C. A. 579, 225 Fed. 705.

A husband who occupies as a family homestead, real estate held by his wife as her separate property, is not the "owner" of such homestead within the meaning of a statute relating to the exemption of property from execution. Davis v. Dodds (1870) 20 Ohio St. 473.

One who has acquired a homestead right in property as surviving husband of the owner of the fee, which descended to her son, is the "owner" within the meaning of a statute which provides that "the owner" may from time to time change the limits of the homestead, or may change it entirely, without losing the exemption privilege. Green v. Root (1893) 62 Fed. 191.

A lessee in possession may be considered the owner of property within the meaning of a statute providing that a homestead of 160 acres of farming land, occupied as a residence by the family as the owner, shall be exempted from sale under any process of law. Grattan v. Trego (1915) 140 C. C. A. 579, 225 Fed. 705.

When all the real and personal property of an insolvent debtor has been, either by a general assignment by himself, or as a result of an adjudication in bankruptcy, transferred to an assignee or trustee, subject only to the debtor's reserved right or claim of exemption, he cannot be said to be the "owner" thereafter of the homestead, within the meaning of a statute providing that the head of the family, not the "owner of a homestead," may, in lieu thereof, hold exempt property not exceeding $500 in value. Re Hewitt (1917) 244 Fed. 245.

A bankrupt having title to a homestead which did not sell in the bankruptcy proceeding for enough to satisfy mortgages against it was "not the owner of a homestead," within the meaning of such statute. Re Stitt (1918) — C. C. A. —, 252 Fed. 1.

XII. In statutes declaring who may redeem from sale under execution.

See caution at the beginning of this note.

The word "owner," as used in a statute relating to the redemption of real estate from execution sale, means any owner of the real estate redeemed whose interest was subject to the payment of the judgment upon which it was sold, without regard to whether he is the judgment debtor or claims under him or not. Lemmon v. Osborn (1899) 153 Ind. 172, 54 N. E. 1058.

XIII. In mechanics' lien statutes.

See caution at the beginning of this note.

The word "owner," as used in mechanics' lien statutes, is not limited in its meaning to an owner of the fee (Eastern Ohio Oil Co. v. McEvoy (1907) 75 Kan. 515, 89 Pac. 1048), but means the owner of any interest in the lands (Sorg v. Crandall (1908) 233 Ill. 79, 84 N. E. 181), and includes every

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character of title, whether legal or equitable, fee-simple or leasehold (Crutcher v. Block (1907) 19 Okla. 246, 91 Pac. 895, 14 Ann. Cas. 1029).

In McDermott v. Palmer (1851) 11 Barb. (N. Y.) 9, it was held that the word "owner," as used in the Mechanics' Lien Statute, meant the person who employed the contractor and for whom the work was done under the contract; but this conclusion is disapproved in Loonie v. Hogan (1854) 9 N. Y. 435, 441, 61 Am. Dec. 683.

One who has a government homestead filing upon land and is resident thereon is the "owner" thereof within the meaning of a Mechanics' Lien Law which declares that "every person for whose immediate use and benefit any building, erection, or improvement is made . . . shall be included in word 'owner' thereof." Mahon v. Surerus (1899) 9 N. D. 57, 81 N. W. 64.

It has been held in some states that one in possession of lands under a contract to purchase is the "owner" of the land in the sense in which that word is used in the Mechanics' Lien Law (Ridgeway v. Broadway (1912) 91 S. C. 544, 75 S. E. 132), especially where the statute provides that "every person for whose immediate use or benefit any building, erection or improvement is made shall be included in the words 'owners thereof'" (Salzer Lumber Co. v. Claflin (1907) 16 N. D. 601, 113 N. W. 1036).

But in other states it has been held that a contract to purchase land does not, so long as any of the purchase price remains unpaid, constitute the vendee the "owner" within the Mechanics' Lien Statute. Galveston Exhibition Asso. v. Perkins (1891) 80 Tex. 62, 15 S. W. 633; Faber v. Muir (1901) 27 Tex. Civ. App. 27, 64 S. W. 938; Hubbell v. Texas Southern R. Co. (1910) 59 Tex. Civ. App. 185, 126 S. W. 313; Eardley Bros. v. Burt (1916) — Tex. Civ. App. —, 182 S. W. 721.

A purchaser of land under an executory contract who subsequently fails to comply with his contract and receive a deed is not the "owner" within the meaning of the statute. William Cameron & Co. v. Trueheart (1914) — Tex. Civ. App. —, 165 S. W. 38.

The word "owner" in statutes relating to mechanics' liens has been construed to mean the owner of the legal title, the vendor before the actual conveyance of the land, and not the vendee under a contract for the same. Thaxter v. Williams (1833) 14 Pick. (Mass.) 49; Lamb v. Cannon (1876) 38 N. J. L. 362; Metcalf v. Hunnewell, 1 Gray (Mass.) 297; Hayes v. Fessenden (1870) 106 Mass. 228; Guy v. Carriere (1855) 5 Cal. 511; Johnson v. Pike (1853) 35 Me. 291; Steinmetz v. Boudinot (1817) 3 Serg. & R. (Pa.) 541; Miller v. Mead (1891) 127 N. Y. 544, 13 L.R.A. 701, 28 N. E. 387; Packard v. Sugarman (1900) 31 Misc. 623, 66 N. Y. Supp. 30; Schnaufer v. Ahr (1907) 53 Misc. 299, 103 N. Y. Supp. 195.

The vendor under a land contract by which the vendee was required to erect a building at once, and the title to both the building and land was to remain in the vendor until full payment was made, is the owner of the premises within the meaning of the Mechanics' Lien Law. Edwards & McC. Lumber Co. v. Mosher (1894) 88 Wis. 672, 60 N. W. 264.

But one who has entered into a contract to convey premises upon which a building is erected by the purchaser is not "the owner of the building" within the meaning of the Mechanics' Lien Act. Loonie v. Hogan (1854) 9 N. Y. 435, 61 Am. Dec. 683.

Persons having a grantor's lien on property are not the "owners" thereof within the meaning of a Mechanics' Lien Statute which declares that the word "owner" includes any person having a transferable or conveyable interest in the claim. Griffin v. Seymour (1900) 15 Colo. App. 487, 63 Pac. 809.

A lessee may be an owner within the meaning of a Mechanics' Lien Law. Choteau v. Thompson (1853) 2 Ohio St. 114; Block v. Pearson (1907) 19 Okla. 422, 91 Pac. 714; Jarrell v. Block (1907) 19 Okla. 467, 92 Pac. 167; Poole v. Fellows (1903) 25 R. I. 64, 54 Atl. 772.

A tenant in possession who constructs an improvement for his own use and benefit comes within the statu-

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tory designation of an owner, made by a Mechanics' Lien Law which provides that "an owner, within the meaning of the statute, is any person for whose use or benefit, any building, erection, or other improvement is made." Webster City Steel Radiator Co. v. Chamberlin (1908) 137 Iowa, 717, 115 N. W. 504.

A lessee under a ninety-nine-year lease is the owner within the meaning of the Mechanics' Lien Law. Ogburn Gravel Co. v. Watson Co. (1916) — Tex. Civ. App. —, 190 S. W. 205.

A wife upon whose land a house was erected under contract with her husband is the "owner" within the meaning of the Mechanics' Lien Law providing that "every person . . . for whose immediate use, enjoyment or benefit any building, erection or improvement shall be made, shall be included within the words 'owner or proprietor' thereof under this chapter." Burgwald v. Weippert (1871) 49 Mo. 60.

The word "owner," as used in a statute requiring the statement filed to preserve a mechanics' lien to contain a true description of the property "with the name of the owner or owners," means the owner at the time the statement is made and filed, rather than one who sold the property after the commencement of the improvement and before the filing of the lien. Davis v. Big Horn Lumber Co. (1906) 14 Wyo. 517, 85 Pac. 980. Citing Corbett v. Chambers (1895) 109 Cal. 178, 41 Pac. 873; Sprague Invest. Co. v. Mouat Lumber & Invest. Co. (1899) 14 Colo. App. 107, 60 Pac. 179; Willamette Lumbering Co. v. McLeod (1895) 27 Or. 272, 40 Pac. 93; Collins v. Snoke (1894) 9 Wash. 566, 38 Pac. 161; Edwards v. Derrickson (1859) 28 N. J. L. 39.

A provision in a statute giving a lien in favor of any person who shall do any labor upon or furnish any material for any building by virtue of any contract with the owner, that "every person for whose immediate use or benefit any building, erection, or other improvement is made, having the capacity to contract, including guardians of minors or other persons, shall be included in the word 'owner,'" is not a limitation upon the term "owner," but is intended to extend it so as to include persons who would not ordinarily be held to come within the meaning. Janes v. Osborne (1899) 108 Iowa, 409, 79 N. W. 143; Ward v. Nolde (1914) 259 Mo. 285, 168 S. W. 596.

The word "owner," as used in a statute giving the right to a lien to whoever performs labor or furnishes material or machinery for erecting, constructing, altering, or repairing any house, etc., "by virtue of the contract or agreement with the owner or agent thereof," does not mean the absolute owner of the building, but the owner of any estate or interest in the building which the court may order sold. Benjamin v. Wilson (1886) 34 Minn. 517, 26 N. W. 725.

Inasmuch as a tenant in common is the owner of the land as against everyone but his co-owner, a contract with one tenant in common to which no objection was made was a "contract with the owner" within the meaning of a statute giving a mechanics' lien for materials furnished under contract with the owner. William Cameron & Co. v. Trueheart (1914) — Tex. Civ. App. —, 165 S. W. 58.

A purchaser of land under a verbal, executed contract is the owner thereof within a statute providing that a materialman who furnishes material under a contract with the owner shall have a lien upon the improvements, though he may not be considered such where he has not yet completely performed. Ibid.

The word "owner" as used in the Mechanics' Lien Law giving a lien to any person who shall, by contract with the "owner" of any plot or piece of land, furnish labor or material, includes the owner in equity as well as at law. Springer v. Kroeschell (1896) 161 Ill. 358, 43 N. E. 1084; Atkins v. Little (1871) 17 Minn. 342, Gil. 320; Carey-Lombard Lumber Co. v. Bierbauer (1899) 76 Minn. 484, 79 N. W. 541.

A person who has paid the consideration for land, although it is deeded to another, is the "owner" thereof within the meaning of a statute giving a lien for labor or material fur-

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nished under a contract with the owner. J. F. Anderson Lumber Co. v. Spears (1910) 25 S. D. 624, 127 N. W. 643.

A mortgagor of land is the owner thereof within the meaning of a statute giving a lien for materials furnished under contract with the owner. Tanner v. Bell (1878) 61 Ga. 584.

A mortgagee out of possession is not an owner within the meaning of a statute permitting a mechanics' lien for lumber and materials furnished by the consent of the owner, so as to charge his interest with the lien in case he knowingly permits materials to be furnished without protest. Allis-Chalmers Co. v. Central Trust Co. (1911) 39 L.R.A.(N.S.) 84, 111 C. C. A. 428, 190 Fed. 700; Central Trust Co. v. Bodwell Water Power Co. (1910) 181 Fed. 735.

The administrator of an estate is not the "owner or proprietor" of the lands of the estate within the meaning of a Mechanics' Lien Law authorizing a lien for materials furnished under contract with the owner or proprietor of the building. Doke v. Benton County Lumber Co. (1914) 114 Ark. 1, 52 L.R.A.(N.S.) 870, 169 S. W. 327.

The relationship sustained by a school district to the school property is not that of "owner" within a statute giving a mechanics' lien for work done or materials furnished under a contract, express or implied, with the owner of the land, his agent or trustee. Florman v. School Dist. (1895) 6 Colo. App. 319, 40 Pac. 469.

A vendor under an executory contract of sale, whose vendee is in possession and has made improvements by erecting buildings on such real estate, is not the owner thereof within the meaning of a statute giving a lien for work done or material furnished for the erection of any building under a contract with the owner "to the extent of the right, title and interest owned therein by the owner thereof for whose immediate use or benefit such labor was done or things furnished," and specifying that "every person for whose immediate use and benefit, any building, erection or improvement is made . . . shall be included in the word 'owners thereof.'" Johnson v. Soliday (1910) 19 N. D. 463, 126 N. W. 99.

One in possession under a contract to purchase is an "owner" within the meaning of a Mechanics' Lien Law which provides that the mechanic or materialman, upon complying with its provisions, shall have a lien "to the extent of the right, title, and interest at that time existing of such owner." Belmont v. Smith (1853) 1 Duer, 675, 11 N. Y. Leg. Obs. 216.

Where other provisions of the statute giving a mechanics' lien show that the term "owners" was used therein to designate the contractor or debtor, it will be given that meaning in construing a provision requiring notice of the filing of the petition to be given to the "owner of the land." Howard v. Robinson (1849) 5 Cush. (Mass.) 119.

The word "owner," as used in a statute requiring notice to be given to "the owner of the property to be affected by the lien" of an intention to claim a mechanics' lien thereon, does not necessarily mean the owner in fee, but denotes the person by whose authority the work is done. Webber Lumber & Supply Co. v. Erickson (1913) 216 Mass. 81, 102 N. E. 940.

The word "owner," as used in the provisions of a statute relating to giving notice of a mechanics' lien to the owner of the property to be affected, means the owner of the estate to be affected. Poole v. Fellows (1903) 25 R. I. 64, 54 Atl. 772.

One in actual possession under an unrecorded deed is the "owner" of the premises within the meaning of the provisions of the Mechanics' Lien Law as to the person upon whom notice of lien may be served. Vogel & B. Co. v. Montgomery (1909) 133 App. Div. 836, 118 N. Y. Supp. 10.

The word "owner," as used in a Mechanics' Lien Law providing that "all suits and actions by subcontractors shall be against both the contractor and owner jointly," must be construed to mean "owners" where the title is held by more than one person. Herbert Boiler Co. v. Lewis (1914) 185 Ill. App. 384.

A mortgagee is not an owner within the meaning of a Mechanics' Lien Law requiring notice to the owner of

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suit upon a lien claim. Tompkins v. Horton (1874) 25 N. J. Eq. 284.

The holder of a promissory note secured by a deed of trust on real estate is not "the owner" of the land within the meaning of the Mechanics' Lien Act, and therefore an indispensable party to an action to foreclose the lien. Cornell v. Conine-Eaton Lumber Co. (1897) 9 Colo. App. 225, 47 Pac. 912.

XIV. In statutes requiring construction of cattle guards.

See caution at the beginning of this note.

A tenant in possession of land is not "the owner of the land" within the meaning of a statute requiring railway companies to put in and keep in repair cattle guards "whenever the owner of the land through which the road passes shall make demand upon them or their agents." Louisville & N. R. Co. v. Murphree (1900) 129 Ala. 432, 29 So. 592.

A tenant in possession is not the "owner" within a statute requiring railroad companies to construct cattle guards "upon notice by the owner to the railroad company," and declaring that if it shall fail to build such cattle guards within the time prescribed by the act it shall be liable "to the owner of the land" for all damages resulting, and for a penalty "to be recovered by the landowner." Florida C. & P. R. Co. v. Judge (1897) 100 Ga. 601, 28 S. E. 379, 3 Am. Neg. Rep. 791.

One in possession of land under a bond for title, with a part of the purchase money paid, is not the "owner" of such land within the meaning of a statute imposing upon a railway company the duty of erecting and maintaining cattle guards. Hardin v. Chattanooga Southern R. Co. (1901) 113 Ga. 357, 38 S. E. 839.

XV. In statutes requiring corporation owning railroad to give crossing signals.

See caution at the beginning of this note.

The corporation operating a railroad is "the corporation owning the railroad" within a statute requiring such corporation to give signals at railroad crossings of the approach of its trains. Chicago, R, I. & P. R. Co. v. State (1907) 84 Ark. 409, 106 S. W. 199.

A railway corporation operating a railroad, whether as absolute owner, lessee, or otherwise, is the "owner" within the meaning of a statute imposing a penalty for failure to give statutory signals at highway crossings, "to be paid by the corporation owning the railroad." State use of Ray County v. St. Joseph, St. L. & S. F. R. Co. (1891) 46 Mo. App. 466.

A statute penalizing "the corporation owning a railroad" for failure to give the required signal when approaching a crossing applies to a receiver operating a railroad. Bush v. State (1917) 128 Ark. 448, 194 S. W. 857.

XVI. In statutes relating to trespass or forcible entry and detainer.

See caution at the beginning of this note.

The word "owner," as used in a statute providing that the owner of land, although not in actual possession, may maintain an action for trespass thereon, means one who owns the land by a title of record deducible from the commonwealth, and by reason thereof superior to any other title, by whomsoever held, or by such right or ownership as may be acquired by the actual adverse possession of the land, claiming and using it as his own, to a well marked or defined boundary, for the statutory period. Scroggins v. Nave (1909) 133 Ky. 793, 119 S. W. 158.

The term "owner," as used in a statute declaring one who trespasses upon the premises of another without the permission of the owner or person in the lawful occupation thereof shall be deemed guilty of a misdemeanor, is not limited to the holder of the fee-simple estate, but includes one holding merely a usufructuary interest. Binhoff v. State (1907) 49 Or. 419, 90 Pac. 586.

The word "owner," as used in a statute designating who is guilty of forcible entry or forcible detainer, which provides, among other things, that any person is so guilty who shall, "without the permission of the owner, and without having any color of title

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thereto, enter upon the land of another," is evidently used in a more comprehensive sense than the record or title owner of the land. Stahl Brewing & M. Co. v. Van Buren (1907) 45 Wash. 451, 88 Pac. 837.

XVII. In statutes penalizing unlawful cutting of timber.

See caution at the beginning of this note.

The grantee of the standing timber on land is not "the owner of the land" within the meaning of the statute which provides that any person who cuts or takes away timber on land not his own, wilfully and knowingly, without the consent of the owner of the land, must pay a penalty to the owner. Clifton Iron Co. v. Jemison Lumber Co. (1895) 108 Ala. 581, 18 So. 554.

The vendee of real estate in possession under a contract to purchase is not the owner within the meaning of such statute. Gravlee v. Williams (1896) 112 Ala. 539, 20 So. 952.

And it is immaterial that before instituting the action he has paid the balance of the purchase money and received a deed. Ibid.

One who fails to establish title by adverse possession as against the defendant's paper title is not the owner of land within the meaning of a statute giving the right of action to recover the penalty therein prescribed for cutting trees. Brasher v. Shelby Iron Co. (1906) 144 Ala. 659, 40 So. 80.

The owner of standing timber is not the owner of timber land within the meaning of a statute which provides that courts of chancery shall entertain suits by any person claiming to own any timbered land, to enjoin trespasses on such land by the cutting of trees thereon. Dove v. Peek (1903) 45 Fla. 244, 110 Am. St. Rep. 70, 34 So. 896.

The term "owner," as used in a statute imposing a penalty for the cutting of timber upon another's land without having first obtained permission so to do from the owner of such land, denotes the owner of the fee. Wright v. Bennett (1841) 4 Ill. 258.

The administrator of the deceased owner of land is not the "owner" thereof within the meaning of a statute giving a right of action to the "owner of such land" against any person who shall cut down or carry away any of the trees or timber thereon without lawful authority. Price v. Ward (1899) 25 Nev. 203, 46 L.R.A. 459, 58 Pac. 849.

A tenant for years is an "owner" and entitled to recover damages given by statute to the "party injured" for the cutting of trees without leave of the owner; but a mere possessor is not. Guild v. Prentis (1909) 83 Vt. 212, 74 Atl. 1115, Ann. Cas. 1912A, 313.

XVIII. In statutes penalizing hunting without permission of owner.

See caution at the beginning of this note.

A tenant, though having the exclusive charge, possession, and control, is not the owner of land within the meaning of a statute making it unlawful for any person to hunt on the land of another without first having obtained from the owner or agent permission to do so. Barclay v. State (1908) 156 Ala. 163, 47 So. 75.

One owning an undivided fractional interest in land of which he is in the possession and control is the owner thereof within the meaning of such statute. Lockhart v. State (1912) 6 Ala. App. 61, 60 So. 591.

One in possession under a parol contract of purchase is the "owner" of the land within the meaning of the statute making it a misdemeanor to hunt in the inclosed grounds of another without the consent of the "owner." Wellington v. State (1889) 52 Ark. 266, 12 S. W. 562.

One who has the sporting rights over certain lands is the "owner" within the meaning of a statute providing for a forfeiture of $10 by a person who wilfully enters upon another's posted lands without permission of the owner or occupant, for the purpose of fishing, trapping, or shooting thereon, "to be recovered by the owner thereof in an action of trespass in addition to the damages sustained thereby." Payne v. Sheets (1903) 75 Vt. 335, 55 Atl. 656.

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XIX. In statutes relating to fences.

See caution at the beginning of this note.

The occupant of land is an "owner" thereof within the meaning of a statute providing that owners of land who do not maintain lawful partition fences cannot be entitled to recover any damages whatever for trespasses by the animals of owners of any adjoining land with whom partition fences might have been maintained if such land had been inclosed. Peterson v. Johnson (1907) 132 Wis. 280, 111 N. W. 659.

A tenant may be "the person owning the adjoining field" within the meaning of a statute imposing a penalty upon anyone taking down a partition fence without first giving six months' written notice to "the person owning the adjoining field." Robinson v. Schiltz (1908) 135 Mo. App. 32, 115 S. W. 472.

The lessee of school land is not the "owner" within the meaning of a statute providing that when the "owner" of any tract of land abutting on a railroad shall construct a fence about said track on all sides except along the railroad, it shall be the duty of the railroad company to construct a fence along its right of way. Crary v. Chicago & St. P. R. Co. (1904) 18 S. D. 237, 100 N. W. 18.

XX. In statutes requiring consent to granting of liquor license.

See caution at the beginning of this note.

The word "owners," as used in a statute providing that no license shall be granted for the sale of intoxicating liquors at any building or place where the owners of the greater part of the land within 200 feet of such building or place shall file objections thereto, must be confined to its prima facie meaning of those seised of a freehold estate. American Woolen Co. v. North Smithfield (1908) 29 R. I. 93, 69 Atl. 293, 16 Ann. Cas. 1227.

The holders of the legal title to premises, and not the life tenants thereof, are the "owners" within the meaning of a provision of the Liquor Tax Law requiring consent to the granting of a liquor tax certificate to be executed by the owners of adjoining property. Re Clement (1906) 101 N. Y. Supp. 447.

A purchaser under contract is the owner within the meaning of a statute requiring an application for a liquor tax to be accompanied by the consent of the owners of the neighboring dwellings. Re Farley (1915) 153 N. Y. Supp. 271.

The owner of the fee of a street at a point where it abuts on property to sell liquor upon which application has been made for a license is within the provisions of the statute authorizing owners of real estate within 25 feet of such property to object to the granting of the license. Moran v. Gallagher (1908) 199 Mass. 486, 20 L.R.A.(N.S.) 116, 85 N. E. 579.

A municipal corporation which has condemned land for purposes of a water supply is, although not entitled to actual possession until one year thereafter, the "owner" of the land within a statute providing that no licenses shall be granted over objection of the owners of the greater part of the land within 200 feet of the building or place of sale. Providence v. Scituate (1918) — R. I. —, 103 Atl. 993.

A lessee is not the "owner" within the meaning of a statute requiring the consent of the owners of premises within a certain distance of the place where liquor traffic is to be carried on. Re Sherry (1898) 25 Misc. 361, 55 N. Y. Supp. 421.

XXI. In statutes relating to qualifications of juror or voter.

See caution at the beginning of this note.

One in the actual occupation and undisputed possession of real estate is the "owner" thereof within the meaning of a statute requiring a juror to be the "owner" of real estate. Territory v. Young (1881) 2 N. M. 93.

The wife of a person owning a homestead on which the family were residing is not, by reason of her homestead interest, an owner of real estate within the meaning of a statute making ownership of real estate a qualication of voters at a school district meeting.

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McLain v. Maricle (1900) 60 Neb. 353, 83 N. W. 85.

XXII. In statutes relating to abatement of nuisances.

See caution at the beginning of this note.

The word "owner," as used in the charter provision giving authority "to compel the owner or occupant of any grocery, . . . or other unwholesome, nauseous house or place, to cleanse, remove or abate the same," may include an agent who is endowed with full power to control or regulate the premises. St. Paul v. Clark (1901) 84 Minn. 138, 86 N. W. 893.

The term "owner," as used in a clause in the city charter giving city authorities power to remove buildings that are or may become dangerous, "or require owners to remove or put them in a state of secure condition," cannot be extended to include an agent of the owner. St. Louis v. J. F. Kaime & Bro. Real Estate Co. (1904) 180 Mo. 309, 79 S. W. 140.

XXIII. In statutes requiring construction of fire escapes.

See caution at the beginning of this note.

The word "owner," as used in the Missouri statute requiring the owner, proprietor, lessee, or keeper of certain kinds of buildings to place fire escapes thereon, is the owner of the building, and not of the business therein conducted. Yall v. Snow (1906) 201 Mo. 511, 10 L.R.A.(N.S.) 177, 119 Am. St. Rep. 781, 100 S. W. 1, 9 Ann. Cas. 1161.

A tenant in possession, using the premises as a factory, is the "owner" of the factory within the meaning of a statute providing that certain factories be provided with fire escapes by the "owner." Schott v. Harvey (1884) 105 Pa. 222, 51 Am. Rep. 201.

XXIV. In statutes requiring real estate broker to have written authority.

See caution at the beginning of this note.

One of two tenants by entireties is not the "owner" of land for the purpose of making a contract with a broker for a commission for the sale of such land, without the consent of the other tenant, within the meaning of a statute providing that no real estate broker shall be entitled to any commission unless his authority is in writing and signed by the owner or his authorized agent. Murphy v. Lewis (1908) 76 N. J. L. 141, 69 Atl. 483.

The requirements of a statute whereby the act of offering real property for sale by a person not possessed of authority in writing from the owner is made a misdemeanor are satisfied where authority is obtained from the ostensible owner. Lopard v. Fritz (1904) 45 Misc. 620, 91 N. Y. Supp. 5.

XXV. Miscellaneous.

See caution at the beginning of this note.

The fact that land is encumbered by a mortgage does not prevent the mortgagor from being considered as the "owner" thereof, within the meaning of the statute authorizing the "owner" of land embraced within the corporate limits of any city or town, and upon or contiguous to the border thereof, to have the same disconnected therefrom. Hendricks v. Julesburg (1913) 55 Colo. 59, 132 Pac. 61.

The lessee of a reservoir may be held liable under a statute providing that "the owner of reservoirs shall be liable for all damages arising from leakage or overflow of water therefrom or by floods caused by the breaking of the embankments of such reservoirs." Larimer County Ditch Co. v. Zimmerman (1893) 4 Colo. App. 78, 34 Pac. 1111.

The term "owner of such possessory claim," within the meaning of a statute making it unlawful to graze sheep within 2 miles of the dwelling house of the owner of a possessory claim, does not mean simply one who asserts a right to possession, but denotes one who is in possession of land by reason of some title thereto, or who, by reason of his settlement, obtains some rights, or one who can maintain his claim by reason of having complied with the provisions of §§ 4552–4556, Idaho Revised Codes. Denney v. Arritola (1918) — Idaho, —, 174 Pac. 135.

A city is the "owner" of land designated for park purposes, within the meaning of an ordinance excepting

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abutting owners from liability for graveling so much of the street as is "occupied by the public grounds owned by the city," though it may not have the fee-simple title thereto. Bennett v. Seibert (1893) 10 Ind. App. 369, 35 N. E. 35, 37 N. E. 1071.

The term "owner in possession" of premises, within a statute prescribing a penalty against such persons where intoxicants are unlawfully sold on their premises, includes a tenant for years, or of any freehold or greater estate. Com. v. Smith (1907) 127 Ky. 171, 105 S. W. 397.

The agent of an owner or lessor of a sawmill is not the "owner" or "occupant" thereof within the meaning of a statute imposing a penalty on the owner or occupant of a sawmill whose employees shall throw mill refuse into a river. State v. Coe (1881) 72 Me. 456.

The word "owner," as used in a statute imposing a penalty upon any owner of a railroad or steamboat who shall refuse to redeem an unused ticket, includes all those who operate a railroad or steamboat in the transportation of passengers; as, for example, lessees, receivers, and the like. State v. Corbett (1894) 57 Minn. 345, 24 L.R.A. 498, 4 Inters. Com. Rep. 694, 59 N. W. 317.

The meaning of the word "owner," as used in the provisions of the Torrens Act, that the "owner" may have his title registered by proceeding in the manner therein directed, is not limited to the owner of record. National Bond & Secur. Co. v. Alderson (1906) 99 Minn. 137, 108 N. W. 861.

One who operates his coal mine under a contract by which he is to furnish all materials, machinery, and appliances necessary for getting out the coal, and the shafting, timbers, props, etc., necessary for the operation of the mine and the safety of the miners, and the other party is to be paid a certain price per bushel for the coal when delivered above ground, is the "owner" within the meaning of a statute making it the duty of the "owner, agent, or operator" to keep a sufficient supply of timber "when required" to be used as props, and giving a right of action to the party injured by any wilful failure to comply with this requirement, and defining the word "owner" as used therein to mean "the immediate proprietor, lessee, or occupant of any coal mine or any part thereof." Leslie v. Rich Hill Coal Min. Co. (1892) 110 Mo. 31, 19 S. W. 308.

Persons owning land protected by a levee constructed by a corporation which had become defunct and had allowed a portion of its levee to be washed away, who, in order to protect their land, have furnished land for and constructed new levees integral with the old, cannot, when a new levee district is organized, have compensation as "owners" of the old levee, under a statute providing for compensation to owners or other persons interested, on the taking of a levee by a newly organized levee district. Voss v. Des Moines & M. Levee Dist. (1918) — Mo. —, 201 S. W. 538, affirming (1916) 195 Mo. App. 636, 187 S. W. 820.

The term "owner," as used in a statute providing for the protection and safety of persons in and about the construction, repairing, alteration, or removal of buildings, etc., and providing that in all actions to recover damages for injury, caused by a failure to comply with the requirements of the statute, "the owner, contractor, or subcontractor, if any, shall in all cases be jointly and severally liable," includes the owner of the real estate who originated and authorized the improvement. Butera v. J. C. Mardis Co. (1916) 99 Neb. 815, 157 N. W. 1024.

A lessee or tenant of land is an owner thereof within the meaning of a statute requiring sheep owners who are not the owners and holders of 1 acre of land for each two sheep to procure a license. State v. Wheeler (1866) 23 Nev. 143, 44 Pac. 430.

A city having a qualified fee to land is the owner thereof within the meaning of a statute authorizing the issuance of bonds for the improvement of property of which the city is the owner. Bew v. Ventnor City (1911) 81 N. J. L. 207, 80 Atl. 28.

The word "owned," as used in a statute authorizing the leasing of such lands as are "owned" by the state, applies to any land in which the state

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has any right or interest. Makemson v. Dillon (1918) — N. M. —, 171 Pac. 673.

The lessor of premises for factory purposes is an "owner" within the meaning of a statute requiring that the owner, agent, or lessee of the factory provide in each workroom thereof sufficient ventilation, and that the term owner, as used therein, be "construed to mean the owner or owners of the freehold of the premises, or the lessee or joint lessee of the whole thereof, or his, her, or their agent in charge of the property." People ex rel. Williams v. Eno (1909) 134 App. Div. 527, 119 N. Y. Supp. 600.

The word "owner," as used in a statute providing that in every tenement house a proper light should be kept burning by the owner in the public hallways, means the person in possession or control as the proprietor. McGowan v. Morgan (1914) 160 App. Div. 588, 145 N. Y. Supp. 787.

A railroad company operating a railroad as lessee thereof is one "owning the track" of such railroad within the meaning of a statute which provides that when the tracks of two railroads cross each other, the crossing shall be made and kept in repair and watchmen maintained thereat at the joint expense of the companies owning the tracks. Baltimore & O. R. Co. v. Walker (1888) 45 Ohio St. 577, 16 N. E. 475.

A board of education holding title to property for school and school building purposes is not the "owner" thereof within the meaning of a statute creating a liability against an "owner" or "possessor" of premises, who, by excavating to a greater depth than 9 feet below street level, causes any damage to any wall, house, or other building upon the lots adjoining. Board of Education v. Volk (1905) 72 Ohio St. 469, 74 N. E. 646, 18 Am. Neg. Rep. 581.

A lessee is an "owner" within the meaning of a statute which provides that where the owner of the building in which money was lost by gaming has knowingly permitted it to be used for gaming purposes, such building and the real estate upon which it stands shall be liable for a judgment rendered, either for fines, costs, or to recover money or other thing of value lost or paid. Iroquois Co. v. Meyer (1909) 80 Ohio St. 676, 89 N. E. 90.

An entryman under the homestead laws who has fully complied with the requirements of the law, but to whom a patent has not issued, is the "owner" of the land within the meaning of a statute providing that whenever a marriage shall be dissolved, the party at whose prayer such decree shall be made shall be entitled to an undivided share in his or her individual right in fee of the whole of the real estate owned by the other at the time of such decree. Thompson v. Thompson (1916) 79 Or. 513, 155 Pac. 1190.

A statute giving a preference lien upon crops for water furnished for irrigation purposes to any person, association, or corporation "owning any land subject to irrigation," is to be construed, in view of the fact that the statute expressly gives a lessee the right to compel the irrigation company to furnish the water, and the fact that the lien is not given upon the land, but upon the crops, as giving such lien as well where the contract is made with a tenant as where it is made with the owner of the land. TEXAS, BANK & T. Co. v. SMITH (reported herewith) ante, 771; Dunbar v. Texas Irrig. Co. (1917) — Tex. Civ. App. —, 195 S. W. 614; Texas Bank & T. Co. v. Smith (1917) — Tex. Civ. App. —, 195 S. W. 617.

A receiver of a railroad is not "a proprietor, owner, charterer, or hirer" of the road within the meaning of a statute making persons of the class described liable for the death of any person by their own negligence or that of their servants or agents. Turner v. Cross (1892) 83 Tex. 218, 15 L.R.A. 262, 18 S. W. 578.

A defect in title does not prevent one from being the "actual bona fide owner" of lands upon which he resides, within the meaning of the statute providing that any actual bona fide owner of and resident on lands contiguous to public lands may purchase such lands. Smith v. Rothe (1900) — Tex. Civ. App. —, 55 S. W. 754.

One who has gone into possession and made valuable improvements under an oral contract to purchase is the

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"owner" of land within the meaning of a statute entitling an owner to purchase contiguous public lands. Bone v. Cowan (1904) 37 Tex. Civ. App. 519, 84 S. W. 385.

The word "owner," as used in a statute regulating the conduct of the hotel business, and providing that "any owner, manager, agent, or person in charge of a hotel," who shall obstruct or hinder an inspector in the proper discharge of his duties under such act, shall be subject to certain penalties, designates the owner of the hotel business, and not the owner of the building. Clark v. Yukon Invest. Co. (1915) 83 Wash. 485, 145 Pac. 624, Ann. Cas. 1916E, 625.

A person holding a contract to purchase land from the state is an "owner" within the meaning of a statute providing for the sale of public land with reservation of the right to extract petroleum and oils therefrom, but stipulating that no right shall be exercised under the reservation until provision has been made to pay the owner of the land on which the rights reserved are sought to be exercised for all damages by reason of entering upon the land. State ex rel. Hall v. Savidge (1916) 93 Wash. 676, 161 Pac. 471.

A person in possession of land under a void deed cannot be regarded as the owner thereof within the meaning of a statute which provides that, in case a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, etc. Hyde v. Shine (1904) 199 U. S. 62, 50 L. ed. 90, 25 Sup. Ct. Rep. 760.

The word "owner," as used in a Federal statute providing that in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement, refers only to one who holds both the legal and equitable title to the patented land. United States v. Hyde (1904) 132 Fed. 545.

One who was a mortgage creditor at the time of the sale of property to enforce the direct tax assessed by the United States under the Act of Congress of 1861 is not the "legal owner," who is entitled under the Act of Congress of 1891 to reimbursement. Glover v. United States (1896) 164 U. S. 294, 41 L. ed. 440, 17 Sup. Ct. Rep. 95.

A corporation which has contracted for the erection of a building on land of which the title was in a subsidiary company, all the stock of which was owned by such corporation, is the "owner" within the meaning of a statute which provides that a subcontractor may give notice of his contract in writing to the owner, stating the probable amount of his claim, and, on furnishing the owner within thirty days after completion of the contract with a correct copy of his account, the owner shall be personally liable for the same, provided it does not exceed the sum due from him to the general contractor when the notice is given, or which thereafter becomes due under the contract. Staples v. Adams, Payne & Gleaves (1914) 131 C. C. A. 464, 215 Fed. 322. E. S. O.

MARGARET LAVIN, Appt.,

v.

JEREMIAH LYNCH, Impleaded, etc.

Michigan Supreme Court — September 27, 1918.

(— Mich. —, 168 N. W. 1024.)

Vendor and purchaser — lien to secure legacy — agreement by devisee to pay.

1. Legatees who quitclaim to one to whom is devised real estate subject to payment of their legacies, upon his unsecured promise to pay such

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legacies, have vendors' liens upon the real estate to secure performance of his undertaking.

[*See note on this question beginning on page* 810.]

Same — lien for purchase money.

2. A vendor of real estate who takes no security for the payment of the purchase price has an equitable lien for the payment of such price upon the lands so sold.

Same — equitable interest.

3. The equitable lien of a vendor to secure payment of the purchase money attaches, although an equitable right or interest only was conveyed, not the fee or legal title.

Assignment — lien to secure legacy.

4. The lien of a legatee upon land devised subject to payment of his legacy, and his interest in which he quitclaimed to the devisee upon the latter's unsecured promise to pay the legacy, is assignable in equity by assignment of the claim against the devisee.

Same — of note — effect on mortgage.

5. The transfer of a note which is secured by mortgage carries with it in equity an assignment of the mortgage, the security for its payment.

Lien — vendors — priority.

6. A vendor's lien is in the nature of an equitable mortgage, and has priority over assignees in bankruptcy or a general assignment for benefit of creditors.

Limitation of actions — action to enforce lien.

7. The vendor's lien of a legatee who quitclaimed to one to whom real estate was devised, subject to payment of his legacy, is not barred by the Statute of Limitations, although the claim on the grantee's promise to pay the legacy is so barred.

Lien — enforcement — equity.

8. A vendor's lien cannot be enforced at law, but resort must be had to a proceeding in equity.

(Ostrander, Ch. J., dissents.)

APPEAL by plaintiff from a decree of the Circuit Court for Kent County, in Chancery, dismissing a bill filed for an accounting and for the enforcement of a vendor's lien. *Reversed.*

Statement by Fellows, J.:

It appears by the bill in this case that at the time of his death, December 24, 1881, Patrick Lynch was the owner of certain real estate in Kent county. By his will it was devised to Jeremiah Lynch, subject to the payment of $400 to Mary Wheeler, $1,200 to Johanna Simonds, and $900 to plaintiff. These sums were not to draw interest for three years, but thereafter should draw interest at 6 per cent. This will was not admitted to probate until December 10, 1915, the interested parties having agreed that it would be unnecessary, as they could settle among themselves. On April 20, 1910, the legatees above named executed to Jeremiah Lynch quitclaim deeds of the lands so devised by Patrick Lynch to Jeremiah; he agreeing to pay to them, respectively, the amount of their several bequests. Jeremiah Lynch has become mentally incompetent, and his daughter, Mary Ellen, has been appointed his guardian. None of such amounts so agreed to be paid by Jeremiah have been paid. Mary Wheeler and Johanna Simonds have assigned their claims and interests to plaintiff, who filed this bill June 16, 1916. She seeks by this bill an accounting, a decree determining and enforcing by foreclosure a vendor's lien upon the premises so deeded by quitclaim deeds, and also prays for general relief. Defendant Mary Ellen Lynch, as guardian for her father, moved to dismiss the bill on various grounds, among them the Statute of Limitations. The trial court dismissed the bill on this ground, and plaintiff appeals.

Mr. E. A. Maher, for appellant:

A vendor of real property, who has made conveyance without being paid the purchase price therefor, has a lien in the nature of a mortgage upon the property so conveyed, for the unpaid amount, such lien being enforceable by a suit in equity.

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Carroll v. Van Rensellaer, Harr. Ch. (Mich.) 225; Palmer's Appeal, 1 Dougl. (Mich.) 422; Michigan State Bank v. Hastings, 1 Dougl. (Mich.) 258, 41 Am. Dec. 549; Sears v. Smith, 2 Mich. 244; Clark v. Stilson, 36 Mich. 482; Hiscock v. Norton, 42 Mich. 320, 3 N. W. 868; Ortmann v. Plummer, 52 Mich. 76, 17 N. W. 703; Dunton v. Outhouse, 64 Mich. 419, 31 N. W. 411; Balow v. Teutonia Farmers' Mut. F. Ins. Co. 77 Mich. 540, 43 N. W. 924; Donovan v. Donovan, 85 Mich. 63, 48 N. W. 163; Curtis v. Clarke, 113 Mich. 458, 71 N. W. 845; Graham v. Moffett, 119 Mich. 303, 75 Am. St. Rep. 393, 78 N. W. 132; Kulling v. Kulling, 124 Mich. 56, 82 N. W. 847; Lyon v. Clark, 132 Mich. 521, 94 N. W. 4; Wood v. Schoolcraft, 145 Mich. 653, 108 N. W. 1075; Shaw v. Tabor, 146 Mich. 544, 109 N. W. 1046.

Such a lien is assignable, and may be enforced for the benefit of an execution creditor of the vendor.

Sears v. Smith, 2 Mich. 244; Zeigler v. Valley Coal Co. 150 Mich. 82, 113 N. W. 775, 13 Ann. Cas. 90.

The liens that might have been asserted under the will were enforceable in equity, and the lien of a vendor of real property for unpaid purchase money exists with regard to equitable, as well as legal, interests.

Ortmann v. Plummer, 52 Mich. 76, 17 N. W. 703.

In suits to enforce vendors' liens after the period limited by statute for the enforcement of personal demands has expired, the mortgage period of limitation governs and the liens are enforceable.

Hardin v. Boyd, 113 U. S. 757, 28 L. ed. 1141, 5 Sup. Ct. Rep. 771; Lewis v. Hawkins, 23 Wall. 119, 23 L. ed. 113; Bizzell v. Nix, 60 Ala. 281, 31 Am. Rep. 38; Ware v. Curry, 67 Ala. 274; Moreton v. Harrison, 1 Bland, Ch. 491; 19 Am. & Eng. Enc. Law, 177; Stringer v. Gamble, 155 Mich. 295, 30 L.R.A. (N.S.) 815, 118 N. W. 979.

Mr. **Joseph Renihan** for appellees.

Fellows, J., delivered the opinion of the court:

That the vendor of real estate who takes no security for the payment of the purchase price has an equitable lien for such purchase money upon the lands so sold has long been the established rule. Carroll v. Van Rensellaer, Harr. Ch. (Mich.) 225; Michigan State Bank v. Hastings, 1 Dougl. (Mich.) 225, 258, 41 Am. Dec. 549; Palmer's Appeal, 1 Dougl. (Mich.) 422; Hiscock v. Norton, 42 Mich. 320, 3 N. W. 868; Dunton v. Outhouse, 64 Mich. 419, 31 N. W. 411; Curtis v. Clarke, 113 Mich. 458, 71 N. W. 845; Kulling v. Kulling, 124 Mich. 56, 82 N. W. 847; Lyon v. Clark, 132 Mich. 521, 94 N. W. 4; Shaw v. Tabor, 146 Mich. 544, 109 N. W. 1046; 39 Cyc. 1787. In the case of Michigan State Bank v. Hastings, supra, it was said by this court: "Such liens exist independently of any express agreement, and courts of equity enforce them, on the principle that a person having gotten the estate of another ought not in conscience, as between them, to be allowed to keep it and not pay the consideration money."

Vendor and purchaser—lien for purchase money.

And in Cyc. supra, it is said:

"A vendor's implied lien, as distinguished from a lien expressly reserved, or from the security which the vendor has while he holds the legal title under an unexecuted contract to convey, is the equitable right, which by implication is accorded to one who has conveyed the title to land without reserving a lien thereupon, and has taken no security for the purchase money other than the personal obligation of the purchaser, to subject the land in equity to the payment of the purchase price, when the rights of others are not injured and it is equitable so to do. . . .

"The principle on which a vendor's lien is generally regarded as resting is one of natural justice, that one who gets possession of the estate of another ought not in conscience be allowed to keep it without paying the consideration, although other grounds, such as the presumed intention of the parties, or the existence of a trust between them, have been assigned."

This lien attaches notwithstanding the fact that the sale did not convey a title in fee, or a legal title, but only an equitable right or interest. Ortmann v.

Same—equitable interest.

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Plummer, 52 Mich. 76, 17 N. W. 703; Warren v. Fenn, 28 Barb. 333; Bledsoe v. Games, 30 Mo. 448; Loomis v. Davenport & St. P. R. Co. (C. C.) 3 McCrary, 489, 17 Fed. 301; Curtis v. Buckley, 14 Kan. 449; Board v. Wilson, 34 W. Va. 609, 12 S. E. 778. In the case of Ortmann v. Plummer, supra, Mr. Justice Campbell said: "The right of a vendor to a lien does not seem to be confined to the sale of a legal title or title in fee. The leading case of Mackreth v. Symmons, 15 Ves. Jr. 329, 33 Eng. Reprint, 778, 10 Revised Rep. 85 (1 Lead. Cas. in Eq. 194, and notes), was one relating to what was treated as an equitable title. The doctrine has been applied to copyholds, and appears to be received as to all recognized titles. See Adams, Eq. 7th ed. 128, and notes; Winter v. Anson, 3 Russ. Ch. 488, 38 Eng. Reprint, 658, 6 L. J. Ch. 7, 27 Revised Rep. 117. The lien on an equitable title may no doubt be more uncertain, by reason of the danger that bona fide purchasers from the legal holder may intervene and destroy it. But subject to that risk (which is not confined to equitable estates) it may be upheld. In the present case the legal title is still in the railway company, having knowledge of the equities, and defendants are not bona fide purchasers. We see no difficulty in the nature of the title."

The case of Robinson v. Woodson, 33 Ark. 307, is not unlike the instant case upon principle. In that case the vendor executed a deed, reserving a lien on the land for the purchase money. Afterwards he executed another deed containing no reservation, but acknowledging payment of the purchase price, although it had not in fact been paid. It was held that he had a vendor's lien which was enforceable in a court of equity.

When this plaintiff and her assignors on the 20th day of April, 1910, executed to Jeremiah Lynch their respective quitclaim deeds of the premises, thereby conveying to him their respective interests therein under the will of Patrick Lynch, deceased, taking his unsecured promise to pay the purchase price therefor, they each held, by virtue of such transaction, a vendor's lien for the payment of such purchase price. Was such lien assignable? While the courts are not in harmony on this question, we think it must be answered in the affirmative. Curtis v. Clarke, 113 Mich. 458, 71 N. W. 845; Dryden v. Frost, 8 L. J. Ch. N. S. 235, 3 Myl. & C. 670, 40 Eng. Reprint, 1084, 2 Jur. N. S. 1030; Buford v. McCormick, 57 Ala. 428; Felton v. Smith, 84 Ind. 485; State Bank v. Brown, 142 Iowa, 190, 134 Am. St. Rep. 412, 119 N. W. 81; Dickason v. Fisher, 137 Mo. 342, 37 S. W. 1114; Armstrong v. Farr, 11 Ont. App. Rep. 186; Board v. Wilson, 34 W. Va. 609, 12 S. E. 778. The transfer of a note which is secured by mortgage carries with it in equity an assignment of the mortgage, the security for its payment. John Schweyer & Co. v. Mellon, 196 Mich. 590, 162 N. W. 1006. So here, we think an assignment of the liability for the purchase money carried with it, in equity, an assignment of the vendor's lien which was security for its payment.

Same—lien to secure legacy—agreement by devisee to pay.

Assignment—lien to secure legacy.

Same—of note—effect on mortgage.

Such vendor's lien in the nature of an equitable mortgage (Clark v. Stilson, 36 Mich. 482; Balow v. Teutonia Farmers' Mut. F. Ins. Co. 77 Mich. 540, 43 N. W. 924), and has priority over assignees in bankruptcy, or a general assignee for the benefit of creditors (Lyon v. Clark, 132 Mich. 521, 94 N. W. 4). This being its character, it may be enforced as against the land, even though the Statute of Limitations had run against the personal liability of the vendee. String-

Lien—vendors—priority.

Limitation of actions—action to enforce lien.

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er v. Gamble, 155 Mich. 295, 30 L.R.A.(N.S.) 815, 118 N. W. 979.

Lien—enforcement—equity.

The very nature of the right precludes its enforcement at law. An equitable proceeding is necessary to establish and enforce it. The authorities already cited and the nature of the right demonstrate this. We have considered all the grounds set up in defendant's motion to dismiss; none of them are tenable. The bill sets forth a cause of action for equitable relief. The decree of the court below must be reversed and the demurrer overruled. Defendant will have the usual time to answer. Plaintiff will recover costs of this court.

Steere, Kuhn, Stone, Brooke, Moore, and **Bird, JJ.,** concurred with **Fellows, J.**

Ostrander, Ch. J., dissenting:

The bill was filed July 6, 1916. It is charged therein:

"II. That at the time of his death the said Patrick Lynch was the owner in fee simple of certain lands and premises situate and being in said county of Kent, known and described as follows, to wit: The southeast quarter of the northwest quarter and the west half of the northeast quarter of section 31 in township 7 north, range 12 west, and of lot 24, in block 2 of Gunnison's subdivision in the city of Grand Rapids, in said county.

"III. That the said Patrick Lynch, previous to the time of his death, had executed an instrument which he intended as his last will and testament, which provided that all of his estate should go to his son Jeremiah Lynch, the defendant in this case, subject to certain specific legacies and other directions. That among the specific legacies was one to Mary Wheeler for the sum of $400, to Johanna Simonds for the sum of $1,200, and to this plaintiff (then Margaret Lynch) for the sum of $900. That said amounts should be without interest for three years after the death of said Patrick Lynch, and should draw interest at the rate of 6 per cent per annum after that period of time.

"IV. That it was arranged and agreed by and between the heirs at law and next of kin of said Patrick Lynch, deceased, that it was unnecessary to have said will presented for probate; that they would arrange for a settlement of the estate of said Patrick Lynch, deceased, without probating said will; and it was further agreed by the said Jeremiah Lynch that he would pay to the above-named Mary Wheeler, Johanna Simonds, and the said plaintiff herein, the several amounts which the said instrument provided that they should receive from the said estate for their interests in the lands and premises appertaining to said estate.

"V. That in the month of April, 1910, the said Jeremiah Lynch requested said Mary Wheeler, Johanna Simonds, and this plaintiff to execute conveyance to him of said lands and premises, and agreed that if such conveyance were made he would pay to them respectively the several amounts of the legacies to them respectively provided for in the said will of Patrick Lynch, deceased. That on or about the 20th day of April, 1910, the said Mary Wheeler, in pursuance of said request, executed such a deed of conveyance to said Jeremiah Lynch, and on or about the 20th day of April, 1910, this plaintiff and Johanna Simonds in pursuance of said request also executed a deed of conveyance of said premises to said Jeremiah Lynch, and said deeds were recorded in the office of the register of deeds of said county of Kent on the 11th day of July, 1910, in Liber 386 of Deeds, on pages 442 and 443, respectively.

"VI. That each of said deeds expressed a consideration of $1 and other good and valuable consideration, and that the other good and valuable consideration mentioned in said deeds were the promises of said Jeremiah Lynch to pay to this plaintiff and to send Mary Wheeler and Johanna Simonds the amounts pro-

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vided for in the will of said Patrick Lynch, deceased, as aforesaid.

"VII. That the said Jeremiah Lynch has never paid to this plaintiff or to said Johanna Simonds or Mary Wheeler, respectively, the said sums of money or interest thereon, or any part thereof, which it was provided in the will of said Patrick Lynch, deceased, that they should be paid by said Jeremiah Lynch.

"VIII. That the said Mary Wheeler and Johanna Simonds have each assigned, transferred, and set over to this plaintiff all of their claims and demands against the said Jeremiah Lynch, and the above-described premises and all of their claims and demands against the estate of Patrick Lynch, deceased, for and on account of the provisions so made for them in the will of said Patrick Lynch, deceased, and the said plaintiff is now possessed of the right to demand, receive, and maintain suits for the purpose of recovering the sums and amounts which were made due and payable to this plaintiff by the terms of the said will of Patrick Lynch, deceased, and of the said promises and agreements of said Jeremiah Lynch, together with all liens that the said Mary Wheeler and Johanna Simonds, as well as this plaintiff, had upon the aforesaid lands and premises."

It is further charged that Jeremiah Lynch has become and is mentally incompetent, and that Mary Ellen Lynch is guardian of his estate, having been appointed March 8, 1916; that the will of Patrick Lynch was allowed December 10, 1915; and that Mary Ellen Lynch has been appointed to administer his estate. Upon information and belief it is charged that Mary Ellen Lynch has contracted with the other defendants to sell to them the said premises, and that the vendees are in possession of them. Relief prayed for is an account of the amounts which the plaintiff and the said Johanna and Mary "became and were entitled to receive from said Jeremiah Lynch under the will of said Patrick Lynch," and that it be decreed that plaintiff has a lien upon the land "for the amounts which became due and owing to this plaintiff and to said Mary Wheeler and said Johanna Simonds, respectively, under and in pursuance of the terms of the will of said Patrick Lynch, deceased, and the agreement so made by Jeremiah Lynch to pay the same as aforesaid." In default of payment, a sale of the land is asked for "to satisfy such lien." There is a prayer for general relief. On motion to dismiss, it was held that the cause of action is barred by the Statute of Limitations.

The will of Patrick Lynch is not set out in or with the bill, nor is the value of his estate or of what it consisted. Upon a motion to dismiss, we must deal with the facts set out in the bill. The bill charges that the testator bequeathed and devised all of his estate to his son Jeremiah, subject to certain specific legacies. This imports that there was personal property. It does not import that the legacies were made a charge upon the real estate. Quite the contrary. It was agreed that the will should not be probated, and Jeremiah promised plaintiff and her assignors, the legatees, to pay them the amounts of their legacies. Apparently, this promise was made thirty-three years before the bill was filed. Jeremiah did not pay as he agreed he would; but when, in April, 1910, the will not yet having been probated, he wanted to secure apparent title to the real estate in himself, to make a sale of it, and for this purpose desired conveyances from the other heirs at law of his father, he renewed his promise to pay them their specific legacies. The plaintiff and her assignors conveyed their then apparent, but not real, title to the land. The will has since been admitted to probate. Nothing further than this can be gathered from the bill of complaint.

Assuming all charges made in the bill to be true, what present enforceable right of plaintiff is disclosed? Obviously, it is a right resting upon either (1) the will and the specific

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legacies therein given to them, or (2) upon the promises of Jeremiah. If upon the will, this is not the forum for asserting it, the estate being open and the probate court engaged in its administration. If upon the promises of Jeremiah, neither of them was made within six years before this suit was begun, and neither is actionable in a court of equity. Plaintiff and her assignors do not claim that they ever had title, legal or equitable, to the land, or ever sold it. Clearly, they never, in fact, had legal or equitable title to it. They never sold it, and it is not asserted that any portion of the purchase price, upon a sale, remains unpaid. They conveyed the land, in form, upon the repeated promise of Jeremiah to pay them, not the purchase price, but the amount of the legacies fixed in the will.

If we indulge the notion that, upon the death of the ancestor, plaintiff and her assignors had an equitable lien upon the estate, including the real estate, to secure payment of their legacies, the promises or denials of Jeremiah could not affect it, enlarge, or diminish it, unless in relying upon them plaintiff and her assignors released the lien. If they did not release it, what has kept it alive for thirty-four years?

The decree should be affirmed, with costs to appellees.

ANNOTATION.

Vendor and purchaser: vendor's lien to secure legacy which one receiving quitclaim from legatee agrees to pay.

The reported case (LAVIN v. LYNCH, ante, 804) seems to be the only one to have passed upon the question of the right of a legatee to a vendor's lien, to secure a legacy which was a charge upon certain devised lands, and which the devisee has agreed to pay in consideration of the legatee's quitclaim deed. This ruling, however, is in keeping with the recognized theory of vendors' liens, that equity will not permit one to keep the property of another without paying for it. It is true that in the present case the legatee was not the legal owner of the devised lands; but at the same time he had an equitable interest, growing out of the fact that the devise was subject to payment of the legacy; and, as the opinion points out, the sale of such an interest is sufficient to support a vendor's lien.

A somewhat similar situation is found in Lenox v. Earls (1916) — Mo. App. —, 185 S. W. 232. In that case a father deeded land to his sons, reserving a life estate in himself and wife and obligating the sons to pay each of his three daughters a specified sum of money, which sums were unquestionably a part of the consideration for the deeds. It was held, in a suit to declare vendors' liens upon the lands in favor of the daughters, that, where one of the sons denies his obligation, equity would declare and establish the liens before the father's death, that in order to have such liens established it was not necessary to show that there was some special ground warranting the equitable relief such as insolvency, etc., and that there was no force in the suggestion that the time when the amounts were to be paid was too indefinite to support a lien, they being due at the death of the life tenants, an event certain to happen.

Another case of like import is Spalding v. Brent (1850) 3 Md. Ch. 411, wherein it was held that a child who was entitled to a portion of his father's real and personal estate (amount determined by arbitrators selected by the children) and who had joined in a conveyance of the real estate and a release of the personalty to another child, who was a coheir, was to the extent of his interest in the realty an unpaid vendor so that he could pursue it in equity. G. J. C.

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STATE OF VERMONT
v.
ROBERT WARM.

Vermont Supreme Court — November 11, 1918.

(— Vt. —, 105 Atl. 244.)

Juror — qualification — wagering on result.

1. One who has made a wager on the conviction of a man charged with murder is not fit to sit as a juror at his trial.

[*See note on this question beginning on page* 813.]

Appeal — exceptions — transcript — argument of counsel.

2. In determining whether or not remarks of counsel in argument were prejudicial, the narrative in the bill of exceptions will control if the argument does not appear in the transcript.

Same — refusal of instructions — error.

3. There is no reversible error in refusing requested instructions if the court in its own way, and in fitting language, charges substantially in accordance with the requests.

Criminal law — juror wagering on results — effect.

4. Public policy will not permit a verdict of guilty in a criminal case to stand where one of the jurors had made a wager that accused would be convicted.

EXCEPTIONS by respondent to rulings of the Franklin County Court, and petition for new trial, after his conviction of manslaughter. *New trial granted.*

The facts are stated in the opinion of the court.

Messrs. C. G. Austin & Sons for respondent.

Messrs. William R. McFeeters and Rufus E. Brown, for the State:

The juror C. C. Martin was not legally disqualified.

Mann v. Fairlee, 44 Vt. 672; Flint v. Holman, 82 Vt. 513, 74 Atl. 232; State v. Hayden, 51 Vt. 296; Thrall v. Lincoln, 28 Vt. 356; Goodright v. M'Causland, 1 Yeates, 372, 1 Am. Dec. 306; Booby v. State, 4 Yerg. 111.

Haselton, J., delivered the opinion of the court:

At the September term, 1918, of the Franklin county court, Robert Warm was tried for the murder of Jennie Hemingway, August 12, 1917, and was found guilty of manslaughter. Judgment on the verdict was rendered, sentence was imposed, and Warm is now in confinement.

We have here a bill of exceptions brought by the respondent and a petition for a new trial. In the view we take of the petition for a new trial, we shall not discuss the exceptions at length.

At the close of the evidence the respondent made a motion for a directed verdict in his favor, on the ground that the state had not introduced evidence fairly and reasonably tending to fasten guilt upon him. This motion was overruled, and the respondent excepted. A careful reading of the entire transcript shows the evidence as to who committed the crime to have been conflicting and circumstantial, but we agree to the contention of the state that the jury had evidence before it upon which it could find the respondent guilty.

The respondent excepted to some remarks made in the argument in behalf of the state. Some of these remarks, taken by themselves, appear unwarranted and unfair, but the court treated them as made in

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reply to statements of the respondent's counsel, and the narrative contained in the bill of exceptions is such that prejudicial error is not shown. The argument of the respondent's counsel does not appear in the transcript; and, while the transcript is made controlling as to matters appearing therein, the bill of exceptions is expressly made controlling as to statements of fact not appearing in the transcript.

Appeal—exceptions—transcript—argument of counsel.

The respondent presented several requests to charge, and excepted to the failure of the court to comply in terms with requests 1, 4, and 6. These requests related to the doctrine of presumption of innocence, burden of proof, and reasonable doubt, and particularly to their application in a case standing on circumstantial evidence. However, we think that an analysis of the charge shows that the court in its own way and in fitting language charged substantially in accordance with the requests. No error appears here.

Same—refusal of instructions—error.

After verdict the respondent moved that it be set aside for reasons already considered, and on the further claim that it appeared that the jury acted hastily and with passion and prejudice. This motion was overruled, and in the action of the court in that regard there appears no abuse of discretion.

The petition for a new trial, brought to this court, goes upon two grounds: newly discovered evidence and the disqualification of one of the jurors, C. C. Martin, to sit in the case,—a disqualification which came to light only after the trial of the case was ended. This juror resided in Montgomery. William Daniels of that town makes affidavit that before the trial Martin said he believed Warm was guilty; knew he was guilty; offered to bet the cigars that Warm would be found guilty; and did make such a wager with Daniels, Martin wagering that Warm would be found guilty, and Daniels wagering that Warm would be found innocent. Joseph La Frank, road commissioner, makes affidavit that a few days after the trial was over he heard Martin demand of Daniels the payment of the wager. Edmos Larivee makes affidavit to the same effect, and Wallace Lumbra and Elias Roberts make affidavits of like import.

The state took counter affidavits of these men, and La Frank, Lumbra, and Roberts make affidavit that the talk in which Martin demanded of Daniels payment of the wager was of a jovial character. Larivee's counter affidavit is to the effect that he heard the bet, and that it was the other way; Martin betting that Warm would go free. Larivee's affidavits are unreliable, and really count for nothing. The counter affidavit of Daniels was taken by the state. In it Daniels deposes that Martin said he knew well enough that Warm was guilty. Daniels said that, so far as he was concerned, he was in earnest in respect to the wager, as he believed Warm was innocent; would have bet the cigars, or would have bet a dollar. However, he says he never dreamed the bet was coming up to hurt Martin, and that no doubt the matter was all fooling. Previous to the wager he talked with Martin about the case right along as the newspapers came out, and their divergent views, based on what they read, led to the wager.

In this state of the affidavits of others we turn with interest to the counter affidavit of the juror himself, taken by the state, for an unqualified denial by Martin of the subject-matter of the other affidavits would go far to sustain the contention of the state. Juror Martin makes affidavit that at the time he was examined on the voir dire he had no recollection of discussing the death of Jennie Hemingway with Daniels, nor of making any wager with regard to parties concerned. He does not deny that he sat in the case with a consciousness that he had wagered that Warm would be

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convicted, but says that he tried the case fairly upon the evidence given in court and the charge as he understood it, and without reference to anything that he had heard, read, said, or done; therefore he does not deny that he made the wager referred to, but says that, if any wager was made, it was merely a joking bet, not based upon anything tangible, and promptly forgotten. He further says that, after he returned home from the trial, Daniels was joked about a wager which the latter had made and lost, on the weight of horses, and that, if there was ever any talk about the wager in question, it was then had; that the existence of such a wager was never mentioned again; that it was never paid to him nor demanded by him. Now, if he did not remember making the bet, he did not remember forgetting it, nor that it was of a joking character. And if he did not remember that there was any talk about it after the trial, he did not remember the connection of the talk with talk about another wager. We are obliged to say that the affidavit of juror Martin is evasive and lacking in candor, and we find on the affidavit of others that he made the wager that Warm would be convicted. Very shortly thereafter he sat as one of the jury that convicted Warm. The counter affidavits, giving color to the claim that the wager was of a joking character, are without weight. Many people regard betting as fun, and the fact that the juror regarded it as a joke to bet on the conviction of a man charged with murder does not commend him to us as a man fit to be a juryman in a case in which he had made that kind of a wager. A grave question of public policy is here involved, and it admits of but one answer.

Juror—qualification—wagering on result.

The amount of the wager in this instance is immaterial to the answer. Courts will not consider how large a wager must be to disqualify the wagerer. Public policy will not permit verdicts to stand which are rendered by jurymen who have bet on the issue, be the stake great or small. It is not for us to inquire whether or not the result of the trial was in any measure due to the situation that existed. The due administration of justice is the question at stake. Austin v. Langlois, 81 Vt. 223, 69 Atl. 739; Moore v. Cross, 86 Vt. 148, 84 Atl. 22; Re Ketchum, — Vt. —, 102 Atl. 1032.

Criminal law—juror wagering on results—effect.

The conclusion reached makes it unnecessary and inadvisable to comment on the newly discovered evidence as set forth by petition and affidavit. On the new trial which public policy demands, such evidence, and all available evidence, whether favorable or unfavorable to the respondent, will stand for careful, impartial, and solemn consideration.

Petition for new trial granted.

ANNOTATION.

Betting on result as disqualifying juror.

A juror who has bet on the result is disqualified, however trifling the amount. Essex v. McPherson (1872) 64 Ill. 349; Seaton v. Swem (1882) 58 Iowa, 41, 11 N. W. 726; STATE v. WARM (reported herewith), ante, 811; Cluverius v. Com. (1886) 81 Va. 787.

The court properly set aside a juror who had made two bets that the defendant would not be convicted, one of a 10-cent cigar and the other of fifty cigars, where the knowledge of these bets did not come to the attorney for the commonwealth until after the juror had been accepted. Cluverius v. Com. (Va.) supra.

In Essex v. McPherson (Ill.) supra, it was held that a new trial for the plaintiff should be granted where he discovered, after the trial, that a juror had before the trial bet a necktie that the result would be in favor of the

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defendant, as the character of the objection was such that it could not be said that reasonable diligence might have discovered it before the trial, and it being impossible to say that, by reason of the smallness of the wager, it was without influence upon the juror.

So, in Seaton v. Swem (Iowa) supra, it was held to be ground for a new trial that a juror had bet 25 cents on the result of an election depending upon the trial, the juror on his voir dire having denied any opinion or interest, and the moving party not knowing the fact until after verdict.

In Booby v. State (1833) 4 Yerg. (Tenn.) 111, the court, while ordering a new trial because a juror made to his fellows statements of matters not in evidence, decided that the fact that a juror had had a wager on the result of the case would not be a cause for a new trial, in the absence of a positive showing that the defendant was ignorant of the wager before the trial.

It was held in Goodright v. M'Causland (1794) 1 Yeates (Pa.) 372, 1 Am. Dec. 306, that it was not ground for a new trial on behalf of the defendant that a juror had wagered a pint of wine that the plaintiff would gain the cause, where he had also made two bets, one of a gallon and the other of a pint, that the plaintiff would miscarry.

It may be noted that in Butts v. Union P. R. Co. (1899) 21 R. I. 505, 44 Atl. 933, the court denied the plaintiff's motion for a new trial where, pending the charge of the court, after the close of the testimony, one of the jurors made a wager of a cigar with an employee of the defendant that the defendant would not lose the case. The court said: "While the conduct of the juror, in wagering a cigar as to what the verdict would be, was highly censurable and would have been sufficient to subject him to punishment if it had been brought seasonably to the attention of the court, still the plaintiff has not shown us by the testimony that the verdict is not fully sustained by the evidence. If the case were a close one on the evidence, or there was reason to believe that the rights of the plaintiff had been injuriously affected, a different question would be presented." B. B. B.

THOMAS BAKER, Appt.,

v.

HUGH MAXWELL, Sheriff.

Iowa Supreme Court — June 27, 1918.

(— Iowa, —, 168 N. W. 160.)

Exemptions — sawmill as tool.

One operating a portable sawmill which he moves from place to place to cut logs into lumber, according to the demand for such service, is a mechanic within the meaning of a statute allowing exemptions to a mechanic, and the mill, although of the value of $800, is a tool or instrument within the meaning of such statute.

[*See note on this question beginning on page* 818.]

APPEAL by plaintiff from a judgment of the District Court for Plymouth County in favor of defendant in an action brought to recover possession of a portable sawmill. *Reversed.*

The material facts are stated in the opinion of the court.

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Mr. C. R. Metcalfe, for appellant:

The property in question was exempt from execution under the laws of the state.

Equitable Life Assur. Soc. v. Goode, 101 Iowa, 160, 35 L.R.A. 690, 63 Am. St. Rep. 378, 70 N. W. 113; Sterman v. Hann, 160 Iowa, 356, 46 L.R.A. (N.S.) 287, 141 N. W. 934; Eckman v. Poor, 38 Colo. 200, 87 Pac. 1088; Wallace v. Bartlett, 108 Mass. 52; Smith v. Roads, 29 Okla. 815, 119 Pac. 627; Re Petersen, 95 Fed. 417; Fore v. Cooper, — Tex. Civ. App. —, 34 S. W. 341; Spence v. Smith, 121 Cal. 536, 66 Am. St. Rep. 62, 53 Pac. 653; Jackman v. Lambertson, 71 Kan. 138, 80 Pac. 55; State ex rel. Achey v. Creech, 18 Wash. 186, 51 Pac. 363.

If there was any doubt about the article being used to make a living, or appellant being a mechanic, or the property being "tools and instruments," it should be submitted to the jury under proper instructions.

Richards v. Hubbard, 59 N. H. 158, 47 Am. Rep. 188; Perkins v. Wisner, 9 Iowa, 320.

Messrs. Hess & Hess for appellee.

Weaver, J., delivered the opinion of the court:

The plaintiff is conceded to be a married man, the head of a family, and with his family has been for many years a resident of the state. He has little, if any, property except that hereinafter mentioned, and for a considerable period has been employed by others in cutting and converting native trees and logs into lumber. In this work he owns and makes use of a portable mill, which he operates himself with such help as is afforded him by his wife and minor son. The power used is steam, and the entire outfit is so designed as to be readily moved from place to place and from farm to farm as may be desired by those having such work to be done, and its value is about $800. One Rawson, having obtained a judgment against plaintiff, procured the issuance of an execution for its collection and caused it to be levied upon said property. Plaintiff thereupon served written notice upon the sheriff that he claimed the property to be exempt from seizure on execution, and demanded that the levy be discharged. The demand was refused, and plaintiff then brought this action to recover the possession.

The defendant denied the alleged exempt character of the property, and on trial of this issue to a jury the court directed a verdict for the defendant, and the plaintiff appeals.

There appears to be no material fact on which there is any occasion for the consideration of the jury, and the arguments in this court are very properly directed to the legal proposition whether, under the undisputed facts, the trial court properly directed a verdict for the defendant.

Our general Exemption Law is found in Code, § 4008, and that portion of it which has more particular bearing upon this controversy is the clause which provides that a resident head of a family, if a farmer, mechanic, surveyor, clergyman, lawyer, physician, teacher, or professor, may hold exempt from execution the proper tools, instruments, and books pertaining to his occupation, and, if a physician, public officer, farmer, teamster, or other laborer, may also hold exempt the team and vehicle with which he habitually earns his living. In support of the ruling below the appellee relies upon two propositions: First, that plaintiff is neither farmer, mechanic, surveyor, clergyman, lawyer, physician, teacher, or professor and therefore is not entitled to any exemption for the tools, instruments, or implements suitable to his employment or business; but is a common laborer for whom there is no exemption except a team and vehicle, if he employs such aids in earning his living; and, second, that if it should be held that plaintiff is a mechanic within the meaning of the statute, the portable mill is not a tool, instrument, or implement of his employment which the law exempts.

Without at all conceding the correctness of appellee's contention that one who is a laborer, as distinguished from a mechanic, is entitled to no exemption from execu-

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tion for the tools and implements suitable for his employment, our views upon the other proposition are such as to render unnecessary any discussion of that question.

It is the plaintiff's theory that, under a fair and liberal construction of the term used in the Code section above cited, he may be classed as a mechanic, and to the question thus raised we give our first attention.

Cases may be found in which the term "mechanic" is limited to a skilled workman employed in shaping materials, such as wood, metal, or stone, into some kind of a structure or machine or other object requiring the use of tools; but the prevailing tendency of modern courts, including this court, is to broaden and enlarge the scope of the word, and this is especially true in construing and applying Exemption Laws. For example, in Smith v. Osburn, 53 Iowa, 474, 5 N. W. 681, the question arose upon a claim of exemption for a printing press, type, and other materials used in the printing business. At that time the statute which specifically exempts such property had not then been enacted, and the claim of exemption was based on the theory that the printer was a mechanic, and that the presses and other property seized were the tools and implements of his trade. We sustained that claim, and exempted his property as the tools of a mechanic, and we defined the word "mechanic" as being applied to "one who works with machines or instruments," etc., and in our judgment, if the owner of and user of a printing office outfit may be classed as a mechanic, and a complicated and expensive piece of machinery, like a newspaper press and equipment, may be exempted as a proper tool or implement of his employment, there ought to be no hesitation in admitting a lumber sawyer and his portable mill to the same class. That very question was considered in Gulledge v. Preddy, 32 Ark. 433, and the owner and operator of a sawmill was there classed as a mechanic. As further illustrating the liberality of the courts in defining these terms and applying Exemption Laws, the word "mechanic" has been held to include a dentist (Maxon v. Perrott, 17 Mich. 332, 97 Am. Dec. 191); a civil engineer (Amazon Irrigating Co. v. Briesen, 1 Kan. App. 758, 41 Pac. 1116); a painter (Waite v. Franciola, 90 Tenn. 191, 16 S. W. 116); a barber (State v. Dielenschneider, 44 La. Ann. 1116, 11 So. 823; State v. Hirn, 46 La. Ann. 1443, 16 So. 403; Terry v. McDaniel, 103 Tenn. 415, 46 L.R.A. 559, 53 S. W. 732. It must require some degree of knowledge, skill, and training to operate a sawmill, even a small portable affair, and we entertain no doubt, under the law as heretofore recognized by this court as well as by other courts, that the plaintiff may be classed as a mechanic, and is entitled to be so considered in applying the Exemption Statute.

Assuming, then, that the plaintiff is a mechanic within the terms of this law, we have further to inquire whether the mill which he uses is a proper tool or implement of his occupation. Both upon principle and precedent this must be answered in the affirmative. Appellee points us to cases where the word "tool" has been held to mean only small implements which may be held in the hand, or are to be operated by manual force or power alone. Such rule seems to be entirely too narrow and technical, but it is to be noted that our statute exempts not "tools" alone, but all the debtor's proper "tools, instruments, and books." The word "instruments" is a word of much more general and inclusive import than "tools," and it has been held to include a very wide range of implements reasonably fitted or employed as means of making their owner's labor in his chosen employment more effective. Nor does the statute require that in order to be exempt the tool or instrument shall be shown to be a necessity in such employment; it is enough if it is a

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"proper" tool or instrument. Any tool or instrument which is usually adapted to such use is a proper one. The statute fixes no limit upon the size or value of such instruments. For the farmer it may properly include a gang plow, a harvester, a traction engine, and any or all of the multitude of modern farm machinery which may be useful or proper, and the fact that it costs hundreds, or perhaps thousands, of dollars, or is operated by steam, gas, or electricity, or may require an expert to use it successfully, will not expose it to seizure as nonexempt property so long as it be fit and proper for the farmer's use. A piano may be an exempt tool or instrument in the hands of a music teacher (Amend v. Murphy, 69 Ill. 337); a turning lathe weighing 600 pounds is a tool within the Exemption Act (Smith v. Roads, 29 Okla. 815, 119 Pac. 627); a portable sawmill is classed as an exempt implement in Eckman v. Poor, 38 Colo. 200, 87 Pac. 1088; a like ruling as to a portable sawmill is sustained in Reeves v. Bascue, 76 Kan. 333, 123 Am. St. Rep. 137, 91 Pac. 77; and a logging outfit may be exempt instrument (State ex rel. Achey v. Creech, 18 Wash. 186, 51 Pac. 363). Even where the statute exempts only the tools "necessary for the debtor's usual occupation," it has been said this does not mean those of absolute necessity in his work, but such as are reasonably necessary for the prosecution of it advantageously and usefully.

"It is by availing himself of new tools, often improved and better adapted to the prosecution of his labor, that improvements are made by the mechanic, and there is no reason why they should not be as much protected on their first introduction, as after they have come into general use." Healy v. Bateman, 2 R. I. 454, 60 Am. Dec. 94.

No one would deny to the worker in concrete and cement an exemption for the time-honored hoe and shovel with which he mixes his materials, and it would be most unreasonable to say that, if the man whom you employ to lay your sidewalk should use a small modern revolving mixer, operated by gas or electricity, to do the work of the hoe and the shovel, it may be seized upon execution simply because it is a new or more complicated or more expensive implement. There is nothing in the statute requiring it, and the courts have no authority, and should have no desire, to impose any such limitation upon the worker's statutory right.

We do not overlook the fact that in Meyer v. Meyer, 23 Iowa, 359, 92 Am. Dec. 432, this court held that a threshing machine which required six to ten horses and a large force of men to operate was not exempt as a proper tool or implement of a farmer, who used it principally to thresh the grain of others than himself. We have no quarrel with the result reached in that case, and concede its authority in cases of like or similar character, but the class does not include cases like the one at bar. If in that case a judgment debtor had been a thresher by trade and occupation, and, being employed to thresh the grain of others, he laid aside the primitive flail and used a small power thresher operated entirely by himself and members of his dependent family, we may safely assume that the machine would have been held exempt as a proper implement of the debtor's employment.

Without further prolonging this opinion we say that, under the conceded facts, the plaintiff is entitled to be classed as a mechanic within the meaning and purpose of the statute, and that the portable mill is to be classed as a proper tool or instrument of his employment and occupation. It follows that a verdict should not have been directed for the defendant, and that judgment should have been entered for the plaintiff, upon the

Exemptions—sawmill as tool.

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agreed statement of facts, for the possession of the property or for its value, if the possession has not been restored under the writ of replevin.

The cause will be remanded for the entry of judgment in harmony with this opinion.

Reversed and remanded.

Preston, Ch. J., and Stevens and Gaynor, JJ., concur.

ANNOTATION.

What are "tools," "implements," "instruments," "utensils," or "apparatus," within the meaning of Debtor's Exemption Laws.

I. Introduction, 818.
II. Costly or extensive property, 821.
III. Use of property, 825.
IV. Exemption of tools, etc., of an occupation or profession, 826.
V. Application to specific chattels, 827.

I. Introduction.

The statutes exempting "tools," "implements," "instruments," and "utensils" vary widely in terms. In some statutes the exemption is without any qualification or condition; in others a qualification or condition appears. For example, the exemption may not be absolute, but may be of such tools, implements, etc., as may be necessary to the debtor or to his trade or profession. Such statutes as the latter present two questions: (a) Whether the chattel involved in the particular case is a tool, implement, etc., and (b) whether it is necessary to the debtor, or to his trade or profession. The question whether an article is a necessary tool, as distinguished from the question whether it is a tool at all, is beyond the scope of this discussion. Between the statutes which exempt tools, implements, etc., without condition, and those which make the exemption depend upon necessity, are statutes widely varying. In some of the decisions it is difficult, if not quite impossible, to determine whether the question was as to the chattel involved being a "tool," "implement," etc., or as to the necessity thereof. This note, so far as practicable, has been confined to the first question, that is, whether the chattel is a "tool," "implement," etc., though some cases that turn upon the necessity thereof are cited with a view of noting distinctions. The question whether the debtor is within the description of persons, in statutes which limit the exemption to certain persons, is also beyond the scope of the note.

See, for example, O'Reilly v. Erlanger (1905) 108 App. Div. 318, 95 N. Y. Supp. 760, holding that a desk of an undertaker was not exempt, under a statute exempting "professional instruments, furniture, and library," upon the theory that the business of undertaking is not included in the term "profession" as used in the statute.

In the absence of any limitation in the statutes as to the character of the tools or implements to be exempted, some courts have expressed an unwillingness to place any limitation by construction. Re Klemp (1897) 119 Cal. 41, 39 L.R.A. 340, 63 Am. St. Rep. 69, 50 Pac. 1062; Spence v. Smith (1898) 121 Cal. 536, 66 Am. St. Rep. 62, 53 Pac. 653. Compare with Henry v. Sheldon (1862) 35 Vt. 427, 82 Am. Dec. 644, infra, as to supplanting a simple tool. Thus, in Re Klemp (1897) 119 Cal. 41, 39 L.R.A. 340, 63 Am. St. Rep. 69, 50 Pac. 1062, the court, after stating that the statutory provision has on its face no limitation as to the character of the implements exempt, and that it does not even provide that the implements must be necessary, continues: "There is no ground for excluding an implement from the operation of the statute, because it is an improvement, and supplants a former implement used with less effectiveness for the same purpose. . . . The whole subject is one of legislative policy; and until the legislature shall see fit to limit the implements of husbandry which shall be exempt, either by enumeration, or by a restriction based on value, a court has no war-

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rant in any of the reasons given by respondent to eliminate from the statute anything which is clearly within its terms." This case is cited with approval on this point in Spence v. Smith (1898) 121 Cal. 536, 66 Am. St. Rep. 62, 53 Pac. 653.

The courts are not agreed whether a limitation as regards the value of the chattel involved may be read into the statute. See infra, II.

The size of the chattel has been treated by some courts as having a direct bearing upon whether it is a tool, implement, etc. See infra, II.

Where the statute exempts specified property without making it a condition of the exemption that it be necessary to the judgment debtor's trade or occupation, the courts have seemingly refused to read such a condition into the statute. Re Klemp (1897) 119 Cal. 41, 39 L.R.A. 340, 63 Am. St. Rep. 69, 50 Pac. 1062; Spence v. Smith (1898) 121 Cal. 536, 66 Am. St. Rep. 62, 53 Pac. 653. In Spence v. Smith (1898) 121 Cal. 536, 66 Am. St. Rep. 62, 53 Pac. 653, where the judgment debtor was engaged in farming about 2,700 acres of land, and it appeared that all the property levied upon and seized was necessary to enable him to properly carry on his farming operations upon land of that extent, the court states that "whether any property shall be exempt from execution, as well as the character and amount of property to be exempted, is purely a question of legislative policy; and, when the legislature has determined that the farming utensils and implements of husbandry of a judgment debtor shall be exempt, a court is not authorized to refuse the exemption because, in its opinion, they are not necessary for the judgment debtor." This statement, however, is followed by another, which renders the meaning of the court somewhat obscure. The court states: "The state has fixed no limit to the amount of land which a judgment debtor may cultivate by farming, and if farming utensils which he has are necessary for the proper cultivation of his land, they are exempt from execution, irrespective of whether he would need them for cultivating a smaller tract."

In exempting an expensive threshing outfit in Re Klemp (1897) 119 Cal. 41, 39 L.R.A. 340, 63 Am. St. Rep. 69, 50 Pac. 1062, the court states that the California Code is broader than any to which the attention of the court has been called, there being no such words used as "necessary," "proper," or "adequate."

It is a theory of some cases that the term, "tools," should be limited to instruments used by hand or operated by direct application of manual strength. Spooner v. Fletcher (1830) 3 Vt. 133, 21 Am. Dec. 579; Garrett v. Patchin (1857) 29 Vt. 248, 70 Am. Dec. 414; Henry v. Sheldon (1862) 35 Vt. 427, 82 Am. Dec. 644.

The word "tools," in its general received sense, has been stated to imply "instruments of small value, and used with the direct application of manual strength." Spooner v. Fletcher (1830) 3 Vt. 133, 21 Am. Dec. 579.

The supreme court of Vermont has stated that the word "tools," in a statute exempting such tools as may be necessary for upholding life, has long been held to extend to such farming tools as are used by hand, and to include hoes, axes, pitchforks, shovels, spades, scythes, snathes, cradles, dung forks, and other tools of that character; but it is held not to include machinery or implements used by oxen and horses, as carts, plows, harrows, mowers, and reapers. Garrett v. Patchin (1857) 29 Vt. 248, 70 Am. Dec. 414.

The supreme court of Vermont in Henry v. Sheldon (1862) 35 Vt. 427, 82 Am. Dec. 644, in holding that a machine used for shaving or splitting leather was not a tool, states that the fact that the machine took the place of a tool that was exempt is not a sufficient reason for holding the machine exempt, the court stating that if the introduction of machinery to supersede the use of tools has introduced such change in the mode of labor as to render it expedient to protect from attachment articles of the class to which the one in question belongs, it is for the legislature, and

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not for the court, to provide the remedy.

Compare with Re Klemp (1897) 119 Cal. 41, 39 L.R.A. 340, 63 Am. St. Rep. 69, 30 Pac. 1062, supra, as to effect of supplanting tools.

But, upon the other hand, the word "tools" has been held not to be indicative only of such implements as are used by the hand of one man. Patten v. Smith (1823) 4 Conn. 450, 10 Am. Dec. 166, exempting a printing press, cases, and type of the value of about $500, such property being regarded as tools, within the meaning of a statute exempting tools from execution. The court here states that the word "tools," in its origin, was applied to instruments that were used by the hand of one man, but the usage of speech has long since extended it beyond these bounds. The court states that "it was the object of the statute to protect the tools of a trade, so far as they were indispensably necessary; and the words of this as of other laws ought to be expounded according to their popular acceptation, in order to attain the legislative intent. In manufactories of recent origin, there may be complicated machinery and expensive utensils of great value, which do not fall within the principle of exemption; and to this subject I refer, without the intimation of an opinion, cautiously to guard against inferences beyond the principles I have assumed."

And see to the same effect Jenkins v. McNall (1882) 27 Kan. 532, 41 Am. Rep. 422, also involving a printing press, though in that case the exemption was denied because it did not appear that the debtor derived his principal support from his printing press.

But see, contra, Buckingham v. Billings (1816) 13 Mass. 82, which is approved in Kilburn v. Demming (1829) 2 Vt. 404, 21 Am. Dec. 543.

The fact that the tools are not used by the owner, but by his employees, does not prevent their being exempt. Howard v. Williams (1824) 2 Pick. (Mass.) 80; Daniels v. Hayward (1862) 5 Allen (Mass.) 43, 81 Am. Dec. 731; McDowell v. Shotwell (1836) 2 Whart. (Pa.) 26; Smith v. McBryde (1915) — Tex. Civ. App. —, 173 S. W. 234; Laguna v. Quiñones (1916) 23 P. R. R. 358.

In Howard v. Williams (1824) 2 Pick. (Mass.) 80, supra, it is stated that "the exemption is not limited merely to the tools used by the tradesman with his own hands, but comprises such in character and amount as are necessary to enable him to prosecute his appropriate business in a convenient and usual manner; and the only rule by which it can be restricted is that of good sense and discretion in reference to the circumstances of each particular case." Tools used by the owner's journeyman or apprentice in the business of his trade were held to be protected from attachment in this case.

And in Daniels v. Hayward (1862) 5 Allen (Mass.) 43, 81 Am. Dec. 731, supra, in holding exempt boot machinery, presumably of the value of less than $100, the court states that while "the exemption was not intended to apply to large manufacturing establishments, it has not been supposed to be at variance with the letter or the spirit of the statute to apply it to the case of a mechanic carrying on a small business, alhough he may have in his employment men who perform the principal part of the labor with the tools, implements, and fixtures."

It is held in Smith v. McBryde (1915) — Tex. Civ. App. —, 173 S. W. 24, supra, that an exemption of "all implements of husbandry" includes all implements used by a farmer in conducting his farming operations; not only those that he may use directly, but those used by his tenants and employees.

Without undertaking to specify what, in every instance, may be comprised in the term, "necessary tools of a tradesman," it has been stated that "generally, those articles without which a man cannot work at his trade must be within the meaning of the" statute. McDowell v. Shotwell (1836) 2 Whart. (Pa.) 26, exempting a loom to a weaver.

Contrary to the assumption in practically all the other cases, it has been

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stated that the tools of a man's trade or occupation do not include the implements of husbandry, used by the husbandman in tilling his farm. Dailey v. May (1809) 5 Mass. 313.

In Pierce v. Gray (1856) 7 Gray (Mass.) 67, the reasoning in the Dailey Case is stated not to apply "to tools to be used by the hand and foot of the laborer, of simple construction, of moderate expense, and all the more necessary, it may be, when the debtor has lost his land, that he may get his bread by tilling the land of others." Accordingly, a shovel, pickax, dung fork, and hoe were held to be tools and exempt to the owner, whose principal business was the ice business, but who had a small garden in which he was accustomed to work in the summer and use the articles mentioned.

In denying an exemption of a lawyer's law library, the supreme court of Rhode Island (Church's Petition (1886) 15 R. I. 245, 2 Atl. 761) stated that the exemption of "working tools of a debtor, necessary in his or her usual occupation," covers "only such utensils or implements as the debtor is accustomed to use in manual work or labor in his or her usual occupation."

The fact that the statute specifically enumerates many things that might be regarded as tools has been held to show an intention to restrict the meaning of the word "tool," used in an exemption statute.

See Kirksey v. Rowe (1902) 114 Ga. 893, 88 Am. St. Rep. 65, 40 S. E. 990, holding that a set of harness is not a "common tool of trade," within a statute which specifically exempts looms, spinning wheels, cotton cards, and sewing machines.

The word "apparatus," in an exemption statute, has been held to be a term of comprehensive signification. Thus, the supreme court of Texas, in speaking of a statute exempting "all tools and apparatus belonging to any trade or profession," states that the term used in the statute, "and especially the word 'apparatus,' is strikingly apt, a generic term of the most comprehensive signification." Green v. Raymond (1882) 58 Tex. 80, 44 Am. Rep. 601, and that case is quoted and followed in Harris v. Todd (1913) — Tex. Civ. App. —, 158 S. W. 1189, holding that pool tables, used in the operation of a pool hall, were within the term "apparatus."

But it has been held in Texas, in denying that a mowing machine was embraced in the term "apparatus belonging to any trade or profession," that "the word 'apparatus' is not understood, either in strict meaning or popular sense, as designating a complicated piece of machinery." Tucker v. Napier (1877) 1 Tex. App. Civ. Cas. (White & W.) 365.

And "apparatus" has been stated to include many things that are not tools in the ordinary meaning of that term. Brummage v. Kenworthy (1910) 27 Okla. 431, 112 Pac. 984, Ann. Cas. 1912C, 607.

In Willis v. Morris (1886) 66 Tex. 628, 59 Am. Rep. 634, 1 S. W. 799, the court, after stating that expensive and complicated machinery, propelled by steam power, or any power other than hand, is not exempt as tools of trade, continues: "The word 'apparatus' used in the statute may take a wider range and embrace such minor machinery as may be operated by hand, and such as courts of high authority have held not to be included under the term 'tools,' as used in similar enactments."

And see the reported case (BAKER v. MAXWELL, ante, 814) for construction of the term "instruments."

II. Costly or extensive property.

It has been stated that if the property comes within the terms of the statute its exemption does not depend upon its value. Re Klemp (1897) 119 Cal. 41, 39 L.R.A. 340, 63 Am. St. Rep. 69, 50 Pac. 1062; Reeves v. Bascue (1907) 76 Kan. 333, 123 Am. St. Rep. 137, 91 Pac. 77.

In Re Klemp (1897) 119 Cal. 41, 39 L.R.A. 340, 63 Am. St. Rep. 69, 50 Pac. 1062, a threshing outfit which originally cost $1,500, but at the time of the exemption was worth about $300, was exempted under a statute exempting the "farming utensils or imple-

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ments of husbandry of the judgment debtor."

In Reeves v. Bascue (1907) 76 Kan. 333, 123 Am. St. Rep. 137, 91 Pac. 77, the court, in dealing with a statute which exempted "the necessary tools and implements of any mechanic, . . . used, . . . for the purpose of carrying on his trade or business," states that "it will be observed that the fact that the tools and implements are large and heavy does not take them out of the operation of the statute. Nor is there any limit placed on the number, character, or value of the tools and implements protected by the exemption. It is enough that they belong to the mechanic, miner, or other person, that they are necessary, and are personally used for the purpose of carrying on his trade or business. If he uses the tools and implements in person, and performs a considerable portion of the work himself, it would seem to be immaterial whether he is called a manufacturer or a mechanic." Knox v. Chadbourne (1848) 28 Me. 160, 48 Am. Dec. 487. But see Martin v. Buswell (1911) 108 Me. 263, 80 Atl. 828, infra.

It is a theory of some cases, however, that the term, "tools and implements," as used in the Exemption Laws, does not include extensive or costly machinery. Burt v. Stocks Coal Co. (1904) 119 Ga. 629, 100 Am. St. Rep. 203, 46 S. E. 828; Boston Belting Co. v. Ivens (1876) 28 La. Ann. 695; Martin v. Buswell (1911) 108 Me. 263, 80 Atl. 828; Buckingham v. Billings (1816) 13 Mass. 82; Danforth v. Woodward (1830) 10 Pick. (Mass.) 423, 20 Am. Dec. 531; Thresher v. McEvoy (1917) — Tex. Civ. App. —, 193 S. W. 159. It has been stated that "it will not be contended that the statute intended, by the term 'tools or implements of trade,' to exempt costly machinery from the payment of the debts of the owner. . . . I see and feel the difficulty in laying down a principle by which we can determine what shall be considered in all cases implements or tools of trade, unless we take the words in their broadest sense, but that construction would lead to results, in my opinion, entirely beyond the design and intention of the law. It would exempt property of great value under the denomination of implements of trade, and might leave the debtor in possession of wealth." Dargan, Ch. J., in Sallee v. Waters (1850) 17 Ala. 482.

In Burt v. Stocks Coal Co. (1904) 119 Ga. 629, 100 Am. St. Rep. 203, 46 S. E. 828, holding that a dentist's chair was not a "common tool of trade," the court states that this phrase has uniformly been construed to refer not to tools in common use by the debtor, regardless of their value, but to those simple and inexpensive appliances used in his trade.

The supreme court of Maine, in holding that a potato planter, a potato sprayer, and a potato digger were not exempt, under a statute exempting "the tools necessary" for the debtor's trade or occupation, states that "it cannot be successfully contended that so ponderous and complicated a device as a potato planter, sprayer, or digger is embraced within the phrase 'tools necessary for his trade or occupation.' While this statute might cover a hoe, a rake, a scythe, and other articles of husbandry, essential to the operation of the farm, to the extent of enabling the husbandman to procure a living for himself and family, it was never intended that its meaning should be so expanded as to include the implements or machinery, by means of which the farmer might be able to cultivate the soil beyond the necessities of himself and family, to the extent of a profit, it may be, of thousands of dollars annually." Martin v. Buswell (1911) 108 Me. 263, 80 Atl. 828.

In Buckingham v. Billings (1816) 13 Mass. 82 (approved in Danforth v. Woodward (1830) 10 Pick. (Mass.) 423, 20 Am. Dec. 531), involving a printing press, the court said: "It is not to be supposed that it was designed to comprehend within the term "tools" (which are properly small articles used by the hand) complicated machinery or expensive utensils which may, of themselves, be of great value. . . . It has been shown from the best lexicographers that by

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the word "tool" is to be understood some simple instrument used by the hand; and even if we should not confine the term to so strict a sense, yet we are not at liberty to suppose that the legislature departed so entirely from the appropriate meaning as to extend it to complicated and expensive machinery, which requires many hands to set it in motion." So, in Smith v. Gibbs (1856) 6 Gray (Mass.) 298, paper mill machinery and stock and fixtures were held not exempt.

And in Thresher v. McEvoy (1917) — Tex. Civ. App. —, 193 S. W. 159, an extensive well-drilling apparatus was held not exempt. The supreme court of Louisiana in Boston Belting Co. v. Ivens (1876) 28 La. Ann. 695, in denying the right to exemption in the case of movable property in a foundry and machine shop, under a statute exempting "the tools and instruments necessary for the exercise of the trade or profession by which" the debtor "gains a living," states: "We cannot think the exemption was intended to apply to the multifarious machinery and implements constituting an extensive factory, requiring the attendance and skill of a large number of operatives, such as the establishment of the defendants seems to be, from the number and character of the articles in the above list. . . . It seems to us Exemption Laws should not be extended beyond their clear intendment. We have heretofore had occasion to say that such laws, being exceptional, should be strictly construed, and we think the exemption claimed should not be applied to the articles seized in this case. They are manifestly such as require the services and management of a number of persons besides the debtors to operate. The fact that two engines are required to 'drive the works' shows the extended scale of the business in which so large a number of various implements are used, and makes it clear that those 'tools and instruments' of the trade or profession 'of foundrymen and machinists contribute to the support of several, if not many, persons besides the debtors; and we are not able to separate them and select such as the debtors themselves require for their manual labor, in the exercise of the trade or profession by which they gain a living.'" The supreme court of Massachusetts in Buckingham v. Billings (Mass.) supra, in denying that a printing press, cases, and type were exempt under a statute exempting the tools of any debtor necessary for his trade or occupation, states that "it is not to be supposed that it was designed to comprehend within the term 'tools' (which are properly small articles used by the hand) complicated machinery or expensive utensils which may, of themselves, be of great value. There are many machines now used in manufactures which may as well be denominated tools as the apparatus of a printing office; and yet it cannot be supposed that it was intended to exempt them from attachment, and thus to enable a debtor to hold a great capital which cannot be reached by his creditors. And, indeed, when the household furniture to be exempt is limited by the statute to a value of $50, and the tools of trade are exempted without any limitation, we are necessarily led to the conclusion that the term 'tools' was used in the statute to designate those implements which are commonly used by the hand of one man, in some manual labor necessary for his subsistence." In this case, the articles taken were part of an extensive printing office, and there were left to the debtor implements with which he could carry on his business of a printer to a considerable extent.

Some cases have distinguished between "tools" and "machinery." Atwood v. De Forest (1849) 19 Conn. 513; Seeley v. Gwillim (1873) 40 Conn. 106; Knox v. Chadbourne (1848) 28 Me. 160, 48 Am. Dec. 487.

It is impossible, however, to draw a precise line between "tools" and "machinery," and attempts to do so have not resulted in any very clear distinctions. The Connecticut court in Seeley v. Gwillim (Conn.) supra, in a case in which the debtor claiming the exemption not only carried on a trade, but was also a manufacturer, states: "His being a manufacturer

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does not prevent the statute from operating to exempt the implements of his trade so far as they are used by him in person. On the other hand, the fact that he is carrying on a trade will not extend the provisions of the statute to articles employed by him as a manufacturer merely." The court then refers to the property which was involved in the case at bar, consisting of the machines used in a plant for book-binding and manufacturing blank books, and worth about $1,000, and continues: "Improved and more expensive tools would be exempt; but when new methods and processes of manufacture are adopted, requiring numerous and expensive machines, adapted to manufacturing upon a large scale, it would be an unwarrantable extension of the statute to hold that it exempted such machines."

See also Reeves v. Bascue (1907) 76 Kan. 333, 123 Am. St. Rep. 137, 91 Pac. 77, infra, V., subd. "Sawmill."

The supreme court of Maine in Knox v. Chadbourne (1848) 28 Me. 160, 48 Am. Dec. 487, has stated that "no property can therefore be considered as exempted or intended to be, as a tool, which in popular language is not and cannot be designated or described by the use of that word. . . . The statute does not exempt machines. Articles correctly designated by the use of that term in popular language cannot be considered as intended to be exempted by the words 'the tools of any debtor.' If all property properly designated by the use of the word machine were to be exempted by the use of the word tool, property never designated by the use of the latter word in a correct, technical, or popular sense would be exempted. If machines are exempted, there can be no limitation of that exemption to a particular class of them, on account of their value. The exemption is not, by the statute, made in any degree to depend upon the value; and there would be no criterion by which the value could be determined. There must be some rule or principle by which to determine what property is exempted by the use of the word tools, and what is not exempted by the use of the word machines. No other rule is discernible, more satisfactory than that arising out of the popular use of language. That determines ordinarily with sufficient accuracy, what article is a tool, and what article is a machine. By the use of it, the article attached is determined to be a 'peg machine,' and not a tool. It may possibly happen that by some unusual use of language an article properly designated as a tool, and easily described as such, may commonly be called, by those who use it, a machine. In such case it is not intended to state that it would not [sic] become liable to attachment, because in popular language it was commonly called a machine. For in such case, as it could with more propriety be designated and described as a tool, the more correct description might prevail over the more common and vulgar one. It might well constitute an exception to the general rule, that the popular use of language should determine the character of the article."

Some statutes expressly limit the value of the property which may be exempt. Under such a statute the courts have not made any very fine discrimination as to the character of the property. For example, in one case (Wood v. Bresnahan (1886) 63 Mich. 614, 30 N. W. 206) involving the exemption of a steam engine and flywheel, a shingle machine and saw gummer, used in the manufacture of lumber and shingles, the court, in answer to the argument that it was not the purpose of the statute to exempt machinery nor to protect a manufacturer, states: "Our view is different. We do not see why the property of the manufacturer should not be exempt from execution, to the amount limited by the statute, as well as that of the farmer, the mechanic, the merchant, or the professional man. The statute extends to all business, occupation, or employment in which a person may be wholly or even principally engaged, and there is no provision of the law which expressly or by implication excepts those engaged in manufacturing business from the benefits conferred by the Statute of Exemptions."

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In Cunningham v. Brictson (1898) 101 Wis. 378, 77 N. W. 740, it was urged that the statute involved in that case exempted "tools and implements" to a mechanic or miner, mentioned therein, and that merchants and traders were only entitled to exemptions of "stock in trade;" but the court, in denying the validity of this argument, states that the limitation of value of the exempt property renders it unimportant to the creditor whether the exemption be chosen from the one or the other of these classes.

III. Use of property.

The use of the property has been regarded as determinative of the right to exemption in some cases. Thus, an exemption of "the farming utensils or implements of husbandry of the judgment debtor has been held not to include an expensive threshing outfit owned by the debtor in common with another, and used by the owners to a limited extent on their own lands, but principally in doing work for others, for hire. Re Baldwin (1886) 71 Cal. 74, 12 Pac. 44. It is stated by the court that it was not intended by the use of this language that all farming machinery which a farmer may own should be exempt because, while he uses it chiefly by renting it out or in doing work on other farms for hire, he still uses it to a small extent on his own land.

It has been held that a threshing machine is not exempt from execution, under a statute exempting "the proper tools or implements of a farmer," where the machine was used by the owner to thresh his own grain and that of others for hire, no emphasis being placed upon the relative importance of the owner's own work and that of others. Meyer v. Meyer (1867) 23 Iowa, 359, 92 Am. Dec. 432.

But it has been held that such a threshing outfit does not cease to be exempt from execution by reason of the fact that it was usually the custom for the owner to use it for hire to thresh the crops of others, after doing his own threshing. Spence v. Smith (1898) 121 Cal. 536, 66 Am. St. Rep. 62, 53 Pac. 653.

A harvester owned and used by the debtor in harvesting his own crops has been held exempt under such a statute, notwithstanding the owner may have, on some occasions, assisted his neighbors in harvesting their crops, where he was not engaged in harvesting crops as a business. Re Klemp (1897) 119 Cal. 41, 39 L.R.A. 340, 63 Am. St. Rep. 69, 50 Pac. 1062.

Where the property in question has ceased to be used by the owner, who has abandoned the occupation or trade to which the property was fitted, it has been held that it is no longer exempt as a "tool of his occupation," whether the property is or is not a "tool," within the ordinary meaning of that term. Norris v. Hoitt (1846) 18 N. H. 196, holding a daguerreotype apparatus not exempt, where the owner, at the time of the levy, had abandoned the business in which the apparatus was used and was using it only in instructing a prospective purchaser in its use.

It has been held that property that can be used in common in different businesses cannot be said to be tools of any particular trade. Seeley v. Gwillim (1873) 40 Conn. 106. In this case property of a bookbinder and manufacturer of blank books was levied upon, consisting of machines used in the business of bookbinding, and also some stoves and furniture, including chairs, tables, and the like. The court states that in respect to the stoves and furniture, although convenient and, in many cases, necessary even, yet they were not peculiar to the plaintiff's trade, being required in other employments as well, and therefore were not exempt.

But implements used by a farmer engaged in several branches of agriculture may be exempt, under a statute exempting "the farming utensils or implements of husbandry of the judgment debtor." In Re Slade (1898) 122 Cal. 434, 55 Pac. 158, a case involving the right of a widow to the property of her deceased husband, exempt from execution, it was argued that as the decedent carried on three

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ditsinct occupations, to wit, farming or agriculture, fruit growing or horticulture, and grape growing or viticulture, the widow must elect to take under some one of these occupations, and no more. In answer to this argument, the court, after quoting the statute exempting the farming utensils or implements of husbandry of the judgment debtor, states: "We do not think that, where a person engages in diversified farming, the law exempts only so much of his farming utensils or implements as he may use in some one of the separate branches of his farming operations." And the court concludes, on this branch of the case, that there were embraced in the list of articles a great many whose use was peculiar to the particular branch of farming carried on by the decedent, but that, as no point was made that any one article was not exempt, the list would not be examined.

An interesting question arising in this connection as to the right of one, by multiplying his employments, to claim cumulatively several exemptions created by the statute for several distinct employments, is beyond the scope of this discussion. See Jenkins v. McNall (1882) 27 Kan. 532, 41 Am. Rep. 422; Howard v. Williams (1824) 2 Pick. (Mass.) 80; Knapp v. Bartlett (1868) 23 Wis. 68, 99 Am. Dec. 109; Re Robinson (1913) 206 Fed. 176.

IV. Exemption of tools, etc., of an occupation or profession.

Some statutes exempt tools or implements of the debtor's trade or occupation.

A debtor is not entitled to have exempted property of his wife, which constitutes implements of her trade or calling. Smith v. Rogers (1854) 16 Ga. 479. The property of the wife being subject to sale for her husband's debts, the property was sold in this case.

Whether a particular chattel is exempt as a tool of the owner's occupation has been held to be a mixed question of law and fact, the question for the court being in general whether there is sufficient evidence to sustain a verdict. Rice v. Wadsworth (1879) 59 N. H. 100 (sustaining an exemption to a teamster of a team wagon, dump cart, sled, and a pair of team harnesses, where the referee found, as a matter of fact, that the above chattels were tools of the plaintiff's occupation); Richards v. Hubbard (1879) 59 N. H. 158, 47 Am. Rep. 188.

In Hall v. Nelson (1880) 59 N. H. 573, it is stated to be a question of fact, to be determined by the referee upon all the evidence, whether a wagon used for ordinary family purposes, and for drawing hay and in harvesting other crops by the owner, whose main business was that of a showman and whose principal use of the wagon was to transport himself and the views and apparatus illustrating his astronomical lectures about the country, was exempt, either as a farming tool or a tool of the owner's occupation.

Whether a specific chattel is a working tool within the meaning of an exemption statute has been held to be question of fact. Sammis v. Smith (1873) 1 Thomp. & C. (N. Y.) 444, sustaining an exemption of a fisherman's boat and nets, which required two men to operate, where the jury found as a question of fact that the boat and nets were working tools of the owner.

In Muse v. Darrah (1862) 2 Ohio Dec. Reprint, 604, it was held to be a mixed question of law and fact whether a threshing machine, clover huller, and wagon used for carrying the machines from place to place are "farming utensils," within the meaning of an exemption statute. The court here states that whether the threshing machine, clover huller, and wagon were "farm utensils" would be a proper question for a jury, in a trial before such a tribunal, under the instruction of the court, and must in some measure be regarded as a question of mixed law and fact. The court further states that, looking to the evidence of the manner in which the property was used, and giving to the words "farming utensils" that liberal construction which the object and purpose of the act seem to require, the property may fairly be regarded as exempt from execution.

See also Meyer v. Meyer (1867) 23

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Iowa, 359, 92 Am. Dec. 432, infra, V. subd. "Threshing outfit."

V. Application to specific chattels.

However difficult it may be to formulate a definition of a "tool," "implement," etc., the application of the rule to a specific chattel is more difficult. Below is shown what property has been held exempt as a "tool," "implement," "instrument," "utensil," or "apparatus," the cases being arranged according to the various chattels involved. A word of caution is necessary in this connection to avoid the use of the note for more than it covers with reference to any particular chattel. The present note is not concerned with the general question whether a particular chattel is exempt, but only with the question whether it is exempt as falling within the meaning of a "tool," "implement," "instrument," "utensil," or "apparatus." For example, a wagon may be expressly exempted in a particular statute; it is not necessary under such a statute to consider whether a wagon is a "tool," "implement," etc. But if the statute does not expressly exempt wagons, it may be urged that the wagon is exempt as being a "tool," "implement," etc. This latter question is the only one considered herein.

Abstract books.

A set of abstracts has been held to be exempt to an abstracter, as the tools and instruments used by him in carrying on his business. Davidson v. Sechrist (1882) 28 Kan. 324.

Automobile.

An automobile has been held not to be a tool or implement of trade, within the meaning of the Exemption Laws. Eastern Mfg. Co. v. Thomas (1909) 82 S. C. 509, 64 S. E. 401.

Barber equipment.

Chattels in ordinary use in a barber shop have been held exempt as tools or implements. Thus, a barber's chair and mirror were held exempt to a barber, in Terry v. McDaniel (1899) 103 Tenn. 415, 46 L.R.A. 559, 53 S. W. 732. The statute under which this decision is made does not appear, except by implication from the claim of the owner that the chair and mirror were the tools of his trade, or occupation, and exempt to him as a mechanic. A barber chair, one large mirror, and one marble-top table were held to be exempt to a barber, in Fore v. Cooper (1896) — Tex. Civ. App. —, 34 S. W. 341, but no particular statute is referred to, covering such an exemption.

The tools and implements used and employed by a barber were held to be exempt, under a statute exempting the "tools or implements of a mechanic or artisan, necessary to carry on his trade." Laguna v. Quiñones (1916) 23 P. R. R. 358. The property included mirrors, chairs, scissors, fans, clippers, brushes, lamps, tables, desk, towels, electric fixtures, and a number of other articles, all of them of the class and kind usually found in a barber shop. The mere duplication of articles was held not to deprive them of their exempt character, if useful and necessary in the barber's trade.

A barber's chair and foot rest were held exempt from execution as a tool, within the meaning of a statute which exempts such suitable tools as may be necessary for upholding life. Allen v. Thompson (1873) 45 Vt. 472.

Bicycle.

A bicycle is held not to be included in the term "tools or apparatus," as used in an exemption statute. Smith v. Horton (1898) 19 Tex. Civ. App. 28, 46 S. W. 401, affirmed in (1890) 92 Tex. 21, 46 S. W. 627, holding a bicycle not exempt to an architect, under a statute exempting "all tools, apparatus, . . . belonging to any trade or profession," although the architect used the bicycle in getting from place to place in his business.

Boat.

An exemption of a fisherman's boat and net, which were found by the jury to be working tools, has been sustained under a statute exempting the working tools of a debtor. Sammis v. Smith (1873) 1 Thomp. & C. (N. Y.) 444.

Boot machinery.

Boot-manufacturing machinery used in a small manufacturing establishment has been held exempt. Daniels v. Hayward (1862) 5 Allen (Mass.) 43, 81 Am. Dec. 731. The statute ex-

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empted property to the value of $100. Presumably the machinery was of less than this value, although nothing is stated as to this.

Bowling alley.

A bowling alley, including the pins and balls, is not exempt as a tool or implement. Williams v. Vincent (1905) 70 Kan. 595, 68 L.R.A. 634, 109 Am. St. Rep. 469, 79 Pac. 121.

Building.

A building conceded to be personal property, in which a photographer carried on his business, has been held not exempt as a "tool" or "instrument" of the debtor. Holden v. Stranahan (1878) 48 Iowa, 70. The court states that it was not found as a fact that the photographer could not carry on his business in any other building, or that the proper pursuit thereof required a building constructed in a peculiar manner. It is further stated with reference to the term "tools," or "instruments," that the statute means the tools or instruments used or handled by the mechanic, and does not include the building or place where the trade is pursued.

Butcher's tools.

Butcher's tools, including knives, saws, meat blocks, meat racks, scales, pans, a sausage mill, an ice box, etc., used by the owner in the conduct of his butcher shop, have been held to be exempt as "tools and apparatus." Hoyt v. Pullman (1915) 51 Okla. 717, L.R.A.1916B, 1288, 152 Pac. 386.

On the contrary, a cash register and refrigerator have been held not to be exempt to a butcher engaged in retailing meats, under a statute exempting all tools and apparatus belonging to a trade or profession. Hammond v. McFarland (1913) — Tex. Civ. App. —, 161 S. W. 47. In rendering this decision the court of appeals follows its interpretation of the holding in Simmang v. Pennsylvania F. Ins. Co. (1908) 102 Tex. 39, 132 Am. St. Rep. 846, 112 S. W. 1044 (infra, "Restaurant equipment"). The court, however, states that if the question were an open one in the state it would hold that the refrigerator in which the butcher kept his meat, and which the evidence showed was necessary to a proper conduct of the butcher's trade in the climate, was a tool or apparatus belonging to the trade, which was exempt; but that the cash register could not, under any proper construction of the statute, be called a tool or apparatus belonging to the trade of a butcher.

Canoe.

A canoe has been held exempt to a professional guide for hunters and fishermen, who is required by the state law to be registered, under a statute exempting the "tools necessary for his (the debtor's) trade or occupation . . . not exceeding $50 in value." Re Mullen (1905) 140 Fed. 206.

Cash register.

See Hammond v. McFarland (1913) — Tex. Civ. App. —, 161 S. W. 47, supra, "Butcher's tools."

Cheese machinery.

The vats, presses, knives, screws, hoops, cans, and other machinery used in making cheese have been held to be tools and instruments, or implements, and as such exempt from execution. Fish v. Street (1882) 27 Kan. 270. The court here states that the evidence does not show that the articles of property claimed as exempt, or any of them, constituted complicated and expensive machinery, nor did it show that they were not instruments or implements which could not be used by hand. The court further states that the supposition is that they were used entirely by hand, and by the owners, who were women.

Commercial books.

The commercial books of a merchant have been exempted, under a statute exempting the tools and instruments necessary for the exercise of the debtor's trade or profession. Farmers & M. Bank v. Franklin (1846) 1 La. App. 393.

Daguerreotype apparatus.

See Norris v. Hoitt, supra, III.

Dental tools.

See "Physician's and dentist's instruments," infra.

Farming tools.

Milk cans, plows, harrows, cultivators, buzz saws, ice racks, hay racks, harness for team, and team

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blankets have been held to be necessary working tools for a farmer, and exempt to him, under a statute exempting "working tools . . . not exceeding in value $250." Re French (1916) 231 Fed. 255.

A plow, wheels, axletree, harrow, and drag were held exempt to a farmer, as tools of his occupation. Wilkinson v. Alley (1864) 45 N. H. 551.

A grindstone, such as those in general use on farms, has been held exempt to a farmer as a tool, within the meaning of a statute exempting such tools as are necessary for upholding life. White v. Capron (1878) 52 Vt. 634.

A farmer has been entitled to select property to the value of that exempted by the statute, from hay, oats, corn, a yearling steer, a heifer, two spring calves, some clover seed, and a quantity of cornstalks, in Hutchinson v. Whitmore (1892) 90 Mich. 255, 30 Am. St. Rep. 431, 51 N. W. 451.

See also other subdivisions herein, such as "Harvester," "Threshing machinery," "Wagons, etc.," for discussion of other property commonly used by farmers.

Foundry machinery.

As to foundry and machine shop machinery, see Boston Belting Co. v. Ivens (1876) 28 La. Ann. 695, supra, II.

Furniture.

Furniture has quite generally been held exempt under the provisions considered herein. Thus the furniture of a lawyer necessary to enable him to carry on business has been held to be instruments within the meaning of an exemption law. Abraham v. Davenport (1887) 73 Iowa, 111, 5 Am. St. Rep. 665, 34 N. W. 767. The property levied upon included a table, and the court, speaking of it, says that, strictly speaking, perhaps a table is not an instrument. Its general use is such that the word "instrument" seems inapplicable. But it should be borne in mind that a lawyer's table is used specifically in his employment; it is one of the things which he employs as a means in the accomplishment of his work. The fact that a table, in its general use, is not an instrument, is not important. It appears quite different when it is adopted specifically as a means in an employment. It then fulfils all the essential ideas of an instrument, and that, unquestionably, is the important consideration.

A cabinet and table, used by an insurance agent and abstracter of titles in his office, have been held exempt as tools and instruments used by him in carrying on his business. Davidson v. Sechrist (1882) 28 Kan. 324.

The counting house furniture of a merchant has been held exempt under a statute exempting tools and instruments necessary for the exercise of the debtor's trade or profession. Farmers & M. Bank v. Franklin (1846) 1 La. Ann. 393.

As to furniture generally, see Galowitz v. Bumford (1907) 54 Misc. 41, 104 N. Y. Supp. 492, infra, "Wagons, etc."

See Harris v. Townley (1913) — Tex. Civ. App. —, 161 S. W. 5, infra, "Printing press, type, etc."

See text to Re Conley (1907) 162 Fed. 806, infra, "Equipment of poultry dealer."

But see Campbell v. Honaker (1914) — Tex. Civ. App. —, 166 S. W. 74, infra, "Moving picture machines, etc.," as to chairs in a moving picture theater.

See Seeley v. Gwillim (1873) 40 Conn. 106, supra, III.

Gun.

A rifle is not exempt to a professional guide for hunters and fishermen, required by state law to be registered, under a statute exempting "the tools necessary for his (the debtor's) trade or occupation . . . not exceeding $50 in value." Re Mullen (1905) 140 Fed. 206.

Harness.

A set of harness has been held not to fall within the meaning of the term "common tools of trade," used in an exemption statute. Kirksey v. Rowe (1902) 114 Ga. 893, 88 Am. Rep. 65, 40 S. E. 990. But a buggy and harness used by an insurance agent in his business have been held to be exempt, under a statute exempting "the necessary tools and implements of any mechanic, miner, or other person, used and kept

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for the purpose of carrying on his trade," the court stating that the buggy and harness must be held to be within the description of tools and implements. See Galowitz v. Bumford (1907) 54 Misc. 41, 104 N. Y. Supp. 492; Wilhite v. Williams (1889) 41 Kan. 288, 13 Am. St. Rep. 281, 21 Pac. 256, infra, "Wagons, etc."

Harvester.

A combined reaper and mower has been held to be a farming utensil, within the meaning of a statute exempting such utensils. Voorhees v. Patterson (1878) 20 Kan. 555. In Henry v. McLean (1881) 1 Tex. App. Civ. Cas. (White & W.) 609, it is held that the property included in the term, "implements of husbandry," exempted in a statute, is a matter of evidence, that is, it must be shown whether or not a given apparatus, tool, or machine is of the quality and character contemplated and intended to be exempted under the law. In this case a machine known as a reaper and mower was found by the trial court to be exempt from forced sale, and this finding was held by the appellate court to be supported by the evidence and was affirmed.

In Humphrey v. Taylor (1878) 45 Wis. 251, 30 Am. Rep. 738, a mower was held exempt, under a statute exempting "other farming utensils, including tackle for teams not exceeding $50 in value," to the owner, who was not a farmer, and who, when the levy was made, was not engaged in any business requiring the use of a mower. It is the theory of this case that articles exempted under the statute are exempted absolutely to all persons alike, so that every exemption that can be upheld in any case, whether the exempted article be specifically named therein or not, must be upheld in favor of any debtor. The court states that a mower is a farming utensil, and may be exempted under certain conditions from seizure on execution, and, that being true, it is exempted to the owner in this case although he was not a farmer.

On the contrary, a mowing machine belonging to one who followed the occupation of hay cutter has been held neither to be a "tool" nor to be embraced within the meaning of the term "apparatus," as used in a statute exempting all tools and apparatus belonging to a trade or profession. Tucker v. Napier (1878) 1 Tex. App. Civ. Cas. (White & W.) 365. Whether an expensive harvester is exempt, under a statute exempting "the farming utensils or implements of husbandry of the judgment debtor," has been made to depend upon its use. When used by the owner upon land farmed by him it has been held to be exempt, notwithstanding the fact that the owner, after having harvested his own crops, used the implement in harvesting the crop or crops of one or two of his neighbors, usually in return for assistance rendered by them in harvesting his crops. Re Klemp (1897) 119 Cal. 41, 39 L.R.A. 340, 63 Am. St. Rep. 69, 50 Pac. 1062.

Horses.

A horse is not usually regarded as a tool, nor as an implement, within the meaning of statutes exempting tools and implements. Wallace v. Collins (1843) 5 Ark. 41, 39 Am. Dec. 359, holding a horse owned by a tanner not an implement of his trade.

The decision in Wilson v. Elliot (1856) 7 Gray (Mass.) 69, denying to a trader an exemption of a stock of goods, consisting of the customary assortment of dry goods and groceries of a country store, and his scales and measures used in the business, and a horse, wagon, and harness kept and used by him for the purpose of going about among his more distant customers and obtaining their orders, and conveying to them any goods bought at his shop, was based principally upon the theory that the owner was not within the class of persons mentioned in the statute. But at the close of the opinion the court states that "the property of which the plaintiff was possessed at the time of his application for the benefit of the act for the relief of insolvent debtors, not having been of that description, nor, within the meaning of the provisions of law, exempt from attachment, passed by assignment" to the assignee.

A horse is not within the meaning

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of a statute, exempting tools and apparatus belonging to a trade or profession. Tucker v. Napier (1878) 1 Tex. App. Civ. Cas. (White & W.) 365.

The horse of a physician is not comprehended within the meaning of "tools and instruments," as used in an exemption statute. Hanna v. Bry (1850) 5 La. Ann. 651, 52 Am. Dec. 606.

Under some forms of statute a horse has been held exempt. Thus, horse, buggy, and harness were held exempt to a dealer in poultry, eggs, and farm produce, who conducted his business by driving to the towns and villages in the territory adjacent to the town of his residence and gathering up the produce so purchased, under a statute exempting "the tools and instruments of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade or business," in Re Conley (1907) 162 Fed. 806.

In Watson v. Lederer (1888) 11 Colo. 577, 1 L.R.A. 854, 7 Am. St. Rep. 263, 19 Pac. 602, the court, in considering the objection that the judgment debtor was not within the class of persons mentioned in the statute as entitled to claim and hold property exempt from execution, states that a horse, harness, and wagon were essential to the business of an assayer, and therefore exempt. The statutory provision under which exemption was claimed provided that the "tools, implements, working animals and stock in trade, not exceeding $300 in value, of any mechanic, miner, or other person not being the head of a family, used and kept for the purpose of carrying on his trade and business," shall be exempt from levy and sale.

Jeweler's tools.

Tools used by a jeweler have been held exempt, under a statute exempting "the tools of any debtor necessary for his trade or occupation." Howard v. Williams (1824) 2 Pick. (Mass.) 80.

Lathe.

A lathe run by man power, and certain appliances used in running the lathe, have been exempted to a journeyman machinist, under a statute exempting "the tools or implements of a mechanic necessary to carry on his trade," although journeymen machinists might obtain employment with a manufacturer who supplied lathes to his employees. Re Robb (1893) 99 Cal. 202, 37 Am. St. Rep. 48, 33 Pac. 890. A turning lathe weighing about 600 pounds, and used by a machinist in a repair shop conducted by him, is exempt under a statute exempting "all tools, apparatus . . . belonging to and used in any trade or profession," although operated by a small engine. Smith v. Roads (1911) 29 Okla. 815, 119 Pac. 627. An electric motor and a lathe were held to be "implements," and therefore exempt to the owner, who was in the general repair business, under a statute exempting the "tools or implements of a mechanic or artisan necessary to carry on his trade, not exceeding in value the sum of $500." Re Robinson (1913) 206 Fed. 176.

Library.

It has been held that a lawyer's library is not included in the meaning of "common tools" of a debtor, exempted from execution. Lenoir v. Weeks (1856) 20 Ga. 596. Nor is it included in an exemption of the "working tools of a debtor necessary in his or her usual occupation." Church's Petition (1886) 15 R. I. 245, 2 Atl. 761. On the contrary, the view has been taken that the library of a lawyer is exempt, under a statute exempting the tools and instruments necessary for the exercise of the trade or profession by which the debtor gains his living. Lambeth v. Milton (1842) 2 Rob. (La.) 81 (dictum).

A share held by a lawyer in a law library association was held to be exempt, under a statute exempting the necessary working tools and library of the debtor, in Keiher v. Shipherd (1883) 4 N. Y. Civ. Proc. Rep. 274.

As to commercial books, see supra, "Commercial books."

Loom.

A loom has been held to be a tool, within the meaning of a statute exempting the necessary tools of a tradesman. McDowell v. Shotwell (1836) 2 Whart. (Pa.) 26. On the con-

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trary, a machine for spinning and manufacturing cloth, worked by hand, and of the cost of $100, called a Billy and Jenny, has been held not to be a tool within the meaning of a statute exempting "such . . . tools . . . as may be necessary for upholding life." Kilburn v. Demming (1829) 2 Vt. 404, 21 Am. Dec. 543.

Mason's tools.

Mortar beds, staying planks, and a half hogshead have been exempted to a mason.* Healy v. Bateman (1853) 2 R. I. 454, 60 Am. Dec. 94, holding that the expression, "tools necessary for his usual occupation," does not confine the exempted tools to such as are absolutely necessary to the debtor's work, but such as are reasonably necessary are exempted thereunder. The exempt tools were not used by all masons in the vicinity, but the court had found, as a question of fact, that they were necessary tools to the usual occupation of the owner.

Moving picture machines.

Machines for projecting moving pictures and metal machine outfits, curtains, and a tin horn have been held to be exempt to the owner, who was running a moving picture show, under a statute exempting all tools and apparatus belonging to any trade or profession. Campbell v. Honaker (1914) — Tex. Civ. App. —, 166 S. W. 74.

But chairs used in a moving picture theater have been held not to be exempt, under a statute exempting tools and apparatus belonging to any trade or profession. Campbell v. Honaker (Tex.) supra. The court of civil appeals relies upon the decision of the supreme court in Simmang v. Pennsylvania F. Ins. Co. (1908) 102 Tex. 39, 132 Am. St. Rep. 846, 112 S. W. 1044, and states that, as an original proposition, the court of civil appeals would hold that the chairs used by the owner in his moving picture business were exempt from forced sale, but regards the decision in the Simmang Case above as conclusive against this position.

Paper mill machinery.

Paper mill machinery, stock, and fixtures have been held not exempt under a statute exempting the tools, implements, material, stock, and fixtures of a debtor, necessary for carrying on his trade or business. Smith v. Gibbs (1856) 6 Gray (Mass.) 298.

Peg machine.

A peg machine was held not to be a tool, and therefore not exempt under a statute exempting tools. Knox v. Chadbourne (1848) 28 Me. 160, 48 Am. Dec. 487, see supra, II.

Photograph lens.

A photographic lens is exempt to a photographer as an implement of his trade, under a statute exempting "implements of the debtor's trade." Davidson v. Hannon (1896) 67 Conn. 312, 34 L.R.A. 718, 52 Am. St. Rep. 282, 34 Atl. 1050.

Physician's and dentist's instruments.

Surgical instruments were held to be tools and, as such, exempt to a physician. Robinson's Case (1856) 3 Abb. Pr. (N. Y.) 466. The surgical instruments of a dentist are exempt, under a statute exempting the tools and instruments necessary for the exercise of the debtor's trade or profession. Duperron v. Communy (1851) 6 La. Ann. 789. A dentist's sign was seized under the execution also, and the court states that it may be doubted whether, under a fair interpretation of the statute, the sign of the plaintiff was not one of the instruments necessary for the exercise of his profession; but concludes that, however this may be, it is a thing of no value to anyone but himself, and comes properly under the rule of law, De minimis non curat lex. Dental instruments have been held to be "mechanical tools," within the meaning of a statute subjecting all property enumerated in an exemption statute, except mechanical tools, to execution upon a judgment rendered for purchase money thereof. Maxon v. Perrott (1868) 17 Mich. 332, 97 Am. Dec. 191. Accordingly the instruments were held exempt from execution upon a judgment for the purchase price thereof.

But a dentist's chair has been held not exempt as a "common tool of

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trade." Burt v. Stocks Coal Co. (1903) 119 Ga. 629, 100 Am. St. Rep. 203, 46 S. E. 828.

Piano.

A piano belonging to a debtor who was a music teacher has been stated to be an implement of the debtor in her profession or business as a music teacher, upon which she mainly relied to support an aged mother and her children, and exempt under the statute. Amend v. Murphy (1873) 69 Ill. 337. The statute is not set out.

Pool table.

Pool tables have been held exempt to the owner who was running a pool hall, under a statute exempting "all tools, apparatus, . . . belonging to any trade or profession," such tables being included in the generic term "apparatus," used in the statute. Harris v. Todd (1913) — Tex. Civ. App. —, 158 S. W. 1189. But where it is not shown that a pool table is necessary to a saloon business, it is not exempt to a saloon keeper under a statute exempting tools and implements to enable the debtor to carry on his trade. Goozen v. Phillips (1882) 49 Mich. 7, 12 N. W. 889.

Potato machinery.

Potato machinery, including a planter, sprayer, and digger used by the owner in cultivating large quantities of potatoes, has been held not exempt as tools. Martin v. Buswell (1911) 108 Me. 263, 80 Atl. 828. See supra, II.

Equipment of a poultry dealer.

An office desk, chair, scales, poultry coop, poultry troughs, candling booths, lamps, and cooling barrels have been held exempt to a poultry dealer, who handled and cleaned eggs purchased by him, and prepared the poultry and produce so purchased for market, and then sold to commission merchants and other purchasers, under a statute exempting "the tools and instruments of any mechanic, miner, or other person used and kept for the purpose of carrying on his trade or business." Re Conley (1907) 162 Fed. 806.

Printing press, type, etc.

A printing press and type have been held to be exempt, under a statute exempting tools and implements of trade, such property being regarded as implements of trade. Sallee v. Waters (1850) 17 Ala. 482, exempting a printing press and type owned by a printer and used by him, and others whom he employed, in publishing a weekly newspaper, under a statute exempting "all implements or tools of trade."

In Bliss v. Vedder (1885) 34 Kan. 57, 55 Am. Rep. 237, 7 Pac. 599, the court states, with reference to the printing press, type, and other articles which were the subject of litigation in this case, that it did not appear that any of them were costly or complicated machinery, or such that they could not be easily used or operated by hand, even if being costly or complicated, or not easily used or operated by hand, would take them out of the Exemption Laws, and the court concludes: "We think the articles in controversy are tools and implements within the meaning of the Exemption Laws."

In Prather v. Bobo (1860) 15 La. Ann. 524, it is held that a printing press and materials are implements of the debtor's trade, within the meaning of a statute exempting from seizure "the tools and instruments necessary for the exercise of" the debtor's trade, and, being necessary in this particular case, to be exempt from execution.

In Jenkins v. McNall (1882) 27 Kan. 532, 41 Am. Rep. 422, the action of the trial court in finding a job printing press not exempt is sustained. It appeared from the findings that at the date of the levy the owner of the printing press was engaged in editing a newspaper, running a job printing office, and also acting as an agent for the loaning of money. It was not shown that the running of the job printing office was his principal or main business. In this state of the evidence the supreme court states that, as the trial court decided that the property was not exempt, and as it did not appear from the special findings that the plaintiff derived his principal support from his business of job printing, and as it did appear from such findings that he was engaged in sev-

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eral employments or pursuits, the supreme court cannot hold, under the circumstances of the case, against the judgment of the trial court.

A printing press, cases, and types have been held to be tools, within the meaning of a statute exempting tools from execution. Patten v. Smith (1823) 4 Conn. 450, 10 Am. Dec. 166.

The ordinary hand press of a printer, type, cases, imposing stone, and other tools and implements used by printers have been held exempt as the "tools of a mechanic." Smith v. Osburn (1880) 53 Iowa, 474, 5 N. W. 681.

A printing press, type, and materials commonly used in a printing office have been held exempt to the editor and publisher of a newspaper, under a statute exempting "all tools and apparatus belonging to any trade or profession." Green v. Raymond (1882) 58 Tex. 80, 44 Am. Rep. 601.

It is held in St. Louis Type Foundry v. Taylor (1896) — Tex. Civ. App. —, 35 S. W. 691, that two printing presses and a paper cutter are exempt to a job printer, if the articles are used as necessary or appropriate tools or apparatus for his business, under a statute exempting "all tools, apparatus, . . . belonging to any trade or profession."

In Harris v. Townley (1913) — Tex. Civ. App. —, 161 S. W. 5, a printing press, and gasolene engine used for running the same, were held to be exempt to the owner, who was the publisher and proprietor of a newspaper, and who did a job or commercial printing business. Other utensils used by the debtor were levied upon in this case, but there seems to have been no dispute that they were exempt. The articles levied upon, besides the press and engine, included a typewriter, type and type cases, a desk, and an iron safe, as well as other furniture and fixtures used in the office.

A paper cutter weighing 685 pounds, and a small card cutter, both operated by hand and used by a printer in a job printing office, were held to be "apparatus" and exempt, under a statute exempting all tools and apparatus belonging to and used in any trade or profession. Brummage v. Kenworthy (1910) 27 Okla. 431, 112 Pac. 984, Ann. Cas. 1912C, 607.

On the contrary, a printing press, type, and cases, part of an extensive printing establishment, have been held not tools, under a statute exempting the tools of any debtor necessary for his trade or occupation. Buckingham v. Billings (1816) 13 Mass. 82, see supra, II.

All the printing type and forms of the printers and publishers of a newspaper were held subject to levy and seizure in Danforth v. Woodward (1830) 10 Pick. (Mass.) 423, 20 Am. Dec. 531, on the theory that a printing apparatus is not exempted from levy and seizure as the tools of trade of a printer.

And a printing press has been held not to be a tool, within the meaning of a statute exempting from taxation "the tools of any mechanic necessary for carrying on his trade." Frantz v. Dobson (1887) 64 Miss. 631, 60 Am. Rep. 68, 2 So. 75.

Likewise, a printing press, types, and instruments used in printing have been held not to be "tools," within the meaning of a statute exempting "such . . . tools . . . as may be necessary for upholding life." Spooner v. Fletcher (1830) 3 Vt. 133, 21 Am. Dec. 579.

Assuming that a printing press, etc., is an implement or tool within the meaning of the Exemption Law, some statutes exempting only such tools or implements as are necessary to the trade, or to the "upholding of life," as it is sometimes expressed, it has been held to be a question of fact whether a printing plant, consisting of four printing presses, a miscellaneous assortment of type, a paper-cutting machine, chases, rules, leads, and the general paraphernalia of a printing office, is necessary to carry on the owner's trade, so as to be exempt under a statute exempting the tools or implements "necesary to carry on his trade." Re Mitchell (1894) 102 Cal. 534, 36 Pac. 840. There was testimony that a printer could get along and make a living with one press

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and $500 or $600 worth of type. In this state of the evidence, it was held that the finding of the jury against the exemption could not be disturbed for want of evidence to support it.

Likewise, it has been held to be a question of fact whether a printing press, case, and type are necessary, within the meaning of a statute exempting tools necessary for the upholding of life. Patten v. Smith (1823) 4 Conn. 450, 10 Am. Dec. 166.

Refrigerator.

See "Butcher's tools," supra, and "Restaurant equipment," infra.

Restaurant equipment.

Restaurant equipment has been held not exempt, under a statute exempting "all tools, apparatus . . . belonging to any trade or profession." Simmang v. Pennsylvania F. Ins. Co. (1908) 102 Tex. 89, 132 Am. St. Rep. 846, 112 S. W. 1044. The court states that, granting the keeping of a restaurant is a trade within the meaning of the law, the question arises whether the property levied upon was "apparatus," as the term is used in the statute. The statement of the property insured, made by the court of civil appeals, was as follows: "Lunch counter, back counter, shelving, safe, tools, stove, fan, cash register, two ice boxes, crockery, tableware, linen, knives, forks, and kitchen utensils, together with similar articles constituting the tools and apparatus of his trade or profession as the keeper of a restaurant, and being entirely property used, designed, and intended for said business and necessary for the purpose of conducting the same, and this being the only property of this character owned by this intervener."

Property used by the owner in carrying on a restaurant business was held not to come within the meaning of "tools" or "apparatus," as used in the Statute of Exemptions, and therefore not to be exempt under that clause of the statute, in Frank v. Bean (1886) 3 Tex. App. Civ. Cas. (Willson) 258.

Property used in conducting a restaurant business was held not to be exempt from execution, as "the apparatus and furniture belonging to the trade and business" of the owner, in Stone v. Schneider-Davis Co. (1908) 51 Tex. Civ. App. 517, 112 S. W. 133.

Safe.

A safe has been exempted to a jeweler, under a statute exempting "the tools or implements of a mechanic or artisan necessary to carry on his trade." Re McManus (1890) 87 Cal. 292, 10 L.R.A. 567, 22 Am. St. Rep. 250, 25 Pac. 413.

A safe has been exempted to a merchant, under a statute exempting "tools and implements." Cunningham v. Brictson (1898) 101 Wis. 378, 77 N. W. 740, holding a safe, show cases, and other personal property to be proper exemptions to a merchant or trader, as being "tools and implements" used and kept for the purpose of carrying on his trade or business.

Two iron chests belonging to a merchant, in which he kept books and papers, were exempted under a statute exempting the tools and instruments necessary for the exercise of the debtor's trade or profession. Farmers & M. Bank v. Franklin (1846) 1 La. Ann. 393.

A safe has been exempted to an insurance agent, under a statute exempting all tools and apparatus belonging to any trade or profession. Betz v. Maier (1896) 12 Tex. Civ. App. 219, 33 S. W. 710.

See Harris v. Townley (1913) — Tex. Civ. App. —, 161 S. W. 5, supra, "Printing press, type, etc."

But see Simmang v. Pennsylvania F. Ins. Co. (1908) 102 Tex. 39, 132 Am. St. Rep. 846, 112 S. W. 1044, supra, "Restaurant equipment."

Likewise a safe has been exempted to an insurance agent and abstracter of titles, as a tool or instrument used by him in carrying on his business. Davidson v. Sechrist (1882) 28 Kan. 324.

On the theory that an undertaker is not a professional man, it has been held that a safe is not exempt to him, under a statute exempting "professional instruments, furniture, and library." O'Reilly v. Erlanger (1905) 108 App. Div. 318, 95 N. Y. Supp. 760.

Saw.

A mill saw constituting a part of a

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mill propelled by water power is not a tool, and is, therefore, not exempt under a statute exempting a tool necessary for the debtor's trade or occupation. Batchelder v. Shapleigh (1833) 10 Me. 135, 25 Am. Dec. 213.

Sawmill.

A portable sawmill, including portable engine and boiler, is exempt, under a statute exempting the "tools, implements . . . of any mechanic, miner, or other person . . . used and kept for the purpose of carrying on his trade and business," when the owner makes his livelihood therefrom. Eckman v. Poor (1906) 38 Colo. 200, 87 Pac. 1088. The Colorado statute limits the value of property which may be exempt to a sum not exceeding $300. The property in this case was of the value of $250.

See the reported case (BAKER v. MAXWELL, ante, 814).

A traction engine and sawmill, used in connection with it for sawing lumber, necessary to the owner in carrying on his trade or business, were held exempt, under a statute exempting "the necessary tools and implements of any mechanic, miner, or other person, used and kept . . . for the purpose of carrying on his trade or business. Reeves & Co. v. Bascue (1907) 76 Kan. 333, 123 Am. St. Rep. 137, 91 Pac. 77.

A shingle machine, steam engine, and fly wheel, and a saw gummer were held to be within the meaning of a statute, exempting "tools, implements, materials, stock, apparatus . . . or other things to enable a person to carry on his profession, trade, occupation, or business." Wood v. Bresnahan (1886) 63 Mich. 614. 30 N. W. 206.

Sewing machines.

A sewing machine has been held to be exempt, as being comprehended within a provision exempting tools. Dowling v. Clark (1861) 1 Allen (Mass.) 283. In this case, involving the right of a manufacturer of ready-made clothing to an exemption of a sewing machine, the supreme court of Massachusetts held proper an instruction to the jury to the effect that the burden of proof was on the manufacturer to show that, at the time of the levy upon the sewing machine, he was engaged in the trade or business of manufacturing ready-made clothing, and that the sewing machine was necessary for that business; and if without it such trade or business could not successfully be carried on, then it was necessary, within the meaning of the law.

It has been held that a sewing machine owned by a debtor may be embraced under the clause of "tools, implements, and fixtures," exempted by a statute, if it appears that the same was necessary for carrying on the trade and business of the debtor, although the debtor was the owner of another sewing machine which was expressly exempted, under a statute exempting one sewing machine to the debtor. Rayner v. Whicher (1863) 6 Allen (Mass.) 292.

A sewing machine hired by a gas stoker, whose wife, a seamstress, used it, and applied the earnings to the maintenance of the household, was held to be an implement of the hirer's trade, within a distress act, in a distraint action by the landlord against the hirer. Churchward v. Johnson, 54 J. P. 326, 5 Mews, Eng. Case Law Dig. col. 1001.

Two sewing machines have been held exempt to a tailor, under a statute exempting "the tools and instruments of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade," where such machines were necessary. Cronfeldt v. Arrol (1892) 50 Minn. 327, 36 Am. St. Rep. 648, 52 N. W. 857.

Show cases.

Show cases, table, and a lamp of a jeweler who manufactured and sold jewelry, which were necessary to him in his character as manufacturer, have been held exempt as "tools and implements," under a statute exempting "the necessary tools and implements of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade or business." Bequillard v. Bartlett (1877) 19 Kan. 382, 27 Am. Rep. 120.

See also Cunningham v. Brictson

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(1898) 101 Wis. 378, 17 N. W. 740, supra, "Restaurant equipment."

Soda fountain.

Whether a soda fountain is exempt, under a statute exempting tools and apparatus belonging to a trade or profession, has been held to depend upon the facts of the individual case. McCord-Collins Co. v. Lazarus (1899) — Tex. Civ. App. —, 50 S. W. 1048. The court here states: "The facts are certainly not conclusive that the soda fountain is a tool or apparatus belonging to a trade or profession. On the contrary, we think the facts show that it was not a tool or apparatus belonging to a trade or profession."

Stock exchange seat.

A seat in the stock exchange is not comprehended within the meaning of "working tools," as used in an exemption statute. Leggett v. Waller (1902) 39 Misc. 408, 80 N. Y. Supp. 13. The court here, however, concludes that, even assuming that the seat in question constituted the judgment debtor's working tool, it would, under the statute, be exempt only to a sum not exceeding $250, whereas the owner's own testimony showed it to be worth about $2,000.

See Seeley v. Gwillim (1873) 40 Conn. 106, supra, III.

Stove.

See Seeley v. Gwillim (1873) 40 Conn. 106, supra, III.

Table.

See Abraham v. Davenport (1887) 73 Iowa, 111, 5 Am. St. Rep. 665, 34 N. W. 766, supra, "Furniture," and Seeley v. Gwillim (1873) 40 Conn. 106, supra, III.

Threshing outfit.

The courts are not agreed as to whether a threshing outfit is a tool, implement, farming utensil, etc. A threshing outfit, including separator, engine, belts, and all parts necessary to constitute a threshing outfit, kept by the owner for the purpose of carrying on his business of threshing, has been held to be included in the term "implements," within the meaning of an exemption statute; and, together with all tools necessary to operate the same, exempt to the resident owner who is the head of a family, while used by him in carrying on his business. Jackman v. Lambertson (1905) 71 Kan. 138, 80 Pac. 55.

See Muse v. Darrah (1862) 2 Ohio Dec. Reprint, 604, supra, IV.

On the contrary, a threshing outfit has been held not to be a "working tool," within the meaning of a statute exempting the "working tools and team owned by any person, being a householder, or having a family for which he provides, to the value of not exceeding $250." Ford v. Johnson (1861) 34 Barb. (N. Y.) 364. Likewise, a threshing separator and engine have been held not exempt, under a statute exempting all tools and apparatus belonging to any trade or profession. Comer v. Powell (1916) — Tex. Civ. App. —, 189 S. W. 88.

Whether an expensive threshing outfit is exempt, under a statute exempting "the farming utensils or implements of husbandry of a judgment debtor," has been made to depend upon its use. If used by the owner upon land farmed by him, it is exempt, notwithstanding it was his custom to use it for hire to thresh crops of others, after doing his own threshing. Spence v. Smith (1898) 121 Cal. 536, 66 Am. St. Rep. 62, 53 Pac. 653. But such an outfit has been held not exempt as a farming utensil or implement of husbandry, where used principally in threshing, for hire, grain raised by other persons. Re Baldwin (1886) 71 Cal. 74, 12 Pac. 44 (see supra, II.). A threshing outfit used by the owner to thresh his own grain, and that of others for hire, has been held not exempt, under a statute exempting "the proper tools or implements of a farmer," without making any point of the relative importance of the owner's own work and that of the others. Meyer v. Meyer (1867) 23 Iowa, 359, 92 Am. Dec. 432, approved in Vandeventer v. Nelson (1917) 180 Iowa, 705, 163 N. W. 354, where a separator was held not exempt from execution. In the Vandeventer Case it was left to the jury to say whether or not a traction engine was one of the instrumentalities by which the

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owner habitually earned a living for himself and family, and it was held that if the jury so found the engine was exempt from execution.

Typewriter.

A typewriter used by a physician who conducted a large correspondence in treating patients at distant points is not exempt as a tool or apparatus of his trade or profession. Massie v. Atchley (1902) 28 Tex. Civ. App. 114, 66 S. W. 582.

See Harris v. Townley (1913) — Tex. Civ. App. —, 161 S. W. 5, supra, "Printing press, type, etc."

Undertaker's equipment.

A candelabrum used by an undertaker at the funeral of persons of certain religious beliefs is a "working tool" of the undertaker, within the meaning of an exemption statute, and as such exempt. O'Reilly v. Erlanger (1905) 108 App. Div. 318, 95 N. Y. Supp. 760.

Upon a finding by the trial court that certain property used by an undertaker was necessary to his trade or profession, an exemption thereof has been sustained, under a statute exempting "all tools or other mechanical instruments or appliances moved or worked by hand or foot necessary to the practice of any trade or profession, and used in practice thereof." Steiner v. Marshall (1905) 72 C. C. A. 103, 140 Fed. 710. The property included an embalming satchel and instruments, other small tools, engraving machine, embalming boards, couch, canopy, six fur rugs, two pairs of black cloth pedestals, one pair of white pedestals, one pair of brass pedestals, three pairs of wooden pedestals, one candelabrum, four door crapes, one transfer case, four ice boxes, one church truck, two black catafalques, one white catafalque, one undertaker's wagon.

Wagons, buggy, sled.

The courts are not agreed as to whether a buggy or wagon is exempt as a tool, implement, etc. A buggy and harness have been held exempt to an insurance agent. Wilhite v. Williams (1889) 41 Kan. 288, 13 Am. St. Rep. 281, 21 Pac. 256. See supra, "Harness."

See Re Conley (1907) 162 Fed. 806, supra, "Horses."

It has been held that a buggy and harness may be exempt to a physician as a tool of his occupation, if they are reasonably necessary for him in pursuing his occupation. Richards v. Hubbard (1879) 59 N. H. 158, 47 Am. Rep. 188.

A wagon which was found as a fact to be a tool of the owner's occupation was held exempt in Johnson v. Lang (1902) 71 N. H. 251, 93 Am. St. Rep. 509, 51 Atl. 908.

A bus used by a hotel keeper has been held to be within the description of tools and implements in an exemption statute. White v. Gemeny (1892) 47 Kan. 741, 27 Am. St. Rep. 320, 28 Pac. 1011.

A cab belonging to a cab driver was held to be exempt, as an "implement of his trade," in Lavell v. Richings (1906) 1 K. B. (Eng.) 480, 4 B. R. C. 475, 75 L. J. K. B. N. S. 287, 54 Week. Rep. 394, 94 L. T. N. S. 515, 22 Times L. R. 316.

A discussion of whether a cab or other vehicle used for transportation of passengers for hire is exempt property appears in the note to Lavell v. Richings, 4 B. R. C. (Eng.) 478.

A wagon with which the owner made a livelihood by hauling sand, cement, bricks, etc., for hire, was held to be comprehended within the meaning of an exemption statute, exempting "tools and instruments" necessary for the exercise of the debtor's trade or profession. Schwartz v. Dennis (1916) 138 La. 848, 70 So. 857, Ann. Cas. 1917D, 94.

See Rice v. Wadsworth (1879) 59 N. H. 100, and Hall v. Nelson (1880) 59 N. H. 573, supra.

A sled used by a shoemaker who also worked at farming, for the purpose of drawing wood and timber cut from a wood lot to the market for sale, and for his own use when not employed at his trade as a shoemaker, has been held to be exempt, as a tool of the owner's occupation. Parshley v. Green (1878) 58 N. H. 271.

On the contrary, a buggy and har-

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ness used by a land, loan, and insurance agent in his business have been held not exempt as a tool or apparatus belonging to his trade and profession. Cates v. McClure (1901) 27 Tex. Civ. App. 459, 66 S. W. 224.

It has been held that a lumber wagon owned by a mason cannot be said to be a working tool of a mechanic, within the meaning of a statute exempting "the tools and implements of any mechanic necessary to the carrying on of his trade." Morse v. Keyes (1851) 6 How. Pr. (N. Y.) 18.

In Van Buren v. Loper (1859) 29 Barb. (N. Y.) 388, the court apparently disapproved of the decision in the Morse Case, and held that a buggy belonging to a physician, and used by him in his practice, is exempt; but this decision seems to be based upon the theory that the buggy is included within the word "team," as used in the statute exempting the "working tools and team."

A buggy was exempted also in Eastman v. Caswell (1853) 8 How. Pr. (N. Y.) 75, under a statute exempting the "necessary . . . working tools and team."

In the subsequent case of Dains v. Prosser (1860) 32 Barb. (N. Y.) 290, the case of Morse v. Keyes is held to be correct so far as it holds that a wagon is not exempt, as such; but it is further held in the Dains Case that, when customarily used in connection with a horse, or horses and harness, it may comprise a part of the team, and be exempt under this provision of the statute.

Upon an application for the appointment of a receiver of the property of a judgment debtor after an examination in supplementary proceedings, it was held in Galowitz v. Bumford (1907) 54 Misc. 41, 104 N. Y. Supp. 492, that a desk, small counter, two chairs, three wagons, two sets of harness, and a Dutch collar, owned by a widow who conducted a small express business, from which she was merely able to make out a living, were exempt, under a statute exempting the necessary household furniture, working tools, and team, not exceeding in value $250. The exemption statute is not set out in full, so it is not clear whether it is the same statute as that involved in the foregoing cases.

A wagon used only for conveyance or pleasure is not exempt to the owner as a tool of his occupation. Parshley v. Green (1878) 58 N. H. 271. But see Rice v. Wadsworth (1879) 59 N. H. 100, supra, IV.

The wheels of a cart, an ox yoke and bows, staple and cops and pin were held not to be exempt, under a statute exempting the tools of any debtor necessary for his trade or occupation. Dailey v. May (1809) 5 Mass. 313. The court states that "the chattels in this case are the wheels of a cart, and part of the gear to be used in moving it with oxen. The case does not state that they were the tools of the plaintiff, necessary for his trade or occupation. Very clearly, the case as stated does not bring the plaintiff within the provisions of the statute; and the defendant must have judgment. If the court could presume that the chattels seized were implements of husbandry, necessary for the plaintiff in tilling his land, yet the plaintiff must fail; for tools of a man's trade or occupation do not include the implements of husbandry, used by the husbandman in tilling his farm."

A wagon with patent couplings attached, built for the owner for the purpose of carrying on his business in selling the patent couplings, was held not exempt in Gibson v. Gibbs (1857) 9 Gray (Mass.) 62.

Watch.

A watch and chain have been held not exempt as "an instrument used and kept by the debtor for the purpose of carrying on" his trade, within the meaning of an exemption statute, although used by the owner, who was a cigar maker by trade, to keep the time of the workmen whom he employed in his business of making cigars. Rothschild v. Boelter (1872) 18 Minn. 361, Gil. 331. Under a statute exempting the tools, implements, and fixtures "necessary" for carrying on the debtor's trade or business, it has been stated that to carry on some kinds of trade or business a watch may be reasonably necessary, and therefore

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exempt, but in the absence of proof that it is necessary it will not be exempt. Re Turnbull (1901) 106 Fed. 667.

In an action for the appointment of a receiver in proceedings supplementary to execution, the court in Re Edlunds (1885) 35 Hun (N. Y.) 367, in refusing the appointment, stated that "the examination of the defendant disclosed no property, except a cheap watch and chain and a trunk and some clothing. The judgment debtor is a clothing cutter and an unmarried man, but certainly he is entitled to all tools and implements necessary for his occupation, of which a watch may well be one."

Well-drilling outfit.

An extensive oil-well drilling outfit, including a boiler, engine, pumps, etc., of the approximate value of $3,300, has been held not exempt to the owner, a well driller, as a tool or apparatus. Thresher v. McEvoy (1917) — Tex. Civ. App. —, 193 S. W. 159.

Miscellaneous.

A shovel, pickax, dung fork, and hoe have been held to be tools, and exempt. Pierce v. Gray (1856) 7 Gray (Mass.) 67, see supra, I.

A clock, a stove, a screen, a pitcher, and a table cover were held to come within the description of "tools, implements, or fixtures," as used in an exemption statute, and as such exempt to a milliner, if necessary to her business. Woods v. Keyes (1867) 96 Mass. 236, 92 Am. Dec. 766.

A sign in the form of a wooden boot used in front of a boot and shoe shop has been held to be in no sense a tool or implement of the debtor's trade, so as to be exempt under the statute. Wallace v. Barker (1836) 8 Vt. 440.

In Garrett v. Patchin (1857) 29 Vt. 248, 70 Am. Dec. 414, an iron shovel, spade, dung fork, three pitchforks, a scythe and snathe, a potato hook, hog hook, common ax, broad ax, adz, hatchet, and five augers were held to be tools, within the meaning of a statute exempting such tools as may be necessary for upholding life, and exempt to the owner, whose principal occupation or trade was shoemaking, but who lived rather isolated, and did his own mending or tinkering of sleds, ox yokes, etc.

A machine for shaving or splitting leather, and operated by hand, by steam, or by water power, which cost $250 and weighed from 600 to 900 pounds, which, when operated by hand, required two men to turn the crank, and which was kept in its place by cleats, was held not to be a "tool," within the meaning of a statute exempting such tools as are necessary for upholding life. Henry v. Sheldon (1862) 35 Vt. 427, 82 Am. Dec. 644.

W. A. E.

VIRGIL FALLOON, Admr., etc., of Edwin Falloon, Deceased, Appt.,
v.
JOSEPH H. MILES.

Nebraska Supreme Court — December 4, 1918.

(— Neb. —, 170 N. W. 191.)

Attorney and client — contract — services contemplated.

1. A new trial on the ground of newly discovered evidence is a statutory remedy, which attorneys may reasonably contemplate in making a contract to protect, for specific fees, the interests of their client in pending litigation.

[*See note on this question beginning on page* 844.]

Headnotes by ROSE, J.

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Same — strict construction.

2. The general rule is that a doubtful or ambiguous contract for professional services and compensation of the attorney who drew it should be construed in favor of the client.

APPEAL by plaintiff from a judgment of the District Court for Richardson County, dismissing an action brought to recover a certain amount alleged to be the reasonable value of services performed by plaintiff's decedent as attorney for defendant. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. S. P. Davidson and Virgil Falloon, for appellant:

The contract should be construed in favor of plaintiff.

Schroeder v. Nielson, 39 Neb. 335, 57 N. W. 993; Patterson v. First Nat. Bank, 78 Neb. 228, 110 N. W. 721; Paxton v. Smith, 41 Neb. 56, 59 N. W. 690; Davis v. Ravenna Creamery Co. 48 Neb. 471, 67 N. W. 436; Lawton v. Fonner, 59 Neb. 214, 80 N. W. 808; Singer Mfg. Co. v. Doggett, 16 Neb. 609, 21 N. W. 468; Rosenthal v. Ogden, 50 Neb. 224, 69 N. W. 779; Coquillard v. Hovey, 23 Neb. 622, 8 Am. St. Rep. 134, 37 N. W. 479; Jones v. Sherman, 34 Neb. 452, 51 N. W. 1036; Bishop v. Busse, 69 Ill. 403; Osborne v. O'Reilly, 42 N. J. Eq. 467, 9 Atl. 209; Schurger v. Moorman, 29 Idaho, 97, 36 L.R.A.(N.S.) 313, 117 Pac. 122, Ann. Cas. 1912D, 1114.

It was error to direct a verdict for defendant.

Johnson v. Missouri P. R. Co. 18 Neb. 690, 26 N. W. 347; Habig v. Layne, 38 Neb. 743, 57 N. W. 539; Rogers v. Kansas City & O. R. Co. 52 Neb. 86, 71 N. W. 977.

Messrs. Mahoney & Kennedy and John Wiltse, for appellee:

A contract of employment between attorney and client should be construed most strongly in favor of the client, and all ambiguities should be resolved against the attorney.

Samuels v. Simpson, 144 App. Div. 466, 129 N. Y. Supp. 534, affirmed in 207 N. Y. 643, 100 N. E. 1133; Walsh v. Helena School Dist. 17 Mont. 413, 43 Pac. 180; Re Hawke, 148 App. Div. 326, 133 N. Y. Supp. 23, affirmed in 204 N. Y. 671, 98 N. E. 1079.

The proceeding for a new trial and the new trial itself, when granted, were parts of the same litigation which plaintiff's contract bound him to stay in until the finish, for the compensation enumerated in the contract.

Hastings v. Foxworthy, 45 Neb. 676, 34 L.R.A. 321, 63 N. W. 955; Gibbons v. Kyner, 53 Neb. 626, 74 N. W. 52; Comstock Mill & Min. Co. v. Allen, 21 Nev. 325, 31 Pac. 434; Calderwood v. Pepper, 42 Cal. 110; Hinckley v. Beckwith, 23 Wis. 328; Hellman v. David Adler & Sons Clothing Co. 60 Neb. 580, 83 N. W. 846.

Rose, J., delivered the opinion of the court:

This is an action by Edwin Falloon, plaintiff, to recover $16,647.60, alleged to be the reasonable value of professional services performed by him as attorney for Joseph H. Miles, defendant. The claim was resisted on the grounds that plaintiff had performed the services in controversy under a written contract and that he had received the stipulated compensation. At the trial plaintiff adduced evidence tending to prove that he performed the services pleaded in his petition, and that the reasonable value thereof exceeded the amount claimed. At the close of his testimony, however, the trial court sustained a motion to direct a verdict in favor of defendant. The action was accordingly dismissed. Later plaintiff died, and the cause was revived in the name of Virgil Falloon, administrator, who has appealed to this court from the judgment of dismissal.

Edwin Falloon, plaintiff, with other attorneys, was employed by defendant to protect the latter's interests under what is called the "Rulo will" of Stephen B. Miles, deceased. The estimated value of testator's estate exceeded $1,000,000, and defendant, under the Rulo will, was entitled to all of it except $150,000. The Rulo will was executed in 1888, and was probated in the county court for Richardson county December 2, 1898. After the time to appeal from the order of the probate court had expired, Joseph Williams and others, heirs at law of Stephen B. Miles, deceased,

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commenced a proceeding March 29, 1899, in the county court for Richardson county to set aside the probate of the Rulo will, and to probate a will alleged to have been executed by Stephen B. Miles, in 1897, described as the "St. Louis will." Twelve days after the St. Louis will had been offered for probate, Joseph H. Miles, defendant herein, engaged attorneys, including Edwin Falloon, by written contract, in the following form:

This agreement, made this 10th day of April, 1899, between Joseph H. Miles, of the first part, and Clarence Gillespie, Francis Martin, and Edwin Falloon, of the second part, witnesseth:

Said Joseph H. Miles hereby employs said Martin, Gillespie, & Falloon as his attorneys to defend his interests in certain litigation now pending in the county court of Richardson county, Nebraska, concerning the probate of the will of Stephen B. Miles, deceased, and in consideration of the services of said parties of the second part said party of the first part agrees to pay the sums and amounts following, to wit:

For the trial of said cause in the county and district courts of said county the sum of six thousand dollars ($6,000), to be paid as follows: Fifteen hundred dollars ($1,500) cash, and on the entry of the judgment of said county court fifteen hundred dollars ($1,500) additional. If said cause goes no further, then the additional sum of three thousand dollars ($3,000), making six thousand dollars in all. But if said cause is appealed or taken to the district court, said second sum of three thousand dollars ($3,000) shall be paid as follows: $1,500 upon the termination of said cause in the district court, and in the event of said cause being taken to the supreme court of Nebraska, the remaining $1,500 at its termination. If said cause shall be taken by either party to the litigation to the supreme court of Nebraska, then said Miles shall pay said attorneys the further sum of $9,000, making in all $15,000: Provided, however, if said Miles shall be eventually unsuccessful in said supreme court, the fees for services in said supreme court shall be $1,500, or $7,500 in all of said courts. In case said cause shall be removed to the inferior Federal courts and there terminated successfully in favor of Miles, the fees shall be $15,000, or if terminated there unsuccessfully, the fees shall be $7,500. If said cause shall be taken to the United States Supreme Court the fees shall be $5,000 additional, or $20,000 in all, in the event of success, and in the event of failure $10,000 in all. In addition to the above, the said Miles agrees to pay all costs and necessary expenses in any event.

Said parties of the second part hereby accept said employment on said terms, agree to divide all fees equally and to give all matters connected with said litigation their best care, skill, and ability, and at all times to protect the interests of said Miles.

This contract also binds the parties to continue in the management of said matters to the end in all courts, if the same shall be reversed by any inferior court. This employment includes and comprehends without additional fees the litigation concerning the claim of Mead to the one sixteenth of said estate.

Witness our hands the day and year last above written.

J. H. Miles.
Clarence Gillespie.
Francis Martin.
Edwin Falloon.

Were the services for which compensation is sought herein performed by Edwin Falloon, plaintiff, under the contract quoted? The St. Louis will was rejected in the county court, in the district court on appeal from the county court, and in the supreme court on appeal from the district court. The judgment of the district court for Richardson county in favor of defendant herein, rejecting the St. Louis will and refusing to set aside the order probating the

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Rulo will, was affirmed in the supreme court April 9, 1903. Williams v. Miles, 68 Neb. 463, 62 L.R.A. 383, 110 Am. St. Rep. 431, 94 N. W. 705, 96 N. W. 151, 4 Ann. Cas. 306. The position of plaintiff herein is that his services under the written contract were then completed, that he had then earned one third of the stipulated compensation, or $5,000, and that he is entitled to additional compensation for subsequent services performed by him for defendant in other proceedings described as follows:

While the appeal of the heirs at law was pending in the supreme court, they filed in the district court for Richardson county, from which the appeal last mentioned had been taken, a petition asking for a new trial on the ground of newly discovered evidence, and renewed their prayer to set aside the probate of the Rulo will and to probate the St. Louis will. Compensation for services of plaintiff herein as attorney for defendant herein in resisting the second petition is the subject-matter of the present suit.

Plaintiff argues that the professional services performed in protecting the interests of defendant in the new proceeding were not within the contemplation of the parties to the written contract, when made, and that additional compensation is recoverable for the reasonable value of the additional services. The answer to this argument is found in the terms of the contract itself. Defendant herein is a layman. The contract was drawn by his attorneys. It speaks their language, describes the services to be performed, and fixes the terms of compensation for protecting the interests of defendant in a $1,000,000 controversy already in court. The Rulo will, giving their client all of testator's estate, except $150,000, had already been probated, and the time to appeal from the order of the probate court had expired. The undetermined course of litigation was in the minds of the attorneys, as shown by the language used in the contract drawn by them. Definite compensation for, and services of, lawyers to protect the client's interests under a probated will, were in the minds of the parties. These interests had already been menaced by a proceeding to probate an alleged later will making a different disposition of decedent's estate. According to the literal terms of the contract the attorneys were employed by defendant "to defend his interests in certain litigation now pending in the county court of Richardson county, Nebraska, concerning the probate of the will of Stephen B. Miles, deceased." This employment is not limited to a case, or to a proceeding, or to a petition, but extends to "litigation" concerning the "probate of the will of Stephen B. Miles, deceased." Litigation concerning that subject fairly includes the application, on the ground of newly discovered evidence, for a new trial in the proceeding which resulted in the rejection of the St. Louis will. A new trial on the ground of newly discovered evidence is a statutory remedy, which attorneys may reasonably contemplate in making a contract to protect, for specific fees, the interests of their client in pending litigation. In the first proceeding the district court's judgment rejecting the St. Louis will and refusing to set aside the Rulo will, when affirmed by the supreme court in Williams v. Miles, supra, was not a "termination," entitling plaintiff herein to the balance of his stipulated compensation, within the meaning of the contract, since the application to set aside the district court's judgment from which the appeal to the supreme court had been taken, was pending, and, if ultimately granted, would have destroyed the affirmed judgment.

Attorney and client—contract—services contemplated.

The contract, according to its plain import, required plaintiff herein to perform the services for which he is seeking to recover; but, even if there were two reasonable constructions, the one most favorable

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to defendant should be adopted. The general rule is that a doubtful or ambiguous contract for professional services and compensation of the attorney who drew it should be construed in favor of the client. 6 C. J. p. 738, § 314; Samuels v. Simpson, 144 App. Div. 466, 129 N. Y. Supp. 534; Walsh v. Helena School Dist. 17 Mont. 413, 43 Pac. 180; Re Hawke, 148 App. Div. 326, 133 N. Y. Supp. 23, id. 204 N. Y. 671, 98 N. E. 1097. In this view of the contract and the law, plaintiff did not make a case.

Same—strict construction.

It follows that the judgment of the District Court is affirmed.

Letton and Aldrich, JJ., not participating.

ANNOTATION.

Construction of contract as regards services contemplated by it where attorney claims compensation in addition to amount named therein.

I. Introductory:
a. Rule of construction, 844.
b. Other rules, 845.
II. Where no contest expected, 846.
III. Services in the suit, 847.
IV. Services in collateral suits, 848.
V. Services after judgment or settlement:
a. In general, 848.
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c. Appeals, 849.
d. Other suits, 851.
VI. Particular contracts, 851.
VII. Miscellaneous, 854.

I. Introductory.

a. Rule of construction.

It is general law that, on account of the confidential relation between them, contracts made between an attorney and a client, after the relation has been established, are to be construed against the attorney. "It is the duty of the attorney to have the contract (if there be one) clearly and definitely stated, and understood not only in its language, but also in its spirit, legal consequences, and practical results." Planters Bank v. Hornberger (1867) 4 Coldw. (Tenn.) 531.

But contracts of employment of an attorney, beginning the relation of attorney and client, are not within the rule of presumption against the attorney, which obtains in contracts between attorney and client after the relation has been established, as may be seen by reference to the following cases, beyond the scope of this note: Cooley v. Miller (1909) 156 Cal. 510, 105 Pac. 981; Rust v. Larue (1823) 4 Litt. (Ky.) 412, 14 Am. Dec. 172 (contract set aside on other ground); Clifford v. Braun (1902) 71 App. Div. 432, 75 N. Y. Supp. 856; Boyd v. Daily (1903) 85 App. Div. 581, 83 N. Y. Supp. 539; Re Howell (1915) 215 N. Y. 466, 109 N. E. 572, Ann. Cas. 1917A, 527 (apparently recognizing the rule); Dockery v. McLellan (1896) 93 Wis. 381, 67 N. W. 733.

The scope of this note does not admit of a full examination of the cases as to the rule of construction that should apply in the construction of contracts of employment which begin the relation of attorney and client; but there seems, in general, a disposition to regard the parties as standing on an equality in making the contract. Sometimes it is said they deal at arm's length. Kent v. Fishblate (1915) 247 Pa. 361, 93 Atl. 509. In Hansel v. Norblad (1905) 78 Or. 38, 151 Pac. 962, the court said: "In the preliminary bargain, the rule goes no further than to ascertain if the parties are free and competent to contract, and are not laboring under any impediment caused by fraud, undue influence, or abuse of confidence."

This is not a satisfactory situation so far as ambiguity or obscurity in the contract is concerned, nor is it sufficiently relieved by construing the contract against the attorney on the ground that he was its draftsman. Morgan v. Roberts (1865) 38 Ill. 65. Generally speaking, the responsibility

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for any obscurity as to the services in litigation, provided for in a contract of retainer, ought to rest upon the attorney, whether he drew the contract or not. Such a rule should require no principle for its support beyond the fact that he is an attorney, making a contract with a prospective client, and the burden should be upon him to show, if he can, why the circumstances of the case excuse him. There are indications in some cases of views of this character.

In Whiting v. Davidge (1904) 23 App. D. C. 156, the court said: "While in contracts between counsel and client, even when the relation is only inchoate, as it was in the present case at the time of the execution of the contract in controversy, the utmost fairness is required, and doubt should be resolved, where reasonable doubt exists, against the contention of the counsel; yet an allegation of wrongdoing on the part of one now deceased, which in all probability could neither be proved nor disproved under the law, must be received with disfavor."

In Pinto v. Seely (1913) 22 Cal. App. 318, 135 Pac. 43, where the court does not seem to distinguish between contracts where the relation already existed and those of original retainer, it said, in dealing with a contract of the latter kind: "It may be conceded that in construing contracts between attorneys and clients concerning compensation, in which there is any ambiguity as to the intent of the parties, it is the rule, generally accepted by courts, to adopt such a construction of the contract as will be most favorable to the interests of the client. . . . We do not understand, however, that the rule in this behalf is so inflexible that it may be invoked to perpetrate a palpable injustice, or that it calls for a construction of such contract beyond the express covenants of the parties."

In construing a contract for the payment of a contingent fee, where the client had independent advice, the court said: "An attorney ought to have his agreement with his clients so plain as not to require construction, and even though the client has independent advice, we think that doubtful clauses are to be construed most strongly against the attorney." Samuels v. Simpson (1911) 144 App. Div. 466, 129 N. Y. Supp. 534, affirmed in (1912) 207 N. Y. 643, 100 N. E. 1133.

b. Other rules.

An attorney must live up to his contract of employment.

A court of equity cannot increase the compensation of an attorney beyond his contract. Lewis v. Yale (1852) 4 Fla. 418.

Attorneys serving a corporation at a salary cannot recover more than the salary, without facts showing that they are entitled to do so. Trimble v. Guardian Trust Co. (1912) 244 Mo. 228, 148 S. W. 934. But an attorney employed at a salary, where his employer is at liberty to change the salary or end the employment at any time, may make with his client a special agreement for services in a certain matter. Bartlett v. Odd Fellows' Sav. Bank (1889) 79 Cal. 218, 12 Am. St. Rep. 139, 21 Pac. 743.

An attorney ought not to do work he considers beyond the contract, with the intent of charging his client therefor, without consulting his client and enlarging the contract. Moses v. Bagley (1875) 55 Ga. 283; Reynolds v. Sorosis Fruit Co. (1901) 133 Cal. 625, 66 Pac. 21; Gabrielson v. Gorin (1916) 92 Wash. 408, 159 Pac. 387.

R. having agreed to advise the manager of the defendant until all matters pertaining to the relation with H. & Co. were adjusted, the defendant agreed to pay C. & R. a certain sum for all services in the county of S., and four trips to a certain city by R., if necessary. It was held that the contract included services rendered in suits about the matter concerned, brought by the defendant, and in one brought against it, certainly where the attorney remained silent until the suits had terminated. He could not then claim an additional amount for services. Reynolds v. Sorosis Fruit Co. (Cal.) supra.

An agreement to foreclose a chattel mortgage for a certain fee does not entitle the attorney to charge additional compensation for services in

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relation to a "settlement" of the case by an extension of time, where he did not inform his client, when doing the work, that such services were outside the contract of employment. Gabrielson v. Gorin (Wash.) supra, where the court said: "We think the rule in cases of this kind is well stated in Isham v. Parker (1892) 3 Wash. 767, 29 Pac. 835, to the effect that where an attorney performs any unusual professional services, 'where there was no further understanding or request, and where there was nothing to show that it was understood by the client that such services were outside of or in addition to the services provided for by the contract of employment, the attorney should be precluded from recovering anything in excess of the contract price.'"

"If in a conversation, subsequently to the making the contract, the parties get together, and the attorney says that the litigation is heavier than either of them contemplated, and he expects to charge additional fees, or words to that effect, and the client makes no response, such failure to respond will not rescind or modify the contract." Moses v. Bagley (Ga.) supra.

It may be noted that in an action by an attorney for services, under a contract employing him, for a certain sum, to manage an action for ejectment in a certain court, to be brought by said attorney for the client, it was held to be error to instruct the jury that the attorney "had a legal right to recover, if he had performed any substantial service as attorney and counsel in the case mentioned in the covenant." Lockwood v. Brush (1838) 6 Dana (Ky.) 433.

Where, on a motion by a client to compel his attorney to pay over money collected for him, there arises a controversy of fact as to the services covered by the contract between them, the court ought not to deny the motion on affidavits, but ought to take the proof, or have it taken by a referee. Re Martin (1902) 73 App. Div. 505, 77 N. Y. Supp. 192.

II. Where no contest expected.

If the agreement is to foreclose a mortgage for a certain sum, provided there is no defense, and there is a vigorous defense, there is no contract as to the amount of the fee. Kracht v. Empire State Surety Co. (1911) 62 Wash. 339, 113 Pac. 769.

Where an attorney was employed for a specified fee to bring an action to quiet title, to which it was not expected there would be any defense, and after a defense had been made he had a conversation with his client in which he stated: "We have a fight on our hands," to which the client replied: "Go ahead with the suit and fight it to a finish," the attorney was not limited to the fee originally specified, particularly where the client had made payments to him in excess of such fee. Tong v. Orr (1909) 44 Ind. App. 681, 87 N. E. 147, 88 N. E. 308.

An agreement that an Indianapolis attorney, employed to collect by suit or other lawful means, from persons in Virginia, money of which they had defrauded his clients, he to be paid a percentage of collections and the expenses, will not limit the attorney to such percentage of the amount collected by suit, when it was expected that a settlement could be made without suit, and the attorney's services included those which he claimed were not included in the contract, to wit: "Traveling over the country, spending as much as three weeks on one occasion in Virginia, nearly 1,000 miles from his office, in search of evidence to be used upon the trial; and the other, of a month or more time spent after the final decree had been entered in the cause on its merits, with a view of ascertaining what, if anything, could be recovered from the different parties against whom the decree had been entered, and professional services in connection therewith." Barcus v. Gates (1904) 130 Fed. 364, affirmed in (1905) 69 C. C. A. 200, 136 Fed. 184.

But where there was an agreement by an attorney for a contingent fee upon collection of a promissory note, it being understood that the note would not be contested, and the attorney continued in the case although it was contested, it was held that he could not, after judgment against his

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client, recover against him on a quantum meruit, although his client had assured him that the defense was untrue, and he could prove it to be so. Lavenson v. Wise (1907) 131 Cal. 369, 63 Pac. 622.

An attorney should not be allowed to urge that the word "recovery" in a receipt meant a settlement out of court, and that therefore he could demand more than 20 per cent for a recovery in an action, where the receipt given at the time the attorney was retained read: "Received of Mr. Wolfe $25 in the case of Wolfe v. Jewellers' Safety Fund Society, it being understood that I am to have, in addition to said $25, 20 per cent of any recovery in said case." Wolfe v. Mack (1913) 81 Misc. 185, 142 N. Y. Supp. 433.

III. Services in the suit.

An agreement to defend a case for a certain sum includes putting in a counterclaim (Lindsay v. Carpenter (1894) 90 Iowa, 529, 58 N. W. 900); and an attorney employed by a client to "look after his interests" and "defend for him" in the suit, for an agreed compensation, is to defend, without other charge, against an amended petition seeking additional relief (McKay v. Lancaster (1893) 15 Ky. L. Rep. 159). So, an agreement to assist in commencing and prosecuting a suit for a percentage of the recovery does not admit of an additional charge for defending against a counterclaim. Payne v. Davis County (1911) 150 Iowa, 597, 129 N. W. 823.

In McKay v. Lancaster (Ky.) supra, the attorney had concealed his intention to make an additional charge, and, after the suit was finally disposed of, had made out a claim to his client based upon the original contract, and, upon payment, had receipted it: "In full of my fees on written contract."

But where one of the attorneys employed on a fee and a percentage of recovery, at the special request of their client, personally attended the taking of the deposition of a witness in a distant state on the client's agreement to pay the expenses and to increase the percentage to a figure named, they are entitled to the increased percentage. Bishop v. Vaughan (1914) 186 Mo. App. 479, 172 S. W. 644.

For services in collecting evidence, see Barcus v. Gates (1904) 130 Fed. 864, affirmed in (1905) 69 C. C. A. 200, 136 Fed. 184, supra, II.

Where an experienced lawyer solicited a firm to conduct an appeal from a judgment against him, and asked them to state the amount of their fees, and, after some correspondence in which he stated that there were but two questions in the case, the firm, not having examined the record, replied: "Unless there is something more in the case than we now know of, there will be no further charge than the $500; but in any event there shall be no misunderstanding between us, and you shall be satisfied." It was held that the lawyers were not limited to a charge of $500, where they found and argued six questions (and reduced the judgment more than one half). Bond v. Sandford (1908) 134 Mo. App. 477, 114 S. W. 570.

In Isham v. Parker (1892) 3 Wash. 755, 29 Pac. 835, an agreement was made by an attorney, for a certain sum and expenses, to conduct "the following suits, commenced in the district court of the first judicial district, at . . . and prosecute said cases through the courts of the territory of Washington, and, if required so to do, to take said cases to the Supreme Court of United States, and prepare briefs for the argument of said cases." It was held that the attorney was entitled to additional compensation, in relation to a petition by him to the territorial supreme court for a rehearing in two cases mentioned in the contract, and decided by that court before the contract was made, and for applying to the United States Supreme Court in those two cases for a mandamus, directing the territorial supreme court to hear and determine the appeal on the merits, and for preparing a brief and transcript of testimony which the territorial supreme court directed to be prepared in one of those cases.

In Bishop v. Vaughan (1914) (Mo.) supra, the court said: "While it is true that the contract of an attorney to render professional services for a

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fixed amount covers all services which are ordinarily or necessarily incident to the proper performance of the duties so undertaken by him, and that for such services he can recover no extra compensation. . . . The mere fact that an attorney at law performs services under a contract fixing the amount of compensation to be received by him does not preclude him from recovering extra compensation for services rendered, with the express or implied assent of his client, which were not contemplated by the contract of employment."

IV. Services in collateral suits.

An agreement to pay an attorney, for services, a percentage of an amount collected on a foreclosure, does not enable him to demand extra compensation for services in defeating an action to restrain the foreclosure. Darrin v. Clay (1911) 143 App. Div. 937, 128 N. Y. Supp. 346.

"Under a contract to receive 10 per cent if the cases were compromised, and 15 if litigated, the contract binds the attorney to attend to *all litigation* necessary to collect, to the extent of defending other suits in his way, or contesting other judgments." Moses v. Bagley (1875) 55 Ga. 283.

In this connection reference may be made to a case where an attorney, retained by a state insurance department to examine and investigate various claims for deficiencies arising upon sales of property upon foreclosure of mortgages theretofore deposited by various insurance companies in said department, was to be paid for his services only out of the proceeds of such collections as he might make on such claims. He procured a judgment of deficiency to be entered in a case where the decree of foreclosure had been entered before his employment, and collected a large amount of this deficiency judgment. It was held that he was not entitled to recover extra compensation for services rendered in the surrogate's court, where he represented the department in a proceeding by the widow of one of the mortgagees to rescind her election to take under her husband's will in lieu of dower, in order to evade payment of the said deficiency. Re Maxwell (1889) 4 N. Y. Supp. 576.

But an agreement to render "any professional services in the courts of this state in an action to test and determine the validity of" a certain deed, and also to defend a certain action there pending in a state court, does not require the attorney to defend an action later brought in the Federal court in relation to the deed, and to enjoin the prosecution of the first action. Mahoney v. Bergin (1871) 41 Cal. 423.

An agreement, for a certain fee, to defend a person upon a criminal accusation, does not obligate the attorney to defend the sureties upon the client's bail bond against a suit by scire facias, growing out of the client's failure to appear in court. Headley v. Good (1859) 24 Tex. 232.

An attorney, while proceeding with an action to recover for the death of an administrator's intestate, became dissatisfied with the arrangement of 15 per cent for his compensation, and it was agreed that he should have 25 per cent; later the administrator died, and a successor was appointed. It was held that the attorney was not entitled to extra compensation for services in the appointment of the first administrator, but that he was so entitled for services in the appointment of the second administrator. Re Bowles (1890) 35 N. Y. S. R. 608, 12 N. Y. Supp. 468.

It may be noted that where a solicitor was instructed to defend a suit, which was discontinued and a new suit for the same cause commenced, and he accepted service of the writ and defended, it was held that the original retainer continued, and that he was entitled to his costs. Clarke v. Union F. Ins. Co. (1884) 10 Ont. Pr. Rep. 339.

For services in suits after judgment in the principal suit, see infra, V.

V. Services after judgment or settlement.

a. In general.

It was held in Judah v. Vincennes University (1861) 16 Ind. 56, that an agreement to allow counsel a percentage of the sums recovered and to be re-

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covered in a suit against the state did not cover services thereafter rendered by him before the legislature.

See also Barcus v. Gates (1904) 130 Fed. 364, affirmed in (1905) 69 C. C. A. 200, 136 Fed. 184, supra, II.

"An attorney who agrees to obtain a judgment upon a lien, or to foreclose the same, only assumes to exercise reasonable skill and care as an attorney in the performance of the service, and after that service is performed, and no error is committed in its performance, he is not required to defend any motion made to set aside said judgment of foreclosure proceedings without extra compensation." Cranmer v. Brothers (1901) 15 S. D. 284, 88 N. W. 105.

Where, after settlement of an action and the payment of the attorney's agreed compensation under the contract between him and his client, the lawyer for the opposing party continued the litigation on the theory that he had been defrauded of his fee, services after such settlement in such litigation are not included in such agreed compensation. Duniway v. Hadley (1919) — Or. —, 178 Pac. 942.

Where, upon a settlement in which cash and notes of a supposedly solvent concern were received, the attorney was paid a certain sum for his service in making the settlement, and for his further services in collecting the notes as they became due, the concern failed and assigned certain claims it had against its customers in other states as collateral security for the aforesaid unpaid notes, the assignees being the owner of the notes and B. The attorney thereupon engaged the services of B in collecting the collaterals, and it was held that these services of B should be borne by the client, as such services were not contemplated in the contract. Singer v. Steele (1888) 125 Ill. 426, 17 N. E. 751.

b. Motion for new trial.

It will be seen that it is held in the reported case (FALLOON v. MILES, ante, 840), that a contract for services in "certain litigation now pending," elaborately describing the various courts in which proceedings might be had, includes services rendered on an application for a new trial in one of such courts, on the ground of newly discovered evidence.

See also Tuttle v. Claflin (1898) 31 C. C. A. 419, 59 U. S. App. 602, 88 Fed. 122, infra, V.

Where pay was claimed for making a motion for a new trial, making and filing a bill of exceptions, and getting case ready for the appellate court, it was held to be error to instruct the jury that, "where there is a general employment, for an agreed sum, of an attorney, that employment extends until the final termnation of the case in the court of last resort; and no additional sum can be charged for services rendered, unless there is an express agreement to pay for the same." Bartholomew v. Langsdale (1871) 35 Ind. 278.

c. Appeals.

The cases are not agreed as to when services on appeal are included in the contract. It may be doubted whether the court does not go too far in the first clause of the following quotation from Bartholomew v. Langsdale (1871) 35 Ind. 278, supra, where it is said: "It is probably true, as a general proposition, that the general employment of an attorney for an agreed sum extends to the termination of a cause, but it is not universally true. Suppose that an attorney only practises in the common pleas court, or the circuit court, or the supreme court, or in one particular county, or does not practise in the Federal court, and this is known to a person who employs him, will it be maintained that he would have to follow the case to the supreme court? or, if a change of venue was taken from the county, or the cause was certified under the laws of Congress from the state to the Federal court, that the attorney would, under his general employment, be required to attend to the case in the county to which the cause was sent, or in the Federal court?"

In Pinto v. Seely (1913) 22 Cal. App. 318, 135 Pac. 43, infra, the court said: "In the absence of an express or implied agreement to that effect, there is no unqualified rule of law which requires the services of an attorney, un-

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der a contract of employment in a particular piece of litigation, to continue until the final determination of the controversy upon appeal, before the attorney can claim compensation for the services contracted for. Nor does the mere acceptance of a retainer under such a contract necessarily imply a retainer and consequent obligation to carry the controversy to the court of last resort."

Services on appeal were held to be included in an agreement in regard to impending litigation, for certain sums, to be in full compensation "for all services growing out of or rendered in the insurance matter." Niagara F. Ins. Co. v. Hart (1896) 13 Wash. 651, 43 Pac. 937.

So, an employment of attorneys on a contingent fee, "in case you get the assets paid over to the heirs," does not enable the attorneys to make a further charge for services on appeal. Cavanaugh v. Robinson (1904) 138 Mich. 554, 101 N. W. 824.

Where a railroad company had instituted condemnation proceedings in the Federal court against an owner's land, he entered into a contract with his attorneys as follows: "In re Boynton v. Mason City & Ft. D. R. Co. pending before Judge McPherson. As full compensation for all attorneys' fees herein, it is agreed that C. D. Boynton shall pay actual expenses and one half of what he may recover, above $5,700." It was held that this included services, not only in the trial court, but on appeal to the circuit court of appeals and to the supreme court. Salinger v. Mason (1912) 114 C. C. A. 300, 194 Fed. 382.

It seems to have been held in Calvert v. Coxe (1843) 1 Gill (Md.) 95, that a contract to pay a sum certain to an attorney, upon the final decision of the cause in his client's favor, would not enable him to recover a further sum for services on an appeal, rendered possible by a statute passed after a verdict in favor of the client.

It may be noted that where an attorney brought a proceeding in behalf of several clients to have certain lands drained under a certain statute, and the act was sustained in the court of first instance, but was set aside on appeal to the appellate division, and the attorney, on the authorization of such of the landowners as had been acting as a committee, appealed to the court of appeals, where the judgment of the appellate division was affirmed, landowners who knew of the appeals taken in their behalf, and not objecting, could not claim that the attorney was not authorized to appear on the appeals. Sanford v. Bronson (1905) 109 App. Div. 835, 96 N. Y. Supp. 859.

In other cases it has been held that the contract did not include services on appeal.

Thus, an agreement by an attorney for a contingent fee "to do the attorney's work in the several cases between" certain parties, where one action only was brought between the parties as to the matters in question, did not require the attorney to prosecute an appeal in the action which had resulted in a judgment for his client, upon counterclaim, although the client desired an appeal. Pinto v. Seely (Cal.) supra.

Where, after the trial in the court below, the attorney wrote his client: "I am willing to lose my time in taking the case to the supreme court, but if you will not do as other clients do, that is, pay the expenses, we will drop," the court declined to set aside a verdict for the attorney for his time when in attendance in the supreme court, where he argued the case. Taggart v. Hower (1889) — Pa. —, 17 Atl. 13.

An allowance made by the trial court to counsel defending a poor prisoner in several trials does not cover services rendered in the appellate court, nor those rendered in the court from which the case was removed, on a change of venue, to the trial court. Cheek v. Schwartz (1880) 70 Ind. 339.

No comment is required upon Hill v. Leland (1888) 10 Ky. L. Rep. 280, where the report of the case is: "Attorneys were employed, as evidenced by a written agreement, 'to appeal' to the circuit court an order of the county court probating a will, and also to appeal to the court of appeals, if the client 'should deem it necessary,' the attorneys to be paid for their serv-

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ices a fixed amount, an additional named amount to be paid in the event the attorneys should succeed in defeating the probate of the will. In an action by the attorneys upon this obligation, the defendant alleges, for defense, that he demanded of his attorneys that an appeal be taken from the circuit court to the court of appeals, which was not done. Held, that the answer does not present a defense. The contract was intended to bind the attorneys to serve the defendant in the court of appeals, in the event an appeal should be taken to that court, but was not intended to bind them to take the appeal."

What included in appeal.

After a decree for nominal damages in a patent suit in the trial court, counsel for the plaintiff agreed to prosecute an appeal for 20 per cent of any recovery, the client to pay expenses. It was held that counsel must be limited to their 20 per cent, although, after a decision of the appeal in favor of the plaintiff, for a substantial sum, the defendants made certain motions, including one to modify the proposed order for a mandate, so that the case should be sent back to the master for further evidence, based upon affidavits which were intended to show that a different state of facts could be proved before the master, and after the denial of these motions, the defendants applied to the supreme court for a writ of certiorari, which was opposed by a brief and an oral statement, and was denied, "so that," said the court, "a large amount of work was performed after the opinion of the court of appeals was filed." Tuttle v. Claflin (1898) 31 C. C. A. 419, 59 U. S. App. 602, 88 Fed. 122.

Where a client's offers in regard to fees were in letters referring to an appeal to the "supreme court," when the case had first to go to the appellate court, it was held that the words "supreme court" should be construed as referring to "appellate court." Sanders v. Seelye (1889) 128 Ill. 631, 21 N. E. 601.

d. Other suits.

A contract for services does not, in general, include services in other suits, subsequent to judgment in the principal suit. Serat v. Smith (1891) 61 Hun, 36, 15 N. Y. Supp. 330; Haines v. Wilson (1909) 85 S. C. 338, 67 S. E. 311.

Thus, a contract for the collection of a promissory note providing for commissions, "if without suit," so much; "if suit is necessary," so much, does not prevent the attorney from claiming additional compensation for services subsequent to judgment and levy and sale under execution, in a suit on the note. Haines v. Wilson (S. C.) supra, where large collections were made by means of subsequent litigation.

By an agreement between a plaintiff and his attorneys, entitled in the action, it was provided: "If the suit is tried and plff. is beaten, they are to have nothing, and if plff. succeeds on trial or by settlement, they are to have one third the amount obtained by plff., and all the costs recovered or received of deft. This is the agreement made in this action." It was held that the attorneys were not thereby prevented from claiming further compensation for services in a sequestration action, brought to secure a judgment recovered in the main action. Serat v. Smith (N. Y.) supra.

But in Nathan v. Halsell (1907) 91 Miss. 785, 45 So. 856, it was held that an attorney employed on a percentage cannot exceed the percentage because, after getting judgment, he has to proceed by garnishment to get the money.

In Fisher v. Mylius (1907) 62 W. Va. 19, 57 S. E. 276, it was held that an agreement by which an attorney is to receive a percentage of the amount recovered in the action does not obligate him to proceed after execution; but if he does not do so, and further services are rendered by another attorney, resulting in a recovery, the expenses of such other services are to be deducted from the recovery, before calculating the percentage of the original attorney.

For collateral suits, generally, see supra, IV.

VI. Particular contracts.

Where an attorney was employed for

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a certain fee by a county board, "in all matters pertaining to the building and construction of turnpikes or macadamized roads, and in all matters that may come before this body in relation thereto, to serve this body as attorney during the pendency of the construction of said roads until the completion thereof, and all matters thereto relating are wound up," there was included in the employment services in defending a suit to enjoin the county from the sale of bonds, authorized by the statute in relation to the building of such roads. Lindsay v. Colbert County (1895) 112 Ala. 409, 20 So. 637.

A contract in 1905 by a county, employing attorneys to collect on a percentage basis, "for said county, any and all taxes to which said county may be entitled from the Ga. R. R. and Banking Co., or the lessees of said railroad, as back taxes, or in any way due said county," was followed by litigation over the taxes, ending in the United States Supreme Court in 1910, whereupon the attorneys collected certain taxes from the railroad company for the years 1896 to 1909, inclusive. It was held that their percentage was to be cast on all collections, and was not limited to the taxes which were back taxes when the contract was made. Cloud v. Taliaferro County (1912) 138 Ga. 214, 74 S. E. 1074

Attorneys occupying offices free, in consideration of doing the owner's ordinary legal business, were asked by him to buy certain property at an auction, which they did, he immediately assuming the purchase; and they also assisted in leasing this property. It was held that they could not charge their client, if anything, on the basis of real estate broker's commissions. Dyer v. Sutherland (1874) 75 Ill. 583. The client is described as "doctor," but what his business was is not otherwise stated.

An attorney employed as solicitor of the defendant company in Illinois, at a fixed salary, was held not entitled to compensation for becoming surety for his client on appeal bonds, during many years, in which he made no claim therefor. Willard v. Pennsylvania Co. (1908) 140 Ill. App. 306, where the court said: "In view of the employment of the plaintiff by the defendant, the fact that the services for which compensation is here sought to be recovered were of a nature so nearly similar to the regular duties of the plaintiff, and that no application was made by the plaintiff to the defendant for compensation for signing said bonds while he was in the employment of the defendant, we think that the plaintiff was not, in the absence of an express contract or promise, entitled to recover."

A "district solicitor" of a railroad company for a county, employed at a salary to represent the company in all suits, and whose salary was to cover all services necessary or rendered to the company, is not entitled to extra compensation for services to the company in a suit brought against a city in the county for damages on account of property destroyed in riots, even though the solicitor had secured a change of venue, and tried the case in another county. Willard v. Pittsburgh, C. C. & St. L. R. Co. (1911) 162 Ill. App. 427.

On the other hand, a contract to do all the legal work connected with the location of a certificate for land does not necessarily include subsequent litigation concerning the title. Ker v. Paschal (1880) 1 Posey, Unrep. Cas. (Tex.) 692.

A contract by which an attorney is to receive a percentage of amount refunded by the government for taxes will not relate to a collection of money refunded as received from the proceeds of tax sales. Wells v. Haynes (1897) 101 Ga. 841, 28 S. E. 968.

An employment by the school board of a city, of a law firm, to prosecute the county auditor for refusing to pay over moneys in his hands belonging to the special school fund, does not authorize the attorneys to commence a civil suit to try the quesion as to who were the legal school trustees of the city. Baldwin v. Logansport (1881) 73 Ind. 346.

An agreement by an attorney to accept a pass for a year over a railroad, as compensation for the legal services he might render the company for the

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year, does not prevent the attorney from recovering fees for services in an important case, as to which it was agreed, before they were rendered, that he should receive a reasonable fee; nor did it prevent him from recovering for services in another important case, in which he was requested to assume charge of the defense. Ohio & M. R. Co. v. Smith (1892) 5 Ind. App. 36, 31 N. E. 371.

Where a railroad company sent their attorneys passes stating: "Which are in full compensation for services that your firm may be called upon to render in White county during 1884, except for assisting in trials of cases against the company other than stock cases; for such services, if rendered, you are to receive reasonable attorney's fees, in addition to inclosed passes," it was held that the attorneys were not limited to other fees for assisting in trials, but were allowed to recover for other services in actions besides trials. Louisville, N. A. & C. R. Co. v. Reynolds (1888) 118 Ind. 170, 20 N. E. 711.

Where the plaintiffs were employed by the vendee to examine the title to premises for a certain fee, and, coincidentally with the examination of this title, the plaintiffs, with the knowledge of the defendant, rendered other services respecting a matter of insurance, about a claim as to gas fixtures, and especially in consequence of a suggestion, apparently made through the attorney of the vendor, that the vendor was of unsound mind, so that the contract could not be fulfilled, and was void, they were not limited to the fee specified, although the client claimed that she had not been told that an extra charge would be made. Allen v. Baker (1899) 29 Misc. 337, 60 N. Y. Supp. 472.

It may be noted that it has been held that a contract by an attorney with trustees of a partnership, to be attorney for the firm and to take no business against them, does not entitle him to be employed in a contest between the beneficiaries of the trust in which the trustees were incidentally involved (M'Cutcheon v. Loud (1888) 71 Mich. 433, 39 N. W. 569); and that an engagement of services of attorneys in the litigated business of a bank, "pending and to be brought before the courts during the remainder of the year," and also to take such steps as the attorneys were able to do in procuring testimony in those cases, does not obligate the attorneys to do any work after the end of the year. Bank of State v. Martin (1843) 4 Ala. 615.

Agents of a company, who are attorneys, employed "to make loans of money on bonds and mortgages, and to collect money to become payable on such loans," the company not to be liable for any charges, disbursements, or commissions to their agents "for their services in said agency," are not required, without compensation, to render services as to the following matters: legal services in foreclosing mortgages or collecting moneys for the company by legal proceedings and actions at law; looking after repairs to, and caring for renting and collecting rents of, properties bought in by the company upon foreclosure of its mortgages; superintending repairs and improvements to, and taking general oversight of, properties in the hands of receivers appointed by the courts, in cases brought to foreclose mortgages executed to the company to secure loans made by its agents; looking after the payment of taxes, and keeping up the insurance, upon properties mortgaged to the company to secure loans, and upon properties bought in by the company upon foreclosure of its mortgages. United States Mortg. Co. v. Henderson (1886) 111 Ind. 24, 12 N. E. 88.

The salary of a district attorney for his first term was fixed at $1,300 per annum, "being $1,000 for his services as district attorney proper and as counsel for the board of supervisors during their sessions, and $300 for acting as attorney in all civil actions and proceedings now pending, or hereafter during his term brought against the board of supervisors or the county treasurer, and as counsel for the superintendent of the poor of the county." Thereafter the legislature authorized the court of claims to hear

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and determine certain claims of counties for taxes paid the state, and the attorney began proceedings for taxes for the county and entered judgment therein, most of the work in that matter having been done in his first term, only the entry of judgment and the details connected therewith being performed during his second term. His salary for the second term was fixed "at $1,000 for his services as district attorney proper and as counsel for the board of supervisors during its sessions, and $300 for acting as attorney in all civil actions and proceedings then pending, or thereafter brought by or against the county of Delaware, the board of supervisors, or the county treasurer during his term of office." It was held that he was entitled to extra compensation for his services in the tax matter. People ex rel. Fisher v. Delaware County (1905) 108 App. Div. 83, 95 N. Y. Supp. 458.

VII. Miscellaneous.

An agreement by an attorney to try cases before commissioners at so much a case, his employer to guarantee two cases per week, means that the attorney is to be paid according to the cases tried, not by the week; so that where the employer furnished the cases, but the attorney could not try two a week, he could only claim pay for those tried. Smidt v. Dessar (1895) 13 Misc. 254, 34 N. Y. Supp. 158.

Where the defense to an action by attorneys for services against individuals is that such services, if any, were covered by a contract between one of said attorneys and a corporation in which the defendants were stockholders, it is error to refuse to admit such contract in evidence. Rosenthal v. Ogden (1897) 50 Neb. 218, 69 N. W. 779.

An attorney employed to examine title for an intending mortgagee, who gives a certificate as to the title, and who is afterwards employed to foreclose the mortgage, may not recover anything for services required by reason of a serious question as to the title, dependent upon statute, as such services were required through his own fault. Page v. Trutch (1876) Fed. Cas. No. 10,668.

It may be noted that, in a case where there was a dispute as to whether a contract for a percentage of recovery covered all the items of recovery, the court considered that the items in question, while covered by the contract, were not in the minds of the parties at the time, but that the client, by subsequent assent to their inclusion as part of the basis on which the percentage was to be cast, had resolved any doubt in the contract by his construction. Comstock v. Flower (1904) 109 Mo. App. 275, 84 S. W. 207.

Reference may be made to Schamberg v. Auxier (1899) 101 Ky. 292, 40 S. W. 911, where real estate brokers who claimed commissions on a purchase which they advised, knowing a third person claimed the land, were held not entitled to charge the purchaser for legal services in defending the title against a suit brought by such third person against vendor and vendee, especially when the vendor paid them a reasonable compensation.

It may be noted that in Simrall v. Morton (1885) 6 Ky. L. Rep. 735, a creditor of an insolvent corporation employed attorneys to bring suit upon his claim, agreeing to pay them a sum equal to 10 per cent of any amount that should thereafter be realized from the claim, "whether by suit, compromise, or otherwise," and that pending an action in equity, after a judgment at law had been obtained and a return of "No property," the client, with the consent of his attorneys, and in association with others, purchased the property of the corporation under a judgment directing its sale, and realized therefrom a large sum of money. It was held that "the compensation of the attorneys should be confined to the value of their services in bringing the several actions, unless those services contributed to enable appellee to realize his debt."

In Hughes v. Dundee Mortg. & T. Invest. Co. (1891) 140 U. S. 98, 35 L. ed. 354, 11 Sup. Ct. Rep. 727, where the attorney's compensation was fixed by the contract, and it was so held, the

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precise ground on which he sought to recover does not seem clear.

In Buttery v. Wright (1908) — Iowa, —, 117 N. W. 31, the facts are not sufficiently reported to make the case of value. B. B. B.

RE ESTATE OF GEORGE W. HALL, Deceased.

GEORGE RAYMOND HALL, Appt.

Pennsylvania Supreme Court — February 22, 1915.

(248 Pa. 218, 93 Atl. 944.)

Spendthrift trust — anticipation of payment of principal — protection in transmission.

1. Under a devise in trust to pay net income to testator's son until he arrives at a specified age, in such manner that the same shall not be liable for his debts, and shall not be assigned or anticipated by him, and then to convey the principal to him free from any trust or limitation whatever, the principal is not protected in transmission to the beneficiary, but an assignment by him of a portion of the principal may be enforced against the property in the hands of the trustee at the termination of the trust.

[*See note on this question beginning on page* 858.]

Will — construction — heirs, executors, and assigns.

2. The words "heirs, executors, administrators, and assigns" are words ordinarily used to indicate a gift of an absolute interest

Spendthrift trust — protection of income — effect on corpus.

3. The protection of the income of a trust estate from the claims of the beneficiary's creditors incidentally protects the corpus of the estate from execution or passing by assignment.

APPEAL by contestant from a decree of the Orphans' Court for Philadelphia County, dismissing exceptions to an adjudication settling the estate of George W. Hall, deceased. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **Conlen, Brinton, & Acker**, for appellant:

An assignment by the beneficiary, executed before the termination of a trust, of an interest in the principal, is invalid and unenforceable at the expiration of the trust.

Hartman's Estate, 31 Pa. Super. Ct. 152; Holbrook's Estate, 213 Pa. 93, 2 L.R.A.(N.S.) 545, 110 Am. St. Rep. 537, 62 Atl. 368, 5 Ann. Cas. 137; Stambaugh's Estate, 135 Pa. 585, 19 Atl. 1058.

The attachment in the common pleas does not support an award by the orphans' court to the attaching creditor.

Poulson's Estate, 11 Phila. 151; Goe's Estate, 146 Pa. 431, 28 Am. St. Rep. 805, 23 Atl. 383; Beck's Estate, 133 Pa. 51, 19 Am. St. Rep. 623, 19 Atl. 302.

Messrs. **J. L. Ritchey, Frank P. Prichard**, and **John G. Johnson**, for appellee:

There is nothing to indicate an intention to create any trust beyond the arrival of the son at the age of thirty-five years, or to protect the estate from assignment or attachment between the arrival of the son at that age and the formal award or conveyance to him of the estate.

McCandless's Estate, 58 Pittsb. L. J. 28; Overman's Appeal, 88 Pa. 276; Morgan's Estate, 223 Pa. 231, 25 L.R.A. (N.S.) 236, 132 Am. St. Rep. 782, 72 Atl. 498.

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Frazer, J., delivered the opinion of the court:

George W. Hall, the testator, died December 14, 1906, leaving a will wherein he devised and bequeathed to his executors an undivided one half part of his residuary estate in trust to invest the same and pay the net income thereof to his son, George Raymond Hall, until he should arrive at the age of thirty years, and at the expiration of that time to grant and convey to the son, his heirs, executors, administrators, and assigns, "the entire principal of the estate so given to them in trust," with the remainder over, in case of the son's death before reaching the age of thirty years. By a codicil testator altered the terms of the trust to read as follows: "I do now give, devise and bequeath unto the said Peter Boyd and to the Guarantee Trust & Safe Deposit Company and the survivor of them, their heirs, executors, administrators, successors and assigns, the one full undivided half part of the rest, residue and remainder of my estate which I gave to them by my will aforesaid, in trust, however, for the following uses and purposes and no other: To invest the same and keep the same invested in lawful securities and pay the net income thereof, to my son, George Raymond Hall, until he shall arrive at the full age of thirty-five years, in such manner that the same shall not be liable for his debts or engagements and shall not be assigned or anticipated by him nor be subject to attachment or any other claim of any of his creditors. As soon as my said son arrives at the age of thirty-five years, I order and direct the said trustees and the survivor of them to grant and convey unto him, his heirs, executors, administrators and assigns, the entire principal of said trust estate free from any trusts or limitations whatsoever."

The only changes made by the codicil to the trust clause were the extension of the term of the trust by five years, the creation of a spendthrift trust, and the addition to the gift of the principal of the words "free from any trusts or limitations whatsoever." Before arriving at the age of thirty-five years the son assigned to his wife, in settlement of her claim against him for alimony and for the expenses of divorce proceedings, the sum of $10,000 out of the principal of the trust fund, to be paid immediately upon his attaining the age of thirty-five years, subject to a similar assignment to his mother for the sum of $13,000. At this same time he gave his wife a judgment note for a like amount, payable the day after his thirty-fifth birthday. When the cestui que trust reached the age of thirty-five the trustees filed their account; and upon the audit in the court below the wife, who had been divorced from him on the date of the assignment, made claim for the sum of $10,000, with interest, to be paid out of the principal of the fund for distribution. It also appeared that on the day after the cestui que trust reached his thirty-fifth year judgment was entered against him on his $10,000 judgment note, and an attachment execution issued on such judgment and was served on the trustees as garnishees. The cestui que trust, resisting both the claim under the assignment and that of the judgment and attachment, contended that his father's will protected the principal of the trust fund as well as the income from his debts and engagements and from assignments or anticipation by himself or attachment by his creditors. The auditing judge held the assignment to be valid and effective, and awarded the assignee $10,000, with interest from the date when the principal was payable. To this adjudication the cestui que trust filed exceptions, which were dismissed by the court. He then took this appeal. It is not disputed that the will created a good spendthrift trust as to the income of the fund until the son should attain the age of thirty-five years. The question raised by the appeal is whether the provision in the will prohibiting assignment or anticipation was intended to apply to the principal as

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well as to the income. Appellant argues that it was so intended, for the reason that the word "same," which is used twice at the beginning of the trust clause as referring to the principal of the trust fund, must be given the same meaning when again used in that clause.

The trust provisions may be divided into three parts, as follows: (1) The direction to invest the trust fund and keep it invested; (2) the disposition of the income; and (3) an entirely separate sentence which disposes of the principal. The trustees are directed to "pay the net income . . . in such manner that the same shall not be liable for his debts." The words "in such manner" apply only to the payment of the income, as the manner of investing the principal clearly cannot affect the spendthrift trust. The word "same," immediately following these words, must consequently also refer to income only. The fact that testator had previously twice used the word "same" in reference to the investment of the principal does not indicate that when he used it a third time he intended it still to refer to principal. Another antecedent "net income" had then intervened, and the obvious and grammatical construction of testator's language must refer "same" to this latter antecedent. It was an entirely appropriate word for him to use in that connection. The third part of the trust clause is the only portion that relates to the disposition of the principal. It is a new sentence, and entirely separate and independent from the sentence relating to the income. It contains no provision protecting the subject of the gift from liability for the legatee's debts or engagements, or from assignment or anticipation by him. On the contrary, it expressly provides that the principal shall be conveyed to him "free from any trusts or limitations whatsoever." With the exception of the latter words, the language used is practically identical with that of the corresponding provision of the will, which contained no spendthrift trust clause even as to the income. These words and the word "entire," in the phrase "entire principal," were unnecessary, as the same thing was expressed without them, and seem to have been used merely for emphasis. The words "heirs, executors, administrators and assigns" are words ordinarily used to indicate a gift of an absolute interest. There is nothing to show that they have any other purpose here. The spendthrift clause protecting the income incidentally protected the corpus during the period of the trust from execution or passing by assignment (Siegwarth's Estate, 226 Pa. 591, 134 Am. St. Rep. 1086, 75 Atl. 842), as there could be no income without the trustee's possession of the corpus. There is nothing in the will or in the codicil which indicates an intention to subject the principal to the spendthrift trust. Neither is there provision for protection of the corpus of the estate in transmission to the beneficiaries at the end of the trust, as in Beck's Estate, 133 Pa. 51, 19 Am. St. Rep. 623, 19 Atl. 302; Goe's Estate, 146 Pa. 431, 28 Am. St. Rep. 805, 23 Atl. 383; and Hartman's Estate, 31 Pa. Super. Ct. 152. In McCandless's Estate, 58 Pittsb. L. J. 28, in the orphans' court of Allegheny county, there the will provided that the trust should continue for ten years following the death of testator's wife; the net income or profit arising therefrom to be paid to the two sons of testator in equal quarterly payments, free and clear from all liability for debts of the sons, and not subject to anticipation, and at the expiration of that period the estate to be divided into equal parts or shares, and transferred and paid over to the sons and their heirs forever. In construing this provision, Judge Hawkins points out these distinctions, and holds that it was testator's intention to protect the in-

Will—construction—heirs, executors, and assigns.

Spendthrift trust—protection of income—effect on corpus.

Same—anticipation of payment of principal—protection in transmission.

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come, "but there was neither express nor implied provision for protection in transmission to the beneficiaries of the corpus at the end of the trust. If this had been intended, the obvious course would have been to have had the protecting clause follow the dispository clause, as was done in Beck's Estate, and Goe's Estate, supra, cited by counsel. It was to be transferred at the end of the period of trust to the sons, it is true, but not, as in case of the income, free and clear of their debts. If there was no restriction in transit, the fund became liable to execution the moment the trust ended."

There is no substantial difference between that case and this, and what is said there should be applied here. Under this view of the case, it is not necessary to consider the right of the claimant under her attachment.

Decree affirmed at the cost of appellant.

ANNOTATION.

Protection of principal in transmission to beneficiary of income of spendthrift trust.

Whether the principal of a spendthrift trust which, at the expiration of the trust, is to be handed over to the beneficiary, is to be protected in transmission to him, will depend upon the intention manifested by the creator of the trust.

The reported case (RE HALL, ante, 855) appears to warrant the generalization that no inference of an intention to protect the principal of a fund in which a spendthrift trust is created, in transmission to the beneficiary, arises from the existence of such a trust in respect of the income. Such a generalization is in harmony with the principle that the existence of the restraints necessary to constitute a spendthrift trust will not readily be presumed. Thus, in Heaton v. Dickson (1910) 153 Mo. App. 312, 133 S. W. 159, it is said that although one may settle an estate in trust with an equitable use to another for life, with a limitation against alienation, and free from the claims of creditors, the presumption of the law is that he has not done so unless either express words to that effect are set forth, or a clear and undoubted intention to the same end is manifested.

It was accordingly held in the reported case, that the beneficiary might, during the existence of the trust, make a valid assignment of the corpus, which would take effect immediately upon the termination of the trust. Although it may seem rather odd that one whose control over the income is so restricted during the existence of the trust should have at the same time an unrestricted right to assign or encumber the corpus of the trust fund, it must be remembered that spendthrift trusts are allowed, not because the law concerns itself for the donee, but in order to give effect to the will of the donor. Where the donor only assumes to protect the income, no inference can be drawn other than of an intention to assure the income to the beneficiary during the continuance of the trust, and it is not to be inferred that the donor intended that the trust fund should pass intact into the hands of the beneficiary at the expiration of the trust period.

Of course, the fact that the beneficiary may have the right to make a disposition of the corpus during the trust period which will become effective at the termination of such period will not affect the trust. The beneficiary of a valid and subsisting spendthrift trust cannot alienate the trust property so as to affect the right of the trustee to the possession thereof, and defeat the object of the trust. Moore v. Sinnott (1903) 117 Ga. 1010, 44 S. E. 810; RE HALL (reported herewith) ante, 855.

Before proceeding to the consideration of the cases dealing with the effect of language used by the creator

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of the trust to protect the property in transmission to the donee, attention may be called to the doubt expressed in Winslow v. Rutherford (1911) 59 Or. 124, 114 Pac. 930, in which the court said: "In all the cases cited by counsel relating to spendthrift trusts, we have not found one in which the ultimate title to the corpus of the trust in any event or at any age was to pass to the cestui que trust; and, while we are not prepared to say that in no instance can a spendthrift trust exist where the estate may finally vest in the cestui que trust, the rarity of such instances furnishes a strong presumption that a trust terminable at a particular date or upon the happening of a particular event is not a spendthrift trust." On principle, however, it would seem that there can be no objection to the creation of a spendthrift trust to continue for a certain period, notwithstanding the beneficiary is also to receive the corpus upon the expiration of the trust, so long as the trust is not terminable at his option.

Instances in which a trust fund has been held to be protected in transmission:

In White v. Williams (1912) 172 Ill. App. 630, where testator created a trust to pay the net income "in semiannual instalments in cash into the hands of my son, Henry E. Huck, in person as long as he lives and not upon any written or verbal order nor upon any assignment or transfer by said Henry E. Huck, and in no event shall said Henry E. Huck have the right or power to anticipate his share of said income by any order on said trustees, or other voluntary transfer, or by application of law by virtue of any attachment, judgment, decree, or other legal proceedings against him," and further provided that "this trust shall continue for and during the life of said Henry E. Huck, unless the same is sooner terminated by the direction of said Henry E. Huck and the consent of at least one of said trustees; and in case such trust is terminated by said Henry E. Huck and said trustees, then said trustees are directed to pay the entire corpus of the estate then in their hands, together with such income which accrued from the same as they have, unto said Henry E. Huck," — it was held that both the fund and the income thereof were put beyond the reach of the son's creditors until after the trustees should have paid the same over to him in person; and that as such fund was also beyond his own control until it should be paid into his hands, an assignee of the son took nothing by the assignment.

In Southern Nat. L. Ins. Co. v. Ford (1913) 151 Ky. 476, 152 S. W. 242, where testator bequeathed to his son all his property, "to be held in trust by the Fidelity Safety Vault & Trust Company of Louisville, Kentucky, until he is twenty-five years of age and then he is to have possession and control of the same. Said trustee is to superintend his property and see that the interest of my son is protected and that he is properly provided for according to his means," it was held that the son could not encumber or convey the property before he reached the specified age.

In Boston Safe Deposit & T. Co. v. Collier (1915) 222 Mass. 390, 111 N. E. 163, Ann. Cas. 1918C, 962, where the testator had created a trust to pay over income to a son's surviving children or the issue then living of deceased children until a certain date, "when the principal is to be distributed in equal shares among his then surviving children, and the issue then living of any deceased child," and also provided: "It is my will that every payment of income or principal hereinbefore directed or devised to be made shall be made personally to the persons to whom they are devised or upon their order or receipt in writing in either case free from the interference or control of the creditors of such persons and never by way of anticipation or assignment," it was held that the distributive share of a grandson should be paid to him rather than to his trustee in bankruptcy.

In Beck's Estate (1890) 133 Pa. 51, 19 Am. St. Rep. 223, 19 Atl. 302, a provision in a will that a bequest to a certain person is expressly upon condition that it will not be liable to be at-

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tached or seized for the debt of the legatee, but that the whole amount shall be paid directly to the legatee by the executor without diminution for the payment of such indebtedness, was held effective to protect the fund in transit from the executor to the legatee, the court saying: "It is true the trust would end the moment the money was paid to the legatee, but during the transit, while the money remained in his hands, it was as much protected from creditors as if a separate trust had been created for that purpose.. It was the right of the testatrix to say that her estate should not go to pay her stepdaughter's creditors. She had said so as emphatically as language can express it, for the time that the money remains in the hands of her executor. Does the fact that she did not protect it further by raising up another trustee of the fund after it left the executor's hands destroy the trust she did create, and nullify the positive directions of the will that it should not be attached in transit? Why shall the will of the testator be defeated in this respect? She had a right to do what she willed with her own. The creditors of her legatee had no claim upon her estate, and when she directed that the share should be paid to her stepdaughter, and not to the creditors of the latter, who shall gainsay her? The creditor is not injured and has no right to complain."

And in Goe's Estate (1891) 146 Pa. 431, 28 Am. St. Rep. 805, 23 Atl. 383, a testamentary provision that "it is my distinct will and desire that none of the effects real, personal, or mixed as above devised and bequeathed to my children or to either of them can be seized upon or levied upon for any debt or claim whatsoever against my husband, Henry B. Goe, or against any one of my said children," was held effective to protect the property in its transit from the executor to the legatee.

In Siegwarth's Estate (1910) 226 Pa. 591, 134 Am. St. Rep. 1086, 75 Atl. 842, where testatrix provided that the share of her estate given to her sons should be held by her executor in trust for them, "but no part of the principal of said estate is to be given to my said sons . . . for five years after my death, and then only when in the judgment of my executor, they shall have proven themselves to be entirely competent and qualified to take proper care of same, at which time the said trustee shall pay the same over to my said sons," it was held that a son could not assign or sell such share during the continuance of the trust.

In Brubaker v. Huber (1889) 2 Pa. Dist. R. 703, it was held that a provision that "none of such trust money nor the income thereof shall be liable for the payment of any debts of my said son Jacob, nor in any manner liable to attachment in their hands, they, my executors, to pay the income thereof annually to my said son Jacob," was effective to protect the corpus as well as the income; and that its effect was not destroyed by a further provision giving the executors a discretion to pay the whole or a part of the legacy to the said cestui que trust.

In Hartman's Estate (1906) 31 Pa. Super. Ct. 152, a testamentary provision that none of the gifts made in favor of any of the testatrix's children "shall be liable to be attached or seized, or in any manner pledged, appropriated, disposed of or parted with by anticipation or before the same shall have accrued or become payable, but the whole amounts of their respective shares shall be for their respective, sole, separate and exclusive use and benefit, and shall be paid over and distributed by my executor or administrator directly to them, as the parties entitled thereto, without diminution for the payment of any debt or liabilities whatever in transit from said executor or administrator to them," was held effective to invalidate an assignment of a son's interest in the estate.

In Staub v. Williams (1880) 5 Lea (Tenn.) 458, testatrix, who had provided by will for an equal division of her property among her children, by codicil directed that "in place of devising those parts of my estate which are devised in said will to my sons [naming them] directly to them, I do

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hereby devise the same to [certain persons] as trustees with liberty to my said trustees to convey the same to each of said sons respectively, or in the event of the death of either, to the heirs at law of such deceased son, or in such other mode as my said trustees may deem proper. Said trustees are to exercise a sound discretion in controlling the use and enjoyment of said property and also in regard to the conveyance of the same in such manner as to prevent the same from being sold by execution or squandered. The intent of this codicil being that neither of my sons is to enjoy said property except with the assent and under the directions of my said trustees." In a subsequent codicil, she said: "In executing the powers conferred by my first codicil, I wish my executors and trustees in the division of my estate to be guided and controlled by the leading objects and motives contained in the original will, the most prominent of which are, to make a just and equal distribution of my property among my children or those representing them, but to do this in such a manner as to prevent the shares ultimately designed for them from being subjected to the satisfaction of unjust judgments which I am under no legal or moral obligation to pay or provide for. For the attainment of these ends it was and is my intention to vest in my said executors and trustees the same unlimited power and discretion which I could exercise myself if living, and not to be subject to the control of my children or of their creditors, real or imaginary." It was held that these provisions were effective to protect the corpus from the creditors of the beneficiaries.

Instances in which a trust fund has been held not to be protected in transmission.

See in this connection, the reported case (RE HALL, ante, 855).

In McCandless's Estate (1910) 58 Pittsb. L. J. (Pa.) 28, where a testator gave his estate in trust to collect and pay income to his wife during her life, and at her death to continue for ten years thereafter to collect and receive the entire income or profit derived therefrom and to pay the same to his sons "in equal, quarterly payments, free and clear from all liability for any debts of my said sons and not subject to anticipation, at the expiration of which period my estate shall be divided and equal parts or shares thereof transferred and paid over to my said two sons and their heirs forever," it was held that while the provisions of the spendthrift trust incidentally protected the corpus from execution during the period of the trust, since there could be no income without the trustee's possession of the corpus, there was neither express nor implied provision for protection in transmission to the beneficiaries of the corpus at the end of the trust, and therefore that a valid assignment might be made by the beneficiary pending the trust.

In Havens v. Healy (1853) 15 Barb. (N. Y.) 296, it was held that the terms of an instrument creating a trust for the benefit of the creator's son Joshua, "to be paid to him in small sums for the support of himself and family or otherwise as said [trustee] shall decide, or for a home to be kept in trust for said Joshua," were insufficient to protect the corpus of the fund in transmission to the beneficiary, but that the interest was assignable by him, and would vest in assignees under bankrupt and insolvent acts, and was liable to be reached by a creditors' bill.

Although the point is outside the scope of this note, it may be of interest to the reader to know that it has been held that if it is within the power of the beneficiary to terminate the trust at any time, the provisions assuming to preserve the income from the claims of creditors are ineffectual.

Thus, a devise of real and personal property in trust to hold for three years and permit a designated person to enjoy the personalty and income of the realty free from the claim of creditors, and at the end of that time, or sooner, if desired by the beneficiary, to convey the deed to any person designated by the beneficiary, is invalid as a spendthrift trust, since the entire disposition of the property is

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within the control of the beneficiary. Morgan's Estate (1909) 223 Pa. 231, 25 L.R.A.(N.S.) 236, 132 Am. St. Rep. 732, 52 Atl. 498.

So, also in Croom v. Ocala Plumbing & Electric Co. (1911) 62 Fla. 460, 57 So. 243, it is held that where a deed creating a spendthrift trust further provides that the trustees named therein shall convey all or any part of the corpus of the property conveyed thereby to the named cestuis que trustent or to their assigns, as they may direct, upon their joint request, expressed in writing, this provision virtually gives to the cestuis que trustent therein such absolute dominion over the property as to vest in them or their assigns an absolute title to the property, and such deed does not exempt the property from the debts of such cestuis que trustent.

And in Ullman v. Cameron (1906) 186 N. Y. 339, 116 Am. St. Rep. 533, 78 N. E. 1074, a testamentary trust by the terms of which the husband of the testatrix was to receive all the income and such part of the principal as might be necessary for his support and maintenance, and containing the further provision that if he should decide to engage in any business or enterprise, then the trustee was to pay to him upon notice the whole or any part of such principal, was held void as against creditors.

And in Hallett v. Thompson (1836) 5 Paige (N. Y.) 583, it was held that creditors of a legatee could reach a legacy which, by the will, was to be retained in the hands of the executors, who were to put it on interest and pay the annual interest to the legatee for life unless he should, by a legal written instrument, require the payment of the principal of the legacy to himself, in which case the whole was to be paid to him; the will also providing for the disposal of the legacy by will, and providing that neither the legacy nor the interest should be liable for the payment of the legatee's debts.

E. S. O.

E. C. BESSELIEU et al., Receivers of the Southern Mutual Home & Real Estate Company,

v.

C. C. BROWN et al., Appts.

North Carolina Supreme Court — January 3, 1919.

(— N. C. —, 97 S. E. 743.)

Corporation — money embezzled by official — liability of directors.

1. Directors of a corporation who neglect to attend directors' meetings, and leave the corporate business largely to the control and management of an officer without control, direction, or restraint, may be liable at the suit of its receiver to make good money embezzled by such officer.

[*See note on this question beginning on page* 867.]

Same — liability of directors.

2. The directors and managing officers of a corporation may, in proper instances, be held liable for loss and depletion of the corporation's assets, due to their wilful or negligent failure to perform their official duties.

Same — errors of judgment — liability.

3. Directors and managing officers of a corporation are not, as a rule, liable to stockholders for mere errors of judgment, nor for slight omissions from which a loss which results to the corporation could not have reasonably been expected.

Same — measure of care required.

4. Directors and managing officers of a corporation are required to give their positions of trust the careful attention which a prudent man should exercise in like circumstances, and

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charged with a like duty in the conduct of his own affairs of a similar kind.

Parties — action against directors of corporation.

5. In case of breach of duty by directors and managing officers of a corporation, causing loss of its assets, the corporation may sue, and in case of its insolvency, the action can be maintained by a receiver.

Same — corporation.

6. Where directors of a corporation commit a wrong against it by neglecting to supervise the acts of one of its officers, so that he is enabled to embezzle its funds, the corporation or its representative should be a party to a suit to hold them liable for the loss.

Receiver — corporation — stockholders' neglect as defense to action.

7. A receiver of an insolvent corporation cannot be prevented from maintaining an action against directors whose negligence has caused loss of assets, to satisfy claims of creditors, by the fact that stockholders, by neglecting to hold regular meetings, failed to have the mismanagement corrected.

Pleading — demurrer — scope.

8. A demurrer must restrict itself to the facts as they appear in the complaint.

Same — demurrer — question open.

9. Neglect on the part of the stockholders of a corporation seeking to recover against directors for permitting an officer to embezzle its funds cannot be raised by demurrer if the facts do not appear on the face of the complaint.

Estoppel — corporation — acceptance of settlement.

10. A corporation is not estopped to hold directors liable for money embezzled through their neglect by an officer of the corporation, by accepting and retaining the proceeds of a settlement made by them with the defaulting officer for a less amount than was due from him.

APPEAL by defendants from a judgment of the Superior Court for New Hanover County, overruling a demurrer to the complaint in an action brought to recover for loss of assets of the insolvent company, alleged to have been caused by the negligent acts of defendants. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **E. K. Bryan** and **Robert Ruark** for appellants.

Messrs. **A. G. Ricaud** and **E. T. Burton** for appellees.

Hoke, J., delivered the opinion of the court:

The complaint alleges that in 1904 the company in question was duly incorporated and organized, pursuant to the laws of the state, and engaged in the transaction of business as contemplated by the charter, etc.; that in 1916, on petition filed and approved by two thirds of the stockholders, the company was declared insolvent, and plaintiffs appointed receivers, and authorized and directed to collect and take charge of company's assets, etc., the order appointing said receiver containing, among other things, a judgment against the company in favor of A. C. Dawson for $848.70, which is annexed and made part of the complaint as exhibit A, and on leave duly granted, the present suit was instituted against defendants, the directors, some of whom were also members of the executive committee and managing officers of the company. It was further alleged, in effect, that the defendants, who had long been directors of the company, and some of whom, as stated, were its managing officers and members of the executive committee, had utterly failed to attend to the business of the company or to perform the duties incumbent upon them and incident to their respective positions, but had turned over the entire management of the company and its business and the custody and care of its assets to one M. C. Hammond, the secretary, and without any supervision or control on their own part; that they did not attend the directors' meetings, as required; they took no bond from said Hammond, did not have his accounts

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audited, nor even require any reports from him, with the result that he made away with the company's assets, to the amount of $12,636.19, causing its insolvency, and in July, 1915, had written a letter to one of defendants, C. C. Brown, confessing his default, which is also made a part of the complaint. It is further alleged that the directors took a mortgage from the sister of said Hammond to secure $6,000 of the sum embezzled by him, and thereafter the directors wrongfully accepted $3,000 in adjustment of the company's claim against Hammond. Having set forth these matters with great fullness of detail, averment is further made, in § 26 of the complaint: "That said defendants were further guilty of reckless negligence in failing to discharge their duties as trustees, by reason of being directors of said company, in that they failed and neglected to hold and attend meetings as directors, as required by law and the by-laws of the company, in order to look after, scrutinize, and protect the business of the corporation and the interests of the stockholders and creditors of same. That during the year 1914 there was only one directors' meeting for the entire year, which was held on the 22d day of January, 1914, and there was no other meeting of the board of directors until January 21, 1915, and that there was no other meeting until after the defalcation of Hammond was acknowledged by him, in August, 1915, and during this period of time, from January, 1914, until August, 1915, the business of the corporation was left almost entirely, if not wholly, to the management, control, supervision, and destruction of a self-confessed embezzler, without any restraint, control, or direction whatever from any other source."

Judgment is then asked for the amount of the loss, due to the inattention and neglect of the defendants, etc.

It is fully established, in this jurisdiction and elsewhere, that the directors and managing officers of a corporation are to be properly considered and dealt with as trustees or quasi trustees in respect to their corporate management, and may, in proper instances, be held liable for loss or depletion of the company's assets, due to their wilful or negligent failure to perform their official duties. They are not, as a rule, responsible for mere errors of judgment (Fisher v. Fisher, 170 N. C. 378, 87 S. E. 113, and authorities cited), nor for slight omissions, from which the loss complained of could not have reasonably been expected; but, where they accept these positions of trust, they are expected and required to give them the care and attention that a prudent man should exercise in like circumstances and charged with a like duty; usually the care that he shows in the conduct of his own affairs of a similar kind; and if there is a breach of legal duty in this respect, causing a loss of the company's assets, the corporation may sue, and, in case of insolvency, the action can be maintained by the receiver. Pittsburg Steel Co. v. Davidson Hardware Co. 175 N. C. 450, 95 S. E. 896; Whitlock v. Alexander, 160 N. C. 465, 76 S. E. 538; Pender v. Speight, 159 N. C. 612, 75 S. E. 851; McIver v. Young Hardware Co. 144 N. C. 478, 119 Am. St. Rep. 970, 57 S. E. 169; Houston v. Thornton, 122 N. C. 365, 65 Am. St. Rep. 699, 29 S. E. 827; Solomon v. Bates, 118 N. C. 311, 54 Am. St. Rep. 725, 24 S. E. 478; Townsend v. Williams, 117 N. C. 330, 23 S. E. 461; Hill v. Pioneer Lumber Co. 113 N. C. 173, 21 L.R.A. 560, 37 Am. St. Rep. 621, 18 S. E. 107; Briggs v. Spaulding, 141 U. S. 132, 35 L. ed. 662, 11 Sup. Ct. Rep. 924; Fisher v. Parr, 92 Md. 245, 48 Atl. 621; Olney v. Connecticut Land Co. 16 R. I. 597, 5 L.R.A. 361, 27 Am. St. Rep. 767, 18 Atl. 181; Hodges v. New England Screw Co. 1 R. I. 312,

Corporation—liability of directors.

Same—errors of judgment—liability.

Same—measure of care required.

Parties—action against directors of corporation.

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53 Am. Dec. 624; Williams v. McKay, 40 N. J. Eq. 189, 53 Am. Rep. 775; Bosworth v. Allen, 168 N. Y. 157, 55 L.R.A. 751, 85 Am. St. Rep. 667, 61 N. E. 163; Cook, Corp. §§ 701–703, 869; 2 Thomp. Corp. § 1410; 3 Pom. Eq. Jur. §§ 1090 et seq.; Clark, Corp. p. 515.

In Briggs v. Spaulding, 141 U. S. 132, 35 L. ed. 662, 11 Sup. Ct. Rep. 924, the controlling principle is stated as follows: "Directors of a national bank must exercise ordinary care and prudence in the administration of the affairs of a bank, and this includes something more than officiating as figureheads. They are entitled under the law to commit the banking business, as defined, to their duly authorized officers; but this does not absolve them from the duty of reasonable supervision, nor ought they to be permitted to be shielded from liability because of want of knowledge of wrongdoing, if that ignorance is the result of gross inattention."

In Fisher v. Parr, 92 Md. 245, 48 Atl. 621, it is held among other things: "Equity has jurisdiction of a bill filed by a corporation, or by its receivers when insolvent, to enforce the personal liability of the directors of the corporation for negligence in the performance of their duties. Directors or managers of a corporation are required to perform their duties with reasonable skill and care, and are answerable for neglect to exercise that degree of prudence that men generally exercise in their own affairs under like circumstances. It is not enough that directors employ officers and agents of good character and skill, but the conduct of the agents must be watched with such vigilance as a discreet business man would exercise over his own affairs. The directors are liable if they suffer the corporate property to be lost by gross inattention to the duties of their trust, and are not relieved from liability because they had no actual knowledge of wrongdoing, if that ignorance was the result of gross negligence."

In that case Associate Justice Fowler, delivering his learned and well-considered opinion, makes further reference to the duty properly imposed upon directors as follows: "What, then, is the care which is required of directors? There ought to be no difficulty about the answer to this question. Directors are selected by the stockholders to manage the concerns of the corporation, and it would seem, therefore, to require no authority, nor, indeed, more than the bare statement of the fact, that, as Lord Hatherley said in Land Credit Co. v. Fermoy, L. R. 5 Ch. 770, 'if the directors sleep, instead of being awake, their being asleep could not exempt them from the consequences of not attending to the business of the company.' It is not, of course, to be expected that the directors shall attend to the current business; but they must, at their peril, give such attention to and so manage the concerns of the company that they may be able at all times to know what their executive officers and other agents, as well as their fellow directors, are doing, and how they are acting in respect to the funds and property of the corporation. In Williams v. McKay, 40 N. J. Eq. 189, 53 Am. Rep. 775, Chief Justice Beasly said: 'I entirely repudiate the notion that this board of managers could leave the entire affairs of this bank to certain committeemen, and then, when disaster to the innocent and helpless cestuis que trustent ensued, stifle all complaints of their neglect by saying: We did not do these things and we know nothing about them. . . . The neglectful acts in question cannot be regarded by the court as isolated instances, for they run through the whole period of the life of the institution, and thus evince a systematic and habitual disregard of the company's charter, and a very striking indifference to the security of the money held in trust by them.'"

Under the doctrine as declared and approved in these well-consid-

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ered authorities, the plaintiff has undoubtedly set forth a good cause of action, and if, on the hearing, the facts are established as stated, defendants, or those of them shown to be in default, may be held liable for the loss which resulted as the proximate consequence of their negligence.

Corporation—money embezzled by official—liability of directors.

In Houston v. Thornton, 122 N. C. 365, 65 Am. St. Rep. 699, 29 S. E. 827, and Solomon v. Bates, 118 N. C. 311, 54 Am. St. Rep. 725, 24 S. E. 478, recovery by a stockholder against individual directors was sustained; but there, as will appear from a perusal of those well-considered cases, the individual stockholder had suffered the injury, having been induced to acquire and pay for stock, comparatively worthless, by the negligent or fraudulent representations of the directors sued. But where, as in this case, the wrong has been done to the corporation, it must sue, or, on proper averment, the company or its legal representative should ordinarily appear as a party either plaintiff or defendant. See Pender v. Speight, 159 N. C. 612, 75 S. E. 851; Braswell v. Pamlico Ins. & Bkg. Co. 159 N. C. 629, 42 L.R.A. (N.S.) 101, 75 S. E. 813; Coble v. Beall, 130 N. C. 533, 41 S. E. 793; Pom. Eq. Jur. §§ 1090 et seq.

Parties—corporation.

As we understand their position, however, defendants in this case have raised no objection to the form of the suit, nor by reason of improper parties, but rest their demurrer on the ground: (1) That the court will take judicial notice of the fact that, in the long period covered by the alleged default of defendants, the stockholders themselves should have had their regular meetings, and are guilty of contributory negligence, barring recovery, in failing to have the mismanagement corrected, and in the election of Hammond as director. (2) That the company, through its directors, having received and retained the $3,000 paid in adjustment of Hammond's default, is estopped from any suit on account of his said acts.

But neither objection can for a moment be maintained. As to the first position, it would suffice to say that, the corporation being insolvent and in the hands of receivers, there are presumptively creditors whose rights are to be considered, and, as a matter of fact, an unsatisfied judgment against the company is annexed as a part of the complaint; but, apart from this, it is the accepted position that a demurrer must restrict itself to the facts as they appear in the complaint, and, if the legal position insisted on be conceded, it nowhere appears in the complaint that there has been any negligence on the part of the present holders of the shares of stock, barring recovery. Giving the fault its technical term, this, at best, would be a speaking demurrer, condemned both under the common-law and Code systems of pleading. Von Glahn v. De Rossett, 76 N. C. 292; Green, Pl. & Pr. under Code, § 878. In the last citation, it is said: "A demurrer is only appropriate when the defect or objection appears on the face of the pleading, as it is not the province of a demurrer to state objections not apparent on the face of the pleadings, nor can it do so either under the old or the new system. Such a practice could not be tolerated."

Receiver—corporation—stockholders' neglect as defense to action.

Pleading—demurrer—scope.

Same—demurrer—question open.

As to the second ground, if this were an action seeking further recovery against Hammond, the position might require consideration; but the action, as we have seen, is against the defendants, the directors and managing officers of the company, to recover for the loss of

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Estoppel—corporation—acceptance of settlement.

the company's assets, attributable to their own negligent breach of duty, —the taking of this $3,000, when they had a mortgage to secure $6,000, being one of the items of charge. This may have been a mere error of judgment on their part, or it may have been the best course to take under the circumstances presented; but we fail to see how it could inure to the protection of defendants, except in reduction of the damages, if any, that may be shown against them, and this effect is allowed it in the complaint.

There is no error, and the judgment overruling the demurrer is affirmed.

ANNOTATION.

Liability of directors for defalcations by executive officer or employee.

I. Directors of corporations in general, 867.
II. Directors of commercial banks:
a. In general, 869.
b. Judicial statements and explanations, 874.
III. Directors of savings banks, 877.
IV. Miscellaneous, 879.

I. Directors of corporations in general.

In some authorities we find a disposition to recognize two theories of a director's duty: one, that of the care used by a prudent man in his own affairs; the other, that of the care used by a prudent man under the circumstances; and some cases make a sharp distinction between the two. The reader will recognize that the limited scope of this note does not admit of a comprehensive review of the authorities on the general principles of a director's liability, but it should be said that the court in the passage immediately quoted below seems to go too far in stating that it is generally held that the care and diligence required of directors is such as a prudent man exercises in his own affairs. It will be seen that a considerable proportion of the cases were decided on demurrer, and these are often of academic rather than of practical value.

In Horn Silver Min. Co. v. Ryan (1889) 42 Minn. 196, 44 N. W. 56, the court said: "The measure of care and diligence required of directors is generally held to be such as a prudent man exercises in his own affairs. Scott v. Depeyster (1833) 1 Edw. Ch. (N. Y.) 547. But, as Morawetz (1 Priv. Corp. § 552) justly observes, the plain and obvious rule is that directors impliedly undertake to use as much diligence and care as the proper performance of the duties of their office requires. What constitutes a proper performance of the duties of a director is a question of fact, which must be determined in each case in view of all the circumstances. The character of the company, the condition of its business, the usual method of managing such companies, and all other relevant facts must be taken into consideration. It is evident that no abstract reasoning can be of service in reaching a proper solution."

Directors are liable for reasonable care. Charitable Corp. v. Sutton (1742) 2 Atk. 400, 26 Eng. Reprint, 642, 9 Mod. 349, 88 Eng. Reprint, 500; Horn Silver Min. Co. v. Ryan (1889) 42 Minn. 196, 44 N. W. 56; Shea v. Knoxville & K. R. Co. (1877) 6 Baxt. (Tenn.) 277; BESSELIEU v. BROWN (reported herewith), ante, 862; Loan Soc. v. Eavenson (1915) 248 Pa. 407, 94 Atl. 121.

The "committeemen" of a loaning corporation formed to assist poor persons, who neglected the precautions of their by-law and suffered the business to be entirely under the control of executive agents, were held responsible for the frauds of those agents, and it was no answer to say that the committeemen served without compensation. Charitable Corp. v. Sutton (1742) 2 Atk. 400, 26 Eng. Reprint, 642, 9 Mod. 349, 88 Eng. Reprint, 500.

A complaint seeking to hold a director for unlawful loans made to themselves by the president and vice president of the plaintiff company was

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held good against a demurrer where, after stating the facts in reference to the misappropriation and use of the funds of the corporation by two of the directors, who were officers and specially intrusted with the management of the same, with full knowledge by the defendant, it shows in substance, among other things, that the defendant, who was a director for a series of years, charged with the duties usually pertaining to that office, and with the duty of exercising care and oversight over the officers of the company, wholly neglected his official duty in respect to the transactions of the defaulting officers and the protection of the funds of the company; that the means of knowledge were within his reach; that he ought to have known the truth in respect to the fraud and misconduct charged, and to have taken steps to prevent and expose the same, which he wholly failed to do, and abstained from attending the meetings, and neglected to perform his duties to the corporation and its stockholders in the protection of the rights and property of the corporation; and that, by reason of his nonfeasance and neglect, the plaintiff had been damaged as claimed. Horn Silver Min. Co. v. Ryan (1889) 42 Minn. 196, 44 N. W. 56, supra.

Directors of a corporation are liable for losses and defalcations occasioned by their neglect, as well as by their positive misconduct; and those appointed by the state are responsible, in the same manner and to the same extent as the directors elected by the stockholders, for their neglect of their duties, resulting in loss to the corporation. Shea v. Knoxville & K. R. Co. (1877) 6 Baxt. (Tenn.) 277 (on demurrer).

It will be observed that the reported case (BESSELIEU v. BROWN, ante, 862) is decided upon demurrer.

Directors of a society which lends on jewelry and other collateral, who re-employ a person suspected of being culpably implicated in the frauds of a customer, should answer for subsequent thefts of collateral made by such person so employed. Loan Soc. v. Eavenson (1915) 248 Pa. 407, 94 Atl. 121.

But directors are not insurers. Scott v. Depeyster (1833) 1 Edw. Ch. (N. Y.) 515; Vance v. Phœnix Ins. Co. (1880) 4 Lea (Tenn.) 385; Bloom v. National United Ben. Sav. & Loan Co. (1894) 81 Hun, 120, 30 N. Y. Supp. 700, affirmed in (1897) 152 N. Y. 114, 46 N. E. 166; McEwen v. Kelly (1913) 140 Ga. 720, 79 S. E. 777.

One of the best known cases exonerating directors is Scott v. Depeyster (1833) 1 Edw. Ch. (N. Y.) 515, holding that directors of an insurance company cannot be charged with personal liability as for negligence in failing to discover a systematic practice of embezzlement by the secretary, merely because a different manner of investigating his accounts would have disclosed his embezzlement, but that their liability depends upon the question whether the investigations made by them were conducted in the usual manner pursued in other companies by prudent men, careful of their own concerns. In this case the chancellor decided, as a matter of fact, that the directors of an insurance company were not chargeable with negligence in failing for a period of three years to discover large embezzlements made by the secretary, notwithstanding that if, at the time of the semiannual examinations, the directors had compared the fictitious bank book presented to them by the secretary with the genuine bank books, they would have instantly detected the frauds, it appearing from the testimony of persons connected with similar companies that the investigations made by the directors in question were conducted in substantially the same manner as is customary with such concerns. The court observed that directors place themselves in the situation of trustees.

The failure of directors of an insurance company to take a new bond from the secretary after the expiration of his first year of service does not render them liable for his subsequent embezzlement, where they mistakenly supposed that it was not necessary to take a new bond at the beginning of each year, and the language of the by-

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law on the subject was not clear. Vance v. Phœnix Ins. Co. (1880) 4 Lea (Tenn.) 385.

Directors are not insurers nor sureties for the fidelity of the officers of the company, and will not be liable for negligence in failing for a short period to discover dishonesty. Bloom v. National United Ben. Sav. & Loan Co. (1894) 81 Hun, 120, 30 N. Y. Supp. 700, affirmed in (1897) 152 N. Y. 114, 46 N. E. 166.

Thus, where three partners turned their business into a corporation, and one of them, who managed the business, ran it for two months, putting off his partners with insufficient accounts, they were not responsible for his defalcations. McEwen v. Kelly (1913) 140 Ga. 720, 79 S. E. 777.

Directors can be held liable on the ground of negligence only for such damages as are the natural and proximate result of their acts or omissions. Bloom v. National United Ben. Sav. & Loan Co. (1897) 152 N. Y. 114, 46 N. E. 166, affirming (1894) 81 Hun, 121, 30 N. Y. Supp. 1129.

II. Directors of commercial banks.

a. In general.

Limits of the liability.

The directors of a bank of discount are not insurers of the honesty of its executive officers or employees.

United States.—Briggs v. Spaulding (1890) 141 U. S. 132, 35 L. ed. 662, 11 Sup. Ct. Rep. 924, see also Rose's Notes to this case; Warner v. Penoyer (1898) 44 L.R.A. 761, 33 C. C. A. 222, 61 U. S. App. 372, 91 Fed. 587 (cashier); Rankin v. Cooper (1907) 149 Fed. 1010 (holding the directors for negligence); Dresser v. Bates (1918) 250 Fed. 525 (bookkeeper).

Kentucky.—Savings Bank v. Caperton (1888) 87 Ky. 306, 12 Am. St. Rep. 488, 8 S. W. 885 (cashier).

Louisiana. — Percy v. Millaudon (1829) 8 Mart. N. S. 68.

New Hampshire. — Ricker v. Hall (1899) 69 N. H. 592, 45 Atl. 556 (cashier).

New Jersey. — Campbell v. Watson (1901) 62 N. J. Eq. 396, 50 Atl. 120 (holding the directors for negligence).

Ohio.—Mason v. Moore (1906) 73 Ohio St. 275, 4 L.R.A.(N.S.) 597, 76 N. E. 932, 4 Ann. Cas. 240 (cashier; obiter).

Oregon.—Devlin v. Moore (1913) 64 Or. 433, 130 Pac. 35 (president and cashier).

Pennsylvania.—Swentzel v. Penn Bank (1892) 147 Pa. 140, 15 L.R.A. 305, 30 Am. St. Rep. 718, 23 Atl. 405 (president).

In Savings Bank v. Caperton (1888) 87 Ky. 306, 12 Am. St. Rep. 488, 8 S. W. 885, supra, where the bank had both a savings and a general department, it was held that the directors were not liable for the embezzlements of the cashier, extending over nine years, and that a bank director who serves without compensation is neither required to be an expert nor a competent bookkeeper, nor do more in the general management of the bank with reference to its cashier and bookkeeper than to see, in the absence of any reason for doubting his fidelity to the trust confided to him, that the weekly, daily, or monthly statements made to the board correspond with the general balances upon the books. The court stated that it was plain that any director, if at all conversant with bookkeeping, could have gone to the individual ledger, and, running over the accounts of depositors, and comparing them with the blotter ending each day's transactions, could have discovered the fraud practised by the cashier and bookkeeper. "But," the court added, "we know of no rule of law or reason that would require such an investigation by directors, and to hold them responsible for failing to discharge such a duty would be imposing a responsibility that no business man would assume without a compensation commensurate with the labor required." It was held that directors of a bank who receive no compensation for their services are not responsible for amounts embezzled by the cashier unless they were guilty of gross neglect, which means an absence of that diligence that ordinarily prudent men in the conduct of such business would have exercised.

In Warner v. Penoyer (1898) 44 L.R.A. 761, 33 C. C. A. 222, 91 Fed. 587,

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61 U. S. App. 372, supra, where the principal loss of a bank was due to loans made by the cashier to a concern in which he was interested, it was held that only those directors should be held liable who were members of the discount and examining committees, and that other directors against whom it was simply charged that they failed to attend the semiannual meetings of the board were not liable, as a director who has failed to act is not liable for the thefts or shortcomings of the cashier, unless it appears inferentially, at least, that his omission had some proximate relation to the losses. It was also held that directors of a national bank are not required to adopt any system of espionage over their cashier or any of their subordinate agents, or to entertain suspicion without any apparent reason, and, until some circumstance transpires to awaken a just apprehension of their want of integrity, have a right to assume they are honest and faithful.

In Dunn v. Kyle (1878) 14 Bush (Ky.) 134, directors of a bank were exonerated from liability for the defalcations of the cashier, who had been permitted to run the bank, where most of the time monthly statements of its condition were examined by the directors, who also counted the notes, bills, and money two or three times a year. (This seems to have been a commercial bank, although in name a savings bank.)

Where the president and cashier fraudulently withdrew from the bank and misappropriated notes of themselves and their concerns, and a concern of the president overdrew large sums, it was held that directors not participating in the frauds had used more than ordinary diligence, and were not negligent in being deceived by the executive officers. Devlin v. Moore (1913) 64 Or. 433, 130 Pac. 35, supra.

A finding by the trial court that the directors of a national bank exercised due care in its management and control is sufficiently supported by the evidence to be sustained on appeal, notwithstanding that, for a period of ten years, the cashier was engaged in embezzling funds from the bank, concealing his defalcations by false entries in the books, where it further appears that, besides the examinations made by the bank examiner, there were two examinations yearly by a committee of the directors, conducted in the manner in which such banks are usually examined, without disclosing the defalcations, and that the cashier was a man of good standing in the community, notwithstanding that one of the directors knew that at a period fourteen years before the discovery of the embezzlements he had been engaged in speculation. Ricker v. Hall (1899) 69 N. H. 592, 45 Atl. 556, supra. The effect of this decision is merely that such facts did not require, as a matter of law, a finding of negligence on the part of the directors. It does not follow, of course, that a finding of negligence on such facts would not have been sustained.

The directors of a bank are not chargeable with gross negligence in failing sooner to discover the false and fictitious entries upon its books by which the frauds of its president were concealed, where an examination of all the books in the bank, with the single exception of the individual ledger, would not have disclosed the fraud, and by a rule of the bank, which also obtained in four fifths of the other banks in the city, the directors were not permitted to see such ledger because of the possible opportunity it might afford them to learn of the affairs of their business rivals. Swentzel v. Penn Bank (1892) 147 Pa. 140, 15 L.R.A. 305, 30 Am. St. Rep. 718, 23 Atl. 405, supra.

In Bates v. Dresser (1915) 229 Fed. 772, the district court held that directors of a bank were liable for most of the amount of stealings by the bookkeeper, as negligent "in not making examinations of the bank twice a year, and in not ascertaining, when such examinations were made, whether the liabilities of the bank, as they appeared on the depositors' ledger, corresponded with the balance due depositors on the cashier's ledger," and in failure to examine the checks in the

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bank when their attention was called to an apparent large and rapid decrease in the amounts due depositors, a by-law of the directors providing that "there shall be appointed by the board, every six months, a committee whose duty it shall be to examine into the affairs of the bank, to count its cash, and compare its assets and liabilities with the balances on the general ledger, for the purpose of ascertaining whether or not the books are correctly kept, and the condition of the bank in a sound and solvent condition, the result of which examination shall be reported to the board at their next regular meeting." But this judgment was reversed on appeal in Dresser v. Bates (1918) — C. C. A. —, 250 Fed. 525, supra, as requiring the application of a standard of diligence more exacting than any heretofore applied in the case of national bank directors. The court considered the by-law, which had been much disregarded, as not controlling, that it was at least doubtful whether the comparison suggested by the court below would have been efficacious without expert assistance, and that the decrease in the amounts due depositors was not so sudden or so long continued as to lead the directors to suspect fraud.

In this connection reference may be made to Mason v. Moore (1906) 73 Ohio St. 275, 4 L.R.A.(N.S.) 597, 76 N. E. 932, 4 Ann. Cas. 240, supra, where a purchaser of stock in a bank sued its directors for making a false report of its condition, and the court, in holding that the directors were not shown to be guilty of negligence in relation to losses resulting from secret speculations of the cashier, stated that while the directors owed the duty of reasonable supervision and that degree of care which is exercised by ordinarily careful and prudent men under the circumstances, yet they were not insurers of the fidelity of the cashier. There were false entries extending over six years, and it was indicated that an examination by a competent bookkeeper would have revealed them. It was assumed by the court that the directors served without pay.

In Briggs v. Spaulding (1890) 141 U. S. 132, 35 L. ed. 662, 11 Sup. Ct. Rep. 924, supra, see also Rose's Notes to this case, it was held that new directors of a bank, who permitted it during ninety days to continue as it had for many years, almost wholly in charge of its executive officers, were not liable for losses mainly due to overloans made by the person who was at first vice president, then president, and who for a time owned two thirds of the stock. He also took money of the bank, placing therefor slips of paper in the cash drawer as cash items.

A bank president and director who is away on leave of absence granted on account of ill health is not liable for acts of another officer during his absence. Ibid.

A nonresident director of a national bank who is the only member of the board not under control of the president is not liable to stockholders for money lost by the bank through wrongful loans by the president in his own interest, merely because of inattention to his duties as director, and failure to supervise local loans. Wallach v. Billings (1917) 277 Ill. 218, L.R.A.1918A, 1097, 115 N. E. 382.

Duty of care.

Directors of a commercial bank are liable for defalcations of its executive officers or employees, due to their want of reasonable care.

United States.—Robinson v. Hall (1894) 12 C. C. A. 674, 25 U. S. App. 48, 63 Fed. 222, reversing (1894) 59 Fed. 648; Gibbons v. Anderson (1897) 80 Fed. 345; Rankin v. Cooper (1907) 149 Fed. 1010.

Arkansas.—Fletcher v. Eagle (1905) 74 Ark. 585, 109 Am. St. Rep. 100, 86 S. W. 810.

Mississippi.—Ellis v. H. P. Gates Mercantile Co. (1912) 103 Miss. 560, 43 L.R.A.(N.S.) 982, 60 So. 649, Ann. Cas. 1915B, 526; Ventress v. Wallace (1916) 111 Miss. 357, L.R.A.1917A, 971, 71 So. 636.

Missouri.—Lyons v. Corder (1913) 253 Mo. 539, 162 S. W. 606.

New Jersey.—Ackerman v. Halsey (1883) 37 N. J. Eq. 356 (on demurrer), affirmed in (1884) 38 N. J. Eq. 501;

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Campbell v. Watson (1901) 62 N. J. Eq. 396, 50 Atl. 120.

New York.—Brinkerhoff v. Bostwick (1882) 88 N. Y. 52; Hand v. Atlantic Nat. Bank (1877) 55 How. Pr. (N. Y.) 231; Nelson v. Burrows (1881) 9 Abb. N. C. (N. Y.) 280.

Utah.—Warren v. Robison (1899) 19 Utah, 289, 75 Am. St. Rep. 734, 57 Pac. 287.

Directors of a bank are liable for losses caused by the stealing of its funds by an officer, if such losses are due to their gross negligence and inattention to the duties of their trust. Brinkerhoff v. Bostwick (1882) 88 N. Y. 52 (arising on demurrer).

Where the managing officer of a bank absorbed a large part of its assets in loans to himself and his concerns, it was held that the duty of the board of directors of a national bank is not discharged by selecting officers of good reputation for ability and integrity, and then leaving the affairs of the bank without any other supervision or examination than mere inquiry of the officers, and relying upon their statements until some cause for suspicion attracts their attention. Gibbons v. Anderson (1897) 80 Fed. 345.

Thus, the directors are not justified in committing the entire control of the bank to the president, however honest and faithful they believe him to be. Fletcher v. Eagle (1905) 74 Ark. 585, 109 Am. St. Rep. 100, 86 S. W. 810.

So, the directors of a bank will be liable for the stealings of the cashier if they are guilty of absolute and unqualified inattention and neglect, including failure to require security of the cashier. Ackerman v. Halsey (1883) 37 N. J. Eq. 356 (on demurrer), affirmed in (1884) 38 N. J. Eq. 501.

So, the directors of a bank were held liable for losses from defalcations of the cashier, due to their neglect, continued over a long period of years, in failing to audit the books of the bank. Ventress v. Wallace (1916) 111 Miss. 357, L.R.A.1917A, 971, 71 So. 636.

So, the court overruled a demurrer to a bill against directors of a bank, charging them with gross negligence and inattention in leaving the entire management and control of the bank to the president and cashier, permitting, among other things, the president to overdraw his account and the cashier to be in default in his cash. Trustees Mut. Bldg. Fund & Dollar Sav. Bank v. Bosseiux (1880) 3 Fed. 817 (apparently this was a bank of discount).

In Robinson v. Hall (1894) 12 C. C. A. 674, 25 U. S. App. 48, 63 Fed. 222, reversing (1894) 59 Fed. 648, a bill by the receiver of a national bank against the directors, to charge them with personal liability for losses caused by their negligence, was held good as against a demurrer, where it charged that during a period of more than three years, while the defendants were in office, the cashier, who mainly conducted the affairs of the bank, and of whom no bond was required, although he had but little property, committed frauds and irregularities which even the most casual attention to the affairs of the bank on the part of the directors would have revealed to them; and that, after the bank had been placed in the hands of a receiver, they improperly advised him that it was not necessary to record certain mortgages held by the bank, in consequence of which the security afforded by such mortgages was lost to the bank.

Where the losses to a bank were largely from improvident loans made to officers and concerns in which they were interested, and in some cases to concerns in which some of the directors were interested, the court, in reversing a nonsuit, said, inter alia, as to directors: "When sued for losses which resulted from careless or unlawful acts and unfortunate transactions, they can never set up as a defense that they did not examine the books or accounts of the bank, knew nothing about the loans or discounts, were ignorant of banking business, or that they intrusted the management and supervision of the business to the executive officers, in whom they had confidence." Warren v. Robison

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(1899) 19 Utah, 289, 75 Am. St. Rep. 734, 57 Pac. 287.

In Ellis v. H. P. Gates Mercantile Co. (1912) 103 Miss. 560, 43 L.R.A.(N.S.) 982, 60 So. 649, Ann. Cas. 1915B, 526, the court sustained an order overruling a demurrer to a bill against bank directors which alleged, among other things: that by-laws, duly adopted by the stockholders of the bank, provided that the directors should have regular monthly meetings; that they should, through a committee of their number, examine the condition of the bank, count the cash, compare its assets and liabilities with the ledger, and, in short, direct the finances and general business of the bank; that the directors failed and refused to hold regular monthly meetings, and failed to appoint a finance committee, as provided, and to keep full and accurate reports of the meetings, and to require the cashier to execute a fidelity bond; that they disregarded their duties as shown above, and failed to make proper supervision, investigation, and report; that they employed a cashier who was wholly inefficient and incompetent to discharge the duties of his office, who was a reckless speculator, dishonest and dissipated, all of which they knew, or could have known by the exercise of the slightest diligence; that by his misappropriations, and his making improvident and unlawful loans, and by his general recklessness and unbusinesslike conduct, large sums of money were lost to the bank, resulting in the insolvency thereof.

In Lyons v. Corder (1913) 253 Mo. 539, 162 S. W. 606, where the members of the court were not agreed as to the expression of the care due from a bank director, the directors of the M. bank were held liable where it appeared that the cashier of the bank was engaged in gambling deals with keepers of certain bucket shops; that to get money for this purpose, he had appropriated the funds of the bank by overdrafts of his personal account, and also by making fraudulent drafts upon two of its depository banks; that in so doing it was his habit to note on the bank register book that a draft had been drawn upon one of these correspondents for a trifling or insignificant sum, and thereafter to fill out the draft for a sum in many cases involving thousands of dollars; and that upon the payment of such drafts, the cashier would appropriate to himself the fraudulent excess. The whole extent and nature of the wrongdoing of the cashier might have been discovered by the defendant directors if they had examined at their monthly meetings the state of his personal account, and had also caused to be submitted to them or to a committee appointed by them, the monthly return statements, called "reconcilement sheets," made to the M. bank by its two correspondent banks, which showed the amount which such depositories had paid out during each month upon the drafts drawn upon them by the cashier of the M. bank. It was conceded that no such examination was had or caused to be made by the defendant directors. "Their neglect in this respect was a clear violation of the duties imposed upon them by the general law as well as by the statutes of the state."

In Campbell v. Watson (1901) 62 N. J. Eq. 396, 50 Atl. 120, the directors of a bank were held responsible for amounts of which the cashier defrauded the bank by drawing drafts upon its New York correspondent for amounts in excess of those shown by draft stubs, from which the entries of credit to the correspondent were made in the bank's books. The ground of the liability was the failure of the directors, either personally or by some person other than the cashier himself, to compare the monthly balance sheet or current account from the correspondent with the books of the bank, which, if done, would have disclosed the fraud. The court used language intimating that, upon general principles of law, the directors were bound to have such a comparison made, but based its decision to a large extent upon the fact that one of the by-laws of the bank expressly required the directors to appoint a committee once in every three months to examine into the affairs of the bank, to correct the cash, and make an inventory of the assets, and compare the same with the

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ledger balances to ascertain the condition of the bank and the accuracy of the books. It was also proved in this case that such examination by committees had been a part of the routine duties of boards of directors of all banks in the vicinity for many years. The court emphasized the fact that a comparison which would have disclosed the fraud would not have required the services of an expert accountant or bookkeeper. The directors were also held liable for a heavy loss, in that they permitted the cashier to borrow freely from the bank, although their attention was called to this by the bank examiner.

An ex-president of a bank, who continues on the board of directors, cannot escape his duty of care because his health causes frequent absences from the city, and prevents his giving proper attention to the bank's affairs. Rankin v. Cooper (1907) 149 Fed. 1010.

In Rankin v. Cooper (Fed.) supra, directors of a bank were held liable for matters occurring after their attention had been directed to the great use of the funds of the bank in speculative matters in which the president was interested.

Directors of a bank are liable for losses due to misappropriations of bank funds by the cashier for the purpose of stock speculations when they retain him in office several years after they learn of his having improperly obtained funds of the bank and lost them in stock speculations, and for the omission to adopt specified reasonable and customary methods to prevent or detect defalcations by the cashier. Hand v. Atlantic Nat. Bank (1877) 55 How. Pr. (N. Y.) 231 (demurrer); Nelson v. Burrows (1881) 9 Abb. N. C. (N. Y.) 280 (demurrer).

b. Judicial statements and explanations.

Perhaps the most comprehensive statement of the duties of bank directors is to be found in Rankin v. Cooper (1907) 149 Fed. 1010, supra, where Finkelnburg, J., said: "(1) Directors are charged with the duty of reasonable supervision over the affairs of the bank. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision over its affairs. (2) They are not insurers or guarantors of the fidelity and proper conduct of the executive officers of the bank, and they are not responsible for losses resulting from their wrongful acts or omissions, provided they have exercised ordinary care in the discharge of their own duties as directors. (3) Ordinary care, in this matter, as in other departments of the law, means that degree of care which ordinarily prudent and diligent men would exercise under similar circumstances. (4) The degree of care required further depends upon the subject to which it is to be applied, and each case must be determined in view of all the circumstances. (5) If nothing has come to the knowledge to awaken suspicion that something is going wrong, ordinary attention to the affairs of the institution is sufficient. If, upon the other hand, directors know, or by the exercise of ordinary care should have known, any facts which would awaken suspicion and put a prudent man on his guard, then a degree of care commensurate with the evil to be avoided is required, and a want of that care makes them responsible. Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. (6) Directors are not expected to watch the routine of every day's business, but they ought to have a general knowledge of the manner in which the bank's business is conducted, and upon what securities its larger lines of credit are given, and generally to know of and give direction to the important and general affairs of the bank. (7) It is incumbent upon bank directors, in the exercise of ordinary prudence, and as a part of their duty of general supervision, to cause an examination of the condition and resources of the bank to be made with reasonable frequency."

The foregoing statement from Rankin v. Cooper is substantially repeated in Devlin v. Moore (1913) 64 Or. 433, 130 Pac. 35, supra, where the court also said that directors are not required to be bookkeepers, and that "if

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a director performs his duty as such in the same manner as such duties are ordinarily performed by all other directors of all other banks of the same city, it cannot be fairly said that he was guilty of gross negligence."

In sustaining an order overruling a demurrer to a bill against directors the court said, inter alia: "The directors, as the officers charged with the management of the bank, are required to be diligent and careful in conducting the bank's business. . . . It is the duty of a director to know the condition of his bank and to see that its affairs are honestly and properly managed. He cannot shirk this duty and avoid liability." Ellis v. H. P. Gates Mercantile Co. (1912) 103 Miss. 560, 43 L.R.A.(N.S.) 982, 60 So. 649, Ann. Cas. 1915B, 526, supra.

In Trustees Mut. Bldg. Fund & Dollar Sav. Bank v. Bosseiux (1880) 3 Fed. 817, supra, it was said: "All authorities now tend to the conclusion that directors of banks and other moneyed corporations hold the relation to stockholders, depositors, and creditors of trustees to cestuis que trust, and as such are personally responsible for frauds and losses resulting from gross negligence and inattention to the duties of their trust." (Apparently this was a bank of discount.)

"The various directions in which the care of directors of banking institutions should be exercised in order to protect against fraud and theft of employees have greatly increased in number and variety within fifty years. . . . The wisdom and propriety, and, from the business man's standpoint, the necessity, of these periodical examinations, does not rest upon suspicion of cashiers and tellers of banks as individuals, or as a class, but upon what experience has shown to be a liability of the best and most reliable men to yield to temptation and go astray, and to abstract funds without any intention or expectation of ultimately defaulting. . . . But this duty of prevention does not require, in the absence of actual suspicion of honesty, a daily watching of each motion and action of the officer who has opportunity to borrow or steal. . . . The directors do not occupy the position of guarantors of his honesty. They are bound only to exercise such care and diligence in looking over his work as experience has shown is at once proper as well as practicable, and as is exercised by other experienced directors, and as is required by their charter and by-laws." Pitney, V. C., in Campbell v. Watson (1901) 62 N. J. Eq. 396, 50 Atl. 120, supra.

In Warren v. Robison (1899) 19 Utah, 289, 75 Am. St. Rep. 734, 57 Pac. 287, supra, it was said that it is necessary for directors "to give the business under their care such attention as an ordinarily discreet business man would give to his own concerns under similar circumstances; and it is, therefore, incumbent upon them to devote so much of their time to their trust as is necessary to familiarize them with the business of the institution, and to supervise and direct its operations."

In a case where losses of a bank were due to bad loans, some of them to the cashier and his firm, the court said, in denying the right of action by the creditors against the directors: "It would therefore seem that the defendant directors were remiss in the discharge of their duties in not knowing, when it was their duty to know, that loans were being made by the bank in violation of the statute, and to persons in amounts larger than its capital. . . . They were guilty of gross neglect in leaving the entire management of the business of the bank to the cashier. And it is no excuse for the want of diligence to say that they had no benefit from it, and that their services were gratuitous, when, by the exercise of ordinary care, they could have prevented the disastrous consequences which flowed from the want of such care." Union Nat. Bank v. Hill (1899) 148 Mo. 380, 71 Am. St. Rep. 615, 49 S. W. 1012.

But in Swentzel v. Penn Bank (1892) 147 Pa. 140, 15 L.R.A. 305, 30 Am. St. Rep. 718, 23 Atl. 405, supra, it was said: "It cannot be the rule that the director of a bank is to be held to the same ordinary care that he takes of his own affairs. He receives

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no compensation for his services. He is a gratuitous mandatory. His principal business at the bank is to assist in discounting paper, and for that purpose he attends at the bank at stated periods—generally once or twice a week—for an hour or two. The condition of the bank is then laid before him, in order that he may know how much money there is to loan. Once or twice a year there is an examination of the condition of the bank, in which he participates. The cash on hand is counted, the bills receivable and sureties examined, to see whether they correspond with the statements as furnished by the officers. Beyond this he has little to do with either the cash or the books of the bank. They are in the care of salaried officials who are paid for such services, and selected by reason of their supposed integrity and fitness. To expect a director, under such circumstances, to give the affairs of the bank the same care that he takes of his own business, is unreasonable, and few responsible men would be willing to serve upon such terms. In the case of a city bank, doing a large business, he would be obliged to abandon his own affairs entirely. A business man generally understands the details of his own business, but a bank director cannot grasp the details of a large bank without devoting all his time to it, to the utter neglect of his own affairs."

In Dunn v. Kyle (1878) 14 Bush (Ky.) 134, supra, the court, in holding directors of a bank not liable for the defalcation of the cashier, said: "A skilful accountant, with a suspicion resting on his mind as to the honesty of this man, would have detected his frauds at once, and prevented these heavy losses to the parties in interest; but those who had such implicit confidence in him as to place almost the sole control of the bank in his hands, he found but little difficulty in deceiving, and eluded by his shrewdness any suspicion even, although the preponderance of the proof shows that the appellees, in the discharge of their duties toward him and the bank, exercised at least ordinary diligence. . . . Their own interests prompted them to use at least ordinary diligence, and when trusting to the honesty and fidelity of their cashier, and at the same time exercising that character of vigilance that is usual and customary with bank directors, it cannot be said that there was, nevertheless, an absence of ordinary care and such bad faith on their part as made them liable to the appellants. . . . When they select a man who at the time is universally regarded as honest and capable, and for the reason that they are themselves ignorant of the business in which they are about to embark, they have done only what the stockholders themselves would have done under the circumstances, and acted as ordinarily prudent men would have acted with reference to their own business transactions. . . . The directors, even as to strangers, and certainly as to stockholders, do not insure the fidelity and honesty of those employed in the bank and filling subordinate positions." (This seems to have been a commercial bank, although in name a savings bank.)

In Briggs v. Spaulding (1890) 141 U. S. 132, 35 L. ed. 662, 11 Sup. Ct. Rep. 924, supra (see also Rose's Notes to this case), the court said: "It is perhaps unnecessary to attempt to define with precision the degree of care and prudence which directors must exercise in the performance of their duties. The degree of care required depends upon the subject to which it is to be applied, and each case has to be determined in view of all the circumstances. They are not insurers of the fidelity of the agents whom they have appointed, who are not their agents, but the agents of the corporation; and they cannot be held responsible for losses resulting from the wrongful acts or omissions of other directors or agents, unless the loss is a consequence of their own neglect of duty, either for failure to supervise the business with attention, or in neglecting to use proper care in the appointment of agents. . . . Bank directors are often styled trustees, but not in any technical sense. The relation between the corporation and them is rather that of principal and agent, certain-

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ly so far as creditors are concerned, between whom and the corporation the relation is that of contract, and not of trust. But, undoubtedly, under circumstances, they may be treated as occupying the position of trustees to cestui que trust. . . . Directors must exercise ordinary care and prudence in the administration of the affairs of a bank, and that this includes something more than officiating as figureheads. They are entitled under the law to commit the banking business, as defined, to their duly authorized officers, but this does not absolve them from the duty of reasonable supervision, nor ought they be permitted to be shielded from liability because of want of knowledge of wrongdoing, if that ignorance is the result of gross inattention."

In Briggs v. Spaulding (U. S.) supra, the court also said, referring to a case where a bank had been wrecked through transactions of the president and cashier: "In Percy v. Millaudon (1829) 8 Mart. N. S. (La.) 74, which has been cited as a leading case for more than sixty years, the supreme court of Louisiana, through Judge Porter, declared that the correct mode of ascertaining whether an agent is in fault 'is by inquiring whether he neglected the exercise of that diligence and care which was necessary to a successful discharge of the duty imposed on him. That diligence and care must again depend on the nature of the undertaking. There are many things which, in their management, require the utmost diligence and most scrupulous attention, and where the agent who undertakes their direction renders himself responsible for the slightest neglect. There are others, where the duties imposed are presumed to call for nothing more than ordinary care and attention, and where the exercise of that degree of care suffices. The directors of banks, from the nature of their undertaking, fall within the class last mentioned, while in the discharge of their ordinary duties. It is not contemplated by any of the charters which have come under our observation, and it was not by that of the Planter's Bank, that they should devote their whole time and attention to the institution to which they are appointed, and guard it from injury by constant superintendence. Other officers on whom compensation is bestowed for the employment of their time in the affairs of the bank have the immediate management. In relation to these officers, the duties of directors are those of control, and the neglect which would render them responsible for not exercising that control properly must depend on circumstances, and in a great measure be tested by the facts of the case. If nothing has come to their knowledge to awaken suspicion of the fidelity of the president and cashier, ordinary attention to the affairs of the institution is sufficient. If they become acquainted with any fact calculated to put prudent men on their guard, a degree of care commensurate with the evil to be avoided is required, and a want of that care certainly makes them responsible.' "

III. Directors of savings banks.

"The difference in the relation between a savings bank and its depositors, on the one hand, and an ordinary bank of discount and its depositors on the other, is well understood, and without going so far as to say that the directors of a savings bank are trustees in any higher sense than those of other banks, it is, nevertheless, evident from the character of the institution, that the rule requiring of bank directors the exercise of reasonable care and diligence in the performance of their duties should not be relaxed at all in the case of savings bank directors. Reasonable care in the performance of the duties of director of a savings bank means the exercise of the same degree of care that ordinarily prudent directors of savings banks would exercise under like circumstances. . . . Absolute uniformity of usage is not required, but in savings banks, as in the conduct of other business, the omission to make use of an ordinary and approved precaution against the known risks of the business is, in the absence of any substitute of such omitted precaution, prima facie evidence of a want of rea-

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sonable care. The directors were careful in selecting as treasurer a man who enjoyed, in a peculiar degree, the confidence of the community; they used care in the selection of competent auditors; they were diligent in attending directors' meetings; they were prudent and successful in investing the funds of the bank; and they were themselves honest, prudent, and successful business men. Nevertheless, the fact that they fully discharged their duty as directors in these other respects does not release them from the discharge of the very important duty of reasonable oversight and supervision of the treasurer's conduct of his office. That such was their duty is well settled." Lippitt v. Ashley (1915) 89 Conn. 451, 94 Atl. 995.

The directors of a savings bank were held guilty of negligence for embezzlement by its treasurer where no trial balance was taken during the thirty-nine years over which his stealing extended, although it was customary in savings banks in the state to take such balances from once in three months to once in two years, and the taking of such balance would have revealed the embezzlement. Ibid.

A negligent surrender by the directors of a savings bank of the conduct of its affairs into the hands of certain officers, making possible wrongful withdrawals of money by one of them, was held to make the directors in general secondarily liable therefor after their executive committee, particularly where there was a failure to require bonds of the officers in charge. Williams v. McKay (1889) 46 N. J. Eq. 25, 18 Atl. 824.

A bill against directors of a savings bank, although they receive no compensation, will be good against a demurrer if it alleges in detail, over a series of years, "official delinquencies in the following particulars, viz.: first, in the investment of moneys in a large number of specified instances on insufficient landed security, and in violation of the charter of the company; second, in the loaning of other moneys on mere personal security; third, in permitting the president of the bank, . . . to withdraw, without giving adequate security, and to apply to his own use, the funds of the bank; and fourth, in the failure to require the president to give bond for the faithful performance of his official duties." Williams v. McKay (1885) 40 N. J. Eq. 189, 53 Am. Rep. 775.

Where the managers of a savings bank, who were not members of the committees having charge of the investments and the examination of the books, never discovered the existence of a practice that had continued for a long period of years, of making investments, in violation of the charter, on insufficient real-estate security and upon personal security, or of the practice of the president of overdrawing his account, such want of knowledge is of itself, and until explained, prima facie proof of gross negligence on their part. Ibid.

Where the directors of a savings bank met, in some years, but once or twice, instead of every week, as required by their by-laws, and never caused the books of the bank to be examined, or called for a statement of their accounts with other banks, while their vaults and cash drawers were emptied by illegal abstractions and insolvent loans, they were held liable. Marshall v. Farmers' & M. Sav. Bank (1889) 85 Va. 676, 2 L.R.A. 534, 17 Am. St. Rep. 84, 8 S. E. 586.

Where the statute provided that no trustee or manager of any savings bank shall be personally liable except for matters stated, including "for neglect or omission in complying with the rules and regulations required by this act to be adopted," etc., a trustee and manager of a savings bank who knows that the act is not being complied with cannot escape responsibility for the fraud of the actuary, which could have been prevented by compliance with the requirements of the act, upon the ground that such actuary was a man of high reputation, who enjoyed the confidence, not only of the trustees and managers, but of his fellow townsmen. Re Cardiff Sav. Bank (Davies's Case (1890) 59 L. J. Ch. N. S. 450, L. R. 45 Ch. Div. (Eng) 537, 62 L. T. N. S. 628, 38 Week. Rep. 571, 2 Megone, 136.

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But a trustee and manager of a savings bank is not chargeable with liability under such act, where he does not know of neglect and omissions in that respect. Re Cardiff Sav. Bank (Bute's Case) [1892] 2 Ch. (Eng.) 100, 61 L. J. Ch. N. S. 357, 66 L. T. N. S. 817, 40 Week. Rep. 538.

In Lippitt v. Ashley (1915) 89 Conn. 451, 94 Atl. 995, supra, the court said also: "The standard of reasonable care required by law of bank directors is affected by their fiduciary position, by the nature of the business, and by the fact that, in accepting the office, they hold themselves out as reasonably competent and reasonably qualified to perform the duties of the office. So that the issue in this case is not whether the defendants have conducted themselves as might reasonably be expected of ordinarily prudent men, but whether they have conducted the affairs of this bank as might reasonably be expected of ordinarily prudent bank directors."

IV. Miscellaneous.

A director of a bank whose duties were executive, but were largely confined to Dublin, received a statement of rumors that out of the business carried on at Cork several directors had received large advances without giving adequate security; and it was held he was negligent in not thereupon going to Cork and examining the accounts. Jackson v. Munster Bank (1885) Ir. L. R. 15 Eq. 356.

In Dovey v. Cory [1901] A. C. (Eng.) 477, 6 B. R. C. 179, a director of a joint stock bank was exonerated where, by the frauds of the executive officers, there were made wrongful declarations of dividends and improper loans, when the minutes of the directors' meetings showed that, speaking generally, they attended with reasonable regularity and transacted a large amount of business, but that no director, unless it was the chairman, attended to any details not brought before the board either by the chairman or by the general manager. Lord Davey said in his opinion that "directors are not bound to examine entries in the company's books. It was the duty of the general manager and (possibly) of the chairman to go carefully through the returns from the branches, and to bring before the board any matter requiring their consideration; but the respondent was not, in my opinion, guilty of negligence in not examining them for himself, notwithstanding that they were laid on the table of the board for reference."

It may be noted that in Houston v. Thornton (1898) 122 N. C. 365, 65 Am. St. Rep. 699, 29 S. E. 827, directors of a bank were held liable to one purchasing stock therein on the faith of their reports and dividends, where certain of the officers and directors had wrecked the bank by absorbing its funds, and the negligence of the defendants was not excused by the fact that they resided away from the town in which the bank was situated.

The court in the reported case (BESSELIEU v. BROWN, ante, 862) is treating of the liabilities of trustees in general where it refers to Fisher v. Fisher (1915) 170 N. C. 378, 87 S. E. 113, as that case related to the duties of a trustee of an estate, and not to the duties of a director.

In Murphy v. Penniman (1907) 105 Md. 452, 121 Am. St. Rep. 583, 66 Atl. 282, where the court sustained in part an order overruling a demurrer to a bill seeking to hold directors of a bank liable for losses partly due to misappropriations of money by its treasurer, the facts are not fully developed.

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STATE OF KANSAS, Appt.,
v.
L. M. CRAWFORD et al.

SAME, Appt.,
v.
PEOPLE'S AMUSEMENT COMPANY et al.

Kansas Supreme Court — January 11, 1919.

(104 Kan. 141, 177 Pac. 360.)

Legislature — delegation of power — building regulations.

1. The legislature cannot delegate to private individuals and private associations of persons the power to make obligatory rules concerning the management and care of property, nor provide that the breach of such rules shall be a penal offense.

[*See note on this question beginning on page* 882.]

Statute — uncertainty — fire prevention.

2. The provision in § 5 of the Fire Prevention Act, § 4863 of the General Statutes of 1915, requiring that "all electric wiring shall be in accordance with the national electrical code," is void for uncertainty.

Electricity — adoption of electrical code.

3. The "national electrical code" is a set of rules relating to electrical wiring, etc., promulgated by a body of private individuals and voluntary unofficial organizations, which meets occasionally throughout the United States. These rules are revised from time to time. A statute requiring the owners of theaters to make all their electrical wiring conform to the "national electrical code" is an attempt to delegate the legislative power of this state, and is therefore unconstitutional.

Headnotes by DAWSON, J.

APPEAL by the state from judgments of the District Court for Shawnee County quashing informations charging defendants with operating theaters without having their electrical wiring conform to the "national electrical code." *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. S. M. Brewster, Attorney General, and Hugh T. Fisher for the State.

Messrs. J. B. Larimer and W. W. Hooper for appellees.

Dawson, J., delivered the opinion of the court:

The state of Kansas appeals from judgments of the trial court, wherein certain informations charged defendants with misdemeanors under § 5 of the Fire Prevention Act (Gen. Stat. 1915, § 4863), which, among other matters, provides: "All electrical wiring shall be in accordance with the national electrical code."

Defendants conduct and operate theaters, and the informations alleged that they did unlawfully operate these theaters as places of amusement, etc., "without having the wiring of said theaters in accordance with the national electric code, to wit, by not having such wiring inclosed in conduit or armored cable, contrary to the form of the statutes."

Counsel for the state advise us: "The national electrical code consists of installation rules of the national board of fire underwriters for electrical wiring and apparatus, as recommended by the Underwriters' National Electric Association. It

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was originally drawn in 1897, as the result of the united efforts of the various insurance, electrical, architectural, and allied interests, which, through the national conference on standard electrical rules, composed of delegates from various national associations, unanimously voted to recommend it to their respective associations for approval or adoption."

This code is revised every two years. The edition of 1915 is a pocket manual, which apparently covers the whole art of installing electric switchboards, poles, lines, inside and outside wiring of theaters, car houses, garages and ships, also suitable designs and materials for fuses, circuit breakers, insulated joints, wireless telegraph apparatus, etc.

The manual recites that the national conference has disbanded, and that its work has been taken over by the following associations: American Electric Railway Association; American Institute of Electrical Engineers; Associated Factory Mutual Fire Insurance Companies; National Association of Electrical Inspectors; National Board of Fire Underwriters; National Electric Light Association; National Electrical Contractors' Association.

It is not disclosed where the national conference convened when this code was promulgated, nor where its periodical meetings for revision of these rules are held, but inventors, seeking to have their new electrical devices recognized by the code, are instructed to submit them to "underwriters' laboratories" in Chicago or New York.

In considering the correctness of the district court's decision in quashing the informations against the defendants, it is only necessary to recur to the most simple and elementary principles of civil government. In our commonwealth the power to make, amend, alter, and repeal the laws is vested in the legislature. That body may not abdicate its functions nor delegate its powers to any other body, however learned, wise, and farsighted the latter may be. This principle of our Constitution and of our public policy is fundamental.

Legislature—delegation of power—building regulations.

Some courts, including our own, have relaxed, or seemingly relaxed, the rigid enforcement of this principle, in some instances, by giving countenance to legislation enacted to punish as misdemeanors, or otherwise to penalize, the breach of rules promulgated, or to be promulgated afterwards, by some subordinate official body created by the legislature. State v. Meyer, 94 Kan. 647, 146 Pac. 1007; Pappens v. United States, — C. C. A. —, 252 Fed. 55; Georgia R. & Bkg. Co. v. Smith, 70 Ga. 694; Isenhour v. State, 157 Ind. 517, 87 Am. St. Rep. 228, 62 N. E. 40; Hildreth v. Crawford, 65 Iowa, 339, 21 N. W. 667; People v. Brooks, 101 Mich. 98, 59 N. W. 444; Hurst v. Warner, 102 Mich. 238, 26 L.R.A. 484, 47 Am. St. Rep. 525, 60 N. W. 440; Polinsky v. People, 73 N. Y. 65; 8 Cyc. 830–834; 21 Cyc. 387, 388. See also State ex rel. Taylor v. Missouri P. R. Co. 76 Kan. 467, 471–481, 92 Pac. 606; Ex parte McNulty, 77 Cal. 164, 11 Am. St. Rep. 257, 19 Pac. 237, and Railroad Commission v. Grand Trunk Western R. Co. 179 Ind. 255, 100 N. E. 852.

But none of the cases cited has ventured so far afield as to intimate that the legislature might delegate to some unofficial organization of private persons, like the National Fire Protective Association, the power to promulgate rules for the government of the people of this state, or for the management of their property, or that the legislature might prescribe punishment for breaches of these rules. We feel certain that no such judicial doctrine has ever been announced. If assent to such a doctrine could be given, a situation would arise where owners of property with considerable persistence might learn what these code rules were, and incur the expense of making their property conform thereto, only to find that the National Fire Protective Asso-

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ciation had reconvened in Chicago, New York, or New Orleans, and had revised the code, and that the work and expense had to be undertaken anew. And there would be no end of such a state of affairs. Furthermore, there is no official way, indeed no practical way, for the average property owner to know what these code rules are. The laws of this state to which our people owe obedience must be officially published. The people may learn what these laws are, and they are privileged to meet legislative committees and petition the legislature for amendment, improvement, and amelioration of the laws. Shall it be intimated that if these fire prevention regulations, these "national electrical code" rules, are oppressive, or otherwise objectionable, the property owners of this state must be referred to some voluntary and unofficial conference of underwriters and electricians, which occasionally meets here, there, or anywhere in North America, for redress of grievances? But the fallacy of such legislation in a free, enlightened, and constitutionally governed state is so obvious that elaborate illustration or discussion of its infirmities is unnecessary. If the legislature desires to adopt a rule of the national electrical code as a law of this state, it should copy that rule, and give it a title and an enacting clause, and pass it through the senate and the house of representatives by a constitutional majority, and give the governor a chance to approve or veto it, and then hand it over to the secretary of state for publication.

Electricity—adoption of electrical code.

The clause in § 5 of the Fire Prevention Act (Gen. Stat. 1915, § 4863), requiring that "all electric wiring shall be in accordance with the national electrical code," is void for uncertainty, and the informations charging offenses thereunder were properly quashed.

Statute—uncertainty—fire prevention.

The court owes it to counsel for the state to say that in the presentation of this appeal they candidly acknowledge the critical point in the controversy, and admit that they have merely brought the case here to procure an authoritative determination of it.

The judgment is affirmed.

All the Justices concur.

ANNOTATION.

Delegation of matter of building regulations to private individuals or associations.

In the reported case (STATE V. CRAWFORD, ante, 880), a statute providing that all electrical wiring should be in accordance with the code of a certain electrical association was declared unconstitutional, as an attempt to delegate the legislative power. It will be observed that the legislation involved in this case was so comprehensive as not only to require a conformance with the code of the association, as it existed at the time the statute was enacted, but to require a compliance with any future changes which the association might see fit to make. This was clearly a delegation of a legislative function. Undoubtedly, the legislature might have used the code in determining what regulations should be adopted, and might, after an examination of the code, have incorporated its existing provisions in the statute as a part thereof, not as a code of the association, but as the legislature's own act and determination of what the regulations should be.

A search has disclosed no other case dealing with this particular question. The cases most analogous appear to be those involving statutes forbidding the erection of certain buildings, without first obtaining the consent of persons owning property, or living in the locality of the proposed site. These cases, inferentially at least, support the reported case, and hold the at-

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tempted delegation unconstitutional. Upon this ground, the courts have condemned ordinances—

—providing that no frame building should be erected, moved, or remodeled, until the owner should have obtained permission from all parties owning permanent brick or stone structures within a radius of 60 feet of the proposed structure, Tilford v. Belknap (1907) 126 Ky. 244, 11 L.R.A. (N.S.) 708, 103 S. W. 289;

—requiring the consent of neighboring property owners to the erection of nonfireproof buildings within fire limits, Hays v. Poplar Bluff (1915) 263 Mo. 516, L.R.A.1915D, 595, 173 S. W. 676;

—providing that no soap factory, slaughterhouse, bone or rendering factory should be erected within 300 feet of a dwelling, without the consent of the owner and occupant thereof, St. Louis v. Howard (1893) 119 Mo. 41, 41 Am. St. Rep. 630, 24 S. W. 770;

—providing that livery stables, gas houses, gas reservoirs, and garages might be built in the part of the city not set aside for business purposes, providing the person desiring to build such buildings should first obtain the written consent of two thirds of all the real estate owners within 300 feet of the proposed site, State ex rel. Nehrbass v. Harper (1916) 162 Wis. 589, 156 N. W. 941;

—providing that no permit for the erection of a livery stable should be granted, until the written consent of the owners of one half of the ground in the block where the erection was proposed to be made was obtained, St. Louis v. Russell (1893) 116 Mo. 248, 20 L.R.A. 721, 22 S. W. 470, overruling State ex rel. Russell v. Beattie (1884) 16 Mo. App. 131, where a contrary conclusion was reached;

—providing that it should be unlawful to erect a gas tank, or holder, without the written consent of the owners of all the property within a radius of 1,000 feet from the site of such structure, State ex rel. Omaha Gas Co. v. Withnell (1907) 78 Neb. 33, 8 L.R.A. (N.S.) 978, 126 Am. St. Rep. 586, 110 N. W. 680.

In Spann v. Dallas (1916) — Tex. Civ. App. —, 189 S. W. 999, where an ordinance provided, in part, that, if there were more residences than business houses within a radius of 300 feet of the location for which a permit was sought to construct a building for business purposes, the applicant should accompany his application with the consent of three fourths of the property owners within the 300-foot radius, and in such event the board of commissioners should cause a permit to be issued, the court was inclined to the view that this provision, when construed in connection with the whole ordinance, was valid; as the determination whether a permit should be issued ultimately rested in the discretion of the commissioners.

J. T. W.

SOPHIA P. ZEEB
v.
CHARLES BAHNMAIER, Impleaded, etc., Appt.

Kansas Supreme Court — November 9, 1918.

(103 Kan. 599, 176 Pac. 326.)

Automobile — injury by driver — presence of owner — liability.

1. An owner of an automobile is not liable in damages for the tort of another adult person who is in the possession of it, and who has the control and management of it, on the mere ground that the owner was pres-

Headnotes by DAWSON, J.

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ent when such other person, although experienced in the operation of the automobile, committed a tort by momentary negligence in driving it.

[*See note on this question beginning on page* 888.]

Parent and child — tort of child — liability.

2. A father is not liable in damages for the torts of his adult son on the mere ground of paternity.

Automobile — son as driver — liability.

3. The defendant owned an automobile which his son, an adult in business for himself, was accustomed to use for business or pleasure with defendant's permission. The son was wont to use it to drive to church. Sometimes defendant or other members of the family, or all together, accompanied the son. At such times the son always drove and exclusively operated the car. On the day of the accident the son invited his parents to accompany him to church. On the return journey the son, while operating the car at a speed of 2 or 3 miles an hour, overtook and collided with a buggy through his negligent failure to give the occupants of the buggy sufficient time to get their vehicle to the side of the road, and one of the occupants of the buggy, the plaintiff, was injured. The jury specially found that the father, who owned the car, had nothing to do with its operation or control at the time of the accident. Held, that the mere fact of ownership and the mere presence of the owner at the time of the accident do not warrant a judgment for damages against the owner of the car.

(Johnston, Ch. J., and Mason, J., dissent.)

APPEAL by defendant Bahnmaier from a judgment of the District Court for Douglas County in favor of plaintiff in an action brought to recover damages for personal injuries, alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion of the court.

Mr. R. E. Melvin, for appellant:

Defendant is not liable.

Halverson v. Blosser, 101 Kan. 683, L.R.A.1918B, 498, 168 Pac. 863; Kayser v. Van Nest, 125 Minn. 277, 51 L.R.A.(N.S.) 970, 146 N. W. 1091.

Messrs. Riling & Riling, for appellee:

Defendant was guilty of negligence and liable for damages.

Hoffman v. Charlett, 97 Kan. 553, 155 Pac. 953; Halverson v. Blosser, 101 Kan. 683, L.R.A.1918B, 498, 168 Pac. 863; Sims v. Williamsburg Twp. 92 Kan. 636, 141 Pac. 881.

Dawson, J., delivered the opinion of the court:

The plaintiff recovered a judgment against the defendant for personal injuries. Plaintiff and her brother were riding in a one-horse buggy on a public road. The defendant's adult son was driving defendant's automobile, which approached the buggy from the rear. Defendant and other members of his family were in the car. The automobile overtook the buggy and, in attempting to pass, the right front fender of the car struck and crushed the left rear wheel of the buggy, causing the plaintiff to be thrown out and injured. On approaching the buggy the auto horn was sounded, but, owing to a strong wind, the occupants of the buggy did not hear the warning until very shortly before the collision. When plaintiff and her brother did learn of the approach of the automobile, her brother, who was driving the horse, pulled the rein to the right, but before the horse had time to draw the buggy out of the way the mishap occurred.

Defendant pleaded a general denial, contributory negligence, and that her injuries were occasioned by her own fault, or that of her brother, or of both.

The evidence showed that the defendant's son, a man of mature years, was driving the car; that he was in the habit of using the car about his own affairs; that on the day of the accident he drove the car to church, and asked his parents, defendant and wife, to go with him,

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and they with other members of the family did so. The son testified: "Am doing for myself; rented farm of father on my own account; pay crop rent; am of age; accustomed to drive father's auto; drive it about my own affairs; . . . car belongs to father; . . . goes to church in it once in awhile; I have sometimes invited him to go to church with me in the car; this particular Sunday I invited them to go with me; they consented and went; they had nothing at all to do with the car that day; I am somewhat of a leader in the family; father pays for gasolene, keeps up repairs; I run it; father runs it, too; Sunday of accident I invited them to go; they were my guests then."

The jury answered certain special questions:

"Q. 3. Do you find that defendant or the driver of the car was guilty of negligence or carelessness in the operation of the auto? A. Yes; the driver of the car.

"Q. 4. If you answer question 3 in the affirmative, state whom you find to be guilty of carelessness or negligence. A. Both Charles Bahnmaier, the owner, and his son, Roy Bahnmaier, the driver of the car.

"Q. 4½. If you answer question 3 in the affirmative, state in what particulars he or they were negligent or careless. A. In this: That defendant failed to give the driver of the horse and buggy sufficient time in which to turn out.

"Q. 5. What, if anything, did the defendant or the driver of the auto fail to do in the handling of the auto that ordinary carefulness and prudence would require? A. The car was not stopped in time to avoid the accident. . . .

"Q. 11. Did the driver of the auto, after warning the occupants of the buggy by shouting, keep the car under reasonable and proper control? A. Had control, but failed to exercise control.

"Q. 12. At what rate of speed was the auto running when it struck the buggy wheel? A. Two to 3 miles an hour. . . .

"Q. 16. What, if anything, had the defendant to do with the operation or control of the auto on the day of the accident and at the time thereof? A. Nothing."

Several errors are assigned, but the important question is whether the law attaches a liability to ownership of an automobile for damages occasioned by the machine which occur when the owner is present, but only as a passenger, and when another responsible person is operating the car, in accordance with his own judgment and without directions from the owner. On this question the trial court instructed the jury thus: "I think one of the first questions that will challenge your consideration will be the extent to which Charles Bahnmaier, the owner of this automobile, the father of this boy [adult] is liable for the negligence of his son under the circumstances of this case. As to that, I have to advise you that a father is not liable for the negligence of his son, either an adult or a minor, if the son is acting away from the father, and independently acting for himself; but if the son, either a minor or an adult, is acting for the father, operating the automobile in the usual and ordinary way, doing the things with the automobile that the father himself might do if the son were not present, then I think you will be warranted in saying that, if the son was negligent, the father would be liable for damages growing out of the negligence. More than that, I think if the father was present in the automobile with the son, and the son was engaged in an act of negligence, and the father saw it and took no steps to prevent it, and it was his automobile, the father would be liable for any damages growing out of the negligence of the son."

Parent and child—tort of child—liability.

The law imposes no liability on a father for the tort of his son on the mere ground of paternity. This is the law, even where the tort is that of a minor son. Mirick v. Suchy, 74 Kan. 715, 87

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Pac. 1141, 11 Ann. Cas. 366; Smith v. Jordan, 211 Mass. 269, 97 N. E. 761.

Unless some rational theory of principal and agent, or of master and servant, supported by substantial evidence, can connect the father with the act or delict of the son, the father is no more liable than a stranger. And this principle holds true, whether the father is present or absent when the tort of the son is committed. If I do no more than permit my adult son to use my horse or my shotgun whenever he cares to do so, and if my son is conceded to be experienced in the management of horses and in the handling of shotguns, and is not known to be careless therewith, shall I be held liable if he, in a moment of negligence, rides down a pedestrian or shoots a neighbor's cow, merely because the horse or shotgun is mine, and because I was personally present when the negligent mishap occurred? There is no such rule of law in any 20th century textbook. Any such rule of liability attaching to mere ownership of an automobile, if found in the decided cases, must have been announced when the judiciary were less familiar than now with that distinctively modern invention. Why should the mere presence of the owner of the automobile, which was in the possession, control, and exclusive management of another responsible adult at the time of the tort, subject the owner of the car to liability in damages? An automobile is a more safe and dependable chattel than a horse, and it is not an inherently dangerous instrument; certainly much less so than a shotgun.

Automobile—injury—by driver—presence of owner—liability.

In Watkins v. Clark, 103 Kan. 629, 176 Pac. 131, Mr. Justice Burch, speaking for the court, and with his characteristic clarity and precision, said:

"The automobile was not a dangerous instrumentality which the defendant let loose in the community. The automobile was not a guilty agent in the accident, bringing punishment on the owner, like the deodands of English law. Mismanagement by the driver was the cause of the accident. The purchase of the automobile by the defendant for the use of his family, including his daughter, operated as a gift to them of the right to use it. When using it to accomplish his purposes, whether business or pleasure, they represent him; but when they exercise their privilege and use it to accomplish their own distinct purposes, whether business or pleasure, they act for themselves, and are alone responsible for their negligent conduct. The fact that the automobile was purchased for use by the owner's family did not make him generally responsible for its subsequent operation, and because the car was subject to appropriation by the members of his family for their own use, there is no presumption that any particular trip was made in his behalf. The use made of the car on any particular occasion is a question of fact, to be determined by evidence showing the fact, and in this instance there was no evidence that anybody was concerned except the daughter.

"The development of the law on this subject has been attended by a rather slow process of clarification. When the automobile was new and strange, and was regarded with some wonder and considerable fear, there was a tendency to look upon it as a dangerous thing, fraught with such possibility for harm that the owner should always be held responsible for its use. When it commenced to take the place of the family horse, this view had to be abandoned. The notion, however, of general liability on the part of the owner for use of his car having been planted in the mind, it lingered there like a superstition. Courts were reluctant to ignore it, and, as a result, an adaptation of the law of master and servant, and principal and agent, was resorted to, to explain the liability. If a man pur-

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chased an automobile and allowed his wife and his son and his daughter to use it, the use was his by virtue of representation, whether representation existed in fact or not. The deduction was facilitated by employment of the fine art of definition, putting into the definition of the term 'business,' the attributes necessary to bolster up liability. So, if daughter took her friend riding, she might think she was out purely for the pleasure of herself and her friend, but she was mistaken; she was conducting father's 'business' as his 'agent.' As this incongruity became more and more apparent, a further concession was sometimes made. If the owner allowed a member of his family to use the automobile, he might not be liable, but it was 'presumed' the use was his by representation. If son took his best girl riding, prima facie it was father's little outing by proxy, and if an accident happened, prima facie, father was liable. Some courts were inclined to get rid of the difficulty of resting liability on the one existing fact—ownership of the car—by declaring that the question of 'agency' was one for the jury, a process known in some quarters as 'passing the buck.' The sooner the courts settle down and deal on the basis of fact and actuality with a vehicle which has revolutionized the business and the pleasure of the civilized world, the better it will be, not only for society, but for the courts."

In the present case, it was not shown that the father did or failed to do anything whatever which in any way contributed to the accident.

"Q. 16. What, if anything, had the defendant to do with the operation or control of the auto on the day of the accident and at the time thereof? A. Nothing." [Special finding of the jury.]

The jury specifically says the defendant father had nothing to do with the car or its management on the day of the accident. It was not shown that the son was using the car for his father's business or pleasure, or for any other project set on foot through the father's agency. The son was going to church in the automobile, and invited the father and mother to accompany him. They went. If the father had stayed at home, he would not be liable; and the fact that he accepted his son's invitation and did go, as did other members of the family, and was present when the accident happened, does not render him liable for the tort of his son.

Same—son as driver—liability.

The supreme court of Michigan arrived at the same conclusion in a case where the owner of an automobile had loaned it for a day to a friend, and then, at the latter's invitation, the owner went along as a guest or passenger, and a tortious accident occurred through the fault of the borrower who drove the car. The court held that, in the absence of a statute (since enacted in Michigan), the owner was not liable. Hartley v. Miller, 165 Mich. 115, 33 L.R.A.(N.S.) 81, 130 N. W. 336, 1 N. C. C. A. 126.

No negligence of the father is disclosed by the evidence; and, as this appeal does not involve the liability of the son, other questions presented need no consideration.

The judgment is reversed, and the cause remanded, with instructions to enter judgment for defendant.

Mason, J., dissenting:

Accepting as sound the general principles of law declared in the opinion, I think the evidence justified a finding that the defendant was liable. The answer to the special question quoted seems to me to be intended to mean merely that the father had no part in the physical management of the car.

Johnston, Ch. J., concurs in the dissent.

A petition for rehearing having been filed, **Dawson**, J., on December 19, 1918, handed down the following additional opinion (103 Kan. 895, 176 Pac. 643):

In a petition for a rehearing, the point is urged that the jury had a

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right to disbelieve the testimony of the Bahnmaiers. That may be conceded; but theirs was the only evidence showing whose errand was being prosecuted when the younger Bahnmaier committed the tort. If the testimony of the Bahnmaiers was not true, there is nevertheless a complete lack of evidence to show that the tort-feasor, the younger Bahnmaier, was on an errand of service or agency for his father when the accident occurred; and this leaves nothing upon which to fasten liability on the father, and nothing upon which a new trial could be based.

Rehearing denied.

ANNOTATION.

Owner's presence in automobile operated by another as affecting former's liability.

I. Generally, 888.
II. Car operated by member of owner's family, 888.
III. Car operated by third person, 890.

Scope.

This note does not include criminal cases. It also, of course, excludes civil cases in which it appeared that the owner was, in fact, present, but in which that fact did not affect the decision.

I. Generally.

On principle, the mere presence of the owner in an automobile, at the time an injury results from its negligent operation while being driven by another, does not necessarily make him liable, if he would not otherwise have been liable. As supporting this view, see Hartley v. Miller, set out infra, III. The owner's presence, however, is an important element where recovery is sought on the theory that the operator was acting as his servant or agent, or that he had control over the operation of the car, as an inference that the machine was being driven by his agent, or that he had some control over its operation, is readily drawn if he was present. The strength of the inference undoubtedly varies with the circumstances, probably being the strongest against the owner in a case where his wife or child was driving him when an injury occurred, and weakest where the facts show that he had loaned his car, and was riding therein merely as a guest of the borrower.

II. Car operated by member of owner's family.

It will be observed that in the reported case (ZEEB v. BAHNMAIER, ante, 883), the owner of an automobile, who was riding as the guest of his son in his car, which the son had borrowed and was driving, was held not liable for an injury caused by its negligent operation.

And in Crawford v. McElhinney (1915) 171 Iowa, 606, 154 N. W. 310, Ann. Cas. 1917E, 221, where a recovery was sought against the owner of a car, purchased for his own and his wife's use, for an injury resulting from its negligent operation by the wife while he accompanied her, it was recognized that if he had no control over the car, and was a mere guest, he could not be held liable. The questions, however, whether he and his wife were engaged in a common enterprise, and whether she was acting as his agent, were held properly left to the jury, upon evidence that the car was kept for their use; that he had never had any driver but his wife; that at the time of the injury he and she were on a pleasure trip, taken at her suggestion and at his expense; that they were accompanied by guests invited by him, and that he permitted his wife to drive the machine on the trip.

And in Potts v. Pardee (1917) 220 N. Y. 431, 116 N. E. 78, where an injury occurred while a car, owned by a wife, and occupied by her and her husband, was being driven by the lat-

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ter's chauffeur, it was contended that the wife might be held liable on the ground that she was the owner of the car, and in it at the time the accident happened; but the court, following the decision in Hartley v. Miller (1911) 165 Mich. 115, 33 L.R.A.(N.S.) 81, 130 N. W. 336, 1 N. C. C. A. 126, infra, held that this could not be done as the law stood, stating that if a change was to be made it should be by legislative enactment.

In Minor v. Mapes (1912) 102 Ark. 351, 39 L.R.A.(N.S.) 214, 144 S. W. 219, however, where an injury occurred while a husband was riding in an automobile driven by his wife, and he testified that he purchased the machine and gave it to his wife for her use, and that he never drove it, he was nevertheless held liable, on the theory that the common-law rule, making the husband liable for torts committed by the wife, was in force in Arkansas, and also on the ground that the evidence was sufficient to warrant a finding of negligence on his part. The court said: "At common law the husband was liable for torts committed by the wife, whether committed in or out of his presence, or whether committed at his command or not. Such is the law in this state now. . . . The only difference is that where the tortious act is committed in the immediate presence and under the direct compulsion of the husband, the wife is not liable, and the husband alone is liable. In other instances, where the tort is committed in the absence of her husband, or, if in his presence, without any control or compulsion on his part, the husband and wife are jointly liable and must be joined in the action, the liability of the husband ceasing upon the dissolution of the marriage relation. . . . No quesion was raised below as to the failure to join the wife as defendant in the action, and that question must be deemed as waived, and cannot be raised here for the first time. . . . But, aside from the question of the husband's common-law liability for torts of the wife, we are of the opinion that the evidence was sufficient to warrant the jury in finding negligence on the part of appellant. The rule is, that where one rides in a public conveyance, or merely upon the invitation of some third party, and exercises no control over the driver, and is not guilty of any positive act of negligence, the negligence of the driver cannot be imputed to him, so as to render him liable for injuries to another person. . . . This rule cannot, however, be extended so as to afford an avenue for the husband's escape from liability on account of the negligent act of his wife or minor child with whom he is driving in an automobile or other vehicle. He is presumed to exercise some control over them under those circumstances, at least, to the extent of preventing an act of negligence which is calculated to result in injury to other persons, and it is his positive duty to do so. In this instance, the husband was sitting beside his wife, who was driving the machine, and whatever danger there was in driving too near the street car was as obvious to him as it was to her. He needed no knowledge or experience in the operation of the machine in order to apprise him of such danger. To say that the husband was not liable for the negligent act of the wife, committed under those circumstances, would be to absolve him entirely from any duty to fellow travelers."

And in Daggy v. Miller (1917) 180 Iowa, 1146, 162 N. W. 854, 14 N. C. C. A. 453, it was held that the owner could not escape liability for an injury caused by the negligent operation of the car by his son while the owner was riding therein, on the theory that he was wholly passive and took no part in its management, where it was driven without proper lights, and operated at a reckless speed; since he was tacitly consenting thereto, and the driver's negligence was chargeable to him.

In Switzer v. Sherwood (1914) 80 Wash. 19, 141 Pac. 181, Ann. Cas. 1917A, 216, where the automobile which caused the injury was occupied by a husband and wife, and driven by the latter, and was owned by them as a community, and used for their pleas-

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ure and that of their family, and in connection with their business, it was claimed that the act causing the injury was the wife's individual tort, or, at most, the tort of the husband and wife, and that it was error to allow judgment against the community; but the court refused so to hold, relying on authorities holding an owner of an automobile, purchased for family use, liable for injuries sustained through its negligent operation by members of the family.

In Risser v. Parr (1918) — Iowa, —, 168 N. W. 865, the owner of a car, against whom there had been a recovery, contended that a verdict should have been directed in her favor on the ground that the person driving had taken the car without her permission, and that she was in the machine at the time of the injury as a guest. This contention was not sustained, however; and the evidence showing that the owner did not drive the car at all, and that the person driving when the injury occurred, who was a member of her household, had driven it for two years, was held to justify the jury's finding that the owner had the right to direct the operation of the machine.

III. Car operated by third person.

In Hartley v. Miller (1911) 165 Mich. 115, 33 L.R.A.(N.S.) 81, 130 N. W. 336, 1 N. C. C. A. 126, it was held that the owner of an automobile could not be held liable, on the theory that it was a dangerous machine, for its negligent operation by a borrower, who had complete control of it, resulting in an injury to another, although the owner was present in the machine at the invitation of the borrower. The court said: "It is the contention of the plaintiff that, because defendant Miller was present and the machine was being used with his consent at the time of the injury complained of, he is liable; that, an automobile being a dangerous machine, its owner should be held responsible for the manner in which it is used. It is the claim of defendant Miller that it is understood that the automobile had passed into the possession and control of defendant Lootens for the day, and that Miller did not have the right or authority to dictate or direct the manner in which the automobile should be operated; that it was as much in the control of Lootens for that day as it would have been had he been the absolute owner thereof; that an automobile is not a dangerous instrumentality, and under such circumstances there is no theory upon which Miller could be held liable for the negligence of Lootens. In our opinion this claim of defendant Miller is supported by the great weight of authority. Doran v. Thomsen (1907) 74 N. J. L. 445, 66 Atl. 897, is a leading case upon this subject. It was there held that the owner of a motor vehicle is not liable for an injury caused by the negligent driving of a borrower, if it was not used at the time in the owner's business. A number of cases are there cited, including Herlihy v. Smith (1874) 116 Mass. 265. See also Cunningham v. Castle, 127 App. Div. 580, 111 N. Y. Supp. 1057, decided in 1908, where the same rule is applied, and where the authorities are reviewed at length."

In accord with this case, it has been held that an owner of an automobile who was present at the time its negligent operation caused an injury was not liable therefor, where he had loaned the machine, and was present as a guest, although his chauffeur, who had been hired by the borrower to drive, was operating the car. Pease v. Montgomery (1913) 111 Me. 582, 88 Atl. 973; Pease v. Gardner (1915) 113 Me. 264, 93 Atl. 550.

In Bell v. Jacobs (1918) 261 Pa. 204, 104 Atl. 587, where, at the time an injury was inflicted by the defendant's automobile, he was seated beside one who was to make repairs on the machine and was driving to see what was needed, it was held that the driver was acting for the owner, and that the latter could not be excused from liability because he was not personally at the wheel. The court said: "A man out riding in his car is not relieved from responsibility for its management because, with his permission, another is acting as driver; and this is especially so where the owner

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tacitly assents to the manner in which the car is driven. There is a presumption, not here rebutted, that an owner present in his car has power to control it."

And in the syllabus by the court in Watkins v. Brown (1913) 14 Ga. App. 99, 80 S. E. 212, which is the only opinion rendered, it is stated that the owner of an automobile, who is present in his machine, is liable for the negligence of a driver operating it for him.

In Winner v. Linton (1913) 120 Md. 276, 87 Atl. 674, the owner of the car was riding in it at the time an injury occurred, but no particular point was made of the fact, the court stating that the chauffeur who was driving was the servant and employee of the owner, and that, assuming that he was negligent, the owner would be liable for the result of the driver's negligence.

In Carpenter v. Campbell Automobile Co. (1913) 159 Iowa, 52, 140 N. W. 225, 4 N. C. C. A. 1, where an action was brought against an automobile dealer for an injury inflicted by one of his machines while he was riding therein with one who had taken the car without permission, there was evidence that the owner met the driver of the car on the street and that the latter informed him that the car, which was new, was not working properly and asked him to get in so that he could show him; that the owner got in to see how the car performed, and that while the trial was in progress the injury occurred. It was held that the questions whether the driver was in the owner's employ, or under his control, or whether they were engaged in a common enterprise, were properly left to the jury, and a verdict for the person injured was sustained. There was held no error in this case in instructing the jury that two persons occupying the same vehicle are not jointly liable for negligence unless it appears that they were engaged in a common enterprise, or, in view of such instruction, in refusing to give another, requested by the owner, that, if the defendants were engaged in a joint enterprise or common purpose, they were both liable; but if they were not so engaged, and the owner was accompanying the other as a guest, the former was not responsible.

In Sloan v. Pasche (1913) — Tex. Civ. App. —, 153 S. W. 672, where recovery was sought against partners for an injury inflicted by their machine while they were riding in it, the court stated that a requested instruction that, if the driver had been placed in charge of the car by one of the defendants, the mere fact that it was the property of the partnership, or that the other defendant was riding in it, would not render the latter liable, was undoubtedly correct; but held that it was properly refused where the court, in its general charge, did not predicate such defendant's liability upon the fact of ownership, or that he was riding in the car, but based the liability of both defendants upon the fact that the car was being driven by one who was acting under their authority and for their benefit.

J. T. W.

MABEL JOHNSON, Respt.,
v.
EDWIN EVANS, Appt.

Minnesota Supreme Court — January 10, 1919.

(— Minn. —, 170 N. W. 220.)

Automobile — injury to child's guest — liability.

1. Defendant owned and kept upon his premises a five-passenger automobile for business purposes, and also for the comfort and pleasure of

Headnotes by BROWN, Ch. J.

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the members of his family, and his minor son was authorized and permitted to operate and use it for either purpose; while the son was so using the car, under defendant's permission, his negligent and careless operation thereof caused injury to plaintiff, who was riding therein as his guest. It is held: (a) That, though using the car for his own personal pleasure and that of his friends, the son was the servant of defendant within the meaning of the law, and defendant is liable for his negligent misconduct in operating the same; (b) the evidence supports the verdict in finding the son guilty of negligence, and in exonerating plaintiff from the charge of contributory negligence.

[*See note on this question beginning on page* 896.]

Trial — jury — authority of child.

2. The question whether the son departed from or exceeded the authority given him on the particular occasion, to such an extent as to relieve defendant from liability during the period of departure, was properly submitted to the jury, and the evidence supports the verdict thereon.

Appeal — instructions — authority.

3. There was no error in the charge of the court to the effect that the possession of the car by the son, in the absence of a showing to the contrary, would be presumed authorized by defendant.

Same — error.

4. The record presents no reversible error.

APPEAL by defendant from an order of the District Court for Norman County denying a motion for judgment notwithstanding a verdict for plaintiff, or for a new trial, in an action brought to recover damages for personal injuries, alleged to have been caused by the negligence of defendant's minor son. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Christian G. Dosland, for appellant:

Defendant was not liable for the negligence of his son.

Linville v. Nissen, 162 N. C. 95, 77 S. E. 1096; Birch v. Abercrombie, 50 L.R.A.(N.S.) 59, note; Kayser v. Van Nest, 125 Minn. 277, 51 L.R.A.(N.S.) 970, 146 N. W. 1091; Provo v. Conrad, 130 Minn. 412, 153 N. W. 753; Blair v. Broadwater, 121 Va. 301, L.R.A.1918A, 1011, 93 S. E. 632; Doran v. Thomsen, 76 N. J. L. 754, 19 L.R.A.(N.S.) 335, 131 Am. St. Rep. 677, 71 Atl. 296; Van Blaricom v. Dodgson, 220 N. Y. 111, L.R.A.1917F, 363, 115 N. E. 443; Reilly v. Connable, 214 N. Y. 586, L.R.A. 1916A, 954, 108 N. E. 853, Ann. Cas. 1916A, 656; Halverson v. Blosser, 101 Kan. 683, L.R.A.1918B, 498, 168 Pac. 863; Maher v. Benedict, 123 App. Div. 579, 108 N. Y. Supp. 228; Erlich v. Heis, 193 Ala. 669, 69 So. 530; Parker v. Wilson, 179 Ala. 361, 43 L.R.A. (N.S.) 87, 60 So. 150; Smith v. Jordan, 211 Mass. 269, 97 N. E. 761; Loehr v. Abell, 174 Mich. 590, 140 N. W. 926; McFarlane v. Winters, 47 Utah, 598, L.R.A.1916D, 618, 155 Pac. 437; Johnston v. Cornelius, 193 Mich. 115, 159 N. W. 318; Ploetz v. Holt, 124 Minn. 169, 144 N. W. 745.

Plaintiff did not prove a cause of action.

Van Blaricom v. Dodgson, 220 N. Y. 111, L.R.A.1917F, 363, 115 N. E. 443; Smith v. Jordan, 211 Mass. 269, 97 N. E. 761; Campbell v. Arnold, 219 Mass. 160, 106 N. E. 599; McFarlane v. Winters, 47 Utah, 598, L.R.A.1916D, 618, 155 Pac. 437; Ferris v. Sterling, 214 N. Y. 249, 108 N. E. 406, Ann. Cas. 1916D, 1161; Woods v. Clements, 113 Miss. 720, L.R.A.1917E, 357, 74 So. 422, affirmed on rehearing in 114 Miss. 301, L.R.A.1917E, 358, 75 So. 119; Gardiner v. Solomon, — Ala. —, L.R.A. 1917F, 380, 75 So. 621; Cohen v. Meador, 119 Va. 429, 89 S. E. 876; Steffen v. McNaughton, 142 Wis. 49, 26 L.R.A. (N.S.) 382, 124 N. W. 1016, 19 Ann. Cas. 1227; Slater v. Advance Thresher Co. 97 Minn. 310, 5 L.R.A.(N.S.) 598, 107 N. W. 133.

Plaintiff was guilty of contributory negligence, barring recovery.

Winston v. Henderson, 179 Ky. 220, L.R.A.1918C, 646, 200 S. W. 330; Fechley v. Springfield Traction Co. 119 Mo. App. 358, 96 S. W. 421; Meenagh v.

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Buckmaster, 26 App. Div. 451, 50 N. Y. Supp. 85.

Messrs. **M. A. Brattland** and **Ole J. Vaule**, for respondent:

The evidence is amply sufficient to sustain the verdict.

Ploetz v. Holt, 124 Minn. 169, 144 N. W. 745; Kayser v. Van Nest, 125 Minn. 277, 51 L.R.A.(N.S.) 970, 146 N. W. 1091; Jensen v. Fischer, 134 Minn. 366, 159 N. W. 827, 138 Minn. 483, 165 N. W. 1055; Uphoff v. McCormick, 139 Minn. 392, 166 N. W. 788; McNeal v. McKain, 41 L.R.A.(N.S.) 755, and note, 33 Okla. 449, 126 Pac. 742; Stowe v. Morris, 147 Ky. 386, 39 L.R.A. (N.S.) 224, 144 S. W. 52; Birch v. Abercrombie, 50 L.R.A.(N.S.) 59, and note, 74 Wash. 486, 133 Pac. 1020; Griffin v. Russell, 144 Ga. 275, L.R.A. 1916F, 216, 87 S. E. 10, Ann. Cas. 1917D, 994; Lemke v. Ady, — Iowa, —, 159 N. W. 1011; Denison v. McNorton, 142 C. C. A. 631, 228 Fed. 401.

The established fact of ownership shifts the burden of proof.

Ferris v. Sterling, 214 N. Y. 249, 108 N. E. 406, Ann. Cas. 1916D, 1161; Birch v. Abercrombie, 74 Wash. 486, 50 L.R.A.(N.S.) 59, 133 Pac. 1020.

The contributory negligence of the driver is not imputed to the guest.

Cunningham v. Thief River Falls, 84 Minn. 21, 86 N. W. 763, 10 Am. Neg. Rep. 106; Finley v. Chicago, M. & St. P. R. Co. 71 Minn. 471, 74 N. W. 174.

Brown, Ch. J., delivered the opinion of the court:

Action for personal injuries in which plaintiff had a verdict, and defendant appealed from an order denying his motion for judgment notwithstanding the verdict, or a new trial.

There is no particular controversy about the facts controlling the result of the action, and they are substantially as follows: Defendant owns and operates a farm near the village of Ada, in Norman county. He keeps and maintains upon his premises a five-passenger automobile for both pleasure and business purposes, a family car, and used for the comfort and pleasure of the family as well as in business affairs. His family consists of himself, wife, and two sons, the eldest son being seventeen years of age at the time here in question. Prior thereto, that son had been permitted to use the car whenever he felt inclined to take some of his friends out for a drive, the permission often being given without special inquiry into the particular purpose or destination the son had in view.

On the day of the accident here complained of defendant gave the son permission to use the car for the purpose, as defendant supposed, of a trip to the village of Ada, a distance of about 6 miles, though the particulars of the trip were not inquired into by defendant nor disclosed by the son. The plan of the son was to pick up his friend Clarence Monson, a neighbor, and the two to invite their young lady friends to accompany them to a dance at Borup, a village some 8 miles south of Ada. The plan was carried out, and the party thus made up, plaintiff in this action being the guest and companion of the son, and a Miss Gilbertson the companion of Monson, started in the automobile for the dance at Borup, passing through but not stopping at Ada. They later learned that the dance at Borup had been postponed to some later date, but at the same time were informed that a dance was then in full swing at the village of Hadler, some 6 miles north of Ada. The automobile was turned around, and the party proceeded on the way to Hadler, again passing through but not stopping at Ada. They reached a point some 3 or 4 miles north of Ada at about 11 o'clock at night, and at a sharp turn in the road, of which the son who was driving the car was unaware, the car was wrecked, as the result of which plaintiff was injured.

It may also be stated that the evidence tends to show, though controverted by defendant, that the son was in the habit of taking the car out for business or pleasure, without asking permission or consent of defendant. But we dispose of the case on the facts above stated, which are not in dispute, and upon the theory that permission was necessary before the son rightfully could take the car out for pleasure purposes.

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The negligence charged in the complaint, and upon which plaintiff predicated her right of action, is that at the time of the accident the son was driving at a grossly negligent and reckless rate of speed, by reason of which, when confronted with the unexpected turn in the road, he was unable to control the car, and it ran with great speed and violence into the highway ditch, injuring the occupants, and throwing plaintiff, who occupied the front seat, upon and against the windshield, a piece of broken glass from which penetrated and totally destroyed one of her eyes. The other occupants were not so seriously injured.

The defendant contends: (1) That the son had no authority to use the car for pleasure or other purposes, except upon express permission granted by defendant; that such permission was granted on this occasion, but for the limited purpose of a trip to the village of Ada and return, and that when the son went beyond that place he exceeded the authority granted, and thereby relieved defendant from liability for any act of negligence thereafter occurring; (2) that the court erred in certain of its instructions to the jury; and (3) that plaintiff was guilty of contributory negligence.

1. Assuming the facts to be as contended by defendant, and that the son had no right to use the automobile except when permission was granted by defendant, we are unable, on the evidence presented, to sustain the further contention that there was such a departure from the permission here granted as to relieve defendant, as a matter of law, from liability for the negligent operation of the car during the period of the alleged departure. In our view of the case, as presented by the evidence, the question whether there was a substantial departure from the authority granted was one of fact for the jury.

The evidence offered by defendant shows that the son stated to defendant that he desired to take the car to go to Ada, and without inquiry as to the purpose of the trip or the imposition of restrictions upon the use of the car on the particular occasion, the request was granted. The purpose of the son was one of pleasure, and the car was devoted to that purpose until the accident happened. And since defendant interposed no restrictions or limitations upon the use of the car, it should not be said as a matter of law that there was a departure from the authority granted, merely because the pleasure drive took the son and party beyond the village of Ada. The record furnishes no suggestion that the permission to use the car would not have been granted had the son made full disclosure of his plans. In fact it affirmatively appears that express permission had previously been granted for a like use of the car, namely, that of attending dances in the neighborhood. It is not fair to assume that the request in this instance would have been denied had the dance at Borup or Hadler been mentioned to defendant. And since there was no departure from the purpose for which defendant kept the car, the question whether the son exceeded his authority to an extent to discharge defendant from responsibility was, at least, one of fact. The verdict to the effect that there was no such departure is supported by the evidence. The case, in point of substance, comes within the rule applied by the authorities generally. Ploetz v. Holt, 124 Minn. 169, 144 N. W. 745; Kayser v. Van Nest, 125 Minn. 277, 51 L.R.A.(N.S.) 970, 146 N. W. 1091; Jensen v. Fischer, 134 Minn. 366, 159 N. W. 827; McNeal v. McKain, 41 L.R.A.(N.S.) 775, and note, 33 Okla. 449, 126 Pac. 742; Denison v. McNorton, 142 C. C. A. 631, 228 Fed. 401; Griffin v. Russell, 144 Ga. 275, L.R.A.1916F, 216, 87 S. E. 10, Ann. Cas. 1917D, 994. The important inquiry in this class of cases, governed generally by the law

Automobile—injury to child's guest—liability.

Trial—jury—authority of child.

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of master and servant, is whether the son had express or implied authority to use the car on the particular occasion, and whether the use being made of it was within the general purpose for which it was kept by the parent. And by the weight of authority and reason the liability exists, where the car is kept for the pleasure and comfort of the family, though a single member thereof be using it for his own exclusive pleasure. Kayser v. Van Nest, 125 Minn. 277, 51 L.R.A.(N.S.) 970, 146 N. W. 1091; Birch v. Abercrombie, 74 Wash. 486, 50 L.R.A.(N.S.) 59, 133 Pac. 1020; Lewis v. Steele, 52 Mont. 300, 157 Pac. 575; Davis v. Littlefield, 97 S. C. 171, 81 S. E. 487; Griffin v. Russell, 144 Ga. 275, L.R.A.1916F, 216, 87 S. E. 10, Ann. Cas. 1917D, 994. Such cases as Slater v. Advance Thresher Co. 97 Minn. 305, 5 L.R.A.(N.S.) 598, 107 N. W. 133, and Provo v. Conrad, 130 Minn. 412, 153 N. W. 753, are not in point. In those cases, there was an undisputed departure from the uses for which defendant therein kept the automobile. In the case at bar, there was no departure from such purposes at all; it was being used until the accident happened, for the pleasure of the defendant's son.

2. The court instructed the jury that, since it stood admitted on the evidence that the car was kept by defendant for family use, and for the pleasure of the members thereof, the presumption, until the contrary was shown, would be that the son's use thereof was authorized. The contention of defendant that the instruction was reversible error is not sustained. There was no intention on the part of the court, by this part of its charge, of shifting the burden of proof, or of relieving plaintiff of the necessity of establishing all the issues affecting defendant's liability. The court merely referred to an inference naturally arising from an undisputed state of facts, and was clearly justified by a similar statement found in the opinion in the Holt Case, 124 Minn. 169, 144 N. W. 745. See also Birch v. Abercrombie, 74 Wash. 486, 50 L.R.A.(N.S.) 59, 133 Pac. 1020, supra.

Appeal—instructions—authority.

3. The contention that plaintiff was guilty of contributory negligence is not sustained. The question was one of fact, and properly submitted to the jury. It appears that plaintiff could operate the car, and that she had driven it a part of the time on this occasion. But she had turned the wheel over to the son before the accident occurred. It was a dark night, and the son was driving the car forward somewhere between 30 and 45 miles an hour. Plaintiff, of course, knew of the darkness, and of the fact that the car was being run at a rapid rate of speed. But she had no control over the operator, and was without authority to order or direct that the speed be slackened. She was the driver's guest. There is some evidence to the effect that while the car was making this rapid speed the driver had one arm around plaintiff, with his single hand as the sole guide of the destinies of the car. Plaintiff denied that the arm was around her, but admitted it was on the top of the seat back of her, and she testified further that she resented the attention thus given her, and stated to the driver that in her opinion the steering wheel required his undivided attention. She was corroborated by those occupying the rear seat of the car as to the position of the offending arm. On this state of the evidence, contributory negligence should not be declared as a matter of law.

4. We have considered all assignments not covered by what has been said, and discover no error of a character to justify a new trial. There was no error in the refusal to submit special issues to the jury. The matters therein referred to were left to the jury, and are covered by the general verdict.

Same—error.

Order affirmed.

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NOTE.

The unusual question is presented in JOHNSON v. EVANS (reported herewith) ante, 891, as to the liability of a parent for an injury to his child's guest, resulting from the negligent operation of his aumotobile, a subject covered in the note following FLYNN v. LEWIS, post, 900. The liability in the JOHNSON CASE, as pointed out in that note, was predicated upon the "family-purpose" doctrine, while in the FLYNN CASE the express authority conferred on the child by the parent on the particular occasion, to use his car and invite the guest, was relied upon.

JOSEPHINE C. FLYNN
v.
HENRY BRADFORD LEWIS.

JOSEPH J. FLYNN, Admr., etc., of Josephine C. Flynn,
v.
SAME.

Massachusetts Supreme Judicial Court — January 3, 1919.

(231 Mass. 550, 121 N. E. 493.)

Automobile — injury to guest of child — liability.

1. The owner of an automobile is liable for injuries, through the overturning of the car by the negligence of the driver, to a guest invited by his child with his permission to ride in the car, only in case the driver was guilty of gross negligence.

[*See note on this question beginning on page* 900.]

Trial — instructions — question for jury.

2. The court cannot, upon conflicting evidence, instruct the jury that a fact, such as that a chauffeur in charge of a car in which a guest was injured was guilty of gross negligence, was established.

Evidence — habits of chauffeur.

3. Upon the question of the liability of the owner of an automobile for injury to a guest by the overturning of the car through the negligence of the chauffeur, evidence is not admissible that the chauffeur drove fast on another occasion, as tending to show reckless habits of which the owner had knowledge.

Appeal — exclusion of question — error.

4. There is no error in excluding a question to a witness, in the absence of any statement as to what the answer would be.

Evidence — negligence of chauffeur — fright of witness.

5. Evidence of the exhibition of fright by a witness to an automobile accident is not admissible, in an action to hold the owner of a car liable for an injury caused by its being overturned, to show negligence on the part of the chauffeur.

Death — automobile accident — gross negligence.

6. Gross negligence cannot be made an element of liability for death of a guest by overturning of an automobile, where the statute requires proof of ordinary negligence only, in actions to recover damages for death.

EXCEPTIONS by plaintiff and defendant to rulings of the Superior Court for Essex County, made during the trial of consolidated actions brought to recover damages for personal injuries sustained by plaintiff in an automobile accident, and to recover damages for her death, which resulted in

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a verdict for defendant in the first action, and for plaintiff in the second action. *Exceptions in each case overruled.*

The facts are stated in the opinion of the court.

Mr. Walter Coulson, for plaintiffs:

The question as to whether the plaintiff was a guest or not is one of fact for the jury.

Massaletti v. Fitzroy, 228 Mass. 492, L.R.A.1918C, 264, 118 N. E. 168, Ann. Cas. 1918B, 1088; McGuire v. Lawrence Mfg. Co. 156 Mass. 324, 31 N. E. 3; Dean v. Boston Elev. R. Co. 217 Mass. 496, 105 N. E. 616; Kelsall v. New York, N. H. & H. R. Co. 196 Mass. 554, 82 N. E. 674; La Fond v. Boston & M. R. Co. 208 Mass. 456, 94 N. E. 698; Com. v. Fitchburg R. Co. 10 Allen, 189; Stewart v. Fuller, 208 Mass. 359, 94 N. E. 680; Denny v. Williams, 5 Allen, 1; Connors Bros. Co. v. Sullivan, 220 Mass. 600, 108 N. E. 503; Nicholson v. Feindel, 219 Mass. 490, 107 N. E. 353; Wellington v. Cambridge, 220 Mass. 312, 107 N. E. 976; Foster v. Essex Bank, 17 Mass. 478, 9 Am. Dec. 168, 1 Am. Neg. Cas. 502; Briggs v. Dearborn, 99 Mass. 50; Davis v. Gay, 141 Mass. 531, 6 N. E. 549; Farnum v. Pitcher, 151 Mass. 470, 24 N. E. 590; Thomas v. Boston & P. R. Corp. 10 Met. 472, 43 Am. Dec. 444; Doyle v. Peerless Motor Car Co. 226 Mass. 561, 116 N. E. 257; Beacon Motor Car Co. v. Shadman, 226 Mass. 570, 116 N. E. 559; Stevens v. Stewart-Warner Speedometer Corp. 223 Mass. 44, 111 N. E. 771; Murray v. Postal Teleg.-Cable Co. 210 Mass. 188, 96 N. E. 316, Ann. Cas. 1912C, 1183; Rubin v. Huhn, 229 Mass. 126, — A.L.R. —, 118 N. E. 290; Plummer v. Dill, 156 Mass. 426, 32 Am. St. Rep. 463, 31 N. E. 128; Cohen v. Henry Siegel Co. 220 Mass. 215, 107 N. E. 912; Foley v. West End Street R. Co. 195 Mass. 332, 81 N. E. 189; Mallock v. Derby, 190 Mass. 208, 76 N. E. 721; Reardon v. Thompson, 149 Mass. 267, 21 N. E. 369; Holmes v. Drew, 151 Mass. 579, 25 N. E. 22; Mellen v. Old Colony Street R. Co. 184 Mass. 399, 68 N. E. 679, 15 Am. Neg. Rep. 79; Davis v. Central Cong. Soc. 129 Mass. 367, 37 Am. Rep. 368; Sweeny v. Old Colony & N. R. Co. 10 Allen, 368, 87 Am. Dec. 644; Letchworth v. Boston & M. R. Co. 220 Mass. 561, 108 N. E. 500; Lane v. Atlantic Works, 111 Mass. 136; Walker v. Fuller, 223 Mass. 566, 112 N. E. 230; Hart v. Cole, 156 Mass. 475, 16 L.R.A. 557, 31 N. E. 644; Fitzsimmons v. Hale, 220 Mass. 461, 107 N. E. 929; Collins v. Splane, 230 Mass. 281, 120 N. E. 66; Fitzgerald v. Boston & N. Street R. Co. 214 Mass. 436, 101 N. E. 1085; Higgins v. Bickford, 227 Mass. 52, 116 N. E. 245; Lockwood v. Boston Elev. R. Co. 200 Mass. 537, 22 L.R.A.(N.S.) 488, 86 N. E. 934; Campbell v. Arnold, 219 Mass. 160, 106 N. E. 599; Gould v. Elder, 219 Mass. 396, 107 N. E. 59; McKeever v. Ratcliffe, 218 Mass. 17, 105 N. E. 552; Hartnett v. Gryzmish, 218 Mass. 258, 105 N. E. 988; Palmer v. Boston & M. R. Co. 227 Mass. 493, 116 N. E. 899.

Defendant was guilty of gross negligence.

Foster v. Essex Bank, 17 Mass. 479, 9 Am. Dec. 168, 1 Am. Neg. Cas. 502; Whitney v. Lee, 8 Met. 91, 1 Am. Neg. Cas. 789; Aiken v. Holyoke Street R. Co. 184 Mass. 269, 68 N. E. 238; Com. v. Pierce, 138 Mass. 165, 52 Am. Rep. 264; Bjornquist v. Boston & A. R. Co. 185 Mass. 130, 102 Am. St. Rep. 332, 70 N. E. 53; Evensen v. Lexington & B. Street R. Co. 187 Mass. 77, 72 N. E. 355; Com. v. Horsfall, 213 Mass. 232, 100 N. E. 362, Ann. Cas. 1914A, 682; Fairbanks v. Kemp, 226 Mass. 79, 115 N. E. 240; Brown v. Thayer, 212 Mass. 392, 99 N. E. 237.

Evidence of habits bearing on the issue on trial is competent.

Cox v. Central Vermont R. Co. 170 Mass. 139, 49 N. E. 97; Hartnett v. McMahan, 18 Mass 3, 46 N. E. 392; Adams v. Swift, 172 Mass. 521, 52 N. E. 1068, 5 Am. Neg. Rep. 607.

The amount to be recovered under the Death Statute is in the nature of a penalty for the wrongdoing of the defendant, and is assessed in the proportion of his culpability.

Leahy v. Standard Oil Co. 220 Mass. 95, 107 N. E. 458; Turnquist v. Hannon, 219 Mass. 562, 107 N. E. 443; McCarthy v. William H. Wood Lumber Co. 219 Mass. 568, 107 N. E. 439; Littlejohn v. Fitchburg R. Co. 148 Mass. 478, 2 L.R.A. 502, 20 N. E. 103.

Messrs. Walter I. Badger and Michael H. Shanly, for defendant:

Plaintiff, to recover, must show gross negligence on the part of the defendant.

Avery v. Thompson, 117 Me. 120, L.R.A.1918D, 205, 103 Atl. 4, Ann. Cas. 1918E, 1122; Foster v. Essex Bank. 17 Mass. 479, 9 Am. Dec. 168, 1 Am. Neg. Cas. 502; West v. Poor, 196 Mass. 183, 11 L.R.A.(N.S.) 936, 124 Am. St Rep.

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541, 81 N. E. 960; Massaletti v. Fitzroy, 228 Mass. 487, L.R.A.1918C, 264, 118 N. E. 168, Ann. Cas. 1918B, 1088; Moffatt v. Bateman, L. R. 3 P. C. 115, 22 L. T. N. S. 140, 6 Moore, P. C. C. N. S. 369; Coughlin v. Gillison [1899] 1 Q. B. 149, 68 L. J. Q. B. N. S. 147, 47 Week. Rep. 113, 79 L. T. N. S. 627.

The court properly refused to rule that, upon all the evidence, the plaintiff had established gross negligence on the part of the defendant.

Corbett v. New York C. & H. R. R. Co. 215 Mass. 435, 102 N. E. 645; O'Neil v. Toomey, 218 Mass. 242, 105 N. E. 974.

Testimony of one relating to the conduct of the defendant's chauffeur on the morning of the day of the accident was properly excluded.

Olsen v. Andrews, 168 Mass. 261, 47 N. E. 90, 2 Am. Neg. Rep. 570.

Upon all the evidence plaintiff could not recover for the ordinary negligence of the defendant or of his chauffeur, for the reason that plaintiff's intestate was a guest in the defendant's car, and he could not be liable except for gross negligence upon either his part or upon the part of his chauffeur.

Massaletti v. Fitzroy, 228 Mass. 487, L.R.A.1918C, 264, 118 N. E. 168, Ann. Cas. 1918B, 1088; McManus v. Thing, 194 Mass. 362, 80 N. E. 487; Lebov v. Consolidated R. Co. 203 Mass. 381, 26 L.R.A.(N.S.) 265, 89 N. E. 546; Walker v. Fuller, 223 Mass. 567, 112 N. E. 230; Sweeny v. Old Colony & N. R. Co. 10 Allen, 368, 87 Am. Dec. 644; Minor v. Sharon, 112 Mass. 477, 17 Am. Rep. 122; Bernabeo v. Kaulback, 226 Mass. 129, 115 N. E. 279; Cruzan v. New York C. & H. R. R. Co. 227 Mass. 594, 116 N. E. 879; Sullivan v. Boston & A. R. Co. 156 Mass. 378, 31 N. E. 128.

Braley, J., delivered the opinion of the court:

The plaintiff's intestate, while riding in the defendant's automobile driven by a chauffeur employed by him, having suffered personal injuries which, after a period of conscious suffering, resulted in death, the first action is at common law for her injuries, and the second action is brought under Rev. Laws, chap. 171, as amended by Stat. 1907, chap. 375, to recover damages for her death.

The jury having found, on evidence which warranted the finding, that the overturning of the automobile was due to the negligence of the chauffeur, and that the decedent was in the exercise of due care, we come to the question of the defendant's liability. It was uncontroverted that the decedent was in the automobile on the invitation of the defendant's daughter, to whom her father had given permission to use it for the purpose of going from Lawrence to Boston to buy a fur coat, and it was on the return journey that the accident happened. The defendant's responsibility rests on the authority conferred on his daughter to invite the decedent to accompany her. Kennedy v. R. & L. Co. 224 Mass. 207–209, 112 N. E. 872. The jury, of course, had the right to believe the evidence of the administrator, who testified that, in an interview after the accident, the defendant said that his daughter told him: "They were going to have a football game Saturday, and asked me if she could have a fur coat. I told her of course she could. Then she asked me if she could have the machine, and if she could invite Josephine," the decedent, "to go to Boston with her to help her to select her coat. I told her she could. . . ." The question is the same as if the defendant personally had invited the decedent to accompany his daughter to help in the selection of the garment. It was agreed at the argument that they were intimate friends, and often had driven together in the automobile, and it is plain that the decedent neither asked nor expected any recompense, but went for the accommodation of her friend, by whom transportation for their mutual companionship and enjoyment had been provided.

The element of any pecuniary benefit or gain to the defendant being absent, the transaction was gratuitous, under which he is liable only for gross negligence in the operation of the automobile. Massaletti v. Fitzroy, 228 Mass. 487,

Automobile—injury to guest of child—liability.

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L.R.A.1918C, 264, 118 N. E. 168, Ann. Cas. 1918B, 1088; West v. Poor, 196 Mass. 183, 11 L.R.A. (N.S.) 936, 124 Am. St. Rep. 541, 81 N. E. 960. The case of Loftus v. Pelletier, 223 Mass. 63, 111 N. E. 712, where the evidence warranted a finding that the plaintiff's right to transportation by the defendant, a physician, was an implied term of her contract of employment as a nurse, is plainly distinguishable. The plaintiff's first and second requests: "If the jury find that the plaintiff's intestate was in the machine for the purpose of assisting the defendant's daughter, at the request of the defendant through his daughter, the defendant owed her a higher degree of care to transport her safely than if she was a mere guest, and is liable for his negligence or that of his servant or agent," and that, "upon all the evidence the plaintiff's intestate was not a mere guest, but at least one of her purposes in the machine was of assisting the defendant's daughter, at the request of the defendant through his daughter, in the selection of a garment, and it is not necessary for the plaintiff to prove gross negligence on the part of the defendant, or his agent or servant, in order to recover," were properly denied. The plaintiff's third request to rule that, upon all the evidence, the plaintiff has established gross negligence on the part of the chauffeur, could not have been given. It was a question of fact for the jury, who have answered in the negative.

Trial—instructions—question for jury.

The plaintiff in this connection offered to show that on the forenoon of the day of the accident, the chauffeur, when the defendant's wife was using the car, drove fast, on the ground that any reckless habits of the employee, which are known or ought to have been known to the employer, are admissible. The evidence was inadmissible. Cooney v. Commonwealth Ave. Street R. Co. 196 Mass. 11, 14, 81 N. E. 905.

Evidence—habits of chauffeur.

The question whether "he saw his housekeeper do anything when she saw the Packard," meaning the defendant's car, which was asked by the plaintiff of a witness called by him, and who, accompanied by her, was passing over the road in a touring car and observed the accident, also was excluded rightly. The short answer is that no offer nor any statement as to what the answer to the question would be was made. Lee v. Tarplin, 183 Mass. 52, 54, 66 N. E. 431; Bachant v. Boston & M. R. Co. 187 Mass. 392, 396, 105 Am. St. Rep. 408, 73 N. E. 642. But even if the answer had been that she exhibited signs of fright, which the jury could have inferred were caused by what she had seen, the evidence would not have been competent as tending to prove negligence of the chauffeur. The final ruling, to which the plaintiff also took exceptions, that unless gross negligence was proved the plaintiff could not recover, was correct, and, finding no error of law in the trial of the first case, we pass to the defendant's exceptions in the second case.

Appeal—exclusion of question—error.

Evidence—negligence of chauffeur—fright of witness.

The defendant requested the court to rule that the plaintiff could not recover unless gross negligence was proved. But the statute in express terms requires proof only of ordinary negligence, and the ruling could not have been given. Brown v. Thayer, 212 Mass. 392, 397, 398, 99 N. E. 237. The exceptions in each case must be overruled, and it is so ordered.

Death—automobile accident—gross negligence.

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ANNOTATION.

Automobiles: liability of parent for injury to child's guest by negligent operation of car.

JOHNSON v. EVANS (reported herewith), ante, 891, and FLYNN v. LEWIS (reported herewith), ante, 896, involve questions which will undoubtedly give rise to considerable litigation in the future. The keeping of a car for family use is a growing custom, and a part of such use would seem to involve the transporting of guests of members of the family.

In JOHNSON v. EVANS, it will be observed that the decision in favor of the injured guest is referred to the so-called "family-purpose" doctrine. This doctrine, which has come into existence since the use of automobiles became common, holds the owner of an automobile which was purchased and maintained for the pleasure of his family liable for injuries inflicted by the machine while it is being used by members of his family for their own pleasure, on the theory that the car is being used for the purpose for which it was kept, and that the person operating it is, therefore, acting as the owner's agent or servant in using it. This doctrine has been rejected by some courts, especially where a child was using the machine for his own pleasure unaccompanied by other members of the family, but has been unqualifiedly adopted by others. In Birch v. Abercrombie (1913) 74 Wash. 486, 50 L.R.A.(N.S.) 59, 133 Pac. 1020, a leading case on the question, the court said: "It seems too plain for cavil that a father who furnishes a vehicle for the customary conveyance of members of his family makes their conveyance by that vehicle his affair, that is, his business, and anyone driving the vehicle for that purpose with his consent, express or implied, whether a member of his family or another, is his agent. The fact that only one member of the family was in the vehicle at the time is, in no sound sense, a differentiating circumstance, abrogating the agency. It was within the general purpose of the ownership that any member of the family should use it, and the agency is present in the use of it by one as well as by all."

On the other hand, in a case involving like facts, in which the doctrine was rejected (Van Blaricom v. Dodgson (1917) 220 N. Y. 111, L.R.A.1917F, 363, 115 N. E. 443), the court said: "It has always been supposed that a person who was permitted to use a car for his own accommodation was not acting as agent for the accommodation of the owner of the car. Reilly v. Connable (1915) 214 N. Y. 586, L.R.A. 1916A, 954, 108 N. E. 853, Ann. Cas. 1916A, 656. The attempt is made, however, to reconcile these apparently contradictory features of this proposition by the assertion that the father had made it his business to furnish entertainment for the members of his family, and that, therefore, when he permitted one of them to use the car, even for the latter's personal and sole pleasure, such one was really carrying out the business of the parent, and the latter thus became a principal and liable for misconduct. This is an advanced proposition in the law of principal and agent, and the question which it presents really resolves itself into the one whether, as a matter of common sense and practical experience, we ought to say that a parent who maintains some article for family use, and occasionally permits a capable son to use it for his individual convenience, ought to be regarded as having undertaken the occupation of entertaining the latter, and to have made him his agent in this business, although the act being done is solely for the benefit of the son. That really is about all there is to the question. Not much can be profitably said by way of amplification, or in debate of the query whether such a liability would rest upon reasonable principles, or whether it would present a case of such theoretical and attenuated agency, if any, as would be beyond the recognition of sound principles of law,

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as they are ordinarily applied to that relationship. The question largely carries on its face the answer, whichever way to be made. Unquestionably, an affirmative answer has been given by the courts of some states. Birch v. Abercrombie (Wash.) supra; Marshall v. Taylor (1913) 168 Mo. App. 240, 153 S. W. 527, 6 N. C. C. A. 313; Hays v. Hogan (1914) 180 Mo. App. 237, 165 S. W. 1125; Davis v. Littlefield (1914) 97 S. C. 171, 81 S. E. 487; Griffin v. Russell (1915) 144 Ga. 275, L.R.A.1916F, 216, 87 S. E. 10, Ann. Cas. 1917D, 994. But it seems to us that such a theory is more illusory than substantial, and that it would be far-fetched to hold that a father should become liable as principal every time he permitted a capable child to use for his personal convenience some article primarily kept for family use. That certainly would introduce into the family relationship a new rule of conduct, which, so far as we are aware, has never been applied to other articles than an automobile. We have never heard it argued that a man who kept for family use, a horse, or wagon, or boat, or set of golf sticks, had so embarked upon the occupation and business of furnishing pleasure to the members of his family that, if sometimes he permitted one of them to use one of those articles for his personal enjoyment, the latter was engaged in carrying out, not his own purposes, but, as agent, the business of his father."

The review of the cases on the "family-purpose" doctrine is, however, not within the scope of this note.

The JOHNSON CASE appears to be the only one which has applied this doctrine where the person injured was a guest of a member of the family. Assuming the soundness of the doctrine, however, its extension to the case of an injured guest would seem to be logically consistent with the theory upon which it rests; at least, if the "family purpose" may be regarded as embracing the authority of the members of the family to invite guests to ride with them, and assuming that the circumstances are otherwise such as to support a recovery by a guest.

With respect to the general question of the liability of an owner of an automobile for an injury sustained by a guest riding with him, it may be stated that the owner is held responsible if the requisite degree of negligence is proved; but that there is a conflict as to whether the owner owes the duty to exercise ordinary care toward his guest, or whether his only duty is to refrain from being grossly negligent.

It will be observed that the "family-purpose" doctrine was not involved in FLYNN v. LEWIS (reported herewith), ante, 896. In that case, the owner had authorized his daughter to use his car, driven by his chauffeur, for a certain purpose, and to invite the guest who was killed to accompany her, and it was held that the question involved was the same as if the parent had personally invited the guest to accompany his daughter; that, as the guest was a gratuitous one, a recovery could not be had in the first action, which was based on the common law, as gross negligence was not shown; but that a recovery might be had in the second action, which was based on a statute imposing liability for a failure to exercise ordinary care.

These two cases appear, from a search, to be the only ones which have considered the exact question under annotation.

Two other cases have been disclosed, however, which border so closely on the question as to warrant their use, although it will be noticed that in both the person injured was not strictly the guest of the owner's child.

In one of these, Powers v. Williamson (1914) 189 Ala. 600, 66 So. 585, the defendant gave his son permission to take his car for the purpose of giving some of the son's friends a pleasure ride, provided one of his acquaintances, whom the father believed a competent chauffeur, would drive; and the acquaintance consented, and personally invited the plaintiff to go on the trip, during the course of which she was injured through the driver's negligence. It was held that if the

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driver was, as to the guests of the son, the servant of the defendant, which the court did not decide, he was not such as to the plaintiff, who was an invitee of the driver, and that no legal principle existed under which the defendant could be held liable.

A somewhat similar situation existed in Wilde v. Pearson (1918) 140 Minn. 394, 168 N. W. 582, in which it was held that no recovery could be had against an owner of a car purchased for family use, where it appeared that the machine was put up on blocks and stored for the winter; that during the owner's absence her daughter, who had been forbidden to use it, with the assistance of another, reassembled the machine; that the daughter requested a friend to meet guests for a party with the car, and that, while he was on this errand, one who was riding in the car at the invitation of an invited guest to the party was killed through the negligent operation of the machine, the court holding on these facts that the car was not being operated in the owner's service, or for the purpose for which it was maintained. J. T. W.

BOYLSTON BOTTLING COMPANY
v.
PATRICK W. O'NEILL
and
SARAH N. NOONAN, Appt.

Massachusetts Supreme Judicial Court — January 2, 1919.

(231 Mass. 498, 121 N. E. 411.)

Bond — to secure performance of illegal act — recovery of fruits.

1. The bond of one employed, for a single consideration, to deliver intoxicating liquors in territory in a part of which such delivery is unlawful, conditioned to account for liquors delivered to him and moneys collected by him, is unenforceable.

[*See note on this question beginning on page* 906.]

Appeal — ruling on sufficiency of evidence — disregarding opposing evidence.

2. In determining the correctness of a refusal to rule that, upon all the evidence in the case, plaintiff was not entitled to recover, the evidence favorable to defendant cannot be considered.

Contracts — illegal — enforcement.

3. A party to an illegal contract will be left by the law where the law finds him.

Same — single consideration — illegal act.

4. A contract for a single consideration is wholly void if the consideration is paid in part for an illegal act.

Same — invalid in part — effect.

5. A contract by which one is employed to deliver intoxicating liquors is unenforceable, if part is to be delivered in territory where such delivery is unlawful.

Wager — recovery from stakeholder.

6. Where money is placed by two betters in the hands of a stakeholder to be paid over to the winner of the bet, either can revoke the stakeholder's authority before the money is paid over, and recover his money from the stakeholder.

Intoxicating liquors — license — violation.

7. One having a license to sell intoxicating liquors at his place of business on a specified street does not comply with his license by giving orders to a drayman to obtain the liquors at a brewery and deliver them to the customers' addresses, contained on tags given him to attach to the packages, and collect the money when the deliveries are made.

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APPEAL by defendant Noonan from an order of the Appellate Division of the Municipal Court of Boston dismissing a report of the case in an action for breach of a bond guaranteeing accounts and collections of defendant O'Neill, who was employed by plaintiff to deliver intoxicating liquors. *Reversed.*

The facts are stated in the opinion of the court.

Mr. John E. Crowley, for appellant:

The contract between plaintiff and defendant O'Neill was for the performance of an illegal act, the delivery of intoxicating liquor sold in the town of Brookline, and no action could be maintained upon the bond guaranteeing the performance of such a contract.

Downey v. Charles S. Gove Co. 201 Mass. 251, 131 Am. St. Rep. 398, 87 N. E. 597; Riley v. Jordan, 122 Mass. 231; Andrews v. Frye, 104 Mass. 234.

The consideration of the contract was undivided, and that portion which contemplated the delivery of intoxicating liquors in Brookline was illegal, and no action would lie upon the contract, even though a portion of the work to be performed (deliveries in Boston) was legal.

Bishop v. Palmer, 146 Mass. 469, 4 Am. St. Rep. 339, 16 N. E. 299; Way v. Greer, 196 Mass. 237, 81 N. E. 1002; Kennedy v. Welch, 196 Mass. 592, 83 N. E. 11; Murphy v. Rogers, 151 Mass. 118, 24 N. E. 35; Andrews v. Frye, 104 Mass. 234.

Mr. Harold S. Davis, for appellee:

The evidence did not require a finding that the plaintiff delivered the goods to O'Neill with any unlawful intent.

Adams v. Coulliard, 102 Mass. 167; Com. v. Riley, 196 Mass. 60, 10 L.R.A. (N.S.) 1122, 81 N. E. 881; Shea v. American Hide & Leather Co. 221 Mass. 282, 109 N. E. 158; Cohen v. Henry Siegel Co. 220 Mass. 215, 107 N. E. 912; Jones v. McLeod, 103 Mass. 58; Trott v. Irish, 1 Allen, 481; Wilson v. Melvin, 13 Gray, 73; Timson v. Moulton, 3 Cush. 269.

Defendant O'Neill was not, in any event, relieved from the duty of accounting for the plaintiff's goods. If not prepared to dispose of them as directed by the plaintiff, he was bound to return them, and he did not have, on any theory, the right to convert the goods to his own use.

Bone v. Ekless, 5 Hurlst & N. 925, 157 Eng. Reprint, 1450, 29 L. J. Exch. N. S. 438; Farmer v. Russell, 1 Bos. & P. 296, 125 Eng. Reprint, 913; Wassermann v. Sloss, 117 Cal. 425, 38 L.R.A. 176, 59 Am. St. Rep. 209, 49 Pac. 566; Souhegan Nat. Bank v. Wallace, 61 N. H. 24; Kiewert v. Rindskopf, 46 Wis. 481, 32 Am. Rep. 731, 1 N. W. 163; Baldwin Bros. v. Potter, 46 Vt. 402; Floyd v. Patterson, 72 Tex. 202, 13 Am. St. Rep. 787, 10 S. W. 526; Fisher v. Hildreth, 117 Mass. 558; McKee v. Manice, 11 Cush. 357.

If the primary obligation of the principal to account is enforceable, the secondary obligation of the surety to indemnify against a failure to account is likewise enforceable.

Eagle Roller-Mill Co. v. Dillman, 67 Minn. 282, 69 N. W. 910; Tri-Bullion Smelting & Development Co. v. McLain, 61 Colo. 80, 156 Pac. 133; Springer v. Exchange Bank, 14 Can. S. C. 716.

Loring, J., delivered the opinion of the court:

This is an action for breach of a bond. The condition of the bond is that "said Patrick William O'Neill, who is about to be employed by said Boylston Bottling Company, shall render a faithful account of all merchandise delivered to him and money collected by him, and shall return all packages received by him from the company, or account to the company for the value of any not so returned." The breach alleged is that O'Neill "received from the plaintiff 1,064 dozen bottles, of the value of 30 cents a dozen, and 361 cases, of the value of 40 cents apiece, for which he has failed to account." The surety on the bond pleaded (inter alia) that "if it shall appear that the principal upon the bond . . . ever did any of the things set out in the plaintiff's declaration, that the same were done or performed under contract in violation of the laws of this commonwealth." At the trial the judge refused to rule "that, upon all the evidence, the plaintiff was not entitled to recover," and reported the case to the appellate division of the municipal court. The appellate di-

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vision directed that the report be dismissed, and from that order the surety took the appeal which is now before this court.

Appeal—ruling on sufficiency of evidence—disregarding opposing evidence.

We agree with the plaintiff that in deciding the question before us (whether, as matter of law, the plaintiff was not entitled to recover) the evidence favorable to the defendant must be laid on one side. The surety's contention is that, on the plaintiff's own evidence, O'Neill (the principal defendant) as matter of law was employed for a single sum to do work which was illegal in part; that for this reason the whole employment was illegal, and that as a result the law will leave the parties where it finds them. If this be so the ruling asked for ought to have been given.

It is stated in the report "that the plaintiff employed O'Neill to deliver intoxicating liquor sold by it in Roxbury and in Brookline, and agreed to pay him for his services in that connection the sum of $60 a week." It is further stated that "the defendant O'Neill was the holder of a license from the selectmen of the town of Brookline, under which he was permitted, as an expressman, to make deliveries of intoxicating liquor in Brookline." It must be taken that this license was granted to O'Neill under Stat. 1906, chap. 421, and the acts in amendment of that statute. From this it follows that on this record it must be taken that Brookline was a no-license town.

"It appeared that the plaintiff was engaged in the sale of intoxicating liquor on Lamartine street in the city of Boston, under a license of the fourth class, issued by the licensing board of the city of Boston." The surety's contention is that the contract between the plaintiff and O'Neill, by which "the plaintiff employed O'Neill to deliver intoxicating liquor sold by it in Roxbury and Brookline," was an illegal contract so far as it provided for the delivery of "intoxicating liquor sold by it [the plaintiff] . . . in Brookline," and that, the consideration paid O'Neill, being an undivided sum ($60 a week for all his services), the contract was an illegal one, although the delivery of liquors sold in Boston was legal.

It is established that a party to an illegal contract will be left by the law where the law finds him. A collection of authorities on that point is not necessary. For a recent case in which the proposition is well stated and a collection of some of the authorities is made, see Pelosi v. Bugbee, 217 Mass. 579, 105 N. E. 222. It is also established that a contract for a single consideration is wholly void if that single consideration is paid in part for an illegal act. Bishop v. Palmer, 146 Mass. 469, 4 Am. St. Rep. 339, 16 N. E. 299; Kennedy v. Welch, 196 Mass. 592, 83 N. E. 11; Murphy v. Rogers, 151 Mass. 118, 24 N. E. 35; Andrews v. Frye, 104 Mass. 234.

Contracts—illegal—enforcement.

Same—single consideration—illegal act.

The answer of the plaintiff to this contention is, that "there is no evidence that the goods referred to in the declaration were delivered to O'Neill for transportation to points in Brookline, and not to points in Boston." The objection which the plaintiff has to meet is, that O'Neill was employed, for a single sum, in part "to deliver intoxicating liquor sold by it [the plaintiff] . . . in Brookline," and that, that part of the employment being illegal and the consideration being single, the whole contract is void.

Same—invalid in part—effect.

The plaintiff's next contention is that this case comes within the established rule that where money is placed by A and B in the hands of a stakeholder, to be paid over to the winner of a bet between A and B, A or B can revoke the stakeholder's authority before the money is paid over, and recover from the stakeholder the money paid him by the person revoking the

Wager—recovery from stakeholder.

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stakeholder's authority. This is established by the cases of Fisher v. Hildreth, 117 Mass. 558, and McKee v. Manice, 11 Cush. 357. Those cases go on the ground that the payment of the money to the stakeholder in such a case is not an illegal transaction, and that, so long as the matter is executory and the money has not been paid over, either party can revoke the authority to pay the money in the illegal way theretofore authorized. The plaintiff has also placed great reliance on the case of Bone v. Ekless, 5 Hurlst. & N. 925, 157 Eng. Reprint, 1450, 29 L. J. Exch. N. S. 438. The decision in that case went on the same ground. In that case the plaintiff had sold a vessel to the Turkish government for £6,500, under an authority from the defendant to pay £500 of the purchase money as a bribe to certain Turkish officials, to secure the sale to the Turkish government. Later, the plaintiff sued the defendant for the sum of £426 due from the defendant to him, and the defendant pleaded in set-off that of the £6,500 received by the plaintiff to the defendant's use he had paid over to them £6,000, and that he had paid in bribes £300, but that he had kept in his own pocket the remaining £200. To this the plaintiff answered that he had promised to pay the £200 (which he kept) as a bribe to an official of the Turkish government, although he had not yet paid it over. The court held that the £6,500 received by the plaintiff was the defendant's money, and that the defendant had a right to revoke the plaintiff's authority to pay over as a bribe the £200 which he had not paid over. This conclusion was reached on the ground on which it was held, in this commonwealth, that the authority of a stakeholder to pay the money deposited with him to the winner of the bet can be revoked so long as the matter is executory and the money has not been paid over. The sale of the ship in Bone v. Ekless was not an illegal transaction, although it had been procured by fraud and so could have been avoided by the Turkish government. The illegal transaction there in question consisted in the payment of the £500 as bribes. But in the case at bar O'Neill's employment was an illegal one. It was an illegal one because he was employed in part to deliver liquor sold in violation of law, and was paid a single sum for all his services. It is not necessary to examine in detail the cases in other jurisdictions which have been cited. If they go beyond this they are not law in this commonwealth.

Bond—to secure performance of illegal act—recovery of fruits.

We have decided the case at bar on the footing on which it was argued. But a word must be added to prevent its being misunderstood. The case was argued on the footing that the sales made in Boston were legal. On the record, it would seem that they were illegal. It is stated in the report that "the employment [of O'Neill by the plaintiff] was carried out in the following manner." The plaintiff recorded on its books at its store on Lamartine street all "orders for liquor" received by it. It delivered to O'Neill a written order on Haffenreffer & Company ("a brewery located in the city of Boston, which furnished the plaintiff with beer") for the beer necessary to fill these orders. O'Neill then drove with his truck to the brewery, presented this order to it, and received from it the beer called for. He then "placed upon the various cases and packages," tags (bearing the name and address of the plaintiff) on which there was written the name and address of the customer to whom the beer was to be delivered. "O'Neill also entered in a book which he kept for the purpose, the date of reception, a transcript of the marks on the packages, and the dates of delivery of the liquor which he so received and delivered. Under the terms of his employment, O'Neill was required to collect the price of the liquor on delivery, and, in the event of failure

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to collect the price, to withhold delivery and to return the merchandise to the plaintiff." The beer so sold by the plaintiff was not sold on the premises owned by the plaintiff "on Lamartine street," and it must be taken on the record that the premises described in the plaintiff's fourth-class license were its premises on Lamartine street. A license authorizes a sale on the premises described in it. A sale by the person licensed, made elsewhere than on the premises described in the license, is not protected by it and is an illegal sale.

Intoxicating liquors—license—violation.

The result is that the order dismissing the report must be reversed, and judgment entered for the surety.

So ordered.

ANNOTATION.

Right to recover against employee or his bond for money or property, the fruits of an employment involving a violation of law.

This note, as suggested in the title, is confined to cases involving the right to recover money or property, representing the proceeds resulting from the performance, in whole or part, of the contract, and is not concerned with cases in which the action is based on a disaffirmance or repudiation of the contract, while still executory, and seeks to recover merely what was advanced or paid by the plaintiff to the defendant.

Recovery not allowed.

It will be noted that in the reported case (BOYLSTON BOTTLING CO. v. O'NEILL, ante, 902) a recovery was denied for a breach of a bond guaranteeing the accounting for property or its proceeds received by one who, for a single consideration, was employed to deliver intoxicating liquor, in part, in a no-license town, it being held that, a portion of the employment being illegal and the consideration being single, the whole contract was void and unenforceable.

This decision appears sound, and is in accord with the following cases, holding that no recovery can be had in a court for money or property received by an employee or agent, acting in pursuance of a contract of employment involving a violation of law, where a recovery would have to be based on the illegal contract:

United States.—Lanham v. Patterson (1871) Fed. Cas. No. 8,069.

Kansas. — Alexander v. Barker (1902) 64 Kan. 396, 67 Pac. 829; Danciger v. Cooley (1916) 98 Kan. 38, 157 Pac. 453.

Mississippi. — Wooten v. Miller (1846) 7 Smedes & M. 380.

Missouri. — Murray v. Wakefield (1881) 9 Mo. App. 591.

New Hampshire.—Udall v. Metcalf (1831) 5 N. H. 396.

New York.—Hunt v. Knickerbacker (1810) 5 Johns. 327; Negley v. Devlin (1871) 12 Abb. Pr. N. S. 210; Rolfe v. Delmar (1868) 7 Robt. 80.

Utah.—Mexican International Bkg. Co. v. Lichtenstein (1894) 10 Utah, 338, 37 Pac. 574.

Vermont.—Buck v. Albee (1854) 26 Vt. 184, 62 Am. Dec. 564.

Wisconsin. — Lemon v. Grosskopf (1868) 22 Wis. 447, 99 Am. Dec. 58.

The reported case finds support in other cases, which also involved employment for the illegal sale of liquor.

Thus, in Buck v. Albee (1854) 26 Vt. 184, 62 Am. Dec. 564, where the defendant agreed with the owner of intoxicating liquor to sell it, in violation of law, and apply the proceeds in a certain way, the court decided that no action could be entertained to compel the application of the proceeds according to the agreement, and said: "In 2 Kent's Com. 588, the rule is given 'that, if the contract grows immediately out of or is connected with an illegal act, a court of justice will not enforce it; but if it be unconnect-

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ed with the illegal act, and founded on a new consideration, it may be enforced.' In the application of this rule, it may be observed that, in all cases where it is necessary to prove that illegal contract and sale to enable the plaintiff to recover, then the contract is so connected with the illegal act that a recovery cannot be had. But if the right can be established without such proof, the plaintiff may recover; for the claim is unconnected with the sale, and rests on a new consideration. In Story on Contracts, 146, it is said that 'if an act in violation of either statute or common law be already committed, and a subsequent agreement be entered into, which, though founded thereupon, constituted no part of the original inducement, or consideration therefor, such an agreement is valid.' If the money arising from the sale of this liquor had been received by the defendant, and the plaintiff had afterwards obtained an order for the payment of the same to him, and the defendant had agreed to pay it, the action could be sustained, as the plaintiff in no sense would be a party to the illegal contract of sale. The knowledge that the money in the defendant's hands arose from an illegal transaction would make no difference; for in such case it would be sufficient to prove the money in his hands and the agreement to pay the same to the plaintiff, without showing the contract or arrangement under which the defendant received it. It is said in Story on Contracts, 146, 147, that 'this rule, and the distinction which is made, will be found to form the principle which lies at the root of many apparent contradictory cases, and to offer the best solution to the various and opposing decisions.' Armstrong v. Toler (1826) 11 Wheat. (U. S.) 258, 6 L. ed. 468. It is expressly stated in the case that before the liquor was sold, and while it was in the defendant's hands, the plaintiff and the other parties in interest agreed that the defendant should proceed and sell the liquor. When the defendant was selling it, he was not only acting for his own interest, but for the plaintiff and the other party also. The plaintiff as much directed the sale as the others, who were equally interested with him, and was as directly concerned in the violation of the statute as was the defendant himself. To sustain this action, it will be necessary for the plaintiff to prove the contract under which the liquor came into the defendant's hands, the mutual arrangement for the sale of it, the illegal sale itself, and the receipt of the money by the defendant. It is through that contract and sale that the plaintiff derives his title. If the plaintiff is allowed to recover, it is not upon a mere receipt of the money by the defendant and a subsequent agreement to pay the same to the plaintiff, for no such subsequent agreement has been made; but it must rest upon a direct adjudication of the court, sustaining that illegal contract and sale. The court can no more enforce that contract, or see to the distribution of the proceeds of that sale between these parties, than they can enforce any illegal contract, or see to the distribution of money between parties which has arisen from any other illegal adventure."

And in Danciger v. Cooley (1916) 98 Kan. 38, 157 Pac. 453, where liquor dealers in one state received orders from customers in another, in which the sale of liquor was unlawful, and shipped liquor to the latter state to their own order, and mailed the bill of lading to the defendant with instructions to deliver it to the parties ordering it, upon payment of an accompanying draft, and agreed to pay the defendant a certain commission for his services, it was held that no recovery could be had of the amount collected by the defendant, as a recovery would be based on the illegal contract, and would amount to an enforcement of such contract.

And in the following cases it was held that no recovery of money received from sales could be had against one who was employed by the plaintiff to sell lottery tickets in a state where such sales were illegal, the obligation to pay such money being so connected with the illegal contract as to be inseparable from it, and the par-

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ties being in pari delicto. Lanham v. Patterson (1871) Fed. Cas. No. 8,069; Lanahan v. Pattison (1874) 1 Flipp. 410, Fed. Cas. No. 8,036; Udall v. Metcalf (1831) 5 N. H. 396; Negley v. Devlin (1871) 12 Abb. Pr. N. S. (N. Y.) 210; Rolfe v. Delmar (1868) 7 Robt. (N. Y.) 80; Mexican International Bkg. Co. v. Lichtenstein (1894) 10 Utah, 338, 37 Pac. 574; Lemon v. Grosskopf (1868) 22 Wis. 447, 99 Am. Dec. 58.

And in Hunt v. Knickerbacker (1810) 5 Johns. (N. Y.) 327, where the plaintiff had left lottery tickets with the defendant for sale, in a state in which their sale was unlawful, and claimed to recover their value on the ground that the defendant had made them his own by not returning them pursuant to his contract, it was held that no recovery could be had, as to allow one would be an affirmance of the illegal contract.

And in Wooten v. Miller (1846) 7 Smedes & M. (Miss.) 380, where a nonresident placed a slave in the hands of one about to move to Mississippi, under an agreement that he would sell the slave for him, and such an introduction of a slave into the state was against its laws, it was held that the owner could not recover from his agent the amount received on a sale of the slave, since he could not establish his case without resorting to the original illegal contract.

And it has been held that no recovery for rent can be had on a contract of agency, under which the agent undertook to rent lands in the Cherokee nation and collect the rents, where the principal was not a citizen of the Cherokee nation, and a statute forbade one who was not such a citizen from buying or renting property in that nation, the court holding that the contract of agency was void, and could not be made the basis of an action. Alexander v. Barker (1902) 64 Kan. 396, 67 Pac. 829.

And in Woodson v. Hopkins (1905) 85 Miss. 171, 70 L.R.A. 645, 107 Am. St. Rep. 275, 37 So. 1000, 38 So. 298, it was held that one who employed another to conduct a loan office and receive rates of interest so extortionate as to shock the moral sense, and be against the public policy of the state, was not entitled to receive the aid of a court of equity to compel the agent to pay over money received in the business, or to obtain possession of books, memoranda, and other property pertaining to the business, notwithstanding the contract might be regarded as executed, the court holding that no relief will be granted, where the parties are in pari delicto and the contract is against public policy.

Recovery allowed.

In other cases, however, in which the contracts of employment were apparently as illegal as some, at least, of those in the preceding cases, a recovery has been allowed, the courts refusing to permit the agent, or employee, to escape liability for money in his hands by asserting the illegality of the transaction he was employed to carry out, and apparently taking the view that the plaintiff was not obliged, in order to make out his case, to rely upon any illegal contract of employment.

Thus, in Anderson v. Moncrieff (1810) 3 Desauss. Eq. (S. C.) 124, where the defendant agreed to receive a cargo of negroes and sell them, in violation of law, and receive the money, it was held that a recovery might be had in equity, after the sales had been made, for the amount received. The court said: "But it is alleged by the defendant that, whatever may have been the moral obligation, the complainants were not entitled to recover from the defendant, because the money in question arose from a shipment of negroes made in October, 1799, from the coast of Africa to Mr. M'Leod, in Charleston, at a time when the importation of negroes into this state was made illegal by the acts of assembly then in force, prohibiting such importation and confiscating the negroes; and that courts of justice will not enforce illegal contracts, nor aid parties in recovering them. The position laid down by the defendant's counsel is certainly true in general, that courts of justice will not enforce illegal contracts, nor assist parties in recovering

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under them. The cases of insurance on illegal voyages, and other examples, have been cited and relied upon in support of this doctrine. But all the cases cited are where attempts are made to recover under the illegal contract itself, as in the instance of insurances, where the suit is brought to recover against the insurer on the illegal policy. The counsel endeavored to give application to this set of cases, by insisting that this was a contract whereby Mr. M'Leod undertook, by receiving the negroes, to sell them and be accountable for the proceeds; and that this contract, being contrary to law, was void, and could not be enforced in our courts. I cannot, however, think that these decisions have any application to this case. This is a mere agency. It was so understood by the parties in the course of the trade whilst it was legal. But suppose it to be a contract, what is it? That defendant would receive a cargo of negroes and sell them, and receive the money for the complainant. All this he has done; it is completed. But the defendant says: I will not pay you the money which I have received on your account, because the whole transaction is illegal, as the law prohibited the importation of negroes. The complainant files this bill to compel the payment. The suit is not brought to recover a cent out of the defendant's pocket of his own money; it is to make him pay money which he has received as the agent, and for the use, of the complainant. It would be monstrous that the defendant should be permitted to keep the money; and the decided cases, following the principles of abstract justice, show that, where an illegal transaction has taken place the agent who has received the money on the part of the principal, shall not shelter himself from the payment of it to his principal, under the pretense of the illegality of the original transaction."

And in Ingram v. Mitchell (1860) 30 Ga. 547, where the owner of a slave charged with having committed a crime entered into an agreement with the defendant to take the slave away and sell him, and to enable the defendant to convey title the latter gave the plaintiff a note, with the condition that if he should not sell the slave he should be returned to the plaintiff, and the note should then be void, it was held that the agent could not defeat a recovery for the proceeds received by him for the sale of the slave, on the ground that the agreement, having been made to screen the slave from trial, was illegal, and that he could not, therefore, be required to account for the money received.

And in Norton v. Blinn (1883) 39 Ohio St. 145, where the plaintiff employed the defendant to speculate in futures, and deposited money with him for that purpose, and the defendant speculated and realized a profit, it was held that a recovery could be had. The court said: "If the agent receiving such money had not been employed in conducting such business, it would seem to be quite plain, upon principles of purest morality, that he should account to his principal therefor; but where the sole employment of the agent was to manage and conduct the unlawful transactions, it seems to me, a much more difficult question arises. In the latter case the agent is a particeps criminis. In offenses against trade, and the like, the law regulating the administration of penal justice does not recognize the relation of principal and agent, unless the agent be an innocent instrument merely. In such cases, the guilty offenders against the law are all principals; hence, as between such, with some show of reason it might be said, that the law will afford no redress by civil remedies. The rulings upon this question, however, have been so uniformly the other way, it becomes our duty to follow them, unless we find them totally repugnant to public policy and morality. Upon a careful examination of the authorities, we find no such repugnancy—indeed, they commend themselves to our judgment. In the first place, the rule which denies civil remedies in such cases applies only to the parties to the illegal transaction. Public policy does not require that one engaged in an unlawful enterprise should, by pleading it, shield himself

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from liability for the wages of his employees, agents, or servants. It is enough that the rule should be enforced as between those who have some interest in the enterprise as principals. In the second place, it is contrary to public policy and good morals, to permit employees, agents, or servants to seize or retain the property of their principal, although it may be employed in illegal business and under their control. No consideration of public policy can justify a lowering of the standard of moral honesty required of persons in these relations. And again, if parties to an illegal contract waive the illegality, and honestly account as between themselves, no other person can be heard to complain of such accounting. Hence, we think that if in making such settlement one of the guilty parties should deliver property or money to an agent of another, to be delivered by the agent to his principal, such agent is bound to account therefor to his principal."

In Holleman v. Bradley Fertilizer Co. (1898) 106 Ga. 156, 32 S. E. 83, the contention of an agent employed to sell fertilizer, in an action by the principal to recover money collected, that the agency was created for an illegal purpose, that is, the sale of fertilizer not inspected and packed as required by law, and that the courts would not help either party, was held not to constitute a defense, where it appeared that there was nothing upon the face of the contract indicating that it was the purpose of the parties to sell fertilizer in violation of law, but that there had simply been an omission to have the property packed and inspected, and that the agents were really the violators of law, by failing to have this done before a sale was made by them in the state where they carried on business. J. T. W.

RE JUDICIAL SETTLEMENT OF THE ACCOUNT OF FARMERS' LOAN & TRUST COMPANY, as Successor Trustee, etc., of Valentine Mott, Deceased.

DE LANCEY K. JAY, Special Guardian of John J. Boyd et al., Appt.

FANNIE VAN SCHAICK, Respt.

New York Court of Appeals — December 1, 1914.

(213 N. Y. 168, 107 N. E. 340.)

Will — meaning of issue.

1. Under a devise in trust for a grandchild for life with remainder to his issue, the word "issue" means descendants, including grandchildren as well as children.

[*See note on this question beginning on page* 915.]

Same — issue to take per stirpes.

2. Under a will devising the share of a child in case of his death before testator to his issue, such issue to take equally what would have been the parent's share, and providing that the remainder, after a life estate provided for a grandchild, shall go to his issue, the issue of the grandchild will take per stirpes and not per capita.

APPEAL by the special guardian of certain infant parties from an order of the Appellate Division of the Supreme Court, First Department, reversing so much of a decree of the Surrogate's Court for New York County as construed the fifth clause of the will of Valentine Mott, deceased, and directed the distribution of the corpus of a trust created therein. *Modified.*

The facts sufficiently appear in the opinion of the court.

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Mr. William Wickham Hoffman, for appellant:

The primary legal significance of the word "issue" is descendants of whatever degree of descent.

Seitz v. Faversham, 205 N. Y. 197, 98 N. E. 385; Schmidt v. Jewett, 195 N. Y. 486, 133 Am. St. Rep. 815, 88 N. E. 1110; Re Bauerdorf, 77 Misc. 656, 138 N. Y. Supp. 678; Drake v. Drake, 134 N. Y. 220, 17 L.R.A. 664, 32 N. E. 114; Soper v. Brown, 136 N. Y. 244, 32 Am. St. Rep. 731, 32 N. E. 768.

The context of the will and codicil in question shows that testator intended to use the word "issue," in question, in its usual legal sense of "descendants," and there is nothing from which an intention can be found to limit its significance to "children."

Drake v. Drake, 134 N. Y. 231, 17 L.R.A. 664, 32 N. E. 114.

An intention to limit the significance of the word "issue" to children, in the fifth paragraph of the will, cannot be found from the fourth paragraph.

United States Trust Co. v. Tobias, 21 Abb. N. C. 392, 4 N. Y. Supp. 211; Drake v. Drake, 134 N. Y. 225, 17 L.R.A. 664, 32 N. E. 114; Harrison v. McAdam, 88 Misc. 21, 76 N. Y. Supp. 701; Jackson v. Jackson, 153 Mass. 377, 11 L.R.A. 305, 25 Am. St. Rep. 643, 26 N. E. 1112; Rasquin v. Hammersley, 152 App. Div. 530, 137 N. Y. Supp. 578; Morrow v. McMahon, 35 Misc. 354, 71 N. Y. Supp. 961.

Messrs. Uterhart & Graham, for respondent:

The testator used the word "issue" throughout his will in the sense of children.

Chwatal v. Schreiner, 148 N. Y. 683, 43 N. E. 166; Palmer v. Horn, 84 N. Y. 519; Palmer v. Dunham, 125 N. Y. 68, 25 N. E. 1081; Soper v. Brown, 136 N. Y. 249, 32 Am. St. Rep. 731; Murray v. Bronson, 1 Dem. 217; Daly v. Greenberg, 69 Hun, 228, 23 N. Y. Supp. 582; Emmet v. Emmet, 67 App. Div. 183, 73 N. Y. Supp. 614; Re Tenney, 104 App. Div. 290, 93 N. Y. Supp. 811; Rasquin v. Hamersley, 152 App. Div. 522, 137 N. Y. Supp. 578, affirmed in 208 N. Y. 630, 102 N. E. 1112; Edwards v. Edwards, 12 Beav. 99, 50 Eng. Reprint, 997; Ridgeway v. Munkittrick (1841) 1 Drury & War. 92; Re Birks [1900] 1 Ch. 417, 69 L. J. Ch. N. S. 124, 81 L. T. N. S. 741.

Cardozo, J., delivered the opinion of the court:

This case involves the construction of the will of Valentine Mott. He died in 1865, leaving a will and codicil. He gave his residuary estate to his wife for life. On her death he directed that the estate be sold and divided. We are concerned at this time with the distribution of the ninth part, which he directed should be held in trust for his granddaughter Fanny Mott. In the fourth subdivision of his will he said: "I give, devise, and bequeath one-ninth part of the proceeds of such sale to each of my surviving children, and one-ninth part of such proceeds to Isaac Bell, Jr., in trust for Fanny Mott, daughter of my son Valentine Mott, deceased, and one-ninth part of such proceeds to Isaac Bell, Jr., in trust for Valentine A. Blacque, son of my daughter Olivia, deceased."

In the same subdivision he said: "In case of the death of either of my children before the division of my estate, I give, devise, and bequeath what would have been his or her share, if living, to his or her issue, if any, such issue to take equally what would have been the parent's share. If no issue, then I give, devise, and bequeath such ninth part to my surviving children and the issue of those deceased."

By the fifth subdivision of the will he amplified the statement of his purpose in respect of the two shares which the preceding subdivision had already placed in trust: "The two several ninth portions of my estate devised to Isaac Bell, Jr., for my grandson Valentine A. Blacque, and for my granddaughter Fanny Mott, respectively, I hereby declare to be upon the trust following: To invest such several ninth parts on bond and mortgage in city and state stocks or in other safe securities, and to collect, and after the majority of each to pay to each of them the net income of his or her respective share during his or her life. Upon the death of either I give, devise and be-

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queath his or her share to his or her issue, if any. If there be no issue, then to my surviving children and the issue of those deceased."

The granddaughter Fanny Mott afterwards became Fanny Mott Campbell. She died in 1912, leaving two daughters, Fanny Van Schaick and Lillie C. Boyd, and four grandchildren. One of these grandchildren is the child of Mrs. Van Schaick. Three of them are the children of Mrs. Boyd. The will gave this share of the estate, on the death of Mrs. Campbell, to her "issue;" and the meaning of that term as here used is the question for decision.

The surrogate held that the word "issue" meant descendants, that it was not limited to children, and that the division must be made per capita among the descendants of every degree. In that view, the two children of Mrs. Campbell and the four grandchildren were entitled, each of them, to one sixth of the share in question. The appellate division held that the word "issue" was used in this will as synonymous with children; and hence that the two children of Mrs. Campbell were entitled, each of them, to a half, and that the grandchildren were excluded. This construction is established, not only by the opinion of the appellate division, but also by its order, which adjudges "that the word 'issue,' as used in that portion of the fifth clause of the will of Valentine Mott, deceased, reading 'upon the death of either, I give, devise, and bequeath his or her share to his or her issue, if any,' be accorded the construction contended for by appellant, and was used by the testator in the sense of children."

We agree with the learned surrogate that the word "issue" was intended to include descendants; but we do not share his view that the gift was to be made per capita, with the result that children would take concurrently with their living parents. Soper v. Brown, 136 N. Y. 244, 250, 32 Am. St. Rep. 731, 32 N. E. 768. We think that the will reveals a purpose that the issue should take per stirpes. This construction leads us to the same result that was reached at the appellate division, but by a different path. The difference, though not important in its consequences here, may be important when the case is cited as a precedent hereafter.

The rule is that, unless some other meaning is given to it by the context, the word "issue" is not confined to children, but includes descendants in any degree. Schmidt v. Jewett, 195 N. Y. 486, 133 Am. St. Rep. 815, 88 N. E. 1110. Another meaning will not readily be given if the result would be to divert the gift from the direct line of descent. Where there is a gift to a child or grandchild for life, and over on the death of such child or grandchild in default of issue, the courts have held it to be "an unnatural construction which would exclude all but the immediate children of the first taker, in favor of the other branches of the family. The reasonable construction in such cases is that the gift over was intended to take effect only on the extinction of the line of descent from the first taker." Soper v. Brown, 136 N. Y. 244, 251, 32 Am. St. Rep. 731, 32 N. E. 770. This testator provided that, in case of the death of his children before the wife's life estate had terminated, their issue should take their share, and only in default of issue was there a gift to others. To say that by the gift to issue he meant children, but not grandchildren, is to impute to him a purpose to disinherit one branch of descent to the enrichment of another. There is nothing in this will to justify us in deviating from the settled rule that a construction leading to such consequences ought generally to be avoided. Soper v. Brown, supra, 136 N. Y. at page 251; Re Brown, 93 N. Y. 295. On the contrary, this testator seems to have used the words "children" and "issue," not at all as synonymous, but with accurate discrimination.

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We see this in many provisions, and notably in the codicil, where he says: "Wherever the words child, children, or issue are used in my will, or in this codicil, I declare the same to mean lawful child, lawful children, and lawful issue."

We have no right to ascribe to the word "issue" a meaning less inclusive than its primary meaning of descendants, in the absence of some tokens of a purpose that its application should be restricted. We do not find that such a purpose is revealed in this will.

Will—meaning of issue.

We are thus brought to a consideration of the question whether the gift to the issue of Mrs. Campbell was one per capita or per stirpes. If it was per capita, children and grandchildren take concurrently. If it was per stirpes, they take by representation. Jackson v. Jackson, 153 Mass. 374, 376, 11 L.R.A. 305, 25 Am. St. Rep. 643, 26 N. E. 1112; Re Bauerdorf, 77 Misc. 655, 138 N. Y. Supp. 682; Re United States Trust Co. 36 Misc. 878, 73 N. Y. Supp. 635; Coulden v. Coulden [1908] 1 Ch. 320, 326, 77 L. J. Ch. N. S. 209, 98 L. T. N. S. 389, 52 Sol. Jo. 172. We think that it may fairly be gathered from the context that the gift was to be per stirpes. The presumption in this state favors a per capita distribution. Schmidt v. Jewett, supra; Bisson v. West Shore R. Co. 143 N. Y. 125, 38 N. E. 104. But the presumption yields to "a very faint glimpse of a different intention." Ferrer v. Pyne, 81 N. Y. 281, 284; Vincent v. Newhouse, 83 N. Y. 505, 513; Bisson v. West Shore R. Co. supra. To determine the meaning of the word "issue" in the fifth subdivision of the will, we must read the latter subdivision in connection with the fourth. The first use of the word "issue" we find in the provision: "In case of the death of either of my children before the division of my estate, I give, devise, and bequeath what would have been his or her share, if living, to his or her issue, if any, such issue to take equally what would have been the parent's share."

Same—issue to take per stirpes.

The fair meaning of this provision is that the issue are to take by right of representation. That construction is not precluded by the direction that they shall take equally. The word "equally," standing by itself, imports a division per capita, but it may get another meaning from the context. Another meaning is given to it here by the direction that the issue shall take their parent's share. Barstow v. Goodwin, 2 Bradf. 413. Equality of division is to be preserved, but only within the limits consistent with a division per stirpes. Ibid.; Jackson v. Jackson, 153 Mass. 374, 11 L.R.A. 305, 25 Am. St. Rep. 643, 26 N. E. 1112; Coates v. Burton, 191 Mass. 180, 77 N. E. 311. We are referred to cases in which it is suggested that the word "issue" should be restricted to children, when used in antithesis to the word "parent." Sibley v. Perry, 7 Ves. Jr. 522, 32 Eng. Reprint, 211, 6 Revised Rep. 183; Drake v. Drake, 134 N. Y. 220, 225, 17 L.R.A. 664, 32 N. E. 114. That is not a rule of construction. It is merely one consideration to be weighed with others in an estimate of a testator's meaning. Ralph v. Carrick, L. R. 11 Ch. Div. 873, 48 L. J. Ch. N. S. 801, 40 L. T. N. S. 505; Re Birks [1900] 1 Ch. 417, 419, 69 L. J. Ch. N. S. 124, 81 L. T. N. S. 741. Sometimes the word "issue" may take its color from the word "parent," and refer to children. Sometimes the word "parent" may take its color from the word "issue," and refer to all who may occupy the position of parent throughout the line of succession. Jackson v. Jackson, supra; Ross v. Ross, 20 Beav. 645, 52 Eng. Reprint, 753; Robinson v. Sykes, 23 Beav. 40, 53 Eng. Reprint, 16, 26 L. J. Ch. N. S. 782, 2 Jur. N. S. 895; Re Embury, 109 L. T. N. S. 511, 58 Sol. Jo. 49; Barstow v. Goodwin, supra. Having in view the rule that favors the keeping of the gift within the primary

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line of descent, we think that by the gift to issue, in the fourth subdivision of the will, there was intended a gift to descendants per stirpes.

If that is the meaning of the word "issue" as used in that subdivision, we may fairly hold that it did not lose that meaning and take on another one in the next subdivision. Ross v. Ross and Re Birks, supra. We must keep in mind the unity of scheme that binds these subdivisions together. The fifth subdivision merely amplifies and develops a gift which takes its origin in the fourth. The trusts affecting two ninths of the estate are established in one clause; the description of them is resumed, and they are made precise and definite, in another. This cohesion of plan must have tended to impress the testator with the belief that, after defining his use of the word "issue" in one paragraph, it was needless to repeat the definition in the next. In all likelihood, it never occurred to him that the need of such repetition would ever suggest itself to anyone. He knew that the property disposed of in the fifth subdivision represented the shares of two deceased children, a son Valentine, and a daughter Olivia. He knew that if these children, instead of dying before the making of the will, had died afterwards, but before the division of the estate, or even before the testator, the fourth subdivision would give their shares to their descendants in any degree, and give it per stirpes. It is incredible that he contemplated a stirpital division among issue of children who died before him, but after the making of the will, and a per capita division among the issue of those children who died before him and before the making of the will. A rule which yields so readily as the one that presumes a per capita division must give way where adherence to it involves a discrimination so unreasonable.

A case closely parallel is Dexter v. Inches, 147 Mass. 324, 17 N. E. 551. There a testator gave his estate in equal shares to eight children, and provided that, in case of the decease of either, leaving issue, before receiving a share, "such issue shall represent and take the parent's share." Seven of the children were to take their shares outright, but the share of one son was put in trust, such share to go at his decease, if he left no widow, to his "issue," without more. The son died leaving no widow, but leaving three children, and also grandchildren. The court held that the gift to issue after the death of the son, though not stated to be to them by right of representation, must be held to have the same meaning as the gift to issue, where the son died before the testator, and hence that the issue took per stirpes. Holmes, J., who wrote for the court, said: "Undoubtedly 'issue' may mean, and in this clause does mean, more than children. If one child of Charles had died at any time leaving children living at Charles's death, we will assume that they would not have been excluded. See Ralph v. Carrick, L. R. 11 Ch. Div. 873, 882, 48 L. J. Ch. N. S. 801, 40 L. T. N. S. 505. But 'issue' is a word which lends itself very easily to the expression of representation. Ross v. Ross, 20 Beav. 645, 52 Eng. Reprint, 753; Robinson v. Sykes, 23 Beav. 40, 51, 53 Eng. Reprint, 16, 26 L. J. Ch. N. S. 782, 2 Jur. N. S. 895; Re Orton, L. R. 3 Eq. 375, 380, 36 L. J. Ch. N. S. 279, 16 L. T. N. S. 146, 15 Week. Rep. 251. The issue of Charles would have taken by way of representation in one event. If Charles had died 'before the receipt of his share,' his issue would have 'represented' him by the words of the will. There is no reason for issue (the same word) taking the same sum otherwise than by way of representation in the other event, which has happened. If the context of the clause which we have to construe does not of itself show clearly in what sense the testator used the word, the alternative limitation makes it plain. We are of opinion

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that the word 'issue,' as here used, means descendants taking by way of representation."

We think the same considerations are applicable to the will before us. It is true that the courts of Massachusetts, unlike the courts of this state, have at times construed a gift to issue as importing a division per stirpes, even without language suggestive of that intent; but the courts of both states agree in holding that the per capita rule will yield to slight indications of another meaning (Ferrer v. Pyne, 81 N. Y. 281, 284), and we think that such indications are present here.

The order of the appellate division should be modified by striking therefrom the provision that the word "issue," as used in the fifth clause of the will of Valentine Mott, was used by the testator in the sense of children, and by substituting a provision that it was used in the sense of descendants taking by representation or per stirpes, and as so modified the order should be affirmed, with costs to both parties payable out of the estate.

Willard Bartlett, Ch. J., and Hiscock, Chase, Collin, Hogan, and Miller, JJ., concur.

NOTE.

The reported case (RE FARMERS' LOAN & T. CO. ante, 910) is of interest in connection with REMBERT v. VETOE, post, 918, as solving the same problem in a different way. In both cases a per capita distribution of a gift to "issue" was undesirable as giving more remote descendants an equal share with less remote, and as making an unequal division among the various branches of the family. In REMBERT v. VETOE the problem was solved by holding the word "issue" to be equivalent to "heirs of the body," and then resorting to the Statute of Distributions for the purpose of ascertaining who might answer to such description. In RE FARMERS' LOAN & T. CO. it was solved by holding that, although the word "issue" embraced all descendants, the context required a stirpital distribution, thus producing an equality of division and excluding the children of living parents from participation.

MINNIE M. DIXON et al., Appts.,
v.
MANNIE M. PENDLETON, Respt.

South Carolina Supreme Court — November 9, 1911.

(90 S. C. 8, 72 S. E. 501.)

Will — "issue of body" — construction.

The words "issue of her body," in a will giving property for life to testator's daughter and, at her death, to the issue of her body who may then be living, will be construed as heirs of her body so that, in case the daughter dies leaving a child, a grandchild whose parent is dead, and great-grandchildren with parent living, the property will be divided equally between the child and grandchild whose parent is dead.

[*See note on this question beginning on page* 918.]

APPEAL by plaintiffs from a judgment of the Common Pleas Circuit Court for Fairfield County in defendant's favor in an action for the partition of certain property. *Modified.*

The facts are stated in the opinion of the court.

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Messrs. A. S. and W. D. Douglas for appellants.

Messrs. McDonald & McDonald for respondent.

Woods, J., delivered the opinion of the court:

The appeal in this action for partition involves the construction of the following clause of the will of Osmund Woodward, who died some time in the year 1862: "I will and direct that all the rest, residue and remainder of my estate, both real and personal, of every kind and description, including all the lands and all the negro slaves and their increase, which may be in possession of my children at the time of my decease, as a loan from me, be divided by my executors into five equal parts or portions, one of which I give, devise, and bequeath to each of my daughters, namely: Jemima Harrison, Sarah Owens, Amanda Heath, Rebekah Buchanan, and Regina Woodward for and during the term of her natural life, to and for her sole and separate use, benefit and behoof, and in no wise to be subject or liable to the debts, contracts, or encumbrances of any husband, and at her death to the issue of her body who may then be living. In case either of my said daughters shall die without leaving issue of her body then living, all the property above given and devised or bequeathed to her (except as hereinafter particularly specified) shall be equally divided among her surviving sisters, to and for their sole and separate use, benefit, and behoof, respectively, for and during the term of their natural lives, respectively, precisely in all respects as the original share or portion above devised and bequeathed to them respectively, and at their several and respective deaths, to the issue of their bodies who may be living. In all contingencies which may arise under this will, the issue of a deceased daughter, if any such, shall represent the parent, and take the share which the parent would have been entitled to, if living. In case either of my daughters shall die in my lifetime, without leaving issue living at the time of my decease, the share or portion above devised and bequeathed to her, shall fall into the general residue of my estate, and augment ratably the shares or portions of my surviving children, the number of shares or portions in that case being less."

Amanda Heath, one of the daughters mentioned in the devise, had been married to one Mobley before the execution of the will. After the death of Heath, her second husband, she married one Keller, and in the record is called Lucy A. Keller. She died in 1909, leaving surviving as claimants in remainder under the devise "to the issue of her body who may then be living," the following persons: Mannie M. Pendleton, a child of her marriage with Mobley; the plaintiff Minnie M. Dixon, a grandchild, the daughter of Minnie Heath, a child of the marriage with Heath, who died before her mother; and the other plaintiffs, the children of Minnie M. Dixon and the great grandchildren of the life tenant, Lucy A. Keller.

The circuit court held that, having regard to the entire context of the will, the word "issue" was intended to mean children, and that, as Mannie M. Pendleton was the only person answering the description of children surviving Lucy A. Keller, she took the entire property. On the part of the appellants, it is contended that the children, grandchildren, and great-grandchildren of Lucy A. Keller were all issue of the body of Lucy A. Keller, and that the property should be divided equally among Mannie M. Pendleton, the daughter, Minnie M. Dixon, the granddaughter, and her children, the great-grandchildren of Lucy A. Keller, per capita. Failing in this, the appellant contends that the word "issue" should be held to be at least as comprehensive a term as heirs of the body, and that Mannie M. Pendleton, the daughter, and Minnie M. Dixon, the granddaughter, should each take one half.

Logically and on authority, there

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is strong reason for saying that the words "issue of the body," when not limited by the context, are more comprehensive than "heirs of the body." It has been often held, in accordance with the commonly understood meaning of the words, that heirs of the body embraces all lineal descendants who would take as heirs, while issue of the body embraces all lineal descendants, including those who would not take as heirs. Under this view, for example, if one dies leaving a son who himself has children, the son and all his children would be issue of the body, but the son only would be an heir of the body; for under the Statute of Distributions the son's children would not inherit. This view was strongly presented, and the authorities sustaining it cited, in the circuit decree in Rembert v. Vetoe, 89 S. C. 198, post, 918, 71 S. E. 959, but it was rejected by this court in an opinion in which all the justices but one concurred; and we think that case is decisive of this. There the devise was: "All the rest and residue of my estate, of any kind and description, real and personal, not hereinbefore disposed of, I devise and bequeath to my beloved wife Sarah H. Jones, for and during the term of her natural life, with the power to dispose of one third thereof, while living, in any way she may choose to do; the remaining two thirds thereof, after the decease of my said wife, I devise and bequeath to my daughter Martha Amanda, to her sole and separate use during her life, and at her death to such of her issue as she may leave living at the time of her death, to be equally divided among such issue, but if my said daughter should die leaving no issue alive at the time of her death, it is my will that said two thirds be equally divided among my next of kin at that time living, according to the Statute of Distribution of Intestates' Estates." The majority of the court held that only those took as issue who would have been entitled to take as heirs of the body under the Statute of Distributions.

The other question is: Did the testator in this case, when he devised to the issue of his daughter living at the time of her death, mean to limit the devise to her child or children then living, to the exclusion of other issue or heirs of her body? The word "issue" is often limited by the context to signify children, to the exclusion of grandchildren and remoter issue; and in his forceful opinion the circuit judge has laid stress on the greater natural affection for children than for grandchildren, and on the use of the word "parent" in connection with the word "issue," as strong reasons for imputing to the testator an intention to so limit it in this instance. But the reasons for thinking that the testator did not mean children only, when he said issue, seem still stronger. The words "child," "son," "daughter," are the common words in which men think and speak of their immediate offspring, and, when the word "issue" is used either in thought or expression, it almost invariably denotes an intention to include not only children, but other lineal descendants. Hence, issue should not be held to mean children unless the context clearly indicates that restricted meaning. In this long will the testator seems to carefully avoid using the common words "child," or "children," and repeats the word "issue" many times in referring to the descendants of his children. It is important to observe, too, that the will was drawn by a capable lawyer who knew the generally recognized distinction so often made between children and issue. On a doubtful construction between children and other descendants, it is true that the presumption of greater affection for children should have weight; but still greater weight should be given to the almost universal inclination and custom of parents to give the children of a deceased child an equal share with a living child. For these

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reasons, we are unable to agree with the circuit court that the testator intended that any child of his daughter who might survive her should take as her issue, to the exclusion of the children of a deceased child.

Comparison of this will with that construed by the court in Rembert v. Vetoe, supra, decided since the circuit decree was rendered in this case, will show that the word "issue" can be construed to have been used in the two wills in a different sense, only on extreme verbal refinement. Such refinement in the construction of wills has been productive of uncertainty in the administration of law, and delay and expensive litigation in the settlement of estates, and should not be indulged. Applying the rule laid down in Rembert v. Vetoe, it results that issue of the body of Lucy A. Keller, living at the time of her death, means heirs of her body, living at the time of her death. The heirs of her body, as determined by the Statute of Distributions, were her daughter Mannie M. Pendleton, and her granddaughter Minnie M. Dixon, and each of these takes one half of the property devised, to the exclusion of the children of Minnie M. Dixon.

Will—"issue of body"—construction.

The judgment of this court is that the judgment of the Circuit Court be modified accordingly.

NOTE.

As is demonstrated by the annotation which accompanies this group of cases (post, 930), the reported case (DIXON v. PENDLETON, ante, 915), and REMBERT v. VETOE, infra, by which its decision was controlled, in holding that the word "issue" must be taken as the equivalent of "heirs of the body," are opposed to the great weight of authority. The court in REMBERT v. VETOE seems to have followed a decision laying down such a rule in a case in which the term was used not as a word of limitation, but as a word of purchase. The distinction between the use of the word "issue" as one of limitation and its use as a word of purchase is explained in the introduction to the annotation accompanying the case.

DIXON v. PENDLETON is also of interest for its holding upon the question whether the word "issue" is confined to children by the use of the word "parent,"—a point as to which there has been considerable judicial controversy. See III. b, in the annotation following REMBERT v. VETOE, post, 936.

SARAH EMELINE REMBERT et al., Respts.,
v.
CARRIE VETOE et al., Appts.

South Carolina Supreme Court—July 7, 1911.

(89 S. C. 198, 71 S. E. 959.)

Will — remainder to issue — determination of takers.

1. Under a devise to one for life, and at her death to such of her issue as she may leave living at the time of her death, to be equally divided among such issue, the issue who will take are to be determined according to the Statute of Distributions, and therefore no descendant can share in the distribution whose parents are living.

[*See note on this question beginning on page* 930.]

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Power — proper exercise — reference to issue.

2. A power to dispose of one third of testator's property, which he devised to his wife for life with such power, is properly exercised by a deed purporting to convey "all my right, title, and interest" in the tract of land wherein an interest "was devised to me by my husband," although no direct reference is made to the power, and the entire tract contains much more than one third of testator's property.

Deed — reservation of life estate — effect.

3. A reservation of a life estate by a grantor in the property conveyed does not invalidate the deed as an attempt to convey a freehold to commence in futuro.

Appeal — amendment of pleading — error.

4. A judgment will not be reversed because of permission to amend the complaint, in the absence of abuse of discretion.

(Woods, J., dissents.)

APPEAL by defendants from a judgment of the Common Pleas Circuit Court for Fairfield County in plaintiffs' favor in an action brought to partition certain real estate. *Modified.*

The facts are stated in the opinions of the court.

Messrs. McDonald & McDonald and Ragsdale & Dixon for appellants.

Mr. W. D. Douglas, for respondents:

All lineal descendants living at death of life tenant take, and the distribution must be, per capita.

Corbett v. Laurens, 5 Rich. Eq. 301; Pearce v. Rickard, 18 R. I. 142, 19 L.R.A. 472, 49 Am. St. Rep. 755, 26 Atl. 38; Ridley v. McPherson, 100 Tenn. 404, 43 S. W. 772; Gourdin v. Deas, 27 S. C. 492, 4 S. E. 64; Rutledge v. Rutledge, Dud. Eq. 201; 2 Jarman, Wills, 71, 101; Wessenger v. Hunt, 9 Rich. Eq. 459; Purcell v. Purcell, Riley, Eq. 282; 11 Am. & Eng. Enc. Law, 869; Vale Royal Mfg. Co. v. Santee River Cypress Lumber Co. 84 S. C. 81, 65 S. E. 955; Barksdale v. Macbeth, 7 Rich. Eq. 134; Hagan v. Hanks, 80 S. C. 94, 61 S. E. 245; Brantley v. Bittle, 72 S. C. 183, 51 S. E. 561; Dukes v. Faulk, 37 S. C. 265, 34 Am. St. Rep. 745, 16 S. E. 122; Kerngood v. Davis, 21 S. C. 183; Templeton v. Walker, 3 Rich. Eq. 550, 55 Am. Dec. 646; Mobley v. Cummings, 35 S. C. 125, 14 S. E. 721.

There was valid execution of the power conferred upon Sarah H. Jones.

Bilderback v. Boyce, 14 S. C. 540; Blagge v. Miles, 1 Story, 426, Fed. Cas. No. 1,479; 2 Story, Eq. Jur. § 1026; 31 Cyc. 1125, 1126; Moody v. Tedder, 16 S. C. 557; Merck v. Merck, 83 S. C. 382, 137 Am. St. Rep. 815, 65 S. E. 347; Sumner v. Harrison, 54 S. C. 353, 32 S. E. 572; Cribb v. Rogers, 12 S. C. 564, 32 Am. Rep. 511; Watson v. Watson, 24 S. C. 228, 58 Am. Rep. 247; Chancellor v. Windham, 1 Rich. L. 164, 42 Am. Dec. 411; King v. Melling, 1 Ventr. 225, 86 Eng. Reprint, 151; Wickham v. Wickham, 3 Taunt. 335, 128 Eng. Reprint, 133.

Mr. A. S. Douglas also for respondents.

Gary, J., delivered the opinion of the court:

This is an action for partition.

Ralph Jones departed this life in 1854, leaving in full force and effect his last will and testament, whereby he disposed of the lands described in the complaint. The 6th clause of the will, which gave rise to this action, is as follows: "All the rest and residue of my estate, of any kind and description, real and personal, not hereinbefore disposed of, I devise and bequeath to my beloved wife Sarah H. Jones, for and during the term of her natural life, with the power to dispose of one third thereof, while living, in any way she may choose to do; the remaining two thirds thereof, after the decease of my said wife, I devise and bequeath to my daughter, Martha Amanda, to her sole and separate use, during her life, and at her death to such of her issue as she may leave living at the time of her death, to be equally divided among such issue, but if my said daughter should die leaving no issue alive at the time of her death, it is my will that said two thirds be equally divided among my next of kin at that time living, according

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to the Statute of Distribution of Intestates' Estates."

The widow, Sarah H. Jones, died in October, 1891, and Martha Amanda Robertson, the daughter mentioned in said clause, departed this life on the 2d of July, 1908. Martha Amanda Robertson had three children, to wit, a son, Thomas W. Robertson, who predeceased her, and two daughters, Sarah Emeline Rembert and Martha R. Mason, who survived her. She also left fourteen grandchildren and twenty-one great-grandchildren, twenty-eight of whom were descendants of Sarah Emeline Rembert. At the time of Martha Amanda Robertson's death, in 1908, there were in esse four children and one grandchild of Thomas W. Robertson, then deceased.

In discussing the proper interpretation of the word "issue," in the 6th clause of the will, his Honor the circuit judge says: "Upon well-settled principles of construction it would seem to be clear that, by the term 'issue' as used in this will, the testator must be held to have intended the lineal descendants of Martha Amanda Robertson, whether children or grandchildren, living at the time of her death; and the words, 'to be equally divided among such issue,' plainly import a division per capita. It must, therefore, be concluded that all the lineal descendants of Martha Amanda Robertson, living at the time of her death, are entitled to participate in the division of the 'remaining two thirds' of the estate of the testator, passing under the residuary devise in said 'item 6' of the will in question, and that such division must be made among such 'issue' of the said Martha Amanda Robertson per capita, and not per stirpes."

The circuit judge relies upon the following cases to sustain his conclusion: namely, Rutledge v. Rutledge, Dud. Eq. 201; Corbett v. Laurens, 5 Rich. Eq. 301; Allen v. Allen, 13 S. C. 512, 36 Am. Rep. 716. In the case of Rutledge v. Rutledge, supra, it was held that the issue of a child, who died in the life-time of the surviving tenant for life, took equal shares with the children of the marriage, as they were alike comprehended under the word "issue." In the case of Corbett v. Laurens, the court ruled that, upon the authorities cited in Rutledge v. Rutledge, all the descendants of the life tenant, grandchildren as well as children, were included in the term "issue," and took per capita. But in neither of these cases was the question raised as to the necessity to resort to the Statute of Distributions for the purpose of determining who were comprehended under the word "issue." And the case of Allen v. Allen, supra, while sustaining the conclusion that the issue take per capita, lays down the principle that when the word "heirs" is used it is necessary to resort to the Statute of Distributions, and that those who would not be entitled to take as heirs under the statute would not have the right to participate in the division of the property.

In that case the rule is thus stated: "The general rule is that where there is gift to a class of persons, without any direction as to the proportions in which the individuals of the class are to take, all who can bring themselves within the class are entitled to participate in the distribution, which must be per capita. But where the gift is to a class, the individuals of which can only be ascertained by a resort to the Statute of Distributions, then the provisions of the statute must also be resorted to for the purpose of ascertaining the proportions in which the donees are to take, unless in the instrument by which the gift is made a different rule of distribution shall be prescribed. Templeton v. Walker, 3 Rich. Eq. 543, 55 Am. Dec. 646. If, therefore, the gift is to a class of persons, designated as heirs of a particular person, then, as it is necessary to resort to the statute to ascertain who are the individuals composing the class, resort must also be had to the statute to determine how, or in what proportions, such individuals shall take. This is upon

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the presumption that the donor, having, by implication at least, referred to the statute as to the persons who are to take, also intended that reference should be had to the statute to determine the proportions in which they should take, unless he expresses a different intention. But when he prescribes a different mode of distribution, then no such presumption can arise, and the distribution must be made in the manner prescribed." See also Brantley v. Bittle, 72 S. C. 179, 51 S. E. 561, and Carolina Bond & Invest. Co. v. Caldwell, 86 S. C. 331, 68 S. E. 640.

It is, however, contended that although it may be necessary to resort to the statute when a devise is to the "heirs," or "heirs of the body," no such necessity exists, when the word "issue" is used by the testator. In determining this question, it will be well to state the reasons upon which the rule is founded, requiring that those words should be interpreted in the light of the statute. Chancellor Harper, in Lemacks v. Glover, 1 Rich. Eq. 141, used this language: "In England, when [the term 'heirs' or 'heirs of the body' is] taken to mean a class of persons, these cannot, in any manner or respect, take as heirs, or heirs of the body. Whether construed children, issue, or descendants, next of kin, etc., they must always be different persons from the heirs;" not so with us.

In the case of Templeton v. Walker, supra, it is said: "Our Act of 1791 is an act of descents, as well as distributions, and determines at once who shall be the heirs of the real estate of an intestate, and the distributee of his personalty." "The term 'heirs' is inapplicable to the succession to personal estate, and even as to real estate we have no other heirs, except the hæredes facti of our Statute of Distributions. (Seabrook v. Seabrook, McMull. Eq. 201). . . . In the case under consideration, the court of appeals, in equity, could not have attained the conclusion that the 'heirs of the body' of the tenant for life took as puchasers, within the rules as to the remoteness of limitations, otherwise than by construing these terms to mean the descendants of the tenant for life, living at the time of her death, or something equivalent. *No one can take as heir of the body of another, unless he fulfils the description, and is not only such a person as would take the real estate of that other under our Act of Distributions, but likewise a lineal descendant.*" (Italics ours.) The court also says: "We do not go to the statute to discover who are children, next of kin, etc., but we are obliged to look there to find out who are heirs of the body, descendants, or relations entitled to take; and in the cases which actually occur, we commonly find them not strictly a class, but individuals standing in various degrees of kindred to the intestate or first taker, and entitled to unequal shares of the estate."

The rule is thus stated in Dukes v. Faulk, 37 S. C. 255, 34 Am. St. Rep. 745, 16 S. E. 122: "When the words 'heirs of the body' occur in a devise, accompanied by the words 'share and share alike,' or 'equally,' or 'in equal parts,' or kindred words, and also the words, 'their heirs, executors, administrators, and assigns,' then we must look to the Statute of Distributions of our state for the parties who shall answer the description, and therefore take the devise, but that the method of distribution is fixed by the devise itself to be per capita, and not per stirpes, and that the estate is one of purchase, and not of descent. It seems to us that the 'heirs of the body' must be persons, *not only who answer the requirement of lineal descendants of the parent stock, but, also, such persons who would stand, at the date of the death of the life tenant, as an heir, under the provisions of our Statute of Distributions.*" (Italics ours.) Continuing, the court in commenting on the case of Lemacks v. Glover, supra, used this language: "The will of Peter Sinkler gave the use of certain prop-

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erty to his sister Jane Glover, for life; Mrs. Glover, at the time of her death, had but one child, Dr. Glover; testator, after the death of the life tenant (Mrs. Glover), bequeathed such property 'to the heirs of her body, to them and their heirs and assigns, forever.' Mrs. Glover died fifty-one years after her brother's death. She had four other children born to her, all of whom but one (Mrs. Lemacks) died before Mrs. Glover, the life tenant, and all were survived by children. The question was made as to the distribution. It was held that Dr. Glover took one share, Mrs. Lemacks one share, and each grandchild, who was the child of a deceased child, took one share each. Both Mrs. Lemacks and Dr. Glover had children, but they were denied participation in the estate. Why? Because, at the death of Mrs. Glover, the life tenant, *although her lineal descendants, they were not her heirs, under our Statute of Distributions;* their respective parents, Dr. Glover and Mrs. Lemacks, were alive, and were such heirs." (Italics ours.)

The case of Kerngood v. Davis, 21 S. C. 183, shows that it is necessary to resort to the Statute of Distributions, when the devise is to heirs of the body. In that case the court says: "The terms of the devise here, being 'to heirs of the body,' imposed the necessity of referring to the statute to ascertain who were such 'heirs,' and if the devise had stopped there the children of Henry W. would undoubtedly have taken in the manner prescribed by the statute. That is to say, they would have represented their father, and taken together, per stirpes, his share—one seventh part of the estate—besides their distributive portion of the share of their deceased aunt, Carolina. But the superadded words 'share and share alike' imply equality of division, and, we think, made the exceptional case, 'when the instrument creating the gift indicates the intention of the donor,'"—citing Templeton v. Walker, 3 Rich. Eq. 543, 55 Am. Dec. 646; Allen v. Allen, 13 S. C. 531, 36 Am. Rep. 716. In De Veaux v. De Veaux, 1 Strobh. Eq. 283, it is said: "The first duty is to ascertain how many of the claimants before the court come within the description given in the will; and the second is to discover whether all who do come within the description can be allowed, by the rules of law, to partake of the bounty intended. *These are very distinct inquiries, though often confounded.*" (Italics ours.)

The words "heirs of the body" and "issue" are generally equivalent in a will. Whitworth v. Stuckey, 1 Rich. Eq. 404. "Issue" is a word of limitations, and not less extensive in its import than the words "heirs of the body." Williams v. Gause, 83 S. C. 265, 65 S. E. 241; Arledge v. Arledge, 86 S. C. 237, 68 S. E. 549.

The foregoing authorities show, first, that it is necessary to resort to the statute, when the devise is to the heirs or heirs of the body; that the words "heirs of the body," and "issue," have practically the same import in a will; that no good reason can be assigned why the necessity is not as great to resort to the statute in a case where the gift is to the "issue," as when it is to "heirs of the body." Therefore, only those grandchildren and great-grandchildren of Martha Amanda Robertson whose parents were not in esse at the time that Martha Amanda Robertson died are to be construed as issue in contemplation of law; and those alone who would have taken under the statute are embraced within the term "issue." The exceptions raising this question are sustained.

Will—remainder to issue—determination of takers.

The next question that will be considered is whether the power conferred upon Sarah H. Jones to dispose of one third of the real and personal property while living, in any manner she may choose to do, was properly executed.

The lands in question embrace two tracts; one containing 1,055

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acres, more or less, known as the "home place," and the other containing about 496 acres, known as the "piny woods place." On the 26th of June, Sarah H. Jones executed an instrument of writing in the form of a deed, whereby she undertook to convey to Sarah Emeline Rembert, her daughter, the home place, in manner and form as follows: "I, Sarah H. Jones, . . . in consideration of the sum of $1 to me in hand paid by Sarah Emeline Rembert, . . . and of the natural love and affection which I bear to the said Sarah Emeline Rembert and her children . . . have granted, bargained, sold, and released, and by these presents do grant, bargain, sell, and release unto the said Sarah Emeline Rembert all my right, title, and interest in all that piece, parcel, or tract of land, . . . containing 1,055 acres, more or less, being the same tract of land wherein an interest was devised to me by my husband Ralph Jones, in his last will and testament;" the habendum and tenendum clause of this instrument being: "To have and to hold all and singular the said premises, from and after my death, unto the said Sarah Emeline Rembert, for and during the term of her natural life, and after her death, to such of her issue as she may leave living at the time of her death, their heirs and assigns, forever;" and the warranty clause thereof being: "And I do hereby bind myself and heirs, executors, and administrators to warrant and forever defend all and singular the said premises, unto the said Sarah Emeline Rembert and her issue, from and against me and my heirs, and all other persons lawfully claiming or to claim the same or any part thereof."

The rule as to the execution of a power is thus stated in Blagge v. Miles, 1 Story, 426, Fed. Cas. No. 1,479: "The authorities upon this subject may not all be easily reconcilable with each other, but the principle furnished by them, however occasionally misapplied, is never departed from; that if the donee of the power intends to execute, and the mode be, in other respects, unexceptionable, that intention, however manifested, whether directly or indirectly, positively or by just implication, will make the execution valid and operative. I agree that the intention to execute the power must be apparent and clear, so that the transaction is not fairly susceptible of any other interpretation. If it is doubtful, under all the circumstances, then that doubt will prevent it from being deemed an execution of the power." In that case, Mr. Justice Story stated, as the result of the English authorities, that three classes of cases have been held sufficient to manifest an intention to execute the power: (1) Where there has been some reference in the deed or other instrument to the power; (2) or a reference to the property, which is the subject upon which it is to be executed; (3) or where the provision in the deed or other instrument executed by the donee of the power would otherwise be ineffectual, or a mere nullity; in other words, it would have no operation except as an execution of the power. See also Bilderback v. Boyce, 14 S. C. 528; Moody v. Tedder, 16 S. C. 557; Lee v. Simpson, 134 U. S. 572, 33 L. ed. 1038, 10 Sup. Ct. Rep. 631. The foregoing language is quoted with approval in Mims v. Hair, 80 S. C. 460, 61 S. E. 968.

Conceding that the words, "being the same tract of land wherein an interest was devised to me by my husband Ralph Jones, in his last will and testament," have no reference to the said power, nevertheless they have reference to the property, which was the subject upon which the power was intended to operate; and the deed would be ineffectual to convey all the "right, title, and interest" of Sarah H. Jones in the land, if the execution of her deed cannot be referred to the power contained in said will.

Power—proper exercise—reference to issue.

We deem it only necessary to cite

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the following authorities to sustain the proposition that the reservation of a life estate by the grantor did not invalidate the deed as an attempt to convey a freehold to commence in futuro; it being effectual as a covenant to stand seised to uses: Chancellor v. Windham, 1 Rich. L. 161, 42 Am. Dec. 411; Kinsler v. Clark, 1 Rich. L. 170; Dinkins v. Samuel, 10 Rich. L. 68; Cribb v. Rogers, 12 S. C. 564, 32 Am. Rep. 511; Jacobs v. Mutual Ins. Co. 52 S. C. 110, 29 S. E. 533; Sumner v. Harrison, 54 S. C. 353, 32 S. E. 572; Cook v. Cooper, 59 S. C. 560, 38 S. E. 218; Merck v. Merck, 83 S. C. 329, 137 Am. St. Rep. 815, 65 S. E. 347.

Deed—reservation of life estate—effect.

The next assignment of error is because the circuit judge permitted the plaintiffs to amend their complaint, so as to allege damages as the result of waste committed by Ruth Mason. Motions to amend are addressed to the discretion of the circuit judge, and his rulings are not the subject of appeal, unless there is an abuse of discretion, which has not been made to appear in this case.

Appeal—amendment of pleading—error.

The foregoing conclusions dispose of all questions presented by the exceptions, except those relating to the accountability of the plaintiff Sarah Emeline Rembert for rents of the home place. The appellant's attorneys have failed to satisfy this court that the preponderance of the testimony is against the findings of fact by the circuit judge touching this question.

Judgment modified.

Woods, J., dissenting:

I dissent, and think the judgment of the circuit court should be affirmed for the reasons therein stated.

The opinion of the Circuit Court, written by **Moore**, Special Judge, is as follows:

This is an action seeking a sale for partition of certain real estate, described in the complaint, alleged to be owned as tenants in common by the plaintiffs and defendants. Certain issues as to the title to the lands and as to the accountability of certain parties for rents and profits being raised by the pleadings, a jury trial of any legal issues of title having been expressly waived, it was referred to James G. McCants, Esq., to take the testimony upon the issues, and report the same to the court. The testimony having been taken and reported accordingly, the cause came on for hearing before me at the last term of the said court, and after full argument, decision thereupon was reserved for further consideration.

The lands in question were formerly the property of one Ralph Jones, who died in July, 1854, leaving of force his last will and testament, which was thereafter duly admitted to probate in the said county. One of the principal questions in the case is as to the proper construction of this will, by which, in the residuary clause thereof, the testator devised as follows: "Item 6. All the rest and residue of my estate of any kind and description, real and personal, not hereinbefore disposed of, I devise and bequeath to my beloved wife, Sarah H. Jones, for and during the term of her natural life, with the power to dispose of one third thereof, while living, in any way she may choose to do; the remaining two thirds thereof, after the decease of my said wife, I devise and bequeath to my daughter Martha Amanda, to her sole and separate use, during her life, and at her death to such of her issue as she may leave living at the time of her death, to be equally divided among such issue, but if my said daughter should die leaving no issue alive at the time of her death, it is my will that said two thirds be equally divided among my next of kin at that time living, according to the Statute of Distribution of Intestates' Estates." While it is doubtless unimportant, yet I have preserved in the above quotation

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the exact punctuation of the will, which was evidently drawn by a lawyer of some experience and accuracy of expression.

As a matter of fact, it appears from the evidence that Sarah H. Jones, the widow of the testator, died in October, 1891, and Martha Amanda Robertson, the daughter mentioned in said will, died July 2, 1908, the latter leaving as her issue two children, Sarah Emeline Rembert, one of the plaintiffs, and Ruth Mason, one of the defendants, fourteen grandchildren (of whom eight were children of the said Sarah Emeline Rembert, two were children of the said Ruth Mason, and four were children of Thomas W. Robertson, a predeceased son of the said Martha Amanda Robertson), and twenty-one great-grandchildren (of whom two were grandchildren of the said Emeline Rembert, and one a grandchild of the said Thomas W. Robertson). The plaintiffs (except D. W. Ruff, who has purchased the interest in the home tract of land of the plaintiff George English Rembert, a son of the said Sarah Emeline Rembert) include all the Rembert branch of the lineal descendants of the said Martha Amanda Robertson living at the time of her death, and the defendants Ruth Mason and her two children, Edward R. Mason and Ralph W. Mason, represent the Mason branch of such defendants, while all of the other defendants, except Frank W. Vetoe, are children of Thomas W. Robertson, already mentioned as a predeceased son of Martha Amanda Robertson; the said Frank W. Vetoe being the infant son of the defendant Carrie Vetoe, and a great-grandchild of the said Martha Amanda Robertson, and living at the time of her death; his said mother being a grandchild of the said Martha Amanda Robertson.

Since the commencement of this action, Annie Rembert Thomas, being a daughter of the said Sarah E. Rembert, and a plaintiff in this case, has died intestate, and her heirs at law, Samuel P. Thomas, her husband, and Annie Rembert Thomas and Sarah Emeline Thomas, her children, have been substituted as parties plaintiff in her stead.

The lands in question embrace two tracts described in the complaint; the one containing 1,055 acres, more or less, being called the "Jones home place," and the other, containing about 496 acres, being known as the "piny woods place."

Another question arising in the case is as to the construction and effect of a certain instrument in writing, executed by the said Sarah H. Jones, under date of June 26, 1875, in the form of a deed, by the granting clause of which the said Sarah H. Jones undertakes to convey to the said Sarah E. Rembert the above-mentioned home place in the following terms (certain descriptive matter being omitted as indicated), to wit: "I, Sarah H. Jones, . . . in consideration of the sum of $1 to me in hand paid by Sarah Emeline Rembert, . . . and of the natural love and affection which I bear to the said Sarah Emeline Rembert and her children, . . . have granted, bargained, sold, and released, and by these presents do grant, bargain, sell, and release unto the said Sarah E. Rembert all my right, title, and interest in all that piece, parcel, or tract of land . . . containing 1,055 acres, more or less, being the same tract of land wherein an interest was devised to me by my husband, Ralph Jones, in his last will and testament;" the habendum and tenendum clause of this instrument being: "To have and to hold all and singular the said premises from and after my death unto the said Sarah Emeline Rembert for and during the term of her natural life, and after her death to such of her issue as she may leave living at the time of her death, their heirs and assigns, forever;" and the warranty clause thereof being: "And I do hereby bind myself and heirs, executors and administrators to warrant and forever defend all and

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singular the said premises unto the said Sarah Emeline Rembert and her issue from and against me and my heirs, and all other persons lawfully claiming or to claim the same or any part thereof." By an indorsement upon the back of this deed, it appears that Colonel James H. Rion was the conveyancer drawing the same.

The plaintiffs contend that under the provisions of the will above quoted all the lineal descendants of Martha Amanda Robertson, living at the time of her death, took as remaindermen, being denoted by the term "issue;" that the distribution amongst such issue must be per capita; while the defendants maintain that the words "according to the Statute of Distribution of Intestates' Estates," which are found in the latter part of said item 6 of the will, must be regarded as qualifying, not only the words "next of kin" immediately preceding the phrase quoted, but also the word "issue," as used in the preceding clause of the same item, and that, therefore, Mrs. Emeline Rembert is entitled to one third, Mrs. Ruth Mason to one third, and the children of Thomas W. Robertson, deceased, are entitled to the remaining third; the distribution being per stirpes.

It is also contended on behalf of Mrs. Sarah Emeline Rembert and her issue in esse (all of whom are before the court) that, as to the one-third interest in the home place, the same was duly conveyed to them by the terms of the above instrument in the form of a deed, which said plaintiffs submit was a valid execution of the power of sale thereof conferred on Sarah H. Jones by the will of Ralph Jones, above quoted.

Considering now the first question presented for determination, as to the proper construction of the 6th item of the will of Ralph Jones, the settled rule of construction is that the intention of the testator must be ascertained from the language used by him, but that, in so ascertaining the intention, not only the sentence or clause of the sentence to be construed is to be considered, but that the provisions of other clauses or sentences may also be taken into the account in determining the particular intent with which the words in question were used by the testator. The primary rule for ascertaining the intention, however, is that the same must be determined from a consideration of the words used by him in expressing that intention, and a resort to conjecture for the purpose of determining the intention is not permitted. Therefore, it has been properly held that limitations imposed by one clause under one contingency cannot be applied to dispositions made by another clause for a different contingency. See Mobley v. Cummings, 35 S. C. 101, 14 S. E. 721.

Now the devise here in question, by its express terms, is to Martha Amanda Robertson for life, and after her death "to such of her issue as she may leave living" at that time, "to be equally divided among such issue." By an immediately succeeding clause in the same sentence, however, separated only by a comma, it is further provided that, "if my said daughter should die leaving no issue alive at the time of her death, it is my will that said two thirds be equally divided among my next of kin at that time living, according to the Statute of Distribution of Intestates' Estates." The argument is that, since the testator has directed the distribution among the *next of kin*, to be made according to the Statute of Distributions, it must be concluded that he desired the division among the *issue* of his daughter to be made in the same way, although the next of kin referred to are the testator's next of kin, while the *issue* intended are the issue of his daughter; and it is further insisted that no special force can be given to the words "to be equally divided," as applied to the issue of the daughter, for the reason that the same words

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are used with reference to the division to be made among the next of kin of the testator, in the event of the death of the daughter without leaving living issue.

Upon well-settled principles of construction, however, it would seem to be clear that by the term "issue," as used in this will, the testator must be held to have intended the lineal descendants of Martha Amanda Robertson, whether children or grandchildren, living at the time of her death; and the words, "to be equally divided among such issue," plainly import a division per capita. Corbett v. Laurens, 5 Rich. Eq. 301; Rutledge v. Rutledge, Dud. Eq. 201; Allen v. Allen, 13 S. C. 512, 36 Am. Rep. 716.

It is true that, whenever, by the terms of description in a devise, resort must be had to the Statute of Distributions for the purpose of ascertaining the objects of the gift, reference must be also had to the statute to determine the proportions in which the donees shall take, unless a different rule of distribution is provided by the will. Templeton v. Walker, 3 Rich. Eq. 543, 55 Am. Dec. 646; Collier v. Collier, 3 Rich. Eq. 555, 55 Am. Dec. 653. But while this rule applies in all cases where the words "heirs" or "next of kin" are used, it has no application to the use of the term "issue," for that word is not a term depending upon the Statute of Distributions for an interpretation of its meaning. See Corbett v. Laurens, and Rutledge v. Rutledge, supra.

By grammatical construction, the words, "according to the statute of Distribution of Intestates' Estates," appearing in the will now at bar, can be taken only as qualifying the immediately preceding words, "my next of kin at that time living." The words in question naturally relate and apply only to the immediately preceding phrase "next of kin," and have no reasonable relation to the remotely preceding word "issue." To adopt the construction as contended for by the defendants, and interpolate after the word "issue" the phrase, "according to the Statute of Distribution of Intestates' Estates," would be, in effect, to add to the will of the testator words which he has not in any way evinced an intention of using in that connection, and which would necessarily destroy the force and effect of the immediately preceding words, actually there used by him, that the property in question is "to be *equally* divided among such issue." To so interpolate the words mentioned would be practically to strike out of the will words used by the testator, which are apt and fit words to express an intention that the division among the "issue" of his daughter living at her death would be per capita. Even if no reason could be seen for a distinction in the matter of the mode of the division prescribed in the case of a taking by the "issue" of Martha Amanda Robertson, and that provided in the case of the happening of the contingency upon which the "next of kin" of the testator are to take, nevertheless the will must be construed as written, and effect given to the expressed intention of the testator. Mobley v. Cummings, supra; Manigault v. Holmes, Bail. Eq. 298; Moon v. Moon, 2 Strobh. Eq. 327; Bowers v. Newman, 2 McMull. L. 472.

It must therefore be concluded that all the lineal descendants of Martha Amanda Robertson living at the time of her death are entitled to participate in the division of the "remaining two thirds" of the estate of the testator, passing under the residuary devise in said item 6 of the will in question, and that such division must be made among such "issue" of the said Martha Amanda Robertson per capita, and not per stirpes.

The next question to be considered is as to whether the instrument styled a deed from Sarah H. Jones to her daughter, the plaintiff Sarah Emeline Rembert, and her issue, is a valid execution of the power conferred upon the said Sarah H. Jones

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by the will of the testator Ralph Jones. It is not questioned but that this instrument was duly executed, delivered, and recorded, but it is objected that it makes no reference to such power of disposition given by the will, nor does it purport to be an execution of such power, nor does it specify what interest in or portion of the lands in question is thereby sought to be conveyed.

Now it is true that Sarah H. Jones had a life estate in the home place of 1,055 acres mentioned in this instrument, and that she had a power of disposition inter vivos as to one third of the fee thereof, but it is also true that she makes no direct reference to this power. But she did undertake to convey "all her right, title, and interest" in the tract in question by the granting clause of the instrument executed by her, and by the habendum clause thereof she limits a fee estate in "the said premises" to such of the issue of Sarah E. Rembert as she may leave living at the time of her death, while by the warranty clause she warrants "the said premises" to the said grantees from and against herself and her heirs, and all other persons. The paper, therefore, must be held to have been intended as a conveyance of the fee in these lands, as its terms could not be satisfied by considering it merely as a conveyance of the life estate of the grantor. Furthermore, after thus conveying or attempting to convey all her "interest" in the tract, the grantor proceeds to define what is meant by the word *interest*, in that clause of the deed where she says, in describing the land, "being the same tract of land wherein an interest was devised to me in and by my husband Ralph Jones, in his last will and testament." In the case of Moody v. Tedder, 16 S. C. 563, the use of this very word "interest" was held to manifest an intention by the grantor to execute a power of sale given by will. In this case, which, upon the point at issue, here closely parallels the one at bar, the grantor had a life estate in the property, coupled with a power of disposal for certain purposes, and she made a conveyance containing no direct reference to the power, but conveying "all her interest and life estate" in the property. In holding this to be a good execution of the power, the supreme court of this state says: "It may be true that the word 'interest' was not the technical term to express the idea of a power; but in the ordinary acceptation of the word it was broad enough to cover it, and we think the deed was intended to include the power. The question of the execution of a power is always one of intention, 'and, if the devisee of the power intends to execute it, that intention, however manifested, whether directly or indirectly, positively or by just implication, will make the execution valid and operative.'"

In the case just cited, the court quotes with approval the doctrine as laid down in 1 Sugden, Powers, 419, that, "when a man has a power and an interest, and he creates an estate which will not have an effectual continuance in point of time, if it be fed out of his interest, it shall take effect by force of the power." See also 31 Cyc. 1125.

Applying these principles to the case at bar, it seems to be clear that the grantor intended to convey to the grantees named in the instrument all the *interest* which she could convey under the provisions of the will of her husband Ralph Jones, for she grants not only her "right and title," but also all the "interest" which she took under said will, and this could not be satisfied, nor could the apparent purpose to convey a fee-simple estate be fulfilled, except by considering it as referring to the power of disposition of the one-third interest in the fee thereof given to her by said will. Moreover, the terms of the instrument, showing the intention of the grantor to reserve her life estate in the very lands, unquestionably and conclusively evidence the purpose to execute the power given

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by the will, as otherwise the paper would have been entirely inoperative.

But it is said that the instrument in question is not effective as an execution of the power, for the reason that (as defendants maintain) an attempt is thereby made to limit a freehold estate to commence in futuro, which cannot be done by way of direct grant, and the defendants also submit that the deed cannot be sustained as a covenant to stand seised to uses, for the reason that it is not supported by a valuable consideration.

It is considered, however, that even if the written instrument in question cannot be held valid as a deed by which the title passes in præsenti, the grantor merely reserving to herself the use and possession during her life, as was held in the somewhat similar cases of Merck v. Merck, 83 S. C. 332, 137 Am. St. Rep. 815, 65 S. E. 347; Sumner v. Harrison, 54 S. C. 353, 32 S. E. 572, and Cribb v. Rogers, 12 S. C. 564, 32 Am. Rep. 511, it may nevertheless be held effective as a covenant to stand seised to uses, being supported by the consideration of blood relationship between the grantor and grantee, notwithstanding the absence of a valuable consideration, and notwithstanding any limitation of a fee to commence in futuro, which may be contained therein. Watson v. Watson, 24 S. C. 235, 58 Am. Rep. 247; Chancellor v. Windham, 1 Rich. L. 164, 42 Am. Dec. 411; Kinsler v. Clark, 1 Rich. L. 170.

But the defendants nevertheless maintain that this deed, considered as a covenant to stand seised to uses, cannot be held as an execution of the power conferred by the will of Ralph Jones, for the reason that (by the terms of the covenant therein) no estate in the lands is created or conveyed until after the death of the said Sarah H. Jones, the donee of the power under the said will, whereas, by the express terms of the will of Ralph Jones, the said donee was empowered to dispose of the said one third of these lands, only "while living." The answer to this position, however, is that the condition of the exercise of the power was merely that it should be exercised by the said Sarah H. Jones "while living;" that is to say, during her lifetime by any instrument then taking effect. The use of the testator of the expression, "while living," was merely a declaration that the power could not be executed by a will which becomes operative only at death, but that it could be executed by any mode of conveyance taking effect inter vivos. Manifestly, the execution of a covenant to stand seised to uses operates as a conveyance in præsenti of the estate thereby created in the lands. The only limitation of the power of disposition given by the will in question was that it should be so exercised that the transfer of the title to the fee-simple remainder after the life estate of Sarah H. Jones should take effect in the lifetime of Sarah H. Jones, by her act. Clearly this requirement was as fully satisfied by the execution of a covenant to stand seised to uses as it could have been by a deed of conveyance in trust for herself for life, with remainder in fee to the grantees named therein. In either case the transfer of the title to the fee-simple remainder, which Sarah H. Jones was empowered to make, would take effect from the date of the execution and delivery of the instrument, which was during the lifetime of the grantor or covenantor, and there was no condition of the execution of the power that she should likewise convey her life estate.

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ANNOTATION.

Meaning of term "issue" where used as a word of purchase.

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I. Introduction.

The word "issue" may be either a word of purchase or limitation, and will be construed to be one or the other as may be necessary to effectuate the intent with which it appears to have been used in the instrument where it is employed. The lawyer who is confronted with the task of construing a deed or will in which the word is used must, therefore, first determine in which sense it is used. Where it is used as a word of limitation, it is regarded as the equivalent of "heirs of the body," and the first taker, by the operation of the rule in Shelley's Case, takes an estate tail, which may, by operation of local statutes, be converted into an estate in fee simple, either in himself or in the next taker. It should be noted that cases which state that the word "issue" is equivalent to "heirs of the body," but which make such statement in connection with the decision that the word is used as one of limitation, are without bearing on the question what the word means where used as a word of purchase. Cases in which the question before the court was whether the word "issue" was used as a word of limitation, and in which the court has expressed its decision that the word was used as one of purchase by saying that the word meant "children," but in which it was not necessary to fix the identity of the persons entitled to take as purchasers, have likewise been excluded from this note, as not actually passing upon the question under discussion.

Cases involving the question whether a limitation over in default of issue connotes a definite or indefinite failure of issue have likewise been excluded; as have cases upon the question as to the time as of which the membership of a class, described as the "issue" of a certain person, is to be ascertained.

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Decisions as to the meaning of the word "issue," where employed in statutes of various kinds, or as to the meaning of such phrases as "male issue," or "female issue," will not be found herein.

Where issue are to take per stirpes, children may not take in competition with living parents (Gourdin v. Deas (1887) 27 S. C. 479, 4 S. E. 64); and in as much as the exclusion of descendants whose parent is living, from participation in a gift to "issue," by a holding that the issue are to take per stirpes, has the effect practically to restrict the meaning of the term "issue," cases upon the question whether division is to be per capita or per stirpes are collected in this annotation.

II. Various meanings of word "issue."

The term "issue," according to the almost universal consensus of opinion, includes descendants of every degree and is to be given that meaning in the absence of explanatory context. See—

Alabama.—Reynolds v. Love (1915) 191 Ala. 218, 68 So. 27.

California.—Re Cavarly (1897) 119 Cal. 406, 51 Pac. 630.

Connecticut. — Bartlett v. Sears (1908) 81 Conn. 84, 70 Atl. 33; Perry v. Bulkley (1909) 82 Conn. 158, 72 Atl. 1014; Eaton v. Eaton (1914) 88 Conn. 286, 91 Atl. 196; Hoadley v. Beardsley (1915) 89 Conn. 270, 93 Atl. 535.

Illinois.—Arnold v. Alden (1898) 173 Ill. 229, 50 N. E. 704; Robeson v. Cochran (1912) 255 Ill. 355, 99 N. E. 649.

Indiana.—Snyder v. Greendale Land Co. (1910) 48 Ind. App. 178, 91 N. E. 821.

Iowa. — Brisbin v. Huntington (1905) 128 Iowa, 166, 103 N. W. 144, 5 Ann. Cas. 931.

Kentucky. — Black v. Cartmell (1849) 10 B. Mon. 188.

Maine.—Union Safe Deposit & T. Co. v. Dudley (1908) 104 Me. 297, 72 Atl. 166.

Maryland.—Goldsborough v. Martin (1874) 41 Md. 488; Backus v. Presbyterian Asso. (1893) 77 Md. 50, 25 Atl. 856.

Massachusetts.—Holland v. Adams (1855) 3 Gray, 188; Houghton v. Kendall (1863) 7 Allen, 72 (obiter); Hills v. Barnard (1890) 152 Mass. 67, 9 L.R.A. 211, 25 N. E. 96; Jackson v. Jackson (1891) 153 Mass. 374, 11 L.R.A. 305, 25 Am. St. Rep. 643, 26 N. E. 1112; Welch v. Colt (1917) 228 Mass. 511, 117 N. E. 834; Manning v. Manning (1918) 229 Mass. 527, 118 N. E. 676.

New Hampshire.—Kimball v. Penhallow (1881) 60 N. H. 448.

New Jersey.—Price v. Sisson (1860) 13 N. J. Eq. 168; Weehawken Ferry Co. v. Sisson, 17 N. J. Eq. 475, 486; Inglis v. McCook (1904) 68 N. J. Eq. 27, 59 Atl. 630; Coyle v. Coyle (1907) 73 N. J. Eq. 528, 68 Atl. 224; Security Trust Co. v. Lovett (1911) 78 N. J. Eq. 445, 79 Atl. 616; Tantum v. Campbell (1914) 83 N. J. Eq. 361, 91 Atl. 120; Dennis v. Dennis (1916) 86 N. J. Eq. 423, 99 Atl. 889.

New York.—Tier v. Pennell (1832) 1 Edw. Ch. 354 (obiter); Drake v. Drake (1892) 134 N. Y. 220, 17 L.R.A. 664, 32 N. E. 114; Soper v. Brown (1892) 136 N. Y. 244, 32 Am. St. Rep. 731, 32 N. E. 768; Cochrane v. Schell (1894) 140 N. Y. 516, 35 N. E. 978; Chwatal v. Schreiner (1896) 148 N. Y. 683, 43 N. E. 166; New York L. Ins. & T. Co. v. Viele (1899) 161 N. Y. 11, 76 Am. St. Rep. 238, 55 N. E. 311; Schmidt v. Jewett (1909) 195 N. Y. 486, 133 Am. St. Rep. 815, 88 N. E. 1110; Seitz v. Faversham (1912) 205 N. Y. 197, 98 N. E. 385; RE FARMERS' LOAN & T. Co. (reported herewith) ante, 910; Murray v. Bronson (1883) 1 Dem. 217; Re Cornell (1886) 5 Dem. 88; Post v. Horning (1887) 6 N. Y. S. R. 716; United States Trust Co. v. Tobias (1888) 21 Abb. N. C. 392, 4 N. Y. Supp. 211; Drake v. Drake (1889) 3 N. Y. Supp. 760, affirmed in (1890) 56 Hun, 590, 10 N. Y. Supp. 183; Chwatal v. Schreiner (1893) 3 Misc. 192, 23 N. Y. Supp. 206; Daly v. Greenberg (1893) 69 Hun, 228, 23 N. Y. Supp. 582; Bodine v. Brown (1896) 12 App. Div. 335, 42 N. Y. Supp. 202, affirmed without opinion in (1898) 154 N. Y. 778, 49 N. E. 1093; Wright v. Mercein (1901) 34 Misc. 414, 69 N. Y. Supp. 936; Morrow v. McMahon (1901) 35 Misc. 348, 71 N.

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Y. Supp. 961; Re United States Trust Co. (1901) 36 Misc. 378, 73 N. Y. Supp. 635; Hilliker v. Bast (1901) 64 App. Div. 552, 72 N. Y. Supp. 301; Harrison v. McAdam (1902) 38 Misc. 18, 76 N. Y. Supp. 701; Wilson v. Wilson (1902) 76 App. Div. 232, 78 N. Y. Supp. 408; Phelps v. Carneron (1905) 109 App. Div. 798, 96 N. Y. Supp. 1014; Re Disney (1907) 118 App. Div. 378, 103 N. Y. Supp. 391, reversed on other grounds in (1907) 190 N. Y. 128, 82 N. E. 1093; Bassett v. Wells (1907) 56 Misc. 81, 106 N. Y. Supp. 1068; Kernochan v. Whitney (1908) 125 App. Div. 371, 109 N. Y. Supp. 721; Clark v. Kittenplan (1909) 63 Misc. 122, 118 N. Y. Supp. 404; Seitz v. Faversham (1910) 141 App. Div. 903, 126 N. Y. Supp. 801; Metropolitan Trust Co. v. Rankin (1911) 74 Misc. 542, 134 N. Y. Supp. 462; Rasquin v. Hamersley (1912) 152 App. Div. 522, 137 N. Y. Supp. 578, affirmed without opinion in (1913) 208 N. Y. 630, 102 N. E. 1112; Re Bauerdorf (1912) 77 Misc. 655, 138 N. Y. Supp. 682; Re Cromwell (1913) 80 Misc. 606, 192 N. Y. Supp. 553; Re Farmers' Loan & T. Co. (1914) 163 App. Div. 533, 148 N. Y. Supp. 574; Re Milnor (1914) 87 Misc. 528, 149 N. Y. Supp. 1064; Re Union Trust Co. (1915) 89 Misc. 69, 151 N. Y. Supp. 246; Williams v. Van Wagenen (1915) 90 Misc. 111, 152 N. Y. Supp. 926, affirmed in (1915) 170 App. Div. 896, 154 N. Y. Supp. 1150, which is affirmed without opinion in (1916) 219 N. Y. 664, 114 N. E. 1087; Brevoort v. Townsend (1915) 91 Misc. 143, 154 N. Y. Supp. 1031; Re Van Cleef (1915) 92 Misc. 689, 157 N. Y. Supp. 549; Re Wienholz (1916) 94 Misc. 55, 157 N. Y. Supp. 677; Re Van Cleef (1917) 99 Misc. 405, 163 N. Y. Supp. 1098.

Ohio.—Moon v. Hepford (1895) 2 Ohio N. P. 365, 3 Ohio Dec. 508.

Oregon.—Love v. Walker (1911) 59 Or. 95, 115 Pac. 296.

Pennsylvania.—Gest v. Way (1837) 2 Whart. 445; Miller's Appeal (1866) 52 Pa. 113; Wistar v. Scott (1884) 105 Pa. 200, 51 Am. Rep. 197; Parkhurst v. Harrower (1891) 142 Pa. 432, 24 Am. St. Rep. 507, 21 Atl. 826.

Rhode Island.—Pearce v. Rickard (1893) 18 R. I. 142, 19 L.R.A. 472, 49 Am. St. Rep. 755, 26 Atl. 38; Gammell v. Ernst (1895) 19 R. I. 292, 33 Atl. 222; Hartwell v. Tefft (1896) 19 R. I. 644, 34 L.R.A. 500, 35 Atl. 882.

South Carolina.—Rutledge v. Rutledge (1838) Dud. Eq. 201; Burleson v. Bowman (1843) 1 Rich. Eq. 111; Corbett v. Laurens (1833) 5 Rich. Eq. 301; Beckam v. De Saussure (1856) 9 Rich. L. 531; Glenn v. Glenn (1884) 21 S. C. 308; Gourdin v. Deas (1887) 27 S. C. 479, 4 S. E. 64; Vale Royal Mfg. Co. v. Santee River Cypress Lumber Co. (1909) 84 S. C. 81, 65 S. E. 955; Carolina Bond & Invest. Co. v. Caldwell (1910) 86 S. C. 331, 68 S. E. 640.

Tennessee.—Ridley v. McPherson (1897) 100 Tenn. 402, 43 S. W. 773.

United States. — Adams v. Law (1854) 17 How. 417, 421, 15 L. ed. 149, 151; Maxwell v. Call (1823) 2 Brock. 119, Fed. Cas. No. 9,323.

England.—Cook v. Cook (1706) 2 Vern. 545, 23 Eng. Reprint, 952; Wyth v. Blackman (1748) 1 Ves. Sr. 200, 27 Eng. Reprint, 980; Davenport v. Hanbury (1796) 3 Ves. Jr. 260, 30 Eng. Reprint, 1000, 3 Revised Rep. 91; Horsepool v. Watson (1797) 3 Ves. Jr. 383, 30 Eng. Reprint, 1065; Freeman v. Parsley (1797) 3 Ves. Jr. 423, 30 Eng. Reprint, 1086; Sibley v. Perry (1802) 7 Ves. 523, 32 Eng. Reprint, 211, 6 Revised Rep. 183; Leigh v. Norbury (1807) 13 Ves. Jr. 344, 33 Eng. Reprint, 322; Hampson v. Brandwood (1816) 1 Madd. Ch. 381, 56 Eng. Reprint, 140; Bernward v. Mountague (1816) 1 Meriv. 421, 35 Eng. Reprint, 729; M'Gregor v. M'Gregor (1839) 1 De G. F. & J. 63, 45 Eng. Reprint, 282; Dodsworth v. Addy (1842) 11 L. J. Ch. N. S. 382, 6 Jur. 700; Head v. Randall (1843) 2 Younge & C. Ch. Cas. 231, 63 Eng. Reprint, 101, 7 Jur. 298; Benn v. Dixon (1847) 16 Sim. 21, 60 Eng. Reprint, 780, 11 Jur. 812; Edwards v. Edwards (1849) 12 Beav. 97, 50 Eng. Reprint, 997; Pope v. Pope (1857) 14 Beav. 594, 51 Eng. Reprint, 412, 21 L. J. Ch. N. S. 276; Hill v. Nalder (1852) 22 L. J. Ch. N. S. 242, 17 Jur. 224; Anderson v. St. Vincent (1855) 4 Week. Rep. 304, 2 Jur. N. S. 607; Ross v. Ross (1856) 20 Beav. 645, 52 Eng. Reprint, 753; Waldron v. Boulter (1856) 22 Beav. 284, 52 Eng. Reprint, 1117; South v. Searle (1856)

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2 Jur. N. S. 390, 4 Week. Rep. 470; Re Jones (1857) 23 Beav. 242, 53 Eng. Reprint, 95; Maddock v. Legg (1858) 25 Beav. 531, 53 Eng. Reprint, 740; Maynard v. Wright (1858) 26 Beav. 285, 53 Eng. Reprint, 908; Rhodes v. Rhodes (1859) 27 Beav. 413, 54 Eng. Reprint, 162; Weldon v. Hoyland (1862) 4 De G. F. & J. 564, 45 Eng. Reprint, 1303, 5 L. T. N. S. 96; Louis v. Louis (1863) 9 Jur. N. S. 244, 7 L. T. N. S. 666; Harrison v. Symons (1866) 14 Week. Rep. 959; Bryden v. Willett (1869) L. R. 7 Eq. 472; Hobgen v. Neale (1870) L. R. 11 Eq. 48, 40 L. J. Ch. N. S. 36, 25 L. T. N. S. 681, 19 Week. Rep. 144; Re Corlass (1875) L. R. 1 Ch. Div. 460, 45 L. J. Ch. N. S. 118, 33 L. T. N. S. 630, 24 Week. Rep. 204; Livesay v. Walpole (1875) 23 Week. Rep. 825; Re Hopkins (1878) L. R. 9 Ch. Div. 181, 47 L. J. Ch. N. S. 672, 26 Week. Rep. 629; Re Warren (1884) L. R. 26 Ch. Div. 208, 53 L. J. Ch. N. S. 787, 50 L. T. N. S. 454, 32 Week. Rep. 641; Edyvean v. Archer [1903] A. C. 379, 72 L. J. P. C. N. S. 85, 89 L. T. N. S. 4, 19 Times L. R. 561; Re Embury (1913) 109 L. T. N. S. 511, 58 Sol. Jo. 49; Re Johnson (1913) 30 Times L. R. 200; Re Burnham [1918] 2 Ch. 196.

Ireland.—Ridgeway v. Munkittrick (1841) 1 Drury & War. 84; Howard's Trusts (1858) 7 Ir. Ch. Rep. 344; Kavanagh's Will (1862) 13 Ir. Ch. Rep. 120; Re Harrison (1879) Ir. L. R. 3 Eq. 114; Re Dixon (1869) Ir. Rep. 4 Eq. 1; Donoghue v. Brooke (1875) Ir. Rep. 9 Eq. 489; Denis's Trusts (1875) Ir. R. 10 Eq. 81; Hobbs v. Tuthill [1895] 1 Ir. R. 115; Harris v. Loftus [1899] 1 Ir. R. 491; Berry v. Fisher [1903] 1 Ir. R. 484.

Canada. — Lazier v. Robertson (1899) 30 Ont. Rep. 529.

In only two instances (REMBERT v. VETOE (reported herewith) ante, 918, and Hart's Estate (1889) 7 Pa. Co. Ct. 369) in which the word "issue" was used as a word of limitation, has it been held to mean "heirs of the body;" and it has, on the contrary, been declared that the word "issue," although always including "heirs of the body," is not confined to them. Black v. Cartmell (1849) 10 B. Mon. (Ky.) 188.

The expression occasionally to be met with, that the word "issue" may mean descendants taking by right of representation (e. g., Union Safe Deposit & T. Co. v. Dudley (1908) 104 Me. 297, 72 Atl. 166), is not to be taken as defining the meaning of the word, but simply as expressing the idea that the right to participate in a gift to issue may be qualified by expressions indicative of an intention to make a stirpital division. See IV., infra.

The word "issue" is a word of broader import than the word "descendant," and may include the children of a living parent as well as the children or descendants of one who is dead. Hillen v. Iselin (1895) 144 N. Y. 365, 39 N. E. 368.

It may, however, receive from the context, read in the light of such extrinsic circumstances as are proper to be considered, the restricted meaning of "children." See—

Connecticut.—Hoadley v. Beardsley (1915) 89 Conn. 270, 93 Atl. 535.

Illinois.—Arnold v. Alden (1898) 173 Ill. 229, 50 N. E. 704.

Indiana. — Snyder v. Greendale Land Co. (1910) 48 Ind. App. 178, 91 N. E. 821.

Iowa. — Brisbin v. Huntington (1905) 128 Iowa, 166, 103 N. W. 144, 5 Ann. Cas. 931.

Maine.—Union Safe Deposit & T. Co. v. Dudley (1908) 104 Me. 297, 72 Atl. 166.

Massachusetts.—Silsbee v. Silsbee (1912) 211 Mass. 105, 97 N. E. 758.

New Jersey.—Price v. Sisson (1860) 13 N. J. Eq. 168; Inglis v. McCook (1904) 68 N. J. Eq. 27, 59 Atl. 630; Coyle v. Coyle (1907) 73 N. J. Eq. 528, 68 Atl. 224.

New York.—Palmer v. Horn (1881) 84 N. Y. 516; Drake v. Drake (1892) 134 N. Y. 220, 17 L.R.A. 664, 32 N. E. 114; Soper v. Brown (1892) 136 N. Y. 244, 32 Am. St. Rep. 731, 32 N. E. 768; Cochrane v. Schell (1894) 140 N. Y. 516, 35 N. E. 978; Chwatal v. Schreiner (1896) 148 N. Y. 683, 43 N. E. 166; Taft v. Taft (1885) 3 Dem. 86; Daly v. Greenberg (1893) 69 Hun, 228, 23 N. Y. Supp. 582; Wright v. Mercein (1901) 34 Misc. 414, 69 N. Y. Supp. 936; Morrow v. McMahon (1901) 35 Misc. 348, 71 N. Y. Supp. 961; Harrison

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v. McAdam (1902) 38 Misc. 18, 76 N. Y. Supp. 701; Re Tenney (1905) 104 App. Div. 290, 93 N. Y. Supp. 811; Bassett v. Wells (1907) 56 Misc. 81, 106 N. Y. Supp. 1068; Clark v. Kittenplan (1909) 63 Misc. 122, 118 N. Y. Supp. 404; Seitz v. Faversham (1910) 141 App. Div. 903, 126 N. Y. Supp. 801; Rasquin v. Hamersley (1912) 152 App. Div. 522, 137 N. Y. Supp. 578, affirmed without opinion in 208 N. Y. 630, 102 N. E. 1112; Re Farmers' Loan & T. Co. (1914) 163 App. Div. 533, 148 N. Y. Supp. 574; Re Milnor (1914) 87 Misc. 528, 149 N. Y. Supp. 1064; Brown v. Tanz (1917) 176 App. Div. 795, 163 N. Y. Supp. 372.

Pennsylvania. — Wistar v. Scott (1884) 105 Pa. 200, 51 Am. Rep. 197; Duckett's Estate (1906) 214 Pa. 362, 63 Atl. 830.

Rhode Island.—Gammell v. Ernst (1895) 19 R. I. 292, 33 Atl. 222.

South Carolina.—Burleson v. Bowman (1843) 1 Rich. Eq. 111; Duncan v. Harper (1873) 4 S. C. 76; Logan v. Cassidy (1905) 71 S. C. 175, 50 S. E. 794; Vale Royal Mfg. Co. v. Santee River Cypress Lumber Co. (1909) 84 S. C. 81, 65 S. E. 955; DIXON v. PENDLETON (reported herewith) ante, 915; Guy v. Osborne (1911) 91 S. C. 291, 74 S. E. 617.

United States. — Adams v. Law (1854) 17 How. 417, 421, 15 L. ed. 149, 151.

England.—Williams v. Jekyl (1755) 2 Ves. Sr. 681, 28 Eng. Reprint, 434; Bristow v. Warde (1794) 2 Ves. Jr. 336, 30 Eng. Reprint, 660, 2 Revised Rep. 235, 21 Eng. Rul. Cas. 356; Hampson v. Brandwood (1816) 1 Madd. Ch. 381, 56 Eng. Reprint, 140; Cursham v. Newland (1835) 2 Bing. N. C. 58, 132 Eng. Reprint, 23, 4 Mees. & W. 101, 150 Eng. Reprint, 1359, 2 Scott, 105, 5 L. J. C. P. N. S. 137, 7 L. J. Exch. N. S. 212; M'Gregor v. M'Gregor (1859) 1 De G. F. & J. 63, 45 Eng. Reprint, 282; Carter v. Bentall (1840) 2 Beav. 551, 48 Eng. Reprint, 1295, 9 L. J. Ch. N. S. 303, 4 Jur. 691; Buckle v. Fawcett (1845) 4 Hare, 536, 67 Eng. Reprint, 760, 9 Jur. 891; Farrant v. Nichols (1846) 9 Beav. 327, 50 Eng. Reprint, 370, 15 L. J. Ch. N. S. 259; Benn v. Dixon (1847) 16 Sim. 21, 60 Eng. Reprint, 780, 11 Jur. 812; Williams v. Teale (1847) 6 Hare, 239, 67 Eng. Reprint, 1155; Edwards v. Edwards (1849) 12 Beav. 97, 50 Eng. Reprint, 997; Bryan v. Manson (1852) 5 De G. & S. 737, 64 Eng. Reprint, 1323, 22 L. J. Ch. N. S. 233, 17 Jur. 202; Anderson v. St. Vincent (1855) 4 Week. Rep. 304, 2 Jur. N. S. 607; Maynard v. Wright (1858) 26 Beav. 285, 53 Eng. Reprint, 908; Rhodes v. Rhodes (1859) 27 Beav. 413, 54 Eng. Reprint, 162; Weldon v. Hoyland (1862) 4 De G. F. & J. 564, 45 Eng. Reprint, 1303, 5 L. T. N. S. 96; Marshall v. Baker (1862) 31 Beav. 608, 54 Eng. Reprint, 1275, 9 Jur. N. S. 396, 7 L. T. N. S. 303, 11 Week. Rep. 78; Fairfield v. Bushell (1863) 32 Beav. 158, 55 Eng. Reprint, 62; Martin v. Holgate (1866) L. R. 1 H. L. 175, 35 L. J. Ch. N. S. 789, 15 Week. Rep. 135; Bryden v. Willett (1869) L. R. 7 Eq. 472; Livesay v. Walpole (1875) 23 Week. Rep. 825; Re Hopkins (1878) L. R. 9 Ch. Div. 131, 47 L. J. Ch. N. S. 672, 26 Week. Rep. 629; Morgan v. Thomas (1882) L. R. 9 Q. B. Div. 643, 51 L. J. Q. B. N. S. 566, 47 L. T. N. S. 281, 31 Week. Rep. 106; Re Smith (1889) 58 L. J. Ch. N. S. 661; Re Walker [1897] 2 Ch. 238, 66 L. J. Ch. N. S. 622, 77 L. T. N. S. 94, 45 Week. Rep. 647; Re Birks [1900] 1 Ch. 417, 81 L. T. N. S. 741, 69 L. J. Ch. N. S. 124; Bennett v. Houldsworth [1911] W. N. 47, 104 L. T. N. S. 304, 55 Sol. Jo. 270; Re Burnham [1918] 2 Ch. 196.

Ireland.—Ridgeway v. Munkittrick (1841) 1 Drury & War. 84; Re Dixon (1869) Ir. Rep. 4 Eq. 1; Foster v. Wybrants (1876) Ir. Rep. 11 Eq. 40; Re Biron (1878) Ir. L. R. 1 Eq. 258; Re Harrison (1879) Ir. L. R. 3 Eq. 114; Re Meade (1881) Ir. L. R. 7 Eq. 51; Denis's Trusts (1875) Ir. Rep, 10 Eq. 81; Hobbs v. Tuthill [1895] 1 Ir. R. 115; Harris v. Loftus [1899] 1 Ir. R. 491.

Canada. — Montreuil v. Walker (1911) 3 Ont. Week. N. 166, 20 Ont. Week. Rep. 259.

In Brisbin v. Huntington (1905) 128 Iowa, 166, 103 N. W. 144, 5 Ann. Cas. 931, it was said that in England as well as in this country there is a strong tendency against the broad construction approved in earlier cases, and slight indications are seized upon as

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manifesting an intention on the part of the testator to limit the meaning of the term.

So, also, in Hobbs v. Tuthill [1895] 1 Ir. R. 115, it is said that the prima facie meaning of the word "issue" easily yields to an explanatory context.

And in Livesay v. Walpole (1875) 23 Week. Rep. (Eng.) 825, it was said by Malins, V. C., that the inconvenience of construing the word "issue" to mean descendants generally is so great that the court lays hold of any circumstance to cut it down.

And in Palmer v. Horn (1881) 84 N. Y. 516, it was said that the word "issue" will be given the meaning of children upon a slight indication in other parts of the will that such was the intention of the testator.

But in DIXON v. PENDLETON (reported herewith), ante, 915, it is said that the words "child," "son," "daughter," are the common words in which men think and speak of their immediate offspring, and that when the word "issue" is used, either in thought or expression, it almost invariably denotes an intention to include not only children, but other lineal descendants; hence issue should not be held to mean children unless the context clearly indicates that restricted meaning.

In Re Van Cleef (1917) 99 Misc. 405, 163 N. Y. Supp. 1098, it is said that "an exception which has almost outgrown the stem upon which it was grafted is that the principal rule 'yields to a faint glimpse' of a different intention in the will. In the search for the 'faint glimpse' judicial zeal may often have seen a light in the will which never else were seen on land or sea. Such occasional extravagance has been but an amiable perversion of a sound impulse, for the main rule has often destroyed the actual purpose of the testator."

In Soper v. Brown (1892) 136 N. Y. 244, 3 Am. St. Rep. 731, 32 N. E. 768, it was said: "It is urged that the popular meaning of the word 'issue' is synonymous with child or children. If this were admitted, it would not control the construction of a formal will, where words are supposed to be used in their legal sense in the absence of a contrary indication. In a note in Kent's Commentaries (vol. 4, p. 278), said to have been written by the author, it is stated that the word 'issue' is generally used as synonymous with child or children, and in Ralph v. Carrick (1879) L. R. 11 Ch. Div. 882, 48 L. J. Ch. N. S. 801, 40 L. T. N. S. 505, 25 Eng. Rul. Cas. 669, James, L. J., remarks that this was its popular meaning. But with great respect, I am not sure that this is correct as a general proposition. It is very unusual, I think, for a parent to speak of his children as his issue, either during life or in a testamentary instrument. When one speaks of the 'issue' of a person deceased, I think in most cases he would intend his descendants in every degree. In popular language, if one speaks of the issue of a marriage, he probably means the children of the marriage. The collocation of the words 'issue' and 'marriage' makes this, in the case supposed, the natural meaning. It was said by Lord Loughborough in Freeman v. Parsley (1797) 3 Ves. Jr. 421, 30 Eng. Reprint, 1085, that 'in the common use of language as well as in the application of the word "issue" in wills and settlements, it means all indefinitely. This sems to me to be nearer the truth than the opposite view; or at least I am of the opinion that, in the majority of cases, where the word 'issue' is used, it is used in its legal sense."

And in Re Burnham [1918] 2 Ch. (Eng.) 196, it was said by Sargant, J.: "Notwithstanding the expression of so high an authority as James, L. J., in Ralph v. Carrick (1879) L. R. 11 Ch. Div. (Eng.) 884, 48 L. J. Ch. N. S. 801, 40 L. T. N. S. 505, 25 Eng. Rul. Cas. 669, I am by no means certain that the legal meaning differs in this respect from the popular meaning of the term so far as it is popularly used at all. It is quite true that a layman, if asked what issue a man has, might probably reply by stating the man's children, and neglecting any grandchildren or remoter descendants. But a slightly inaccurate statement of the kind is also often made in petitions and other legal documents when it is

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said, and said almost as a matter of course, that there was issue of a marriage a certain number of children, and no more. In each case the explanation obviously is that attention is concentrated on the more immediate issue, and the remoter issue are neglected. If, however, the facts are stated, not positively, but negatively, —which seems to me the surer test,— I think that ordinary usage as well as legal usage is exactly the reverse. In the case of a family man whose children had all died in his lifetime, but who had grandchildren who survived him, I do not think that anyone, whether a lawyer or a layman, who had the facts present to his mind, would think of saying that the person in question had died without issue, or had left no issue."

In Re Birks [1900] 1 Ch. (Eng.) 417, it is said by Lindley, M. R.: "Although it is true that among lawyers 'issue' is generally taken to mean descendants, we must not allow ourselves to be misled by that. We must not start with any predisposition to read the word in that way, but we must look at the will and try and see whether the testator has shown what he meant when he used the word."

In Phelps v. Cameron (1905) 109 App. Div. 798, 96 N. Y. Supp. 1014, it was said that although the word "issue" is limited to children upon a slight indication in other parts of the will, an examination of the cases shows no instance in which the court has felt justified in construing the words in and of themselves as limiting a gift to the immediate children.

III. Indicia of intention tending to support or vary prima facie meaning.

a. Use of phrase "lawful issue."

The words "lawful issue" are not sufficient to confine the issue to children. Harris v. Loftus [1899] 1 Ir. R. 491.

In Harrell v. Hagan (1908) 147 N. C. 111, 125 Am. St. Rep. 539, 60 S. E. 909, the court, in discussing the meaning of the term "lawful issue," said that no great importance was to be attached to the use of the word "lawful." "In the absence of a contrary intent clearly indicated in the will, the term does not at all mean 'legitimate,' but simply the person designated by law to take by descent. It is more frequently used in wills without special meaning being intended, and as a rule should not be allowed any controlling significance."

b. Direction that they shall take equally.

The fact that an ultimate remainder to take effect in the absence of an instrument of appointment is in favor of surviving issue "equally" does not show that the word "issue" is not employed in its primary and usual sense, an equal distribution being as natural a provision in the case of grandchildren as of children. Bartlett v. Sears (1908) 81 Conn. 34, 70 Atl. 33.

But a direction that a division to be made twenty-five years after the death of the testatrix among persons described as "legal issue" of her nephews and niece is to be made "equally" is indicative of the use of the term in a restricted sense, it being scarcely conceivable that the testator contemplated such a division among the issue of the nephews and niece, whatever the degree of their relationship might be, and as, if the class of distributees was to be formed of issue without restriction in the matter of degree, it might well become one of formidable proportions. Hoadley v. Beardsley (1915) 89 Conn. 270, 93 Atl. 535.

c. Force of fact that unrestricted construction permits parents and children to take concurrently.

It is not enough to limit the meaning of the word "issue" that it is against reason and probability that it could have been intended that the parent and his children should share the estate equally. Price v. Sisson (1860) 13 N. J. Eq. 168; Weehawken Ferry Co. v. Sisson (1864) 17 N. J. Eq. 475; and see also, generally, cases cited throughout this note in which the word "issue" has been given an unrestricted meaning.

However, the fact that children would be placed on a footing of equality with grandchildren is a circumstance to be considered. See Palmer v. Horn (1881) 84 N. Y. 516.

In DIXON v. PENDLETON (reported herewith) ante, 915, it is said that on

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a doubtful construction between children and other descendants, it is true that the presumption of greater affection for children should have weight; but that still greater weight should be given to the almost universal inclination and custom of parents to give the children of a deceased child an equal share with a living child.

d. Construction beneficial to testator's family.

Each case depends upon the peculiar expression used and the structure of the sentence; but if the case be doubtful, the court, so far as it can, will prefer that construction which will most benefit the testator's family generally, on the supposition that this must more nearly correspond with his intention. Farrant v. Nichols (1846) 9 Beav. 327, 50 Eng. Reprint, 370.

Another meaning will not readily be given to the word "issue" if the result would be to divert the gift from the direct line of descent. RE FARMERS' LOAN & T. Co. (reported herewith) ante, 910.

e. Fact that limited construction may produce intestacy.

The fact that a construction of the word "issue" as limited to "children" may produce a partial intestacy is a circumstance to be taken into consideration, though it may not be sufficient to turn the scale.

Thus, it has been held that it is not enough to resolve an ambiguity as to the meaning of the word "issue" that a limited meaning put upon the word may involve an intestacy. Re Timson [1916] 2 Ch. (Eng.) 362, 85 L. J. Ch. N. S. 561, 115 L. T. N. S. 55, 60 Sol. Jo. 526.

But it has been held that the word "issue" will not be regarded as confined to children where, under such construction, there is the possibility, and perhaps probability, of a partial intestacy. Union Safe Deposit & T. Co. v. Dudley (1908) 104 Me. 297, 72 Atl. 166.

f. Use of phrase "issue by marriage."

It has been laid down as a rule of construction that the words "issue of the intended marriage," used in a marriage settlement, should, in the absence of any indication in the context of a contrary intention, be construed to mean children (Re Dixon (1869) Ir. Rep. 4 Eq. 1; Denis's Trusts (1875) Ir. Rep. 10 Eq. 81); but this is dissented from in Hobbs v. Tuthill [1895] 1 Ir. R. 115.

In Reed v. Braithwaite (1871) L. R. 11 Eq. (Eng.) 514, where testator gave his residuary estate to a cousin for her sole use, adding, "should she have any legal issue by marriage, then after her death the said residue to be divided amongst them equally, share and share alike when they attain the age of twenty-one years," it was held that the words "legal issue by marriage" clearly meant "children."

g. Use of word "begotten."

The words "of her body begotten" cannot be taken as indicative of the intent of the testator to limit a gift over to the "issue of her body begotten" to her immediate issue, where it is apparent that the provision in question was not the production of a skilled draftsman or of a person familiar with legal terms, and a subsequent provision made another disposition of the property should she "die without issue." Perry v. Bulkley (1909) 82 Conn. 158, 72 Atl. 1014.

So, also, in Evans v. Jones (1846) 2 Colly. Ch. Cas. 516, 63 Eng. Reprint, 840, where testator made a bequest to his brother and sisters for their several lives, share and share alike, and after the decease of either of them, then as to the share or shares of one or either of them so dying, bequeathed the same to the "issue of the body or bodies of him, her or them so dying begotten or to be begotten by their present husbands," it was held that the words "begotten or to be begotten by their present husbands" did not render it necessary to restrict the meaning of the words "issue of the body or bodies" to "children."

But see as to the use of the word "begotten," Granger v. Granger (1896) 147 Ind. 95, 36 L.R.A. 186, 44 N. E. 189, 46 N. E. 80, in which the question was as to the meaning of the term "heirs of his body."

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h. Ages of respective parties.

The relative ages of the respective parties has been regarded as a circumstance to be taken into consideration, although, as the following cases show, it is by no means conclusive.

The fact that the testator was, at the date of his will, sixty-nine years old, while a granddaughter for whom he made a provision therein was thirteen, is insufficient to show that, in providing for her issue, he used the term as meaning children, although he provided for the event of her dying before him, leaving issue. "All men think all men mortal but themselves." Bartlett v. Sears (1908) 81 Conn. 34, 70 Atl. 33.

In Wright v. Mercein (1901) 34 Misc. 414, 69 N. Y. Supp. 936, where testatrix gave her son, an only child, all her property during the term of his natural life, adding: "Should my son . . . leave lawful issue at the time of his death I request that the property real and personal be divided equally between such issue share and share alike when the youngest child shall have reached the age of thirty years, and the income of said property is to be equally divided between such issue and used for their support until such age shall be reached," with a limitation over should her son die without leaving lawful issue,—it was held that, taking into consideration the fact that the son was, at the time of the execution of the will, forty-three years old and unmarried, so that the issue which the testatrix contemplated would seem reasonably not to extend beyond his children, the direction to distribute "when the youngest child shall have reached the age of thirty years," and the invalidity of the will in case of a broader construction of the term "issue," the word "issue" meant "children."

In Emmett v. Emmett (1901) 67 App. Div. 183, 73 N. Y. Supp. 614, where a testatrix, who was, at the time of making her will, under twenty-eight years of age, and who had at that time but one child, a mere baby, gave her residuary estate "to my lawful issue, to be equally divided between them," and gave to her executor authority to sell and reinvest her property "in such manner as he may deem most for the interest of my child or children," it was held that the language employed in the direction to the executor, taken in connection with the circumstances of the case, which rendered it unlikely that the testatrix contemplated the necessity or propriety of providing for possible grandchildren at the expense of her own children, the gift to "issue" must be construed as one to immediate issue.

i. Absence of remote issue at time of making of will.

The fact that there was, at the time the will was made, no issue of deceased children, is indicative of an intent to use the word "issue" in a restricted sense. Emmett v. Emmett (1901) 67 App. Div. 183, 73 N. Y. Supp. 614.

j. Use of word "issue" interchangeably with word "children."

The word "issue" means children where used interchangeably with the word "children."

Connecticut.—Russell v. Hartley (1910) 83 Conn. 654, 78 Atl. 320.

Georgia.—O'Byrne v. Seeley (1878) 61 Ga. 77; Johnstone v. Taliaferro (1899) 107 Ga. 6, 45 L.R.A. 95, 32 S. E. 931.

Illinois.—Arnold v. Alden (1898) 173 Ill. 229, 50 N. E. 704.

Iowa.—Brisbin v. Huntington (1905) 128 Iowa, 166, 103 N. W. 144, 5 Ann. Cas. 931.

New York.—Palmer v. Horn (1880) 20 Hun, 70, affirmed in (1881) 84 N. Y. 516; Daly v. Greenberg (1893) 69 Hun, 228, 23 N. Y. Supp. 582; Clark v. Kittenplan (1909) 63 Misc. 122, 118 N. Y. Supp. 404.

South Carolina.—Burleson v. Bowman (1845) 1 Rich. Eq. 111; Guy v. Osborne (1911) 91 S. C. 291, 74 S. E. 617.

United States.—Adams v. Law (1874) 17 How. 417, 15 L. ed. 149.

England.—Horsepool v. Watson (1797) 3 Ves. Jr. 383, 30 Eng. Reprint, 1065; Swift v. Swift (1836) 8 Sim. 168, 59 Eng. Reprint, 67, 5 L. J. Ch. N. S. 376; Carter v. Bentall (1840) 2 Beav. 551, 48 Eng. Reprint, 1295, 9 L. J. Ch. N. S. 303, 4 Jur. 691; Goldie v. Greaves (1844) 14 Sim. 348, 60 Eng. Reprint,

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392; Buckle v. Fawcett (1845) 4 Hare, 536, 67 Eng. Reprint, 760, 9 Jur. 891; Hedges v. Harpar (1846) 9 Beav. 479, 50 Eng. Reprint, 429, 10 Jur. 578; Benn v. Dixon (1847) 16 Sim. 21, 60 Eng. Reprint, 780, 11 Jur. 812; Bryan v. Mansion (1852) 5 De G. & S. 737, 64 Eng. Reprint, 1323, 22 L. J. Ch. N. S. 233, 17 Jur. 202; Bradshaw v. Melling (1853) 19 Beav. 417, 52 Eng. Reprint, 412, 23 L. J. Ch. N. S. 603; Baker v. Bayldon (1862) 31 Beav. 209, 54 Eng. Reprint, 1118; Re Corrie (1863) 32 Beav. 436, 55 Eng. Reprint, 167; Bryden v. Willett (1869) L. R. 7 Eq. 472; Re Hopkins (1878) L. R. 9 Ch. Div. 131, 47 L. J. Ch. N. S. 672, 26 Week. Rep. 629; Re Birks [1900] 1 Ch. 417, 81 L. T. N. S. 741, 69 L. J. Ch. N. S. 124.

Ireland.—Foster v. Wybrants (1876) Ir. Rep. 11 Eq. 40; Re Meade (1881) Ir. L. R. 7 Eq. 51; Re Handcock (1889) Ir. L. R. 23 Eq. 34.

The same is true where the word is used interchangeably with the phrase "sons or daughters." See Farrant v. Nichols (1846) 9 Beav. 327, 50 Eng. Reprint, 370, 15 L. J. Ch. N. S. 259.

When a testator uses the words "heirs," "issue," and "children" indiscriminately, giving them the common and popular instead of their strict and legal meaning, the court is warranted in reading them interchangeably, so as to give the will such construction as will best comport with the intention of the testator as drawn from the entire instrument. Gannon v. Peterson (1901) 193 Ill. 372, 55 L.R.A. 701, 62 N. E. 210; Stisser v. Stisser (1908) 235 Ill. 207, 85 N. E. 240.

The word "issue" may be taken as meaning "children" where they are subsequently referred to as such. Daly v. Greenberg (1893) 69 Hun, 228, 23 N. Y. Supp. 582.

On the other hand, the meaning of the word "children" may be enlarged and extended by the use, in connection therewith, of the word "issue." Wythe v. Blackman (1748) 1 Ves. Sr. 200, 27 Eng. Reprint, 980.

The fact that the testator has used the word "issue" interchangeably with the word "children" in another part of the will is not conclusive. Dalzell v. Welch (1828) 2 Sim. 319, 57 Eng. Reprint, 808, 29 Revised Rep. 110.

Where there is a direction that the issue shall take in equal shares if more than one, and if only one, the whole to such one child, it is clear that the word "issue" connotes children only, and not all descendants. Burleson v. Bowman (1845) 1 Rich. Eq. (S. C.) 111; Swift v. Swift (1836) 8 Sim. 168, 59 Eng. Reprint, 67, 5 L. J. Ch. N. S. 376; Carter v. Bentall (1840) 2 Beav. 551, 48 Eng. Reprint, 1295, 9 L. J. Ch. N. S. 303, 4 Jur. 691; Briden v. Willett (1869) L. R. 7 (Eng.) Eq. 472; Re Hopkins (1878) L. R. 9 Ch. Div. (Eng.) 131, 47 L. J. Ch. N. S. 672, 26 Week. Rep. 629; Re Birks [1900] 1 Ch. (Eng.) 417, 81 L. T. N. S. 741, 69 L. J. Ch. N. S. 124; Foster v. Wybrants (1876) Ir. Rep. 11 Eq. 40; Re Meade (1881) Ir. L. R. 7 Eq. 51; Re Handcock (1889) Ir. L. R. 23 Eq. 34.

Instances in which the words "issue" and "children" have been used interchangeably.

In Palmer v. Horn (1881) 84 N. Y. 516, construing a direction to executors to divide a sum of money "into as many shares as there shall be lawful issue of my deceased nephew, Matthew Horn living at my death, and to invest the same and apply the interest and income from each of said shares to the use of each of said children respectively, and as they respectively depart this life, to pay over the principal of said share to their lawful issue, share and share alike," it was held that the reference to the issue of the nephew as "said children" showed that the testatrix used the term "issue" as synonymous with "children."

In Daly v. Greenberg (1893) 69 Hun, 228, 23 N. Y. Supp. 582, where testator devised certain real estate to a daughter for life, "and if at the time of her death she shall have lawful issue then living I devise to such child or children the said house, lot of ground and appurtenances, to them their heirs and assigns forever," and disposed of other parcels of real estate to his children in the same language, it was held to be testator's intention to use the word "issue" as synonymous with "children."

In Burleson v. Bowman (1845) 1

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Rich. Eq. (S. C.) 111, where testatrix bequeathed the interest of a sum of money to one for life, and after her death the principal to her issue, "to be equally divided amongst such issue, share and share alike and their issue; and in case of only one child her surviving, then to such only surviving child," it was held that the limitation over to one child in case the life beneficiary should leave but one surviving her demonstrated that by "issue" were meant "children;" and that this construction was not negatived by the fact that, in other similar legacies, the term "issue" was used without any context to restrict its meaning.

In Guy v. Osborne (1911) 91 S. C. 291, 74 S. E. 617, where testator devised lands to his nephew during his life and at his decease "to his surviving issue," adding, "but should my said nephew die without any surviving issue of his body, . . . the said lands . . . herein bequeathed to his children" should go to others, it was held that the testator had clearly indicated that he meant to use the words "his surviving issue" in the sense of "his surviving children," and therefore, that his surviving children took the remainder to the exclusion of the children of a child who did not survive him.

"Issue" will be construed as meaning "children" where used interchangeably with the words, as in the case of a marriage settlement by which property was limited to the children of the intended marriage upon the wife's death, "leaving issue of said marriage one or more children." Adams v. Law (1854) 17 How. (U. S.) 417, 15 L. ed. 149.

In Horsepool v. Watson (1797) 3 Ves. Jr. 383, 30 Eng. Reprint, 1065, where testatrix devised estates upon trust for A and his wife for life, and after the decease of the survivor, upon trust to sell and apply the proceeds unto and amongst "all and every the issue child or children male or female of the body of the said" A by his said wife "and their representatives equally share and share alike," it was held that the testatrix herself had defined the issue to take as being the child or children of A and his wife.

In Swift v. Swift (1836) 8 Sim. 168, 59 Eng. Reprint, 67, 5 L. J. Ch. N. S. 376, construing marriage articles by which a reversionary interest in a fund was agreed to be settled on the husband for life, remainder to the wife for life, and, after the death of the survivor, on the "issue" of the marriage living at the death of the survivor of the husband and wife, in equal shares if more than one, but, if but one, then the whole was to go to such only "child," it was held that the expression, "and if but one the whole to go to such only child," was demonstrative that the word "issue" meant "children."

In Carter v. Bentall (1840) 2 Beav. 551, 48 Eng. Reprint, 1295, 9 L. J. Ch. N. S. 303, 4 Jur. 691, where the testator gave the income of his real and personal estate to his daughter for life for her separate use, and after her decease gave the residue of his estate in trust to sell and pay half the produce "to the issue" of his daughter equally, to be paid at twenty-one, and if only one child, then to such only child, and directed the trustees to apply the interest in the maintenance and education of such issue, and, "in default of such issue," gave such moiety of his residue between his nephews and nieces living at the death of his daughter, it was held that the use which the testator made of the words "only one child" and "such only child" showed that by the word "issue" he meant "children."

In Goldie v. Greaves (1844) 14 Sim. 348, 60 Eng. Reprint, 392, where testatrix bequeathed the use of her personal estate to her mother and unmarried sisters for life, and directed that after their death her estate should be divided among her brother Edward, her sister Jane, and such other sister or sisters who should have been married, "or in case of the death of either or any of them leaving issue, then the share of him or her so dying to go to such child or children equally between them," it was held that by the use of the term "such child or children" the testatrix had made it clear what she meant by the word "issue."

In Buckle v. Fawcett (1845) 4 Hare, 536, 67 Eng. Reprint, 760, where the

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testator gave his estate, subject to the payment of debts, legacies, and annuities, to a nephew for life, and upon his decease to and amongst all and every of the children of his said nephew and the issue of such children as should then be dead as the said nephew should by deed or will appoint, and, in default of appointment, to the use of all and every the children of his said nephew or the survivors of them when and as they should severally attain their respective ages of twenty-one, but in case the said nephew should die without leaving any lawful children him surviving, or, there being such, they should all die under twenty-one years without issue, then to the children of the testator's two cousins and the survivors of them, with the further provision that "in case any of such children should be then dead leaving issue of his, her or their body or bodies lawfully begotten, that then and in such case such issue should have and receive and be entitled as well to such original portion or portions, share or shares, . . . as the father or mother of such issue so dying would have been entitled to if then living," it was held that the gift being first to children and the will afterwards speaking of the father and mother and their issue, it was clear that the word "issue" must be construed as "children."

In Farrant v. Nichols (1846) 9 Beav. 327, 50 Eng. Reprint, 370, where testator directed his residuary estate to be held in trust for his three daughters to transfer one moiety of their respective shares to each on attaining twenty-three, and as to the other moiety, to pay the interest to his daughters during their lives, and after their respective decease, in trust for all and every "the respective issues of his said daughters, whether sons or daughters, living at the time of the respective deceases of his said daughters in equal shares and proportions, and to be paid and payable if sons, on their attaining their respective ages of twenty-one years, and if daughters, at their respective ages of twenty-three years;" but if any or either of his said daughters should die without leaving any such issue, or. having left any issue, all such issue should happen to die before attaining their respective ages as aforesaid, in trust for his surviving daughter or daughters and their respective issues, it was held that as the testator spoke of the issue of his daughters "whether sons or daughters," and as the subsequent phrase "such issue" is a relative expression referring back to the last antecedent, the testator must be understood to have put his own construction on the word "issue," and to have meant the "sons or daughters" of his daughters, and that the restriction thereby put on the words was not enlarged by the gift over on the daughters' dying without leaving "any issue."

In Hedges v. Harpur (1846) 9 Beav. 479, 50 Eng. Reprint, 429, 10 Jur. 578, where the testator devised property to a daughter for life, and if she died leaving "issue," then to her "children," it was held that the testator had evidently used the word "issue" in the sense of children.

In Benn v. Dixon (1847) 16 Sim. 21, 60 Eng. Reprint, 780, 11 Jur. 812, where a testator gave all his real and personal property to his wife for life and at her death, if he left issue, to the child or children he might have at his decease, but if he should die without leaving issue, then to his brothers and sisters, and further provided that should any of them "die without leaving issue, I then give such share or shares to the survivor or survivors of them; but leaving issue, I then give such share to their children in equal proportions," it was held that the word "issue" meant "children."

In Bryan v. Mansion (1852) 5 DeG. & S. 737, 64 Eng. Reprint, 1323, 22 L. J. Ch. N. S. 233, 17 Jur. 202, where testatrix gave a fund to trustees upon trust to pay the dividends to a niece, and after her decease, if her husband should survive her and she should leave no "issue" living at her decease, then to the husband for life, but if she should leave "issue," then upon trust to pay a moiety of the dividends to the husband and to apply the other moiety during his life for the benefit of "such issue" during their minority, and after the decease of the niece, as to one

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moiety of the fund, and after the decease of the survivor of her and her husband, then as to the whole of the fund, upon trust to transfer and divide the same unto and among the "children" of the niece, the shares of the sons to be vested at twenty-one and of daughters at that age or marriage with consent, with survivorship in case of the death of any child before his portion should become vested, with a provision for maintenance for "children" during minority,—it was held that the word "issue" obviously meant "children."

In Baker v. Bayldon (1862) 31 Beav. 209, 54 Eng. Reprint, 1118, where testator gave legacies to his nieces, with power to his executors to settle them on his nieces for life, and at their deaths for the benefit of their "issues," and also gave them his residue, with like power to settle it on his nieces, and for the benefit of their "children," as was by his will before provided with respect to the specific portions before given to them, it was held that the testator had given his own explanation that by the word "issues" he meant "children."

In Re Corrie (1863) 32 Beav. 436, 55 Eng. Reprint, 167, where testator bequeathed his residuary personal estate to his nephew and niece equally, and after their respective deaths, amongst their issue, "if there be any child or children to take the share of their deceased parent," it was held that the word "issue" clearly meant children.

In Bryden v. Willett (1869) L. R. 7 Eq. (Eng.) 472, where testator gave his residuary estate upon trust to pay a share of the dividends to each of his four married sisters therein named for their respective lives, directing that when and so soon as either or any of them should die without leaving issue, the part or share of one so dying should be divisible among all the survivors or survivor of his said sisters "and the issue of any who may be then dead, in equal parts or shares but such issue to take only their respective parents' share therein," and when and so soon as any of said married sisters should die and leave issue, then to pay the share of the one so dying leaving issue unto such respective issue, "if more than one child equally to be divided between them for their respective absolute benefit," it was held that the testator had interpreted his own language and shown that by "issue" he meant "children."

In Re Hopkins (1878) L. R. 9 Ch. Div. (Eng.) 131, 47 L. J. Ch. N. S. 672, 26 Week. Rep. 629, it was held that under a trust "for the lawful issue of (a person named) surviving him, equally to be divided between them if more than one share and share alike, and if but one, then for such only child," children only might take, although the effect was to exclude the children of a deceased child.

In Re Hopkins (Eng.) supra, where a testator gave a fund in trust for the lawful issue of a certain person surviving him, "equally to be divided between them if more than one, share and share alike, and if but one then for such only child," with directions as to payment at twenty-one or marriage, and a gift over "in default of issue of the said [person] becoming entitled to the said" fund, it was held that the provision in case of an only child showed that the testator used the word "issue" in the sense of "children," and that it made no difference that the limitation over was expressed to be in default of issue rather than in default of "such issue."

Where the testator directs that the issue shall take in equal shares if more than one, and if only one, the whole "to such one child," it is clear that he meant "children" only, and not all descendants. Re Birks [1900] 1 Ch. (Eng.) 417, 81 L. T. N. S. 741, 69 L. J. Ch. N. S. 124.

Instances in which the words have been held not to have been used interchangeably.

In Harrison v. Symons (1866) 14 Week. Rep. (Eng.) 959, it was held that where, in a deed, a power is given to appoint among "issue," followed by a limitation over in their favor, an accompanying declaration that the "children" shall take in equal shares did not cut down the strict technical meaning of the word "issue."

In Hall v. Hall (1885) 140 Mass. 267, 2 N. E. 700, where testator, who had created a trust for the benefit of

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his daughters for life, directed the trust estate to be conveyed at the decease of the surviving daughter to the issue or children of his said daughters then living, "to be divided among all such issue or children, share and share alike, to them and their respective heirs and assigns forever in fee simple," it was held that the phrase "issue or children" could not be read as meaning either "issue, or, in other words, children," or "child or children," but that the words "issue or" must be taken to have been intended to add something to the substantial meaning of the clause, and to enlarge the scope of the limitation, and accordingly that the children of a daughter's deceased child were entitled to participate.

k. Use of word "issue" elsewhere in a limited sense.

Where the word "issue" is used in other parts of the will as meaning "children," it will be presumed to have been used in that sense in a connection in which its use is ambiguous. Foster v. Wybrants (1876) Ir. Rep. 11 Eq. 40; Silsbee v. Silsbee (1912) 211 Mass. 105, 97 N. E. 758; Dennis v. Dennis (1916) 86 N. J. Eq. 423, 99 Atl. 889; Duckett's Estate (1906) 214 Pa. 362, 63 Atl. 830. Thus, where, in the first part of a will, the word "issue" is used equivocally, and there is nothing in the immediate context to fix its meaning, and in another part of the will the word is used in such a way as to show that the testator considered the expression as equivalent to the word "children," it must be assumed that he applied it in that sense in every part of his will. Edwards v. Edwards (1849) 12 Beav. 97, 50 Eng. Reprint, 997. And in Re Birks [1900] 1 Ch. (Eng.) 417, 81 L. T. N. S. 741, 69 L. J. Ch. N. S. 124, reversing [1899] 1 Ch. 703, where twelve distinct legacies contained gifts over to the "issue" of legatees dying in the testator's lifetime, and except in the case of the eleventh legacy the gift over in each contained words clearly restricting "issue" to "children," but in the eleventh case the gift over to "issue" contained no words of restriction whatever, it was held that the restriction of "issue" to "children" applied to the gift over in the eleventh legacy as well as to the gifts over in the other legacies. Where the word "issue" is used in a will on several occasions as equivalent to "children" and the issue were in some instances spoken of in reference to their "parent," the word "issue" must receive the same construction throughout the will. Rhodes v. Rhodes (1859) 27 Beav. 413, 54 Eng. Reprint, 162. Where the term "issue" has been frequently and clearly restricted by a testator to the meaning of "children," and nowhere previously used by him as necessarily equivalent to descendants, the court will not put an expanded construction upon the word in an ultimate gift of one legacy. Re Harrison ¶1879) Ir. L. R. 3 Eq. 114. The use in a codicil of the terms "issue" and "lawful issue," where the persons intended to be thus described were unmistakably children, is, in the absence of anything in the will to indicate that the term "legal issue" as therein employed was used more comprehensively, a strong indication that the testatrix used the words there in the same sense. Hoadley v. Beardsley (1915) 89 Conn. 270, 93 Atl. 535. In Peel v. Catlow (1838) 9 Sim. 352, 59 Eng. Reprint, 400, 7 L. J. Ch. N. S. 273, 2 Jur. 759, where testator, who had bequeathed a share of his residuary estate amongst the children of a deceased sister, directing that their share should be paid to them at twenty-one, and that in case any of them should die under that age, leaving issue, their share should be paid to their issue, or, in default of issue, to the surviving children and the issue of such of them as should be then dead, such issue taking no greater share than their deceased parents would have been entitled to if living, bequeathed another share to a sister for life, and after her death unto and among her issue, and to be payable at the like times and with the like benefit of survivorship "and in like manner" as was thereinbefore expressed concerning the share thereinbefore given to the children of the deceased sister, it was held that the reference to the former clause in the will

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showed that the word "issue" was used in the sense of "children."

But the same word may on different occasions, and from the immediate context, have two different meanings (Edwards v. Edwards (1846) 12 Beav. 97, 50 Eng. Reprint, 997); and the word "issue" may be used in different senses in different parts of the will (Williams v. Teale (1847) 6 Hare, 239, 67 Eng. Reprint, 1155); Morrow v. McMahon (1901) 35 Misc. 348, 71 N. Y. Supp. 961. Hence, the use of the term "issue" in the restricted sense of "children" in other parts of the same instrument is not conclusive. Drake v. Drake (1892) 134 N. Y. 220, 17 L.R.A. 664, 32 N. E. 114; Head v. Randall (1843) 2 Younge & C. Ch. Cas. 231, 63 Eng. Reprint, 104, 7 Jur. 298; Hedges v. Harpur (1846) 9 Beav. 479, 50 Eng. Reprint, 429, 10 Jur. 578; Carter v. Bentall (1840) 2 Beav. 551, 48 Eng. Reprint, 1295; Re Warren (1884) L. R. 26 Ch. Div. (Eng.) 208, 53 L. J. Ch. N. S. 787, 50 L. T. N. S. 454, 32 Week. Rep. 641; Louis v. Louis (1863) 9 Jur. N. S. (Eng.) 244, 7 L. T. N. S. 666.

So far as may be reasonably possible, the same construction should be put on the same word wherever it may occur in a will or settlement; but words are not to be strained from their natural meaning in a collocation in which they may be found for the purpose of producing a fallacious uniformity. Re Dixon (1869) Ir. Rep. 4 Eq. 1.

The fact that the testatrix, in making a gift to her own children, limited such gift over in case she should die without leaving "such issue," is not enough to show that when she made use of the word "issue" in other parts of the will she meant "children." Caulfield v. Maguire (1845) 2 Jones & L. (Ir.) 176.

In Berry v. Fisher [1903] 1 Ir. R. 484, where testator bequeathed a fund upon trust to pay the income to a daughter, and in case of her death leaving issue, "said interest money to be paid and payable to such issue if more than one, share and share alike, for their support and education, and on their respectively attaining the age of twenty-one years such principal sum and such other sum as they or their said mother may be entitled unto in this will shall be divided among them share and share alike," and also directed that, in the case of the death of any of his children leaving lawful issue, the share or shares of such child or children should go respectively to the lawful issue of such child or children if more than one, share and share alike, it was held that the reference to the mother of such issue in the clause above quoted was not sufficient to confine to "children" all the gifts to "issue."

l. Use correlatively with word "parent."

It has become one of the recognized principles of construction in the class of cases comprehended within this note, that where it appears that the words "parent" and "issue" are used as correlatives, as where it is directed that the issue shall take the share which a deceased parent would have taken if living, the word may be construed as meaning children. This is known as the rule in Sibley v. Perry (1802) 7 Ves. Jr. 522, 32 Eng. Reprint, 211.

Connecticut.—See Mitchell v. Mitchell (1900) 73 Conn. 303, 47 Atl. 322.

Georgia.—Doe ex dem. Sheftall v. Roe (1860) 30 Ga. 453.

Illinois.—Madison v. Larmoe (1897) 170 Ill. 65, 62 Am. St. Rep. 356, 48 N. E. 556; Arnold v. Alden (1898) 173 Ill. 229, 50 N. E. 704.

Iowa.—Brisbin v. Huntington (1905) 128 Iowa, 166, 103 S. W. 144, 5 Ann. Cas. 931; Horner v. Haase (1916) 177 Iowa, 115, 158 N. W. 598.

Massachusetts.—King v. Savage (1876) 121 Mass. 303.

New Jersey.—Dennis v. Dennis (1916) 86 N. J. Eq. 428, 99 Atl. 889; Coyle v. Coyle (1907) 73 N. J. Eq. 528, 68 Atl. 224.

New York.—Murray v. Bronson (1883) 1 Dem. 217; Cochrane v. Schell (1894) 140 N. Y. 516, 35 N. E. 961.

Ohio.—Moon v. Hedford (1895) 2 Ohio N. P. 365, 3 Ohio S. & C. P. Dec. 508.

Pennsylvania.—Nice's Estate (1910) 227 Pa. 75, 75 Atl. 1025.

South Carolina.—Brown v. McCall

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(1895) 44 S. C. 503, 22 S. E. 823; Logan v. Cassidy (1905) 71 S. C. 175, 50 S. E. 794.

England.—Pruen v. Osborne (1840) 11 Sim. 132, 59 Eng. Reprint, 824; Pope v. Pope (1851) 14 Beav. 591, 51 Eng. Reprint, 411, 21 L. J. Ch. N. S. 276; Bradshaw v. Melling (1853) 19 Beav. 417, 52 Eng. Reprint, 412, 23 L. J. Ch. N. S. 603; Anderson v. St. Vincent (1855) 4 Week. Rep. 304, 2 Jur. N. S. 607; Ross v. Ross (1855) 20 Beav. 645, 52 Eng. Reprint, 753; Smith v. Horsfall (1858), 25 Beav. 628, 53 Eng. Reprint, 776; Rhodes v. Rhodes (1859) 27 Beav. 413, 54 Eng. Reprint, 162; Tatham v. Vernon (1861) 29 Beav. 604, 54 Eng. Reprint, 762, 4 L. T. N. S. 531, 9 Week. Rep. 822, 7 Jur. N. S. 815; Stevenson v. Abingdon (1862) 31 Beav. 305, 54 Eng. Reprint, 1156, 9 Jur. N. S. 1063, 9 L. T. N. S. 74, 11 Week. Rep. 935; Fairfield v. Bushell (1863) 32 Beav. 158, 55 Eng. Reprint, 62; Lamphier v. Buck (1864) 34 L. J. Ch. N. S. 650, 6 New Reports, 196, 2 Drew & S. 484, 62 Eng. Reprint, 704, 11 Jur. N. S. 837, 12 L. T. N. S. 660, 13 Week. Rep. 767; Martin v. Holgate (1866) L. R. 1 H. L. 175, 35 L. J. Ch. N. S. 789, 15 Week. Rep. 135; Heasman v. Pearse (1871) L. R. 7 Ch. 282, 41 L. J. Ch. N. S. 705, 26 L. T. N. S. 299, 20 Week. Rep. 271; Re Smith (1889) 58 L. J. Ch. N. S. 661; Re Birks [1900] 1 Ch. 417, 81 L. T. N. S. 741, 69 L. J. Ch. N. S. 124; Re Timson [1916] 2 Ch. 362, 85 L. J. Ch. N. S. 561, 115 L. T. N. S. 55, 60 Sol. Jo. 526.

In Ross v. Ross (1855) 20 Beav. 645, 52 Eng. Reprint, 753, it is said that it must be certain before the rule in Sibley v. Perry can apply that the testator has, by the word "parent," meant to signify the first taker, the child in the first instance.

The rule, however, is not an invariable one, since the word "parent" may be construed, in furtherance of the intention of a testator, to mean any lineal ancestor (Rasquin v. Hamersley (1912) 152 App. Div. 522, 137 N. Y. Supp. 578, affirmed without opinion in (1913) 208 N. Y. 630, 102 N. E. 1112); in which case the only effect of the phrase is to require a stirpital distribution.

It may again be controlled by the general effect and scope of the whole will and by the use of the word "issue" in other parts of the will, which may enlarge this construction and restore the word to its original comprehensive meaning. Maynard v. Wright (1858) 26 Beav. 285, 53 Eng. Reprint, 908; and see also cases infra under heading, "Instances in which the rule has not been followed, or held not to apply."

The rule in Sibley v. Perry (1802) 7 Ves. Jr. 522, 32 Eng. Reprint, 211, which has proved very useful in cases where it was desirable to exclude the children of living parents from participation in a gift to issue, has been the subject of considerable faultfinding in cases in which the result of its application was to exclude the children of deceased parents. The modern view is that the presence of a provision that the issue shall take the share which their parent would have taken if living is neither controlling nor does it create a presumption of intention to use the word "issue" in its restricted sense, but that it is simply a circumstance to be taken into consideration in ascertaining the meaning of the user.

In Re Timson [1916] 2 Ch. (Eng.) 362, it was said by Cozens-Hardy, M. R.: "There has been a discussion as to the principle which ought to govern us in construing a will of this kind and the extent to which what is well known in the textbooks as the rule in Sibley v. Perry (Eng.) supra, or in Pruen v. Osborne (1840) 11 Sim. 132, 59 Eng. Reprint, 824, should be adopted. That rule seems to me to govern the case unless there is some context which enables us to take a different view. But in saying that I do not mean that the court must rely solely upon that rule; regard must be had to the whole will. It is a fallacy to say: 'Look at Sibley v. Perry—that is a prima facie rule—and see whether there is anything to cut it down;' we must consider the whole will."

The doctrine that the word "issue" shall be restricted to parent when used in antithesis to the word "parent" is not a rule of construction, but is merely one consideration to be weighed with others in an estimate of

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a testator's meaning. Sometimes the word "issue" may take its color from the word "parent," and refer to children. Sometimes the word "parent" may take its color from the word "issue," and refer to all who may occupy the position of parent throughout the line of succession. RE FARMERS' LOAN & T. Co. (reported herewith) ante, 910.

It will not do to start with a presumption that the case is governed by the rule in Sibley v. Perry because it may have some marked features in common with it, and then inquire whether there is other context sufficient to displace or override this presumption. Re Burnham [1918] 2 Ch. (Eng.) 196.

The word "issue" when used in relation to the word "parent" has been sometimes construed as synonymous with children; but this rule of construction has not always been followed, and when applied to wills easily yields to slight considerations of probable testamentary intention. Re United States Trust Co. (1901) 36 Misc. 378, 73 N. Y. Supp. 635.

Among the indications of a contrary intention which will negative the application of the rule in Sibley v. Perry is the presence of a limitation over in default of issue. See United States Trust Co. v. Tobias (1888) 21 Abb. N. C. 392, 4 N. Y. Supp. 211; Harrison v. McAdam (1902) 38 Misc. 18, 76 N. Y. Supp. 701; Riker v. Gwynne (1910) 139 App. Div. 423, 124 N. Y. Supp. 124, modified in (1911) 201 N. Y. 143, 94 N. E. 632; Ross v. Ross (1855) 20 Beav. 645, 52 Eng. Reprint, 753, approved in Ralph v. Carrick (1879) L. R. 11 Ch. Div. 873, 48 L. J. Ch. N. S. 801, 40 L. T. N. S. 505, 25 Eng. Rul. Cas. 669; Re Embury [1913] 109 L. T. N. S. 511, 58 Sol. Jo. 49; Kavanagh's Will (1862) Ir. 13 Ch. Rep. 120, set forth infra under catch line, "—effect of limitation over in default of issue."

And where throughout the provision in question there is a very careful and marked distinction between the use of the word "issue" and the use of the word "children," and the former word is used throughout in its strict meaning of descendants generally, the rule in Sibley v. Perry does not apply. Re Burnham (Eng.) supra.

Criticisms of Sibley v. Perry.

In Jackson v. Jackson (1891) 153 Mass. 374, 11 L.R.A. 305, 25 Am. St. Rep. 643, 26 N. E. 1112, it is said: "We think that, as a matter of verbal construction, it would be as easy and natural to say that where the words 'parents and issue' are used in connection with each other the word 'parents' means ancestors, as that the word 'issue' means children; and in the construction of any instrument it is always necessary to look beyond the literal meaning of words. The English decisions are collected in 2 Jarman, Wills, 5th ed. **101–107. They do not seem to be wholly satisfactory even to the English judges, and in Hills v. Barnard (1890) 152 Mass. 67, 9 L.R.A. 211, 25 N. E. 96, we refused to follow the decision in Martin v. Holgate (1866) L. R. 1 H. L. (Eng.) 175, 35 L. J. Ch. N. S. 789, 15 Week. Rep. 135, in a case closely resembling that, and reached a conclusion analogous to that of the court of appeal in Ralph v. Carrick (1879) L. R. 11 Ch. Div. (Eng.) 873, 48 L. J. Ch. N. S. 801, 40 L. T. N. S. 505, 25 Eng. Rul. Cas. 669. The tendency of our decisions has been more and more to construe 'issue' where its meaning is unrestricted by the context as including all lineal descendants and importing representations; and certainly when the issue take as of a particular time after the death of the testator, and only the issue living at that time take, the issue of deceased issue take by a sort of substitution for their ancestors."

The supreme court of Maine has also refused to follow Sibley v. Perry in Union Safe Deposit & T. Co. v. Dudley (1908) 104 Me. 297, 72 Atl. 166, saying: "Notwithstanding the doctrine of Sibley v. Perry, we are of opinion that there is nothing in the context of this will which necessarily or reasonably shows that the testator intended to confine and restrict the meaning of 'issue' to children only. He used the words 'the aforesaid issue taking only the deceased parent's share' only to show his intention that the issue were to take by right of representation, and not to show that he

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used the word 'issue' as synonymous with 'children.' He evidently meant the same and no more than if he had said, 'the aforesaid issue taking only by right of representation.'"

Sibley v. Perry was held in United States Trust Co. v. Tobias (1888) 21 Abb. N. C. 392, 4 N. Y. Supp. 211, not to be a controlling authority, the court saying: "There is nothing decided in the courts of this state which should make it so, nor do I perceive anything which entitles it to be regarded as such in this country, whatever may be the views of the English judges as to its having established a general rule of construction binding upon them."

In Coyle v. Coyle (1907) 73 N. J. Eq. 528, 68 Atl. 224, Leaming, V. C., said, with reference to the expression, "such issue shall take the share their parent would have taken if living:" "I do not think I should feel at liberty to adopt the view that this language discloses the intent of the testator to use the word 'issue' in the restricted sense referred to with sufficient clearness to warrant a court in disregarding the natural significance of the word were it not for the fact that eminent jurists have in the past adopted that view. In Sibley v. Perry (1802) 7 Ves. Jr. 523, 32 Eng. Reprint, 211, Lord Eldon held the word 'issue' similarly used in a will in collocation with the word 'parent' to be used in the restricted sense of children, to the exclusion of grandchildren. I think it may be fairly said that this determination of Sibley v. Perry does not appear to have been wholly free from the influence of considerations arising from other provisions of the will and circumstances surrounding it; but the case appears to have always stood as authority for the rule of construction stated, though it has not escaped severe criticism."

In Dennis v. Dennis (1916) 86 N. J. Eq. 423, 99 Atl. 889, it is said that while the case of Sibley v. Perry has been much criticized, it has been followed with very little, if any, diminution of its force as a precedent.

In Ralph v. Carrick (1879) L. R. 11 Ch. Div. 873, 25 Eng. Rul. Cas. 669, it was said by James, L.J.: "It is, I think, much to be regretted that Sibley v. Perry was ever made a leading case, because, according to the report of what Lord Eldon himself said in that case, it is, to my mind, perfectly clear that he never intended to lay down any general rule or canon of construction, but was dealing only with the peculiar language of the will in that particular case. He found one clause in which he considered that the testator had used the word 'issue' to signify children only, and then he said, 'I give the same meaning to the word "issue" in other parts of the will.' It is, however, I think, settled, but rather by the case of Pruen v. Osborne (1840) 11 Sim. 132, 59 Eng. Reprint, 824, than by Sibley v. Perry, that, as a general rule, when you find a gift to a person and then a gift to the issue of that person, such issue to take only the parent's share, the word 'issue' is cut down to mean children. I am not sure that some of the consequences of such a rule have always received the attention they ought to have received. Suppose a man to leave his property to his wife for life, and at her death to all his children then living and the issue of such of them as should be then dead, equally to be divided between them, the issue of any of them who might be then dead to take only their parent's share. Suppose then his children all to die before the period of division, having had children who predeceased them, leaving families. The grandchildren might go to the workhouse, and the family property go to a stranger under the residuary gift. That seems a possible result of that rule." And in the same case it was said by Brett, L. J.: "I think, after the way in which Sibley v. Perry (1802) 7 Ves. Jr. 522, 32 Eng. Reprint, 211, has been spoken of in subsequent decisions, we are not at liberty to say that it does not lay down a general rule. But I think the fate of that general rule will be the fate which usually accompanies a rule which is not liked; namely, that it will be applied to cases exactly like Sibley v. Perry, and to no others; or, in other words, it will be no general rule at all, and, after hearing what the effect of such a general rule may be as de-

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scribed by Lord Justice James, I should have no objection to be present at the funeral of Sibley v. Perry." But in Re Timson [1916] 2 Ch. (Eng.) 362, Cozens-Hardy, M. R., said: "It is quite true that Brett, L. J., in Ralph v. Carrick (Eng.) supra, said he should be happy to attend the funeral of Sibley v. Perry, but I am not one of those who would like to follow that funeral. I think it is a good rule, although like all other rules of the kind its application may be cut down by the context of the will."

In Re Embury [1913] 109 L. T. N. S. (Eng.) 511, 58 Sol. Jo. 49, it was said by Sargant, J., that the rule in Sibley v. Perry applies only in default of other indications to the contrary.

In Drake v. Drake (1892) 134 N. Y. 220, 17 L.R.A. 664, 32 N. E. 114, it was said, with reference to Sibley v. Perry: "While that case has been so criticized or limited as not to be treated as establishing a general rule, the proposition is not questioned that in such case in bequests and devises the issue take substitutionally."

Instances in which the rule has been held to control the construction.

In Sibley v. Perry (1802) 7 Ves. Jr. 522, 32 Eng. Reprint, 211, testator directed the transfer of certain securities to certain of his relatives "if they be living at the time of my decease, and if all or any of them shall die before I do then I will that the lawful issue of every one of them so dying before me shall share and share alike, have and enjoy that £1,000 stock which their respective parents if living would have had and enjoyed." In the next clause he made a bequest to a certain person if living at the time of testator's death, "and to his lawful issue share and share alike if he the parent should then be dead." He also made bequests to "each of the lawful issue of" certain persons mentioned as being then deceased. It was held by Lord Eldon that as, throughout the will, the testator had contemplated the case of persons of whose existence or nonexistence he was not sure, giving to them in the first place, and if they should not be living at the time of his decease substituting other persons in their place, and as it was clear in the second of the clauses above quoted that he did not mean "grandfather" by the expression "if he the parent should then be dead," the word "issue" in the first of the clauses above quoted should be read as meaning children. The Lord Chancellor said: "The clauses of this will, to which I have referred, shew, the testator was likely to use the words 'lawful issue' as descriptive of children only, and the question is, whether upon the whole will taken together he did use them in that sense. Observe the tenor and design of the will. It is to give to persons living, whom in some instances he states, and in others conjectures, to be living, certain funds, if they shall be alive at his death; and, if dead, to substitute their issue, that is, children, in their room. Then he takes up the case of those he considers dead; and gives to their lawful issue. Is it a strain beyond what the court may go in the construction of the will upon all its parts, to say, that, substituting children under the words 'lawful issue' in the room of those he knew, and of those he conjectured, to be dead, but whom he would not pass over, as they might be living, where he treats the parents as dead, he meant the same by the same words?"

In Pope v. Pope (1851) 14 Beav. 591, 51 Eng. Reprint, 411, where testator bequeathed a sum of consols to his daughter for life, with remainder to her husband for life, and after the death of the survivor upon trust for all and every the issue of his daughter as should be then living, and went on to provide: "But my will and desire is, that in the event of any of the issue of my said daughter Mary dying in the lifetime of my said daughter and the said husband of my said daughter, or the survivor of them leaving issue, the issue of such of the issue of my said daughter so dying shall stand in the place of his, her, or their parent, as to the share which such parent would have been entitled to, if such parent had not departed this life," it was held, following Sibley v. Perry, that the testator having spoken of the "issue" of "issue," it was plain that he did not, in the first instance,

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use the word "issue" in its broader sense, and that the expression "parent" limited it to children.

In Bradshaw v. Melling (1853) 19 Beav. 417, 52 Eng. Reprint, 412, 23 L. J. Ch. N. S. 603, where a testator gave certain property to eight persons by name during their respective lives, and, if any of them should die leaving issue, directed his share to go to "such issue if more than one, and if only one, to such only child" during the life of the survivor of the eight persons, and after the decease of the survivor, gave the property to the issue of the eight persons then living, and directed that they should not take equally, but only their parent's share, it was held that although there were some expressions in the clause which, if taken alone, might have warranted a different construction upon the words, the direction that the issue should take the parent's share cut down the effect of the word "issue" and restricted it to the children of the parent so designated; and that this construction was confirmed by the circumstance that, in the previous part of the clause, where the testator spoke also of issue, he confined it to one "child."

In Anderson v. St. Vincent (1855) 4 Week. Rep. (Eng.) 304, 2 Jur. N. S. 607, construing a limitation contained in a settlement to certain children named therein, or such of them as should be living at the death of the tenant for life, and the issue of such of them as might then be dead leaving issue, equally among them, but so that the issue of any deceased child should take between them no more than the parent would have taken if living, it was held by Stuart, V. C., that although he would have been glad to adopt a more enlarged construction, he was not at liberty, upon the ground of mere hardship, to depart from the settled doctrine that the word "issue," used in conjunction with that of "parent," implies children only, and does not include a more remote descendant.

In Smith v. Horsfall (1858) 25 Beav. 628, 53 Eng. Reprint, 776, where testator bequeathed his residue equally to his five cousins who should be living at his decease, and to the "issue" of such of them as should be then dead leaving issue, share and share alike, "such issue respectively, nevertheless, taking between them a parent's share," it was held that the word "issue" was to be taken as meaning "children," to the exclusion of grandchildren.

In Rhodes v. Rhodes (1859) 27 Beav. 413, 54 Eng. Reprint, 162, where testator gave a sum of money upon trust to pay the interest to his wife for life and afterward unto his children as his wife should by will appoint, and if she should make no disposition, then the whole equally amongst his children living at the time the same should "become divisible, and the lawful issue of such of them as shall be then dead, share and share alike," so that such issue take no greater share than his, her, or their deceased parent or parents would have taken if living, it was held that the word "issue" was restricted to children.

In Tatham v. Vernon (1861) 29 Beav. 604, 54 Eng. Reprint, 762, 4 L. T. N. S. 531, 9 Week. Rep. 822, 7 Jur. N. S. 815, where testator gave property in trust for his wife during widowhood, and afterward in trust to convey and divide amongst the children and issue of their children who should be then living as tenants in common, the issue of any deceased child to take their parent's share, it was held that "issue" must be read "children."

In Stevenson v. Abingdon (1862) 31 Beav. 305, 54 Eng. Reprint, 1156, where testator gave his property in trust for his cousins living at his death, "and such of the issue living at my death of any cousin or cousins of mine . . . who shall have died in my lifetime leaving issue living at my death, as being a male or males, have attained or shall attain the age of twenty-one years, or being a female or females have attained or shall attain that age, or who have married or shall marry; such cousin or cousins and issue, if more than one, to take in equal shares per stirpes," it was held, according to the established rule, that the reference to their parent's share confined the word "issue" to "children."

In Lamphier v. Buck (1864) 34 L. J. Ch. N. S. 650, 6 New Reports, 196, 2 Drew & S. 484, 62 Eng. Reprint, 704, 11

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Jur. N. S. 837, 12 L. T. N. S. 660, 13 Week. Rep. 767, where testator gave his residuary estate amongst his nephews and nieces who should be living at the time of the failure of prior gifts, "and to the issue of such of them as may be dead, such issue to be entitled to its parent's share only," it was held that the direction that such issue should be entitled to its parent's share only showed that those who were to take under the term "issue" must be children of the nephews and nieces.

In Martin v. Holgate (1866) L. R. 1 H. L. (Eng.) 175, 35 L. J. Ch. N. S. 789, 15 Week. Rep. 135, where testator gave his residuary estate in trust to pay over the income therefrom to his wife during her life, and after her decease to distribute and divide such residuary estate unto and amongst such of his four nephews and two nieces, naming them, as should be living at the time of her decease, in equal shares and proportions as tenants in common, and not as joint tenants, adding, "but if any or either of them should then be dead leaving issue, then it is my will and meaning that such issue shall be entitled to their father's or mother's share but in equal proportions," it was held that as the "issue" were to take the father's or mother's share, the word "issue" necessarily meant "children."

In Re Smith (1889) 58 L. J. Ch. N. S. (Eng.) 661, where testatrix bequeathed a fund upon trust for her son for life and then "in trust for and to be equally divided between all and every my nephews and nieces . . . who shall be living at the time of the death of my said son as aforesaid, and the issue of such of them as shall then be dead leaving issue as tenants in common, such issue nevertheless, taking only the share or respective shares which their deceased parent or parents would have taken if living," it was held that the word "issue" must be confined to "children."

In Murray v. Bronson (1883) 1 Dem. (N. Y.) 217, testator gave all his estate, with certain exceptions, upon trust to divide from time to time, as soon and to as large an amount as its condition might admit, among all his surviving children equally and the issue of such as might be dead, "who are to take what the parent of such issue would be entitled to if living." The portions of his daughters he directed to be held in trust to pay the income to each during her natural life, and "on her decease her portion to be conveyed and delivered to her issue, to be and belong to such issue forever," adding, "if any of my daughters die without issue her portion shall thereupon belong to my other children and their issue, subject to the restrictions and regulations aforesaid." By codicil he threw additional safeguards around the provisions made for his daughters, and further provided: "If any of my daughters die without issue her portion shall thereupon belong to my surviving children in equal parts and to the issue of such as are dead, who are to take what the parent of such issue would be entitled to if living." It was held that, in view of the limitation imposed upon the term "issue" by the use of the word "parent," the trust estate of a daughter dying without issue, all her brothers and sisters being dead, must be divided per stirpes among the children of such brothers and sisters, to the exclusion of grandchildren, whether children of living or deceased parents; and that the fact that this interpretation would include certain of testator's descendants who, in the event that he had died intestate, would have been entitled to take as his next of kin, would not justify any construction at variance with the plain import of his language.

In Cochrane v. Schell (1894) 140 N. Y. 516, 35 N. E. 971, where testator created a trust for the benefit of a daughter during her life, and directed that at her death the trust estate should be transferred to such of certain named grandchildren as should be living, equally, share and share alike, adding, "but if any of said seven grandchildren shall die previous to the decease of my daughter Sarah Ann, leaving issue him, her, or them surviving, then I direct that such issue shall take the share to which their parent would have been entitled hereunder (if living); under this clause of

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my will, said shares to be received by said grandchildren for their descendants free from any control of claim of any husband that she or they may have," it was held that the context showed that the word "issue" in the will meant "children."

In Logan v. Cassidy (1905) 71 S. C. 175, 50 S. E. 794, where testator gave a legacy "to the issue of my sister Mary," and further directed that "in case any of the foregoing legatees be dead, leaving issue him or her surviving, then such issue shall represent the deceased parent," it was held that the latter clause showed the word "issue" to have been used to denote children.

Instances in which the rule has not been followed, or held not to apply.

In Hills v. Barnard (1890) 152 Mass. 67, 9 L.R.A. 211, 25 N. E. 96, where testator gave a share of his estate to such as should be living of certain nephews and nieces, "each individual nephew and niece to take an equal share, the issue of any deceased legatee to take his parent's legacy," it was held that the words "the issue of any deceased legatee" should not be restricted to the children of a deceased nephew or niece.

In Re United States Trust Co. (1901) 36 Misc. 378, 73 N. Y. Supp. 635, where testator directed his executors to invest a sum of money sufficient to produce a stated income, and to apply it to the use of his daughter so long as she should remain unmarried, "and upon her marriage or decease to pay and divide the said principal sum equally to and among my said daughters that shall then be living and the issue of such of my said daughters as may have then died leaving issue, such issue to take the share their parent would have taken if living," it was held that the word "issue," as used and intended by the testator, meant "descendants," who, however, were to take per stirpes, and not per capita.

In Bierly's Estate (1898) 7 Pa. Dist. R. 395, where testator gave a share of his personal estate in trust to pay the income to each of his two daughters for life, and the principal at her death to her issue by her then husband, with a further provision that in case of the death of a daughter "leaving lawful issue (limited as above written) then such issue to take the same share to which their parent would have been entitled if living; otherwise such share to be divided equally among my remaining children," it was held that the word "issue" was not synonymous with "children" because the issue were to take such share as the parent would have taken.

In Re Burnham [1918] 2 Ch. (Eng.) 196, where testator gave property to trustees upon trust to pay the income thereof to his widow for life and after her death to his daughter for life, and after the daughter's death to hold the property in trust for her "issue" as she should appoint, and in default of appointment in trust for all her "children," but if there should be no child of the daughter who should become entitled to a vested interest, then "in trust for such of the class of persons following, namely, my brothers and sisters living at the death of the survivor of my said wife and daughter and the issue then living of my brothers and sisters dying in the lifetime of the survivor of my said wife and daughter as shall attain the age of twenty-one years distributively, yet so that the issue shall participate only as representing their deceased parents," it was held that if there had been no previous context to the contrary, the effect of the provision that the issue was to represent their deceased "parents" would probably have been to confine "issue" to "children;" but that, having regard to the very careful distinction between the use of the word "issue" and the use of the word "children" in the earlier parts of the will, the word "issue" must be taken to include grandchildren as well as children.

For another instance in which the use of the word "parent" in connection with the word "issue" was held not to limit the meaning of the term to children, see DIXON v. PENDLETON (reported herewith) ante, 915.

— effect of limitation over in default of issue.

In United States Trust Co. v. Tobias (1888) 21 Abb. N. C. 392, 4 N. Y.

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Supp. 211, where the testatrix, having eight children, directed that her estate be divided into as many parts, one of which she bequeathed to each child, using the same language in each case: in the case of her daughter Selina directing the share to be held upon trust to apply the income to the use of such daughter during her life, and upon her decease giving such share "unto the child or children of my said daughter Selina living at the time of her decease and the issue of any deceased child or children of my said daughter Selina, such child or children of my said daughter Selina and the issue of any deceased child or children of my said daughter Selina to take as tenants in common; but so nevertheless that the issue of any deceased child or children of my said daughter Selina shall take equally among them the share or shares only which the parent or respective parents of such issue, if living, would have taken at her my said daughter Selina's decease such issue representing the parent," and further provided that if Selina should die without leaving a child or issue of any deceased child, the principal of the trust fund should go to her surviving child or children living at Selina's decease and the issue of any deceased child or children, "such surviving child or children and the issue of any deceased child or children to take as tenants in common, but so nevertheless that the issue of any deceased child or children shall take equally among them the share or shares only which the parent or respective parents of such issue, if living, would have taken at her my said daughter Selina's decease, such issue representing the parent," it was held that, in as much as the court would not have been prepared to hold that great grandchildren of the first taker would not have been entitled to any part of her share, a like construction should be given to the word "issue" in the ultimate limitation, the provisions that the issue of any deceased child or children should take only the parent's share being regarded as insufficient to limit the meaning of the term "issue" to "children."

In Harrison v. McAdam (1902) 38 Misc. 18, 76 N. Y. Supp. 701, testator devised his property in trust to pay one third of the net income to his wife during her life, and the remaining two thirds, and upon the death of his widow all the net income, to his six children during their respective lives, and further provided: "After the death of my said dear wife, and on the death of any of my said dear children leaving lawful issue surviving, I hereby authorize and direct my said executors, executrix and trustees, and the survivors and survivor, to apply the share of their income of my said estate to which the parent of such child or children was entitled under this, my will, to the use of such child or children during their respective minority; and upon such child or children attaining full age then I give, devise and bequeath to each of them, as capital and absolutely, their respective proportion of that part of my estate to the income of which their deceased parent was entitled under this my will. But if any of my said children shall die without leaving lawful issue surviving, or if such issue shall all die under the age of twenty-one years, then it is my will and I do hereby declare, that the share of my estate (to the income of which such child of mine so dying without issue living to the age of twenty-one years was entitled) shall revert to and become part of my residuary and other estate for the benefit of my other heirs. The provisions herein made for my children to be in full bar of any claims by them against my estate." It was held, in order to avoid a construction which would exclude the child of a deceased grandson of the testator dying in his father's lifetime, and in view of the intention indicated by the limitation over to other heirs, that the substituted devise should not take effect unless the line of the testator's son became entirely extinct; that the use of the word "parent" was not sufficient to confine the meaning of the word "issue" to children of the first taker.

In Riker v. Gwynne (1910) 139 App. Div. 423, 124 N. Y. Supp. 124, modified in (1911) 201 N. Y. 143, 94 N. E. 632, where testatrix left all her real property to her husband for life, or until

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his remarriage, and upon his death to her brothers, with the proviso that should either of them die in her lifetime or before the death or remarriage of her husband, not leaving lawful issue him surviving, then the survivor should take the share which the deceased if living would have taken, but that if the deceased should leave lawful issue, such issue should take their parent's share, it was held that, as it was not reasonable to suppose that the surviving brother would be entitled to the property to the exclusion of grandchildren of a deceased brother, the word "issue" should not be limited to children.

In Ross v. Ross (1855) 20 Beav. 645, 52 Eng. Reprint, 753, where testator gave a fund upon trust for a niece for life, and after her decease upon trust to transfer the same to all and every the child and children of the said niece who should be living at the time of her decease, and of the issue, if any then living, of such of her children as might have died in her lifetime, each of her surviving children to take an equal share, and the issue, if more than one, of such of her children as may have died in her lifetime, to take equally amongst them a part or share which their parent would have been entitled to had he or she survived the said niece, and if but one, then to take a child's share, and, after making similar provisions for each of two other nieces, their children and issue respectively, went on to provide that "in case all my said nieces shall depart this life without leaving a child or issue of a child living at their respective deaths," the trust fund should sink into and become part of his residuary personal estate, it was held that the context took the case out of the rule in Sibley v. Perry (1802) 7 Ves. Jr. 522, 32 Eng. Reprint, 211, and that the provision that the issue should take the share of the parent must be taken merely to provide for stirpital distribution.

Ross v. Ross (Eng.) supra, was said by James, L. J., in Ralph v. Carrick (1879) L. R. 11 Ch. Div. 873, 48 L. J. Ch. N. S. 801, 40 L. T. N. S. 505, 25 Eng. Rul. Cas. 669, to have been decided upon very sound principles, it being a settled and reasonable rule of construction that where there is a gift over on the failure of certain persons, the previous gift must, if the words reasonably admit of it, be construed as a gift to the same person. And in the same case it was said by Brett, L. J., that Ross v. Ross is an authority for holding that where the word "issue" is used in its more extended meaning in the gift over, that more extended meaning is to be carried back to the former part of the will, though the gift is there in collocation with "parents."

In Re Embury [1913] 109 L. T. N. S. (Eng.) 511, where testator gave certain property upon trust for his wife for life, and after her death to his children, and if there should be no child, "then unto and equally between all such of my brothers and sisters as shall be living at the decease of my said wife and the issue of such one or more of them as shall be then dead, such issue to take in equal proportions the share or respective shares to which their deceased parent or parents would have been entitled if then living. But in case of the decease of all my said brothers and sisters and their issue in the lifetime of my said wife, then" to such persons as his wife should appoint, or, in default of appointment, to the testator's next of kin,—it was held that although there was in the first clause an ambiguity which might introduce the rule in Sibley v. Perry, the gift over had the effect to restore to the word "issue" its original and broader meaning.

But in Re Timson [1916] 2 Ch. (Eng.) 361, 85 L. J. Ch. N. S. 561, 115 L. T. N. S. 55, 60 Sol. Jo. 526, affirming [1916] 1 Ch. 293, where testatrix gave her residuary estate subject to a life interest to five named nephews and nieces, and directed that if any of them should die in the lifetime of the tenant for life leaving lawful "issue," such issue should take the share which his, her, or their deceased "parent" would have taken if living; but that if any of them should die in the lifetime of the tenant for life without leaving "issue" him or her surviving, the share of the one so dying should be divided amongst the survivor or sur-

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vivors and the "issue" of him, her, or them so dying and leaving issue, it was held that the word "issue" in each branch of the clause must be confined to children. Ross v. Ross and Re Embury (Eng.) supra, were distinguished upon the ground that in each of them not only was there an original gift to the persons corresponding to the nephews and nieces in the present will, but there was an original gift to their issue as well, which was not the case in the will under construction, in which there was no original gift to the issue at all.

In Kavanagh's Will (1862) 13 Ir. Ch. Rep. 120, where testator, who had made provision for divers nephews and nieces, went on to provide, "and my will and intentions are that if any or all of my said nephews and nieces shall leave legitimate issue, that issue respectively shall have, possess and enjoy the bequest which I make and intend for the parent of such issue respectively as herein devised and mentioned; but the sums devised to such of my nephews or nieces respectively as shall not leave issue shall go to the survivors or survivor of my said nephews and nieces and to the issue of same," it was held that although the reference to the parent in one part of the clause would lead to the construction that issue meant children, yet as it could not be considered to have been the intention of the testator that if the children of a nephew or niece had died leaving children, the limitation over to the survivor of the nephews or nieces and to the issue of same should take effect, the word "issue" cannot be confined to "children," but must be considered to have been used in its natural and ordinary sense, and to have intended remoter descendants.

m. Use correlatively with phrase "father" or "mother."

If the word "parent" confines the word "issue" to the children of the taker, there is no reason why the words "the father or mother" should not also confine the word "issue" to the children of the taker. Arnold v. Alden (1898) 173 Ill. 229, 50 N. E. 704.

The word "issue," as used in a provision that "in case any of my sons or daughters should intermarry and die leaving issue legally begotten they shall not inherit their father's or mother's portion of my estate before they attain the age of eighteen years, and in case of their death before they attain that age the property of the father or mother so deceased shall return to my children," is shown by the context to mean "children." Doe ex dem. Sheftall v. Roe (1860) 30 Ga. 453.

n. Inferences from gift over.

Where, after a gift to issue there is a gift over in default of such issue, any implication that the word "issue" was used in the primary gift in a restricted sense is rebutted, as it cannot be supposed that it was intended that the gift over should take effect so long as there are issue to take. See, in addition to the cases hereinafter cited, the cases cited in subdivision III. l, supra, under catch line "— effect of limitation over in default of issue."

The fact that there is a gift over "in default of such issue" is a strong indication that a preceding gift to issue comprehends descendants of whatever degree. Re Van Cleef (1915) 92 Misc. 689, 157 N. Y. Supp. 549.

In Freeman v. Parsley (1797) 3 Ves. Jr. 421, 30 Eng. Reprint, 1085, where testator devised his estate upon trust, inter alia, to pay to his half sister a moiety of the residue, but in case of her decease, said moiety to be equally divided between her lawful issue, share and share alike, and the other moiety to his first cousins, naming them, share and share alike, "but in case of their decease or any of them such deceased's share to be in like manner divided among the lawful issue of such deceased and in default of such issue then such shares to be equally divided among the survivors," it was held that there was nothing to control the prima facie meaning of the word "issue." Lord Loughborough said: "I very strongly suspect that in applying that to this will I am not acting according to the intention; but I do not know what enables me to control it. If a medium could be found between a total exclusion of the grand-

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children, and the admission of them to share with the parents, the nearest objects of the testator, that would be nearer the intention; as by letting in those whose parents were deceased, to take the share the parents, if living, would have taken; but that construction would be setting up my own conjecture against the obvious sense of the words. When you put the question, whether he meant all these grandchildren should take with their parents, I think he would say, he did not; yet if he was asked the other way, if it should go to the survivor, while there was a defendant, I am equally clear he would not have given it to the survivor. They are therefore all entitled."

But where, after a gift to the issue of a certain person, there is a gift over if he dies without leaving children, it is apparent that the word was used as equivalent to children.

Thus, in Morgan v. Thomas (1882) L. R. 9 Q. B. Div. (Eng.) 643, 51 L. J. Q. B. N. S. 556, 47 L. T. N. S. 281, 31 Week. Rep. 106, where testator devised land to his eldest son for life, "and after his decease to his lawful issue and their heirs forever, if any; if he shall die without leaving any children born in wedlock," then to another son, it was held that by the contingency upon which the gift over was to take effect, the testator had translated his own language and shown that by "issue" he meant "children."

o. Mention of issue of "issue," or "children" or "descendants" of "issue."

Where a gift is to issue and the testator proceeds to speak of issue of that issue, he does not in the first instance use the word "issue" in its most comprehensive sense. Rasquin v. Hamersley (1912) 152 App. Div. 522, 137 N. Y. Supp. 578, affirmed without opinion in 208 N. Y. 630, 102 N. E. 1112.

In Livesay v. Walpole (1875) 23 Week. Rep. (Eng.) 825, where testator bequeathed a share of his residuary personalty to the issue of a daughter, and if his daughter should die without leaving "issue or issue of her issue," then over, it was held to be clear that the word "issue" meant children.

A gift over in the event of the issue dying without issue shows that the word "issue" in the first instance must mean something else than descendants generally. Re Dixon (1869) Ir. Rep. 4 Eq. 1.

Where testator speaks of issue dying without issue, the word "issue" in the first instance means children, but in the second instance, all issue generally. Re Corrie (1863) 32 Beav. 436, 55 Eng. Reprint, 167.

Where a testator speaks of the "children" of "issue" taking their parents' share, the meaning of the word "issue" must be cut down to "children," as otherwise the reference to the children of the issue would have no meaning. Fairfield v. Bushell (1863) 32 Beav. 158, 55 Eng. Reprint, 62.

Where the words "or descendants of such" are employed in connection with the word "issue," it indicates that the word was used as meaning "children," since if it had been used to denote an unbroken and indefinite succession, there would be no sense in adding such words, for all would be covered by "issue." Shearer v. Miller (1898) 185 Pa. 149, 39 Atl. 846.

p. Limitation over to "next of kin" of any deceased.

In Palmer v. Dunham (1890) 125 N. Y. 68, 25 N. E. 1081, affirming (1889) 52 Hun, 468, 6 N. Y. Supp. 46, construing a direction to invest a sum of money and pay over the income thereof to a niece during her life, "and upon her death to pay over said principal sum to her lawful issue, share and share alike," read in connection with a provision in the residuary clause by which the testatrix directed that "in case of the death of any of the beneficiaries or persons entitled to share in the investments herein directed to be made before the time limited for the payment thereof, my will is that the same be paid over to their next of kin as, according to the Statute of Distributions, their personal estate would be divided and distributed," it was held to be the evident intention that the fund invested should, upon the death of the niece, pass to the children of that niece who were living when the will was made, and the next

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of kin of any of them who subsequently died.

q. Miscellaneous.

The words "whether male or female" are applicable to grandchildren as well as to children, and therefore prove nothing. Hobbs v. Tuthill [1895] 1 Ir. R. 115.

It is not possible to construe the word "issue" as meaning children, where the gift to issue is expressly conditioned upon the contingency that there are no children. Sumner v. Westcott (1912) 86 Conn. 217, 84 Atl. 921.

The court may be influenced toward a construction of the word in a limited sense by the fact that the legatees take interests vesting at birth, and not contingent upon surviving a tenant for life, so that the effect of such construction will not be to exclude from participation the offspring of parents dying in the life tenant's lifetime. Re Harrison (1879) Ir. L. R. 3 Eq. 114.

The word "issue" as used in a marriage settlement in which it is referred to issue "living in the lifetime of the husband or born in a reasonable time after his death," naturally imports children. Thompson v. Simpson (1841) 1 Drury & War. (Ir.) 459.

It has been said to be a settled rule that where a will is capable of two constructions, one of which would exclude the issue of a deceased child and the other permit such issue to participate in a remainder limited upon a life estate given to the ancestor, the latter should be adopted (Soper v. Brown (1892) 136 N. Y. 244, 32 Am. St. Rep. 731, 32 N. E. 768); but instances may be found to the contrary.

r. Additional instances in which context has been held not to restrict meaning of word "issue."

In Jackson v. Jackson (1891) 153 Mass. 374, 11 L.R.A. 305, 25 Am. St. Rep. 643, 26 N. E. 1112, where testator gave a sum of money in trust to pay the income to a certain woman during life, and on her death to pay the principal "to her issue," adding, "and if she should survive her said husband and should leave no issue, I give this $10,000 at her death to all my children then living and the issue of any deceased child; such issue to take as by right of representation the shares of their respective parents," it was held that the will contained no evidence of a contrary intention sufficient to rebut the presumption that the issue of the life tenant should include all lineal descendants, excluding the issue of living issue.

In Inglis v. McCook (1904) 68 N. J. Eq. 27, 59 Atl. 630, where testator gave half of his residuary estate upon trust to pay over the net income to his wife during her life, "and upon her death to divide the same among my lawful issue or to trustees for their use respectively as my said wife shall direct by any last will or testament duly executed, and in default of any such will I give the same to the same persons who shall then be entitled to the other undivided half of said residuary mentioned in the next clause of this will, to be distributed in the same proportions and held upon the same trusts and with like powers as are therein mentioned,"—the clause referred to directing the remaining half of his residuary estate to be divided into as many shares as he might leave children him surviving and children then deceased leaving issue him surviving, and giving one of these shares to be divided equally among the issue of each of his then deceased children per stirpes, and not per capita, and the shares of the living children to be held upon trust for life, with testamentary power of distribution among his or her lawful issue, and in default of appointment to such issue, to be divided among them per stirpes, and not per capita,—it was held that the inference sought to be drawn from the fact that, in case of failure to appoint, his grandchildren would not obtain an immediate, but only a remote and precarious, interest, was not sufficient reason for attributing to the word "issue," as used in the provision giving the widow the power of appointment, any restricted meaning, and that it therefore included testator's grandchildren, although children of a living child.

In Security Trust Co. v. Lovett (1911) 78 N. J. Eq. 445, 79 Atl. 616,

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where testator gave all his estate to his wife for life, and directed that after her decease his real estate be sold and the proceeds divided between his children, naming them, and the children of the deceased daughter, who were to take the share which their mother would have been entitled to if living, and added: "Should either of my above-named children die leaving issue, it is my will that the portion herein devised or bequeathed to such child or children shall be equally divided between their issue," it was held that there was nothing in the will from which it might be properly determined that the word "issue" was used by testator with any restricted meaning, and therefore, that the grandchildren of testator's children were entitled to share in the distribution.

In Tantum v. Campbell (1914) 83 N. J. Eq. 361, 91 Atl. 120, where testator devised certain land to his daughter for life, and after her decease "to the lawful issue of her body begotten her surviving, to hold in equal shares as tenants in common in fee simple," with a limitation over in case of her death without lawful issue of her body begotten her surviving, it was held that, as there was nothing to indicate an intention on the part of the testator to limit the contingent remainder in the estate devised to the children only of his daughter, the word "issue" must be given its usual significance, and must be held to include all of the daughter's descendants.

In Drake v. Drake (1892) 134 N. Y. 220, 17 L.R.A. 664, 32 N. E. 114, it was held that the words "lawful issue" in a will giving one a power to appoint to "all or any or either of" testator's sisters, "or to all or any or either of the lawful issue of" said sisters, were not restricted in meaning by a devise over to the issue of testator's sisters in default of appointment, in which the word "issue" was used in its restricted sense of "children," the term "lawful issue" having been used in its unconfined sense in other parts of the will, and there being reasons why the testator desired to place the donee of the power in a position to command the respect of the possible appointees.

In Soper v. Brown (1892) 136 N. Y. 244, 3 Am. St. Rep. 731, 32 N. E. 768, where a testator devised real estate upon trust for a daughter during her life, and directed that upon her death it should go "in fee simple as tenants in common to the lawful issue of my said daughter Eliza, if more than one share and share alike, and for want or in default of such issue then to all my grandchildren who may then be living as tenants in common, his, her or their heirs or assigns forever," it was held that the fact that the gift over in default of issue of any child was to "grandchildren," and that remoter descendants could not take under this limitation, was not sufficient to justify overriding the legal meaning of the word "issue" and confining it to the sense of "children,"—especially as such construction would exclude all but the immediate children of the first taker in favor of other branches of the family.

In Seitz v. Faversham (1912) 205 N. Y. 197, 98 N. E. 385, modifying (1910) 141 App. Div. 903, 126 N. Y. Supp. 801, where testatrix devised certain property "to the issue of" a niece "when the youngest of such issue attains the age of twenty-one years, the net income . . . to be applied to their use in equal shares, in the meantime. In the event of the death of any such issue before the youngest survivor shall attain the age of twenty-one years then I give the share of the one so dying to the survivors of such issue," it was held that the word "issue" was not used in the sense of "children."

In RE FARMERS' LOAN & T. CO. (reported herewith) ante, 910, testator, in the fourth subdivision of his will, devised a one-ninth part of the proceeds of a sale of his residuary estate to each of his surviving children, and one-ninth part in trust for the daughter of a deceased son, and one-ninth part in trust for the son of a deceased daughter. In the same subdivision he said: "In case of the death of either of my children before the division of my estate I give, devise and bequeath what would have been his or her

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share, if living, to his or her issue, if any, such issue to take equally what would have been the parent's share. If no issue then I give, devise and bequeath such ninth part to my surviving children and the issue of those deceased." By the fifth subdivision of the will he amplified the statement of his purpose in respect of the two shares which the preceding subdivision had already placed in trust for his grandson and granddaughter by directing the payment to each of the net income of his or her respective share for life, adding, "upon the death of either I give, devise and bequeath his or her share to his or her issue, if any. If there be no issue, then to my surviving children and the issue of those deceased." It was held that the word "issue," as used in the fifth clause of the will, should not be read as equivalent to "children."

In Wilson v. Wilson (1902) 76 App. Div. 232, 78 N. Y. Supp. 408, where testator devised certain realty to a son for life, excepting a certain tract "which is forever to be devoted to the sole purpose of a burial place for myself, my connections and descendants," and in case the son should die leaving lawful male issue, then to such male issue and to his or their heirs and assigns forever, it was held that the use of the word "descendants" in the reservation of the burial place was not conclusive of the use of the word "issue" as meaning children, where, in other parts of the will, the testator never referred to his own children as "issue," but always as "children."

In Phelps v. Cameron (1905) 109 App. Div. 798, 96 N. Y. Supp. 1014, where testator directed his trustees to divide the residue of his estate into eight parts and to invest the same separately and apply the income of one of such parts for the use of each child during life, and upon such child's death to pay and divide the capital among the lawful issue of such child equally, all of the trusts being alike and expressed in the same terms, it was held that as the testator had used but a single phrase in connection with each of the trusts, and as there were in existence at the time of the making of the will and at the death of the testator those who were to become the life tenants as well as those who would take upon the death of the parents, so that there was not only the potentiality but the probability of great-grandchildren, there was nothing in the context of the will as a whole, or anything in the circumstances surrounding the testator, to indicate that the words "lawful issue" were used in any other than their legal sense, although the court was of opinion that if the testator had realized that his great-grandchild was to become the competitor of his grandchild in the final distribution, he would have used different language.

In Bassett v. Wells (1907) 56 Misc. 81, 106 N. Y. Supp. 1068, where testator gave his residuary estate upon trust to pay the income thereof, one third to his wife for life and two thirds to his children for life in equal proportions, and then provided: "VIII. In case of the death of either of my children without issue before the decease of my wife, Caroline B., the share or portion of my estate and the income and interest thereof to which such child would at that time be entitled shall revert to my estate and be divided and distributed as hereinbefore provided. IX. In case of the death of either of my children leaving issue after the decease of my wife, Caroline B., the share or proportion of my estate and the income and interest thereof to which such child shall be then entitled shall be paid to such issue or to the next of kin of said deceased child," it was held that there was nothing in the context to vary the prima facie meaning of the word "issue." The court said: "My attention is directed to paragraph VIII. of the will, by the provisions of which the testator has directed the share of a child dying without issue to revert to his estate for equal distribution among his next of kin, as indicating an intention to limit the distribution of his estate to his nearest descendants, or, at any rate, to prefer such of his descendants who are nearest in degree over others of remoter degree; but this is neither

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a fair nor a logical deduction. The proposition, stated in other words, is that, because the testator has provided for his descendants of the first degree in one way and for his remoter descendants in another, therefore he intended to provide for those of the second degree to the exclusion of or preferentially over his descendants of the third degree. Clearly this involves a non sequitur. With as much, or rather, with as little, logic the proposition might be alternated, and the contention made that, because the testator has provided for his remoter descendants less favorably than for those of the nearest degree, therefore he intended to provide for his nearest descendants no more favorably than he did for the remoter ones."

In Re Wienholz (1916) 94 Misc. 55, 157 N. Y. Supp. 677, where testatrix directed her trustees to pay the income of her residuary estate to a son during his life, and gave it upon his death "to the lawful issue of my said son, to be divided among said issue per stirpes," it was held that the word "issue" should be read as meaning descendants rather than children, so as to admit the children of a grandson, dying in the lifetime of his father, since if the testatrix had intended to limit the distribution of the remainder to children of her son who survived until the time of distribution, it might reasonably be assumed that she would have used the word "children" instead of "issue," and there would have been no occasion for the use of the words "per stirpes."

In Pearce v. Rickard (1893) 18 R. I. 142, 19 L.R.A. 472, 49 Am. St. Rep. 755, 26 Atl. 38, where testator gave a sum of money in trust to pay the income to one during her life, and at her death to pay, transfer, and deliver the same "to the lawful issue of the said [life beneficiary] then alive," and such beneficiary died leaving four children and seven grandchildren, whose parents were living, it was held that there was nothing in the language used to restrict the meaning of the word "issue" to "children."

For another instance in which the context was held insufficient to limit the meaning of the word "issue" to "children," see DIXON v. PENDLETON (reported herewith) ante, 915.

In Waldron v. Boulter (1856) 22 Beav. 284, 52 Eng. Reprint, 1117, where a testator bequeathed a leasehold upon trust to divide the rents equally among his four grandchildren, and from and after the decease of said grandchildren "in trust for such lawful issue as they or any of them shall leave lawfully begotten," and afterward gave and devised other property upon trust to pay the rents to the same four grandchildren, share and share alike, and from and after the death of such grandchildren, then in trust for such "children" as they should leave them surviving, it was held that the argument that the use of the word "children" in the second gift showed that the expression "issue" was in the first instance to be limited to "children" cut both ways, and that it was evident that when the testator intended the "children of his grandchildren he used that expression; but when he meant all the descendants, he adopted the expression "issue."

In Re Jones (1857) 23 Beav. 242, 53 Eng. Reprint, 95, where testator bequeathed a fund in trust to pay the income therefrom to the niece for life, and after her decease, if she should die leaving legitimate issue, to transfer such sum amongst such issue toward their education and maintenance in such manner as the trustees should think most advisable, with a gift over should the niece die leaving no legitimate issue, it was held that there was nothing to cut down the general meaning of the word "issue."

In Maddock v. Legg (1858) 25 Beav. 531, 53 Eng. Reprint, 740, where a testator made a bequest to certain persons for life and after their deaths "unto their and each of their issue lawfully begotten or the survivor of them, on their severally attaining their respective ages of twenty-one years, in equal proportions share and share alike," with a limitation over to survivors in case of the death of any of such issue before attaining twenty-one, it was held that the word "issue" included descendants of every degree.

In Weldon v. Hoyland (1862) 4 De G. F. & J. 564, 45 Eng. Reprint, 1303,

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5 L. T. N. S. 96, where testator bequeathed to his daughter Grace the interest of a certain sum for life, and if she should happen to marry and have issue, then at her decease he gave such sum "to the child if only one born of the body of my said daughter . . . then if more than one then I give the said sum of £600 to all of the children born of the body of my said daughter Grace equally to be divided among them share and share alike;" but if his daughter Grace should happen to die without issue, then he gave and bequeathed such sum at her decease to his two daughters Susanna and Elizabeth if then living, but if either should be then dead, then the share of the daughter so dying, to her issue, equally to be divided among them if more than one, it was held that there was nothing to confine the meaning of the word "issue" to the children only of the testator's daughters Susanna and Elizabeth.

s. Additional instances in which context has been held to restrict meaning of word "issue."

In Arnold v. Alden (1898) 173 Ill. 229, 50 N. E. 704, the meaning of the word "issue" as used in a testamentary provision by which the testator gave his residuary estate in trust for the benefit of his brothers and sisters during the term of twenty-one years, at the expiration of which term the principal was to be equally divided between them, share and share alike, "the child or children of any deceased brother or sister to take the same share the father or mother would have taken if living. And in case of the death of any of my said brothers or sisters leaving no issue, the share such brother or sister would have taken if living to be equally divided among my surviving brothers and sisters," was held, in view of the context, to have the restricted meaning of "children."

A gift to a certain person for life, and on her death to her lawful issue, will be construed to mean "to her children." Brisbin v. Huntington (1905) 128 Iowa, 166, 103 N. W. 144, 5 Ann. Cas. 931 (obiter).

In Chwatal v. Schreiner (1896) 148 N. Y. 683, 43 N. E. 166, where testator directed that certain real estate should remain unsold during the life of the longest liver of his children, "and until the youngest person among such of the issue of my said children or any of them as shall be living at the death of such longest liver or shall be born in due time afterwards shall come to the age of twenty-one years," and further directed that the residue of rents, issues, and profits of such property which might remain after satisfying certain other provisions should be distributed "in equal parts among my children then living and the lawful issue of such of my said children as may be then dead leaving lawful issue, such issue to receive such share only as the parent of such issue, if living, would be entitled to receive, and each of my children always to receive such share as such child would have been entitled to receive if all my children then dead, leaving lawful issue then alive, had been living," and after the expiration of the trust term devised such real estate "to my lawful grandchildren and the lawful issue of such grandchildren, such grandchildren and their lawful issue to take said estate in like manner in every respect as if it had been the estate of the respective parents of such grandchildren as tenants in common and had descended to them and their lawful issue by inheritance," it was held that the ultimate disposition of the property showing that the testator expected his grandchildren to take the estate, taken in connection with the fact that, at testator's death, no great-grandchildren had been born so as to become the special object of his bounty, indicated that he intended the word "issue," as used by him in fixing the term of trust, as referring to his grandchildren only.

In Taft v. Taft (1885) 8 Dem. (N. Y.) 86, where testator directed that if any person to whom he had bequeathed a legacy should die in his lifetime, such legacy should go "to his or her lawful issue then surviving," the word "issue" was held to mean children, with the result that the surviving children of a legatee took a legacy bequeathed to their father,

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to the exclusion of the children of a deceased child.

In Morrow v. McMahon (1901) 35 Misc. 348, 71 N. Y. Supp. 961, testator gave his residuary estate in trust, to apply the income during the life of his wife by paying one third thereof to her for her life, and directed the remaining two thirds to be divided into six equal parts, one sixth thereof to be paid to his sister Eliza and one sixth thereof to the "lawful issue" of each of his five deceased brothers and sisters. In the case of the death of Eliza or of all the lawful issue of any of his deceased brothers and sisters, the share of the person or persons so dying was to become a part of the net income and be divided among all the remaining beneficiaries of the will; namely, Eliza and the lawful issue of his deceased brothers and sisters in the same proportions. Upon the death of testator's wife, he gave and devised the trust property to his sister Eliza if then living, and to the "lawful issue" of his deceased brothers and sisters then living, per stirpes. In case his sister Eliza should die before the termination of the trust, her share was to be divided among the surviving beneficiaries in like proportions as the principal devise. In case of the death of all the issue of any of the testator's deceased brothers and sisters before the termination of the trust, the share which such issue would have taken was to be divided among the surviving beneficiaries in like proportions as the principal devise. It was held that, as it was not reasonable to suppose that testator contemplated the possible failure of all descendants of the brothers and sisters before his own death, the word "issue," as applied to the income, was used by testator in the sense of "children," meaning thereby the immediate children of his brothers and sisters who were living at the time of his death, the scheme of that part of the will seeming to have been to provide for those children only; but that, as respects the final disposition of the residue of the estate, the words "lawful issue" must be construed as including all descendants of the testator's brothers and sisters indefinitely.

In Re Tenney (1905) 104 App. Div. 290, 93 N. Y. Supp. 811, testator created a trust fund for his niece during her life, going on to provide that "upon her death such share shall be paid or transferred to her issue, and in default of issue to her next of kin in such proportions as they would be entitled to under the laws of the state of New York upon distribution of personal estate belonging to her upon her dying intestate." In other clauses of the will he manifested an intention to substitute for a beneficiary in whose favor a life estate was created the issue of such beneficiary upon the beneficiary's death, in which case the share of the parent was to be divided equally, share and share alike, among the parent's issue. The niece left four children, two of whom had no issue, while the other two had eight issue living, so that if all of them should be admitted to share equally, the niece's grandchildren would benefit at the expense of her children. It was accordingly held that, taking the will as a whole, it disclosed an intention of the testator to distribute the shares of his estate given to his nephews and nieces for life equally among those who succeed them, and accordingly that testator did not intend to use the word "issue" in its primary signification.

In Brown v. Tanz (1917) 176 App. Div. 795, 163 N. Y. Supp. 372, where testator devised to a daughter a life interest in certain property, adding, "and after her death I direct that the said property be given unto her lawful issue share and share alike, and if my said daughter . . . die without issue living then the said property shall descend to her heirs," it was held that the testator had used the term "lawful issue" as synonymous with children, the court saying: "It would be more natural that if he intended descendants he would have made a provision as to a distribution per stirpes. He writes not 'issue,' but 'issue living.' Again, if 'issue' was intended to include 'heirs,' why should he have writ-

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ten in duplication, 'then the said property shall descend to her heirs?' "

In Gammell v. Ernst (1895) 19 R. I. 292, 33 Atl. 222, testatrix gave her residuary estate in trust to pay over the income to her three daughters, further providing: "(a) On the decease of either of my said three daughters leaving issue, her distributive share or portion of the whole property composing the trust fund shall be paid over to the issue of such deceased daughter, to be and remain to such issue and his, her, or their heirs and assigns forever. (b) And on the death of either of my said three daughters without leaving issue, her share or portion of the profits and income of the trust fund, as it may then be, shall go to and be paid to the surviving sister or sisters before named, for her or their sole use and benefit. (c) The trust created by this item of my will to continue and remain in full force during the joint and several lives of my said three daughters. (d) On the death of the last of my said three daughters, if she leaves issue, said issue to take the distributive share and portion of the trust capital belonging to his, her, or their mother, and the residue of said capital fund (if any) to be divided equally among the children of my said three daughters before named in this item of my will . . . that is, my said grandchildren to inherit in the right of their respective mothers. . . . (e) And should the last survivor of my said three daughters . . . die without leaving issue, then the capital of the trust fund then in the hands of said trustee or his successor, however and wherever the same may be invested, shall be divided to and among the children and issue of my said three daughters . . . in the manner before stated. . . . " It was held that from the provision in ¶ (b), that on the death of the last of the three daughters, leaving issue, the issue should take a distributive share belonging to his or her or their mother, and the explanatory phrase thrown in by the testatrix in directing that the residue of the capital of the trust fund, if any, should be divided equally among the children of her three daughters, "that is, my said grandchildren to inherit in the right of their respective mothers," the intention of the testatrix to make the children of the three daughters beneficiaries to the exclusion of their children in the event that the daughters should leave children surviving, at their decease sufficiently appeared.

A bequest to a daughter "and her bodily issue" will be construed as one to her children, where, when the will was made, the daughter had, to testator's knowledge, been dead for over a year, leaving several children then living. Duncan v. Harper (1872) 4 S. C. 76.

In Vale Royal Mfg. Co. v. Santee River Cypress Lumber Co. (1907) 84 S. C. 81, 65 S. E. 955, where land was conveyed in trust to the use of a woman during her life, and after her death in trust "to the lawful issue of the said [woman] living at the time of her death, taking per stirpes and not per capita as tenants in common," it was held that the manifest meaning of the words last above quoted was to confine the division to immediate issue of the life tenant living at her death and the children of such immediate issue as predeceased her, the latter to take per stirpes.

In Bristow v. Warde (1794) 2 Ves. Jr. 336, 30 Eng. Reprint, 660, 2 Revised Rep. 235, 21 Eng. Rul. Cas. 356, where the question was as to whether a power in a marriage settlement to appoint among the issue of the marriage was well executed by an appointment to a child for life, with the remainder to his children as he should appoint, it was held that the meaning of the word "issue" was confined to children by provisions in the settlement that they should take at twenty-one, and for an application of income to their maintenance and education before that age, and that the survivor attaining that age should be entitled to the whole fund, and those dying before it should not take anything.

In M'Gregor v. M'Gregor (1839) 1 DeG. F. & J. 63, 45 Eng. Reprint, 282, where testator gave a moiety of his residuary estate upon trust to pay the

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income equally amongst all his children who should be living when his youngest child attained the age of twenty-one years, for their respective lives, and after the death of any of them upon trust as to an equal portion of the moiety proportionate to the number of his children then living, for the use of the issue of such child or children so dying absolutely forever; and in case of such child or children dying without leaving issue, then upon trust for and equally to be divided between his other children then living and the issue of such of them as might be then dead, such issue, nevertheless, only taking the share his, her, or their parent would have taken if living, and afterward made a codicil by which he recited the provision made in his will for his daughters, and directed that the shares given them should pass to each of them for her own sole and separate use for her respective natural life without being subject to the debts or control of any husband, "and that after decease the same shall go to her children as directed in my will," it was held that to let in the great-grandchildren of the testator with grandchildren to constitute the class among whom the share of his children was to be divided would clearly contravene the intention of the testator as expressed in several parts of his will and of his codicil.

In Fairfield v. Bushell (1863) 32 Beav. 158, 55 Eng. Reprint, 62, where there was a devise to a daughter for life, and after her decease "unto her lawful issue then living, and the child or children of such of them as should then be dead, in equal shares and proportions, the child or children of such deceased issue to take his, her or their deceased parent's share only," it was held that the words "then living" and the reference to the "child and children" of the issue who might be dead operated to restrict its meaning.

In Bennett v. Houldsworth [1911] W. N. (Eng.) 47, 104 L. T. N. S. 304, 55 Sol. Jo. 270, where testator gave his residuary estate upon trust for his daughter for life, and after his death to divide between and amongst the members of a class of nephews and nieces then living and their issue per stirpes if any of them should be then dead, and gave to his trustees power during the minority of any legatee to apply the annual income to which such infant legatee should be actually or presumptively entitled toward its maintenance, it was held that the word "issue" was limited to children.

In Re Biron (1878) Ir. L. R. 1 Eq. 258, construing a marriage settlement by which property was settled upon the husband for life and after his death, if there should be no "issue" then living, upon his wife for life, but if there should be "children" living at the husband's death the wife was to take a portion for life and the residue was to be applied to the maintenance of such "child or children," and after the death of the surviving parent in trust for the "issue" as the husband should appoint; in default of appointment, share and share alike; if but one "child," in trust for such only child, and if no "issue" should outlive the surviving parent, then to another,—it was held that no issue more remote than children took any estate under the limitations of the settlement.

IV. Whether division is per stirpes or per capita.

It is very generally held, except in Massachusetts, that under a gift to "issue," where the word is used without any terms in the context to qualify its meaning, the children of the ancestor and the issue of such children, although the parent is living, as well as the issue of deceased children, take in equal shares per capita, and not per stirpes, as primary objects of the disposition. See McPherson v. Snowden (1862) 19 Md. 197; Soper v. Brown (1892) 136 N. Y. 244, 32 Am. St. Rep. 731, 32 N. E. 768; Schmidt v. Jewett (1909) 195 N. Y. 486, 133 Am. St. Rep. 815, 88 N. E. 1110; Bisson v. West Shore R. Co. (1894) 143 N. Y. 125, 38 N. E. 104 (obiter); Jay v. Lee (1903) 41 Misc. 13, 83 N. Y. Supp. 579; Bassett v. Wells (1907) 56 Misc. 81, 106 N. Y. Supp. 1068; Kernochan v. Whitney (1908) 125 App. Div. 371, 109 N. Y. Supp. 721; Rasquin v. Hamersley (1912) 152 App. Div. 522, 137 N. Y.

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Supp. 578; Re Bauerdorf (1912) 77 Misc. 656, 138 N. Y. Supp. 673; Re Cromwell (1913) 80 Misc. 606, 142 N. Y. Supp. 553; Re Milnor (1914) 87 Misc. 528, 149 N. Y. Supp. 1064; Re Union Trust Co. (1915) 89 Misc. 69, 151 N. Y. Supp. 246; Re Van Cleef (1915) 92 Misc. 689, 157 N. Y. Supp. 549; Gest v. Way (1837) 2 Whart. (Pa.) 445; Wistar v. Scott (1884) 105 Pa. 200, 51 Am. Rep. 197; Corbett v. Laurens (1853) 5 Rich. Eq. (S. C.) 301; Gourdin v. Deas (1887) 27 S. C. 479, 4 S. E. 64; Ridley v. McPherson (1897) 100 Tenn. 402, 43 S. W. 772; Wythe v. Thurlston (1750) 2 Ambl. 555, 27 Eng. Reprint, 355; Leigh v. Norbury (1807) 13 Ves. Jr. 340, 33 Eng. Reprint, 321; Davenport v. Hanbury (1796) 3 Ves. Jr. 257, 30 Eng. Reprint, 999, 3 Revised Rep. 91; Dodsworth v. Addy (1842) 11 L. J. Ch. N. S. (Eng.) 382, 6 Jur. 700. Children and grandchildren take per capita under a bequest to lawful issue without specifying the shares, when there is no room for a substitutional taking because the children are all living. Pearce v. Rickard (1893) 18 R. I. 142, 19 L.R.A. 472, 49 Am. St. Rep. 755, 26 Atl. 38. Although it is not very probable, a priori, that a testator would intend that parents and children and grandchildren should take together as tenants in common per capita, and the court will not very willingly adopt such a construction, yet, if such an intention is clearly expressed and there is nothing in the will to control it and to show that such was not his intention, that construction must of course, prevail. Cancellor v. Cancellor (1862) 2 Drew. & S. 194, 62 Eng. Reprint, 595, 1 New Reports, 12, 32 L. J. Ch. N. S. 7, 8 Jur. N. S. 1146, 7 L. T. N. S. 307, 11 Week. Rep. 16.

In Massachusetts, however, the courts have adopted the converse rule, that the word "issue," where its meaning is unrestricted by the context, will be construed as importing representation. Manning v. Manning (1918) 229 Mass. 527, 118 N. E. 676; Jackson v. Jackson (1891) 153 Mass. 374, 11 L.R.A. 305, 25 Am. St. Rep. 643, 26 N. E. 1112.

In Jackson v. Jackson, Chief Justice Field said, after a review of the cases: "The tendency of our decisions has been more and more to construe 'issue,' where its meaning is unrestricted by the context, as including all lineal descendants and importing representation; and certainly when the issue take as of a particular time after the death of the testator, and only the issue living at that time take, the issue of deceased issue take by a sort of substitution for their ancestors."

In Re Bauerdorf (1912) 77 Misc. 656, 138 N. Y. Supp. 673, the doctrine of the Massachusetts courts is criticized as making a will for the testator rather than interpreting it according to the established canons of interpretation.

All courts, however, agree in holding that "issue" is a word which lends itself very easily to the expression of representation (Dexter v. Inches (1888) 147 Mass. 324, 17 N. E. 551); and that a construction which admits children to compete with their living parents is to be avoided unless such plainly was the testator's intention (Manning v. Manning (1918) 229 Mass. 527, 118 N. E. 676; Re Dixon (1869) Ir. Rep. 4 Eq. 1). The presumption which favors a per capita distribution yields to a very faint glimpse of a different intention (RE FARMERS' LOAN & T. Co. (reported herewith) ante, 910; Re Milnor (1914) 87 Misc. 528, 149 N. Y. Supp. 1064).

In Re Van Cleef (1917) 99 Misc. 405, 163 N. Y. Supp. 1098, it was said that "unless . . . the court is constrained to the contrary it will be inevitably assumed that the decedent did not intend a capital division among all his surviving children and all the issue of his deceased children."

But in Hobbs v. Tuthill [1895] 1 Ir. R. 115, it is said that if it is difficult to suppose that a settler would wish to provide equally for grandchildren and for his own children per capita, it is equally difficult to suppose that he would desire to exclude grandchildren altogether, their parents being dead, whether he had or had not any children to take under the trust.

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The intention that issue shall take per stirpes may be found in other provisions of the will. RE FARMERS' LOAN & T. CO. (reported herewith) ante, 910. If the word as used in other paragraphs of the will can equitably be taken to intend a stirpital instead of a capital distribution, then the word should be invested with the same stirpital intent. Re Van Cleef (1915) 92 Misc. 689, 157 N. Y. Supp. 549.

A construction that issue are to take by right of representation is not precluded by a direction that they shall take equally, since, while the word "equally," standing by itself, imports a division per capita, it may get another meaning from the context. RE FARMERS' LOAN & T. CO. And the words "share and share alike" do not necessarily require a distribution per capita, the phrase being satisfied if all such issue share in a division which is equal as between the living children and the issue of deceased children taking per stirpes. Coates v. Burton (1906) 191 Mass. 180, 77 N. E. 311.

Instances in which issue have been held to take per stirpes.

In Reynolds v. Love (1915) 191 Ala. 218, 68 So. 27, where testator devised real estate in trust for the benefit of a daughter for life, and on her death for a granddaughter for life, and after the death of the granddaughter, in trust for her issue and their issue, it was held that the granddaughter's children took at birth a vested interest, subject to open and let in after-born children, and accordingly that distribution must be made among her descendants per stirpes.

A testamentary provision that "at the death of my said daughters or any of them her share to pass to her issue, children or descendants," is to be taken as intending to make provision for children in the first instance, if any, and for the descendants of the deceased children; and accordingly, the surviving children of the daughter take to the exclusion of their children. Thomas v. Levering (1891) 73 Md. 451, 21 Atl. 367, 23 Atl. 3.

In King v. Savage (1876) 121 Mass. 303, where testator who, in every case in which he gave an estate for life, gave the remainder over to the children of the life tenant, and in no case gave anything to the issue of such a child otherwise than by providing that if the child had deceased, its issue should "take the share of their deceased parent," and who had made a provision for the benefit of the four children of a sister during their lives, directing that "upon the decease of either of them the principal of his or her share shall be equally divided among the heirs at law of such deceased person," substituted by a codicil for a devise for the benefit of the sister's four children, a devise for the benefit of three of them for life, "and upon the decease of either of them the principal of his or her share shall be divided among the issue of such deceased person and if he or she leave no issue, then among their heirs at law," it was held that as the codicil was to be read in connection with and as part of the will, and was to receive the same construction except so far as a different intention was clearly manifested, the word "issue," used therein, should be limited to children, to the exclusion of the issue of a child still living.

In Hall v. Hall (1885) 140 Mass. 267, 2 N. E. 700, it was held, "although not without hesitation and doubt," that under a bequest to "issue or children" distribution should be made per stirpes, and not per capita, the court saying: "We take the disjunctive 'or,' in the phrase 'issue or children,' to signify that issue take only in the alternative that a child, the parent of such issue, is not living. And if issue more remote than children are only to take in place of children, their respective parents, and not along with them in equal shares, then, in the absence of anything further, such issue will naturally take the share of the parent that they replace. We should at least expect to find a substitution, and not that the death of a child of one of the testator's daughters, leaving children, should diminish the share of other children, possibly of the other daughter. And this result is reached if we regard the children of daugh-

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ters as the units for the equal division 'share and share alike,' as we well may in view of our opinion, already stated, that issue only come in by way of substitution for children. It is true that the property is to be equally divided among 'all such issue,' etc. But this does not necessarily mean that each of such issue shall have an equal share with every other, or with a child. It is satisfied if all such issue share in a division which is equal as between the living children and the issue of deceased children taking per stirpes."

In Dexter v. Inches (1888) 147 Mass. 324, 17 N. E. 551, where testator gave the residue of his property to his eight children in equal shares, seven of them taking their shares outright, but the share of his son Charles being put in trust for him for life, with a direction that "after his decease . . . the income . . . shall be paid, one moiety for the use of his widow and the other moiety to his issue during the life of [the widow]. If said Charles shall leave no widow and shall leave issue, then at his decease the principal or capital sum shall be paid and distributed equally to and among the issue of said Charles," and further provided that "in case of the decease of either or of any of my children before the receipt of his or her share, leaving issue him or her surviving, such issue shall represent and take the parent's share," it was held that although the word "issue" meant more than "children," the context showed that the issue were to take not per capita, but by representation, the court saying: "If Charles had died 'before the receipt of his share,' his issue would have 'represented' him by the words of the will. There is no reason for issue (the same word) taking the same sum otherwise than by way of representation in the other event, which has happened. If the context of the clause which we have to construe does not of itself show clearly in what sense the testator used the word, the alternative limitation makes it plain. We are of opinion that the word 'issue,' as here used, means descendants taking by way of representation. What the principle of division would have been had there been no descendants alive nearer than grandchildren, we need not discuss. Possibly in that case each grandchild would have formed new stirpes, after the analogy of the statutes."

The issue of living issue will not take under a provision for the issue of any deceased legatees where they are to take "by right of representation." Hills v. Barnard (1890) 152 Mass. 67, 9 L.R.A. 211, 25 N. E. 96.

In Dary v. Grau (1906) 190 Mass. 482, 77 N. E. 507, where testatrix directed that her residuary estate should be distributed into nine equal parts, two of which she gave to two sons outright, another ninth part to four grandchildren all members of one family, and the remaining six parts upon trust to pay the income to her six other children and on the decease of each of them leaving issue to give the share of which the child so dying received the income to the issue of that child, but that, on the decease of any of them without leaving issue, then the share of the trust property devised for the use of such son or daughter so dying without issue should be held upon the same trust as before declared for the use of the surviving sons or daughters, and finally to be conveyed, divided, and distributed among their issue, it was held that issue whose parents were alive were not entitled to participate.

In Coates v. Burton (1906) 191 Mass. 180, 77 N. E. 311, it was held that under a provision in a will other provisions of which indicated a scheme that issue should take by right of representation, that on the death of a daughter of the testator the share of which she had enjoyed the income should go to "her lawful issue, share and share alike," the child of a living child of the daughter was not entitled to participate, but that distribution should take place per stirpes.

In Manning v. Manning (1918) 229 Mass. 527, 118 N. E. 676, where testator bequeathed practically his whole estate upon trust to pay out of the income $1,000 a year to each of his daughters, $600 a year to his son, during their several lives, and on the de-

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cease of either of them leaving issue or descendants of such issue, then in trust to pay to such issue or descendants the sum given to the parent of such issue or descendants until the decease of the last survivor of his children, and upon such event in trust to convey and deliver "to all my then surviving grandchildren and their issue all my said estate and property with the increase thereof, in equal shares in fee simple and full property forever," it was held that, in view of the dominant purpose of the testator to treat his children or their issue with substantial equality in distributing the income, and the unreasonable and unfair results that would follow any other interpretation, the provision for the distribution of the principal should be read as if it had been written "to all my then surviving grandchildren, and, in case of their death, to their issue."

In Ballentine v. De Camp (1884) 39 N. J. Eq. 87, where testator created a trust to pay over the income to his five children in equal shares, "and in case of the death of any one or more of my children without leaving lawful issue then to pay over the share of such deceased child or children to my surviving child or children in equal parts or shares; and in case of the death of any of my said children leaving lawful issue then to pay over his or her share to and among such issue in equal parts or shares," adding, "it being always understood that the child or children of any of my deceased children shall take the part or share of the said trust estate that the parent would have taken had I died intestate," it was held that the will evinced an intention that there should be a stirpital distribution.

In Dennis v. Dennis (1916) 86 N. J. Eq. 423, 99 Atl. 889, construing a codicil by which testator directed that two-thirds part of the shares of the residue and remainder of his estate, which by his will he had given to his sons and their issue, should be held upon a like trust as that provided in the will for his daughter, "the income and proceeds thereof when received to be paid unto my said sons respectively during the natural life of each, and at the death of each the said two thirds to be relieved from said trust and go absolutely to the issue of the son so dying. . . . In case of default of issue at the death of any of my sons, I give, bequeath and devise his said two-thirds part held in trust as aforesaid to his next of kin and heirs according to the nature of the estate whether personal or real,"—it was held that as, under the original scheme of the will, there was a clearly expressed intention on the part of the testator to treat the word "issue" as if it were "children," and to provide for a division per stirpes, and as, in the provision in the codicil in default of issue at the death of any of his sons he seems to have had in mind a stirpital distribution of his estate, the term "issue" should be so construed as to exclude the children of a living parent.

In RE FARMERS' LOAN & T. CO. (reported herewith) ante, 910, testator in the fourth subdivision of his will devised a one-ninth part of the proceeds of a sale of his residuary estate to each of his surviving children, and one ninth part in trust for the daughter of a deceased son, and one ninth part in trust for the son of a deceased daughter. In the same subdivision he said: "In case of the death of either of my children before the division of my estate I give, devise and bequeath what would have been his or her share, if living, to his or her issue, if any, such issue to take equally what would have been the parent's share. If no issue then I give, devise and bequeath such ninth part to my surviving childred and the issue of those deceased." By the fifth subdivision of the will he amplified the statement of his purpose in respect of the two shares which the preceding subdivision had already placed in trust for his grandson and granddaughter by directing the payment to each of the net income of his or her respective share for life, adding "upon the death of either, I give, devise and bequeath his or her share to his or her issue, if any. If there be no issue, then to my surviving children and the issue of those deceased." It

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was held that as in the gift to issue in the fourth subdivision a distribution per stirpes was intended, and as a unity of scheme bound together the two subdivisions, the fifth merely amplifying and developing the gift which took its origin in the fourth, the issue of the grandchildren took per stirpes rather than per capita. The court said: "This cohesion of plan must have tended to impress the testator with the belief that, after defining his use of the word 'issue' in one paragraph, it was needless to repeat the definition in the next. In all likelihood it never occurred to him that the need of such repetition would ever suggest itself to anyone. He knew that the property disposed of in the fifth subdivision represented the shares of two deceased children, a son, Valentine, and a daughter, Olivia. He knew that if these children, instead of dying before the making of the will, had died afterwards, but before the division of the estate, or even before the testator, the fourth subdivision would give their shares to their descendants in any degree and give it per stripes. It is incredible that he contemplated a stirpital division among issue of children who died before him, but after the making of the will and a per capita division among the issue of those children who died before him and before the making of the will. A rule which yields so readily as the one that presumes a per capita division must give way where adherence to it involves a discrimination so unreasonable."

In Re Cornell (1886) 5 Dem. (N. Y.) 88, it was held, construing a will by which testatrix gave all her estate to "my brothers who shall survive me and to the issue of such of my brothers as have heretofore died or may hereafter die," that distribution must be per stirpes.

In Kernochan v. Whitney (1908) 125 App. Div. 371, 109 N. Y. Supp. 721, where testator, after providing for a per capita taking in equal portions by all living grandchildren, used words unmistakably indicating that he intended that the issue of any grandchild who had died prior to such taking should take only the share which the parent would have taken if living, "including the issue of any grandchild or grandchildren then deceased leaving issue then alive, who shall take the same share together, if more than one, which such deceased parent or parents would have taken if living," it was held that the words, "who should take the same share," etc., when taken in connection with the testamentary scheme of the testator, indicated that he intended to treat the child or children of such grandchild as one class, and to divide the property equally among different classes.

In Re Milnor (1914) 87 Misc. 528, 149 N. Y. Supp. 1064, testatrix gave her residuary estate in trust to divide the same into as many shares as she should leave children living and children dying in her lifetime leaving issue living at her death, and to appropriate one such share to each of the living children and to the collective issue living at her death of each of her children who should have died in her lifetime, to pay over to each of her children during his or her lifetime the income of one of such shares respectively, and upon his or her death to pay over the principal of said share to his or her lawful issue, and in case he or she should die without leaving lawful issue living at the time of his or her decease, to pay over such principal to her other children then living and to the issue of such of them if any issue should be dead, so that the issue of each deceased child should take the same share which their parent would have taken if living, and to divide each of such shares appropriated to the collective issue living at her death of any predeceased child into as many parts as the number of persons constituting the issue to whom such share should be appropriated, and to pay over to each of such persons during minority the income of his or her share, and thereupon or upon his or her death before attaining the age of twenty-one, leaving issue surviving, to pay over to him or her or to his or her issue, as the case might be, the principal, or, in default of such issue, to divide the principal amongst the other persons constituting the col-

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lective issue of the same deceased child from whom he or she was descended, and if all the persons constituting such issue should have died without issue, than to pay over the principal to the other children of testatrix then living and to the issue of such of them as might be dead, such issue to take the same portion as their parent would have taken if living. It was held that the will did not show any intention on the part of the testatrix to create such an inequality of distribution as would result from a per capita sharing between the several grandchildren of living children and the children themselves, but that the controlling intention of the testatrix throughout the will was to provide for a per stirpes, and not a per capita, distribution.

In Re Meeker (1915) 89 Misc. 365, 153 N. Y. Supp. 645, where the provision in question was one of a number made in favor of each of testator's children and their issue, in others of which the gift over upon the death of the primary beneficiary was obviously to issue by representation, it was held that the provision in question, which, standing alone, might be consistent only with an intention that the issue to whom the devise in remainder was made should comprise all the living descendants, to take concurrently without regard to the degree of their generation, was to be construed as if it contained a provision for stirpital distribution, like that of the others.

In Re Union Trust Co. (1915) 170 App. Div. 176, 156 N. Y. Supp. 32, aff'd without opinion in (1917) 220 N. Y. 657, 116 N. E. 1080, where testator gave his wife an annuity, and all the rest of his estate, subject to such annuity, to trustees in two equal shares, in trust to collect and pay the net income of each of such shares, after deducting one half of said annuity, to the use of each of his two daughters for life, and further provided: "Should my said wife die before either of my daughters then and in that case upon each daughter's death, I give devise and bequeath the share in my said real and personal estate theretofore held in trust for her in equal portions unto her then surviving issue, if any; or, if no such issue shall then survive, I direct that her said share shall be added to the share then held in trust for my other daughter, if she shall then survive; or, if not, then I give, devise and bequeath the same in equal portions to her issue, if any then surviving," it was held that, in order to conform the construction to the idea of equality running all through the will, it should be read as requiring a stirpital distribution. The lack of any definite basis for that conclusion is conceded by the author of the prevailing opinion, who said: "It may be that in this construction of the will an intention to confine this distribution per stirpes rather than per capita has gone beyond any reported case, but after examination of a great many wills I am clearly of the opinion that to give to the word 'issue' a construction that would include all descendants, whether their parents were living or not, has resulted in a distribution of estates which has really been contrary to the testator's intention, and which has really worked great injustice among a testator's descendants; and so I think, in construing such a will, that equality means, not equality of all descendants, but equality in the branches into which the person's family are naturally divided. The testator leaves his estate to his grandchildren, subject to a life estate in a child. The natural division is among the grandchildren who survive the life beneficiary. It is not to the descendants of those grandchildren while the grandchildren are alive. And while he contemplates the possibility of the death of a grandchild leaving descendants, and desires that such descendants shall also be included, it seems to me, where equality is provided and is the predominating intent, that it is only in the case of the death of the grandchildren that the grandchildren's issues should be included."

In New York L. Ins. & T. Co. v. Wells (1916) 173 App. Div. 769, 160 N. Y. Supp. 100, where a testator directed his residuary estate to be equally divided among his children, the shares or portions of his daughters to

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be held in trust for them during their natural lives, and on the decease of each the principal to go "to the issue and descendants of the one so dying," and further provided that, in the event of the death of any of his children without leaving lawful issue or descendants, his or her share to go to the survivor or survivors, so to be divided and distributed between them that in all cases the children of the deceased child should take only the share the parent would have taken or been entitled to if living, it was held that as it was the testator's manifest intention to make an equality of distribution between his children, the issue of one dying, leaving issue, should be distributed by representation, and not per capita.

In Duncan v. Clarke (1916) 106 S. C. 17, 90 S. E. 180, construing a trust deed to one for the life of her husband, "and at his death for use of such issue as he shall leave living at his death," it was held, following REMBERT v. VETOE (reported herewith), ante, 918, that children took to the exclusion of grandchildren whose parent was living.

In Minchell v. Lee (1853) 17 Jur. (Eng.) 727, where testator gave his residuary personal estate upon trust to pay the annual produce thereof to a nephew during his life, and after his decease to pay and divide the capital unto and equally between all the children of said nephew who should be living at his death, except his eldest son, James, and also among the issue of any children of the said nephew who should be then dead, "and also among the issue of the said James, such issue taking their respective parents' share," it was held that the issue of James took with the issue of the other children of the nephew per stirpes, as though their parent had previously had a share given him.

In Robinson v. Sykes (1856) 23 Beav. 40, 53 Eng. Reprint, 16, 26 L. J. Ch. N. S. 782, 2 Jur. N. S. 895, where, by settlement, a fund was settled after the death of husband and wife upon the children equally who should survive them, but if any child should die in the lifetime of the husband and wife and leaving issue then living, his share should go equally between the issue of such child, it was held that the "issue" of "children" took per stirpes, and that the successive generations of issue took their respective shares by substitution, and not concurrently.

In Coulden v. Coulden [1908] 1 Ch. (Eng.) 320, 77 L. J. Ch. N. S. 209, 98 L. T. N. S. 389, 52 Sol. Jo. 172, where testator directed his real and personal estate to be sold at a certain period and equally divided amongst his then surviving children "and their respective issue," it was held that the use of the word "respective" pointed to a stirpital distribution, and that although the intention of the testator was obscure, the gift to the issue would be held to be alternative, though original, and that the issue of children living at the period of distribution did not take concurrently with such children.

In Re Rawlinson [1909] 2 Ch. (Eng.) 86, 78 L. J. Ch. N. S. 443, 100 L. T. N. S. 509, where testator gave his residuary estate upon trust on the death of the survivor of his wife and four daughters to divide the same among the issue then living of his said daughters in equal shares according to the parent's stock, and not the number of individual objects, to the intent that the issue then living of any one of said daughters might be entitled to a share equal to that which the issue, if any, of any other of them, should be entitled to, and in case there should be issue then living of only one of them, then the whole to be paid to or equally divided amongst such issue, it was held that, according to the plain and unambiguous words of the original gift, there was a gift to the issue of the daughters per stirpes, and not per capita, and that such construction was not affected by the ambiguous words of the gift over in the particular event of there being issue living of only one of the daughters.

Instances in which issue have been held to take per capita.

In Schmidt v. Jewett (1909) 195 N. Y. 486, 133 Am. St. Rep. 815, 88 N. E. 1110, aff'g (1908) 127 App. Div. 376,

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111 N. Y. Supp. 680, where a testator gave the income of a sum of money to a daughter for life and at her death the principal "to her legal issue in equal portions after they severally reach the full age of twenty-one years," it was held that there was nothing in the will to require a distribution per stirpes.

In Jay v. Lee (1903) 41 Misc. 13, 83 N. Y. Supp. 579, where testatrix left a share of her residuary estate to each of two female cousins for life, remainder to their respective issue, "and in case either of said legatees shall die without issue then the share of such legatee shall revert to the issue of the other," and other shares thereof to each of four other female cousins for life, remainder to her issue, and in case any legatee "die without issue then the share of such legatee shall revert to the issue of the others or other," it was held that no such meaning could be implied from the use of the word "revert" as to displace the rule that, under a bequest to issue, the division is to be per capita.

In Re Bauerdorf (1912) 77 Misc. 656, 138 N. Y. Supp. 673, where testator directed his estate to be divided equally among his brother and three sisters at the termination of a life estate given to his wife therein, adding, "and in case any of them are dead at the time of the decease of my said wife, then I direct that the share of those who are dead shall be paid to their issue if any, or in default of issue to the surviving brother or sisters and the issue of any deceased brother or sister," it was held that, as there was nothing in the context of the will or in any relevant circumstance dehors the will, limiting the technical and settled meaning of the term "issue," all the descendants of the respective sisters and brother were entitled among themselves per capita, and not per stirpes.

In Re Farmers' Loan & T. Co. (1913) 82 Misc. 330, 143 N. Y. Supp. 700, where testator gave his residuary estate upon trust to be divided into seven equal shares, and to pay over the income of one of said equal shares to each of his four sons until they should severally attain the age of thirty years, when the share of each was to be handed over to him, and as to the remaining three shares, to pay the net income of one of said shares to each of his daughters during their natural lives, and upon the death of any daughter leaving issue, then to pay the principal of said share to such issue, further providing, "in the event of the death of any or either of my said daughters without issue the share of such deceased daughter should be distributed among my surviving children and the issue of any deceased child," it was held that, it being apparent that the testator had in mind primarily the interests of his own children as a class, and that each of them should benefit equally inter se in his estate, distribution of the share of a daughter dying without issue was, as between his own children and the issue of deceased children, per stirpes, but that the issue of deceased children took per capita.

In Re Union Trust Co. (1915) 89 Misc. 69, 151 N. Y. Supp. 246, where testator gave his residuary estate to trustees in two equal parts, in trust to apply the income for the use of two daughters for life, with remainder "unto and among the issue (if any) of" each daughter, or, if she should have left no issue, then to the other daughter if then surviving, or in equal portions to her issue if she should have died leaving issue then surviving, it was held that there was nothing from which an intention could be inferred that the issue should take amongst themselves by way of representation.

In Re Van Cleef (1915) 92 Misc. 689, 157 N. Y. Supp. 549, where testator made provision for each of his four children in substantially the same terms, giving each of them the income of one fourth of his estate for life, and upon the death of each gave the said one fourth to the lawful issue of such one, adding "and in default of such lawful issue I give, devise and bequeath the same to the survivors and survivor of my children and the lawful issue of such of my children as shall be dead," it was held that the closing words of the provision above quoted were not enough to show that the testator contemplated a stirpital

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distribution among the issue of a daughter, especially as the gift over in default of issue could not have been intended to take effect had the daughter died leaving no living children, but leaving children of a deceased child.

In Re Van Cleef (1917) 99 Misc. 405, 163 N. Y. Supp. 1098, testator devised one fourth of his estate to each of his daughters for life and upon the death of each of her lawful issue adding, "and in default of such lawful issue I give, devise and bequeath the same to the survivors and survivor of my children and the lawful issue of such of my children as shall be dead." One of the daughters having died without issue, leaving one sister surviving, a grandniece, the daughter of a deceased grandnephew, and another nephew who had three children, it was held distribution of the deceased daughter's share should be made, one half to her surviving sister and one half to the issue of deceased sister, but that among themselves the issue of such deceased sister, though of two generations, took per capita.

In Gest v. Way (1837) 2 Whart. (Pa.) 445, where testator devised property to each of his three daughters, to hold to them respectively during life, and after death to their issue provided such issue should live to be twenty-one or have lawful issue, but if either of his daughters should die without lawful issue, or if such should die in their minority without leaving lawful issue, then to his other child or children's lawful issue as tenants in common, it was held that there was nothing to prevent the operation of the rule that division should be made per capita.

In Ridley v. McPherson (1897) 100 Tenn. 402, 43 S. W. 772, construing a deed conveying certain land in trust for the grantor's daughter Mary for life, and at her death to be conveyed "to the issue of said Mary E. living at her death, and in default of any such issue living at the death of said Mary E. then upon this further trust that said lands be forthwith conveyed to the grantor if living and to his right heirs at that time," it was held that there was nothing in the context to indicate that a representative or substitutional division among issue was intended.

In Birdsall v. York (1859) 5 Jur. N. S. (Eng.) 1237, where testator gave all his real property in trust for the benefit of his wife and daughter for their life, and on the decease of the survivor to convey unto and equally between A, B, C, and D, share and share alike, or unto such of them as should be then living and the issue of such of them as should be then dead leaving lawful issue, adding that in case any one of them should happen to die in the lifetime of his wife or daughter leaving issue, such issue then living should be entitled equally among them to the share only which his, her, or their parent or parents would have been entitled to if living, and one of the persons named died leaving three children, all of whom died in the lifetime of the testator's widow and daughter, and all of whom left children surviving, it was held that the words "their parent or parents" were confined to the four persons named in the will, and that the one fourth which the primary devisee would have taken if living was distributable among his grandchildren per capita, and not per stirpes.

V. As including child conceived but not yet born.

The term "issue" includes a child conceived but not born at the time when the class is to be ascertained. Re Farmers' Loan & T. Co. (1913) 82 Misc. 330, 143 N. Y. Supp. 700.

But a child in ventre sa mére, to be capable of taking under a bequest to issue, must be one who is legitimately begotten before the period of distribution, and it is not enough that its parents were married before its birth. Re Corlass (1875) L. R. 1 Ch. Div. (Eng.) 460, 45 L. J. Ch. N. S. 118, 33 L. T. N. S. 630, 24 Week. Rep. 204.

VI. As including illegitimate children.

It is a generally recognized rule (except in Connecticut) that the word "issue" must be taken prima facie to mean legitimate children, and does not include illegitimate offspring unless a different intention appears from

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the context. Brisbin v. Huntington (1905) 128 Iowa, 166, 103 N. W. 144, 5 Ann. Cas. 931; Doggett v. Moseley (1860) 52 N. C. (7 Jones, L.) 587; Gibson v. McNeely (1860) 11 Ohio St. 131, affirming (1858) 2 Disney (Ohio) 158; Kemper v. Fort (1907) 219 Pa. 85, 13 L.R.A.(N.S.) 820, 123 Am. St. Rep. 623, 67 Atl. 991, 12 Ann. Cas. 1022; Flora v. Anderson (1896) 75 Fed. 217, affirming (1895) 67 Fed. 182; Re Walker [1897] 2 Ch. (Eng.) 238, 66 L. J. Ch. N. S. 622, 77 L. T. N. S. 94, 45 Week. Rep. 647.

But in Connecticut it has been held that the words "issue of his or her body" include illegitimate as well as legitimate issue in the absence of anything in the will to indicate the use of these words in any other than their prima facie signification. Eaton v. Eaton (1914) 88 Conn. 286, 91 Atl. 196.

A similar presumption prevails in the case of a bequest to "children." The right of illegitimate children to take under a testamentary gift to "children" is discussed in a note in 8 B. R. C. 295, which the consultant of this subdivision may profitably examine in connection with the question whether illegitimates may participate in a bequest to "issue." The criticism therein made of the presumption that legitimate children only are intended is measurably applicable to the rule that "issue" presumptively connotes legitimate issue. It was there said: "A perusal of the decisions leads to the conclusion that this presumption is most unfortunate and fundamentally unsound. Instead of operating as a presumption should operate, only in cases where the testator's intention is in doubt, it has operated to defeat an intention as to which there was no actual uncertainty. This result is due not to the operation of the presumption itself, but to its operation in conjunction with the rule that where there is nothing on the face of a will, in its application to the subject of disposition or the object of the testator's bounty, to raise a latent ambiguity, parol evidence is not admissible as to the testator's meaning. But a rule adopted by the court for the purpose of ascertaining a testator's intention should not so operate as to defeat his intention. The true rule should be that 'children' is a neutral word, taking its color from the surrounding circumstances. If it be regarded as such, no difficulty will be experienced with the rule that parol evidence as to the testator's intention is inadmissible, as the existence of natural children known to the testator will necessarily create the ambiguity which opens the door to such evidence."

An illegitimate child cannot be considered "issue" so as to defeat a remainder created by will made contingent upon the first taker's leaving no issue, where by statute the word "issue," as applied to the descent of estates, is limited to lawful lineal descendants. Jenkins v. Jenkins (1887) 64 N. H. 407, 14 Atl. 557.

An illegitimate child does not take under a gift to "lawful issue." Olmsted v. Olmsted (1908) 190 N. Y. 458, 123 Am. St. Rep. 585, 83 N. E. 569; United States Trust Co. v. Maxwell (1899) 26 Misc. 276, 57 N. Y. Supp. 53; Central Trust Co. v. Skillin (1912) 154 App. Div. 227, 138 N. Y. Supp. 884.

Whether illegitimate children subsequently legitimatized by the marriage of their parents are entitled to share in a bequest to the lawful issue of their father does not depend on their legal status after the marriage, but on the intention of the testator. Central Trust Co. v. Skillin (N. Y.) supra.

The fact that an illegitimate child may inherit from its mother is not a sufficient ground for saying that he is embraced in the words "lawful issue." Black v. Cartmell (1849) 10 B. Mon. (Ky.) 188.

A statutory provision permitting bastards to inherit or transmit inheritance on the part of their mothers does not enable an illegitimate child to take under a devise of a remainder to the issue of the body of its mother. Flora v. Anderson (1896) 75 Fed. 217, affirming (1895) 67 Fed. 182.

In United States Trust Co. v. Maxwell (1899) 26 Misc. 276, 57 N. Y. Supp. 53, where testator, knowing that his son was the father of an illegitimate child, gave property in trust for

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the son, to be paid over on the son's death to "his lawful issue," and in default of such issue gave the son a power of appointment over one half of the fund, it was held that a subsequently enacted statute providing that an illegitimate child whose parents marry "shall thereby become legitimatized and shall be considered legitimate for all purposes and entitled to all the rights and privileges of a legitimate child" did not operate to enlarge the meaning of the words "lawful issue," so as to include the illegitimate child.

But in Miller's Appeal (1866) 52 Pa. 113, it was held that an illegitimate child might take under a devise by a father to the lawful issue of his daughter, where such child had been legitimated in her mother's lifetime, though long after the death of the testator, by an act of the legislature by which she was declared "capable in law to inherit and transmit any estate whatsoever as fully and completely and to all intents and purposes as if she had been born in lawful wedlock." The court said: "Nor can this fairly be called a making of a new will by act of assembly forty years after the death of the testator. He must be presumed to have meant his words should have their appropriate legal effect, and at all times it is the province of the lawmaking power to define who shall be lawful issue. The law of every country regulates the succession to estates on the death of its citizens. The testator referred himself to the law for ascertainment of lawful issue. We do not, therefore, change his will when we say it would have operated in favor of Rachel had she survived her mother. We simply give effect to the act of assembly, and like effect to the will."

In Re Walker [1907] 2 Ch. (Eng.) 238, 66 L. J. Ch. N. S. 622, 77 L. T. N. S. 94, 45 Week. Rep. 647, it was held that the illegitimate daughter of a niece was entitled to take under a gift to issue where the testatrix in her will described the niece as the wife of the father of her illegitimate child, and referred to such child as the daughter of the niece, and in a codicil referred to her as her great-niece.

In Re Smilter [1903] 1 Ch. (Eng.) 198, 72 L. J. Ch. N. S. 102, 51 Week. Rep. 231, 87 L. T. N. S. 644, where testator, after giving an estate to his nephew George for life, determinable upon his becoming bankrupt, directed that, on the happening of that event, the income should be applied for and towards the maintenance and support of such nephew and his wife and issue, "whether children or more remote for the time being in existence (including Samuel Smilter Revill, hereinafter named)," with remainder to the nephew's children, "including among such children and child Samuel Smilter Revill, the illegitimate son of my said nephew," and further declared that "if there shall be no child of my said nephew, including the same Samuel Smilter Revill, living at my death or born afterward," the property should go to others, and thereafter gave the proceeds of other property upon trust, in an event which happened, for such of each named nephews and nieces (including George) as should be living at the death of his niece Mary, and the issue living at the death of his said niece of such of his other nephews and nieces as should die in her lifetime leaving issue,—it was held that as the testator had in the first part of his will recognized Samuel Smilter Revill's status as son of the nephew, there was a sufficient indication of his intention that he should take under the substantial gift in favor of issue of a deceased nephew.

VII. As including stepchildren or adopted children.

The word "issue" prima facie does not include a stepchild. Barnes v. Greenzebach (1831) 1 Edw. Ch. (N. Y.) 41 (obiter).

The term "lawful issue" does not include a child adopted after the death of the testator. Bealor's Estate (1914) 23 Pa. Dist. R. 1117.

In Blodgett v. Stowell (1905) 189 Mass. 142, 75 N. E. 138, it was held that an adopted daughter was not "issue" within the meaning of a provision in the will of the adopted par-

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ent's father, made long before her adoption, giving the income of certain property to his son during his life, with remainder "to his issue if any then living, in equal shares by right of representation," there being nothing in the will to show that it was the testator's intention that an adopted child should take under the description of "issue," and the words "by right of representation" being inconsistent with such a construction, since they apply to lineal descendants only.

An adopted child is not "issue" so as to defeat a remainder created by will contingent upon the first takers leaving no issue, where the statute for the adoption of children provides that the adopted child shall be "for the purpose of inheritance by such child and all other legal consequences and incidents of the natural relations of parents and children the child of the parents by adoption, the same as if he had been born to them in lawful wedlock, except that he shall not be capable of taking property expressly limited to the heirs of the body or bodies of the parents by adoption." Jenkins v. Jenkins (1887) 64 N. H. 407, 14 Atl. 557.

In Re Truman (1905) 27 R. I. 209, 61 Atl. 598, it was held that an adopted child was within the provisions of a will bequeathing property over "to the children or issue" of a deceased brother of the testatrix, under a statute vesting the parties to the adoption with reciprocal rights, duties, and obligations, including the right of inheritance, the same as if the child had been born the lawful child of the adopting parents, where it clearly appears that the testatrix intended to include such child, such intent, when legally ascertained, being the test.

And in Re Olney (1906) 27 R. I. 495, 63 Atl. 956, where a trust had been created for the benefit of testator's two sons, and, in the event of their decease "leaving lawful issue," for the support of such issue until the termination of the trust, and, upon the death of both sons, the trust res was to be distributed to the "children then living" of each deceased son, it was held, under a statute declaring that an adopted child shall be deemed the child of the adopting parents for the purposes of inheritance, the same as if it had been born to them in lawful wedlock, except that it should not be capable of taking property expressly limited to the heirs of the body or bodies of such parents, nor property from the lineal or collateral kindred thereof by the right of reversion, that an adopted child of one of such sons would take the same interest she would have taken had she been a child of the body.

And in Hartwell v. Tefft (1896) 19 R. I. 644, 34 L.R.A. 500, 35 Atl. 882, under the same statute an adopted child was held the "lawful issue" of a person, within the meaning of a will making a gift to such person, with remainder to his "lawful issue."

E. S. O.

ATCHISON, TOPEKA, & SANTA FE RAILWAY COMPANY
v.
RAILROAD COMMISSION OF THE STATE OF CALIFORNIA et al.

California Supreme Court (In Banc) — October 23, 1916.

(173 Cal. 577, P.U.R.1917B, 336, 160 Pac. 828.)

Public service corporation — requiring rendition of new service by railroad.

1. A railroad company cannot, in view of the constitutional protection of property rights, be required to connect with its line points which it has never undertaken to serve.

[*See note on this question beginning on page* 983.]

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Public Service Commission — authority to enforce contracts.

2. The Railroad Commission has no authority to enforce a contract between a railroad company and persons subscribing funds for the construction of its road.

Same — restoration of abandoned line.

3. After discontinuance of the operation of a railroad until the right to operate has been lost by abandonment, the Public Service Commission has no authority to require restoration of the service.

Public service corporation — undertaking to supply public.

4. A public utility undertaking to supply a given public need submits itself to the regulation and control of public authority with respect to the service which it has thus undertaken.

Railroad — undertaking by construction of road.

5. A railroad company in constructing a line between given points does not undertake to supply the transportation needs of any territory not reached by its line.

Public service corporation — duty to extend service.

6. The obligation of a gas, water, electric light, or telephone company to supply a given district carries with it the duty, under reasonable limitations, to extend the mains or lines of the public utility to a point on the consumer's premises where use can be made of the service.

Railroad — duty to supply facilities.

7. A railroad company may be compelled to furnish proper stations for the reception and discharge of passengers and freight, to supply adequate motive power and cars, to install safety devices, and make needed repairs and additions to its roadbed and track, and other like improvements.

Public Service Commission — power to supervise railroad service.

8. The supervision of service rendered by a railroad company is a proper matter for public regulation and control.

Railroad — extension of road — question for directors.

9. The question whether a railroad shall extend its lines to points not theretofore reached by it is one of public policy, to be determined by its directors.

PETITION for a writ of certiorari to test the validity of an order of the respondent Commission, requiring petitioner to construct and put in operation a line of railroad between certain points. *Order annulled.*

The facts are stated in the opinion of the court.

Messrs. **E. W. Camp, U. T. Clotfeller,** and **Pillsbury, Madison, & Sutro** for petitioner.

Mr. **Douglas Brookman** for respondent.

Messrs. **Allan Brant** and **W. C. Wilde,** amici curiæ:

The railroad company, claiming the right to operate, and operating, over all the route covered by the original franchise except the 12-mile gap, could not abandon and refuse to restore this portion of its railroad.

People ex rel. Schaghticoke v. Troy & B. R. Co. 37 How. Pr. 427; 33 Cyc. 80; State v. Hartford & N. H. R. Co. 29 Conn. 546; Colorado & S. R. Co. v. State R. Commission, 54 Colo. 64, 129 Pac. 506; State ex rel. Grinsfelder v. Spokane Street R. Co. 19 Wash. 518, 41 L.R.A. 515, 67 Am. St. Rep. 739, 53 Pac. 719; Day v. Tacoma R. & Power Co. 80 Wash. 161, L.R.A. 1915B, 547, 141 Pac. 349.

The provision for forfeiture of the right to build is not self-executing.

Santa Rosa City R. Co. v. Central Street R. Co. 4 Cal. Unrep. 950, 38 Pac. 986; Chesapeake & O. Canal Co. v. Baltimore & O. R. Co. 4 Gill & J. 1; Taylor v. Holmes, 14 Fed. 498; Davis v. Gray, 16 Wall. 203, 21 L. ed. 447; Kanawha Coal Co. v. Kanawha & O. Coal Co. 7 Blatchf. 391, Fed. Cas. No. 7,606; Wallamet Falls Canal & Lock Co. v. Kittridge, 5 Sawy. 44, Fed. Cas. No. 17,105; Arthur v. Commercial & R. Bank, 17 Miss. 394, 48 Am. Dec. 719; Boyer v. Little Falls, 5 App. Div. 1, 38 N. Y. Supp. 1114; Forster v. Juniata Bridge Co. 16 Pa. 393, 55 Am. Dec. 506; Shand v. Gage, 9 S. C. 187; Greenbrier Lumber Co. v. Ward, 30 W. Va. 43, 3 S. E. 227.

Sloss, J., delivered the opinion of the court:

This is a proceeding in certiorari to test the validity of an order of

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the Railroad Commission, requiring the Atchison, Topeka, & Santa Fe Railway Company to construct and put into operation a line of railroad between Oceanside, in San Diego county, and Temecula, in Riverside county. The Atchison, Topeka, & Santa Fe Railway Company (which we shall herein term the "Santa Fe Company") operates a transcontinental line of railroad, connecting with a number of lines in this state. It has succeeded to the property and railroad lines of the Southern California Railway Company, which was in turn the successor in interest of the California Southern Railroad Company. The last-named corporation was organized about the year 1880, to build and operate a railroad from the bay of San Diego to a point of connection with the line of the Atlantic & Pacific Railroad, running easterly from Barstow in San Bernardino county, and now forming a part of the main line of the Santa Fe system. The line of the California Southern Railroad Company was constructed from San Diego to Oceanside, thence northeasterly to Fallbrook Station, thence through the Temecula canyon to Temecula, and thence northeasterly through Riverside and San Bernardino counties to Barstow. The distance from Fallbrook Station to Temecula through the Temecula canyon is about 12 miles. In the year 1891 this portion of the road was washed out by a flood, and it has never been rebuilt. Theretofore, in 1888, another line had been built, connecting San Diego and Oceanside with San Bernardino via Santa Ana. This road, while longer than the one through the Temecula canyon, could be operated to better advantage because it avoided unfavorable grades and curves. It has also passed into the ownership and possession of the Santa Fe Company.

The proceeding now under review was instituted before the Railroad Commission by the complaint of various civic and commercial organizations in San Diego, joined by citizens of the vicinity who sought an order requiring the Santa Fe Company to re-establish railroad operations between Fallbrook and Temecula in order to give direct service over this line to persons residing in the territory beyond Temecula. Prior to the construction of the original line, the California Southern Railroad Company had received donations of money and land, aggregating several millions of dollars in value, as an inducement to the construction of a railroad from the bay of San Diego to a connection with the Atlantic & Pacific Railroad. An agreement to that end had been made between a representative of the intending donors and a group of men who undertook to form a corporation for the proposed construction. Pursuant to this agreement the California Southern Railroad Company was formed, and its line built.

The Commission filed an elaborate opinion, in which it recited the foregoing facts and many others. It went carefully into the question of the cost of reconstructing the road through the Temecula canyon, and made estimates of the extent of territory which would furnish traffic in consequence of the proposed connection. Suggestion having been made that an alternative route could be constructed from Oceanside to Temecula without going through the Temecula canyon, the Commission also found the cost of constructing this line. The findings of the Commission included the following:

"Eighth. That the re-establishment of a direct connection between San Diego and Temecula, either by way of the Temecula canyon or by way of the so-called alternative line, both of which said lines are described in the preceding opinion, is a public necessity and will greatly benefit all of the country affected by this railroad.

"Ninth. That it is reasonable to order the defendant to make such connection, and that the present and prospective traffic justify the ex-

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penditure of the sum of money necessary to establish this connection."

On these findings an order was made, requiring the Santa Fe Company to present to the Commission for its approval plans and estimates for a line connecting Oceanside and Temecula, either through the canyon or by the alternative route, and requiring it within twelve months after the approval by the Commission of such plans and estimates to construct, complete, and put into operation such line of railroad, and operate thereover regular passenger and freight service. This is the order which is attacked in the present proceeding.

The Railroad Commission seeks to find authority for its order in § 36 of the Public Utilities Act. So much of the section as is material here reads as follows: "Sec. 36. Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that additions, extensions, repairs or improvements to, or changes in, the existing plant, equipment, apparatus, facilities or other physical property of any public utility or of any two or more public utilities ought reasonably to be made, or that a new structure or structures should be erected, to promote the security or convenience of its employees or the public, or in any other way to secure adequate service or facilities, the Commission shall make and serve an order directing that such additions, extensions, repairs, improvements or changes be made or such structure or structures be erected in the manner and within the time specified in said order." Stat. 1911 (Ex. Sess.) p. 36.

In assailing the validity of the order, the petitioner makes a number of contentions. These, generally speaking, divide themselves into two branches. One challenges the authority of the Railroad Commission to order the construction of a line of railroad, under the circumstances here shown, regardless of the consideration that the operation of the new line might, in a financial view, be beneficial to the company, while the other turns more specifically on the inquiry whether, under the evidence in this particular case, the construction directed to be made would be justified by the showing of probable earnings to accrue to the company. The first of these questions is the more fundamental, and in view of the conclusion we have reached on it we do not find it necessary to go into an analysis of the evidence that would have to be considered in passing on the second.

The issue to be determined is this: Has the Railroad Commission authority to require a railroad company to extend its line of railroad, or to build a new line, so as to connect with its existing line points that have not theretofore been connected, and which the company has not undertaken to so connect? In thus stating the question, we eliminate from consideration the contract found to have been made between citizens of San Diego and the incorporators of the California Southern Railroad Company, as well as the fact that a line had once been run from Fallbrook to Temecula.

While the Commission, in its opinion, dwelt at some length upon the moral obligations arising from this contract, its conclusion was not, perhaps, in a legal sense, based upon it. The first finding of the learned commissioner who heard the testimony, after referring to the grants made under the contract, concludes as follows: "I do not, however, find that the moral or legal obligations resulting from this contract are, of necessity, a deciding factor in this case."

But whether or not the existence of the contract may, in some degree, have influenced the Commission in reaching its conclusion, it is clear that grounds must be sought elsewhere for supporting the order here under review. We may pass, without expressing an opinion of its validity, the petitioner's suggestion that the Santa Fe Company was not a party to the contract, but was a purchaser under foreclosure of the properties of the corporation in

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whose behalf the agreement had been made, and therefore not bound by the contractual duties of its predecessor. See Hoard v. Chesapeake & O. R. Co. 123 U. S. 222, 31 L. ed. 130, 8 Sup. Ct. Rep. 74. For, even if it be granted that the burdens of the agreement rest on the petitioner, the Railroad Commission is not a body charged with the enforcement of private contracts. See Hanlon v. Eshleman, 169 Cal. 200, P.U.R.1915B, 842, 146 Pac. 656. Its function, like that of the Interstate Commerce Commission, is to regulate public utilities, and to compel the enforcement of their duties to the public (Southern P. Co. v. Interstate Commerce Commission, 219 U. S. 433, 55 L. ed. 283, 31 Sup. Ct. Rep. 288); not to compel them to carry out their contract obligations to individuals. This is conceded by the respondents themselves, and we need not, therefore, go into a review of the various provisions of the act (among others, § 36 itself), which demonstrate the soundness of the conclusion just stated.

Public Service Commission—authority to enforce contracts.

Nor is the fact that a railroad line had once existed between Fallbrook and Temecula a factor of any moment in the present inquiry. No question is made of the authority of the Railroad Commission to compel a railroad company or other public utility to restore a service which it has been furnishing. Here, however, the line between Fallbrook and Temecula had been destroyed for about twenty years before the action of the Commission was invoked, and, indeed, before the enactment of the law upon which the Commission relies for its authority to act. It is expressly found that "that portion of the line was left abandoned and service discontinued. It has remained abandoned ever since." In view of this fact, it cannot be doubted that any obligation of the predecessor of the Santa Fe Company to maintain and operate the line from Fallbrook to Temecula had long since ceased (Public Service Commission v. Philadelphia, B. & W. R. Co. 122 Md. 438, 89 Atl. 726), and that no such obligation ever rested upon the Santa Fe Company itself. The duty to maintain the line was dependent upon the right to maintain it, and this right was lost by abandonment (Home Real Estate Co. v. Los Angeles P. Co. 163 Cal. 710, 126 Pac. 972), without regard to the question whether it had been forfeited under the provisions of § 468 of the Civil Code. The case must, therefore, stand precisely as it would if there had never been any connection between these two points.

Same—restoration of abandoned line.

The solution of the problem thus presented must be found in a definition of the character of the order complained of. Is the Railroad Commission, in ordering the construction of a railroad line, regulating the service which the petitioner has undertaken to give to the public, or is it compelling the railroad company to dedicate its property to a new service? If the former, the Commission is acting within its jurisdiction; if the latter, it is attempting to exercise an authority which the statute either has not attempted or is unable to confer upon it. Section 36 of the Public Utilities Act authorizes the Commission to make an order directing that "additions, extensions," etc., be made in the plant or facilities of any public utility. It might be argued that this language is broad enough to include additions to the plant, even though such additions may involve a service never contemplated nor undertaken by the owner of the utility. But if this be taken to be the true meaning, the section expresses an intent which cannot, under the restrictions of the Federal Constitution, be given effect. As was said by Henshaw, J., in Pacific Teleph. & Teleg. Co. v. Eshleman, 166 Cal. 640, 665, 50 L.R.A.(N.S.) 652, 137 Pac. 1128, Ann. Cas. 1915C, 882: "It may not be amiss to point

Public service corporation—requiring rendition of new services by railroad.

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out that the devotion to a public use by a person or corporation of property held by them in ownership does not destroy their ownership, and does not vest title to the property in the public so as to justify, under the exercise of police power, the taking away of the management and control of the property from its owners without compensation, upon the ground that public convenience would better be served thereby, or that the owners themselves have proven false or derelict in the performance of their public duty."

And the following quotation from my opinion in the same case is also in point: "I think it cannot be doubted that an order, compelling the owner of private property, against his will, to subject that property to the use of the public or of an individual, amounts to a taking of property. . . . Where the particular property has been dedicated to a public use, where the property, in other words, is employed in a public service, the owner has consented that the public may use his property within the limits to which the dedication extends. Within those limits, the use by the public does not constitute a taking, or, if it be a taking, it is one which has been invited by the owner. But the fact that the property has been offered for one public use does not authorize the public to use it for other and different purposes."

Again, in Del Mar Water, Light, & P. Co. v. Eshleman, 167 Cal. 666, 680, 140 Pac. 596, Mr. Justice Shaw, in referring to § 36 and other provisions of the Public Utilities Act, said: "These sections, taken literally, seem to empower the Commission to direct any public utility to extend its plant and enlarge the territory supplied by it in such manner as the Commission shall judge advisable. But a proper interpretation of these provisions must be that they are limited in their application to such public service corporations as may have devoted their entire property to the use of the entire public, or to those which may have undertaken to supply a certain district, such as a city, and dedicated their property to that service and which afterward may have failed or refused to give to such district an adequate service, or failed or refused to extend the system and supply to parts of the district, when it was within its means to have done so, and such extension would not be unreasonable. In such cases it would be entirely proper to give such a Commission power to compel adequate service within the territory which the corporation has undertaken to serve, and to compel any reasonable extension of the service to other parts of such territory. But even a constitutional declaration cannot transform a private enterprise, or a part thereof, into a public utility, and thus take property for public use without condemnation and payment. The provisions of this act could not authorize the Commission to compel such corporation to dedicate additional property to public use without additional compensation. When a corporation voluntarily devotes a part of its property to public use, it is to be presumed that it makes the dedication because it is satisfied with the return which it expects to receive, and in that way it is deemed to have been compensated for such dedication. But when it is forced to devote to public use additional property which it has not dedicated to public use, or is compelled to extend its service to supply uses or territory not embraced in the original dedication, it must under our constitutional provisions, as a condition precedent, be compensated for the value of the new property taken or new use exacted. This may be done under the power of eminent domain."

The views thus announced, when applied to the facts of the case before us, lead inevitably to the conclusion that the Commission exceeded its power in ordering the construction of a new line of road to connect Oceanside and Temecula. A public utility, undertaking to

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supply a given public need, submits itself to the regulation and control of public authority with respect to the service which it has thus undertaken. Thus, a water company, having a franchise to supply water to the inhabitants of a given city, assumes the public duty of supplying that community with water. It may be compelled to extend its mains in order to furnish the service to such inhabitants. Lukrawka v. Spring Valley Water Co. 169 Cal. 318, P.U.R.1915B, 331, 146 Pac. 640, Ann. Cas. 1916D, 277. So, of companies furnishing gas, electric current, or telephone service. 1 Wyman, Pub. Serv. Corp. § 797. But to require a public utility to devote its property to a service which it has never professed to render is to take that property, pro tanto, and such taking cannot be justified except under the power of eminent domain—i. e., upon just compensation. A railroad company, in constructing a line between given points, does not undertake to supply the transportation needs of any territory not reached by its lines. 1 Wyman, Pub. Serv. Corp. § 272. As is pointed out by petitioner, there is a very real difference between the nature of the service rendered by a railroad and that furnished by a water or gas company, or a telephone system. Gas, water, electric light, or (as a rule) telephone service must, in the nature of things, be brought to the consumer. The obligation to supply a given district carries with it the duty, under reasonable limitations, to extend the mains or lines of the public utility to a point on the consumer's premises where use can be made of the service. Not so with a railroad company. Before freight or passengers can be transported they must be brought or must come to some point on the line of the railroad.

Same—undertaking to supply public.

Railroad—undertaking by construction of road.

Public service corporation—duty to extend service.

True, the railroad company is bound to provide adequate facilities for the service of the public on its lines. It may be compelled to furnish proper stations for the reception and discharge of passengers and freight, to supply adequate motive power and cars, to install safety devices, to make needed repairs and additions to its roadbed and track, and other like improvements. All of these matters fall within the scope of the regulation of the service which the company has undertaken to give. But there is a vital distinction between regulation of this character and a requirement that the railroad company shall extend its operations by building a new line of road to tap or supply a territory which has not theretofore had the benefit of direct railroad service. Such a requirement cannot be justified by saying that the points to be thus reached are within the area already served by the railroad. The area served by any railroad may, in a certain sense, be said to include all of the territory, in any direction, from which freight or passengers may be brought to the railroad by any other mode of conveyance. Such area may extend to a distance of many miles from the line of the road. Certainly the public duty of the company does not include the obligation of building lines to any or every portion of this indefinite expanse of territory.

Railroad—duty to supply facilities.

Various decisions upholding orders of regulating bodies with respect to railroads are cited, but we think they do not, in any instance, meet the necessities of the case at bar. Much stress is laid upon Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115. There the Supreme Court of the United States had under consideration an order of the Railroad and Warehouse Commission of the state of Minnesota, requiring two railroad companies whose tracks intersected at a certain point to provide connecting

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tracks, so that the cars of each company could be run onto the tracks of the other. The ground of the decision sustaining the order was, in effect, that the requirement was simply a regulation of the operations of the two companies, in furtherance of their obligation to properly serve the public needs and convenience. There was no attempt to compel a road to extend its service beyond the lines which it was already operating. The companies were merely required to furnish facilities for the more adequate performance of a service already supplied. The same is true of the other cases upon which reliance is placed. Thus, in Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398, the order in controversy directed a railroad to rearrange its schedules, so as to make a convenient connection between its trains and those of another road passing a junction point. The order under review in Missouri P. R. Co. v. Kansas, 216 U. S. 262, 54 L. ed. 472, 30 Sup. Ct. Rep. 330, required the railroad company to put into operation on one of its branches, a passenger train, in place of a mixed passenger and freight train. This order, said the court, did nothing more "than command the railroad company to perform a service which it was incumbent upon it to perform, as the necessary result of the possession and enjoyment of its charter powers." So, in Minneapolis & St. L. R. Co. v. Minnesota, 193 U. S. 53, 48 L. ed. 614, 24 Sup. Ct. Rep. 396, the court sustained the validity of an order of the Railroad and Warehouse Commission of Minnesota, directing the railroad company to build and maintain a station house at a certain point on its line. This ruling, like the others mentioned, was based upon the duty of the company to provide proper service upon its lines, the court saying that "to establish stations at proper places is the first duty of a railroad company. The state can certainly provide for the enforcement of that duty." The same grounds led to the decision in Chicago, M. & St. P. R. Co. v. Iowa, 233 U. S. 334, 58 L. ed. 988, 34 Sup. Ct. Rep. 592. The order there in question was one requiring the railroad company to accept shipments of coal in carload lots when tendered in cars of other railroad companies. The requirement was justified "in order that reasonably adequate facilities for traffic may be provided." And similar considerations were made the ground of rulings, upholding orders requiring various railroads to use their tracks within the city of Detroit for interchange of traffic (Grand Trunk R. Co. v. Michigan R. Commission, 231 U. S. 457, 58 L. ed. 310, 34 Sup. Ct. Rep. 152), and directing a street railroad company to double track its line for a distance of ten blocks (Phœnix R. Co. v. Geary, 239 U. S. 277, 60 L. ed. 287, 36 Sup. Ct. Rep. 45). In the case last cited the court, in its opinion, used this expression: "Complainant is not required to open up new territory, but only to give better service upon a street already occupied by it under a public franchise."

These cases, one and all, have to do with regulations designed to improve the facilities for transacting the business already conducted upon the lines built by the company and devoted to the transaction of that business. They furnish no support for the claim that a railroad company may be compelled to build new lines in order to render a new service, however necessary or convenient such new service may be to the public.

"It must be remembered," said Mr. Justice Brewer in Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 108, 118, 52 L. ed. 705, 712, 28 Sup. Ct. Rep. 496, "that railroads are the private property of their owners; that while, from the public character of the work in which they are engaged, the public has the power to prescribe rules for securing faithful and efficient service, and equality

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between shippers and communities, yet in no proper sense is the public a general manager." To the like effect are the following expressions from recent decisions of the Supreme Court of the United States:

"A railroad's possessions are subject to its public duty, but beyond this and within charter limits, like other owners of private property, it may control its own affairs." Great Northern R. Co. v. Minnesota, 238 U. S. 340, 59 L. ed. 1337, P.U.R. 1915D, 701, 35 Sup. Ct. Rep. 753.

"The company is entitled to the privilege of managing its business in its own way so long as it does not injuriously affect the health, comfort, safety, and convenience of the public." Chicago, M. & St. P. R. Co. v. Wisconsin, 238 U. S. 491, 59 L. ed. 1423, L.R.A.1916A, 1133, P.U.R.1915D, 706, 35 Sup. Ct. Rep. 869.

See also People ex rel. Duryea v. Wilber, 198 N. Y. 1, 27 L.R.A.(N.S.) 357, 90 N. E. 1140, 19 Ann. Cas. 626; People ex rel. Binghamton Light, Heat & P. Co. v. Stevens, 203 N. Y. 7, 96 N. E. 114; Bacon v. Boston & M. R. Co. 83 Vt. 421, 76 Atl. 128.

These quotations point to the essential ground of the invalidity of the order here in question. The supervision of service rendered by a railroad company is a proper matter for public regulation and control. The question whether a railroad company shall extend its lines to points not theretofore reached by it, whether, in other words, it shall engage in a new and additional enterprise, is one of policy, to be determined by its directors. To compel a railroad company to apply its property to the construction and operation of a line of railroad, which it does not desire to construct or operate, is to take its property.

Public Service Commission—power to supervise railroad service.

Railroad extension of road—question for directors.

As we have already indicated, we are cited to no authority which supports the power of the state, acting through its Railroad Commission, or otherwise, to compel the extension of a railroad line in the manner here attempted. On the contrary, such decisions as have come to our attention tend, rather, to deny the existence of any such power. In Public Service Commission v. Philadelphia, B. & W. R. Co. 122 Md. 438, 89 Atl. 726, the court declared the invalidity of an order of the Maryland Public Service Commission requiring the railroad company to rebuild and operate a branch which had been abandoned (as had the line here in question) years before the making of the order and the acquisition of the line by its then owner. The Maryland statute authorized the Commission to require a railroad company to make "repairs, improvements, changes . . . or additions," if, in its judgment, they "should reasonably be made"—a provision not unlike that found in § 36 of our Public Utilities Act. See also Towers v. United R. & Electric Co. 126 Md. 478, P.U.R.1915F, 474, 95 Atl. 170; Northern P. R. Co. v. Railroad Commission, 58 Wash. 360, 28 L.R.A.(N.S.) 1021, 108 Pac. 938.

The order is annulled.

We concur: **Angellotti**, Ch. J.; **Shaw**, J.; **Melvin**, J.; **Henshaw**, J.; **Lawlor**, J.

Dismissed by the Supreme Court of the United States, January 21, 1918, 245 U. S. 638, 62 L. ed. 525, 38 Sup. Ct. Rep. 191.

ANNOTATION.

Power of public service commission to require railroad or street railway to extend its line or build new line to new territory.

The power to require the construction of sidetracks, or strictly spur lines, for the accommodation of a particular patron, is not considered in this note.

And this note is not concerned with

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cases dealing merely with the reasonableness or lawfulness of orders of commissions, requiring extensions, although it is stated in the opinion that the orders were set aside on the ground that the Commission had no power to make an unreasonable or confiscatory order. Such a statement is rather an assertion of the right of the utility, than a limitation upon the authority of the Commission. The principle involved is in no wise peculiar to extensions, but applies to all orders of commissions, without reference to the subject-matter of the order. The question involved is not one of law, but is one of fact; and the result is determined in the particular case, by determining whether or not the facts presented do constitute unreasonableness or confiscation.

A public service commission cannot compel a railroad company or a street railway company to extend its line beyond the limits of territory covered by its charter. Scranton v. Scranton R. Co. (1915; Pa.) P.U.R.1915C, 890; Allied Asso. v. Philadelphia Rapid Transit Co. (1917; Pa.) P.U.R.1917E, 945; State ex rel. United R. Co. v. Public Service Commission (1917) 270 Mo. 429, P.U.R.1917D, 752, 192 S. W. 958, 198 S. W. 872.

So, in State ex rel. United R. Co. v. Public Service Commission (Mo.) supra, the Missouri supreme court said that, while the Public Service Commission has ample power to order the construction of such sidetracks, switches, crossovers, and terminals as are purely incidental to the operation of main lines, it is not empowered to compel public utilities, in the absence of authority in their charter, to enter new territory by the extension of their lines of road.

And in Scranton v. Scranton R. Co. (Pa.) supra, in speaking of the power conferred upon the Commission by the Pennsylvania act, the Commission said: "Does the provision that 'the Commission shall have power to require extensions in and about facilities (including tracks), and service,' mean to confer power upon the Commission to order an extension of tracks beyond the termini named in the charter of the company? or should it be construed to mean an extension of the facilities in the territory covered by and embraced in the charter, and in which the company is bound by the charter to supply service? There can be no doubt that the Commission has the power to compel a public service company to extend its facilities and service, if for the service, accommodation, and convenience of the public, into every portion of a municipality in which it is authorized by its charter to do business; but to order an extension beyond the points covered by its charter would be to assume power in the Commission which cannot be fairly interpreted from any of the provisions of the Act of July 26, 1913."

If the charter of a railroad or a street railway company requires it to build a line to a certain point, there would seem to be no question as to the power to compel it to carry out its charter obligations.

But where the charter of the railroad or street railway simply authorizes the corporation, without requiring it, to construct and maintain its tracks to a certain point, it has been held that it cannot be compelled to extend or maintain its road to that point, when it would not be remunerative, and when public necessity does not require it. Public Service Commission v. Philadelphia, B. & W. R. Co. (1914) 122 Md. 438, 89 Atl. 726; Towers v. United R. & Electric Co. (1915) 126 Md. 478, P.U.R.1915F, 474, 95 Atl. 170; Scranton v. Scranton R. Co. (Pa.) supra.

So, there is no unrestricted and uncontrollable power in the Maryland Public Service Commission to require an extension of an electric railway which the company is under no contractual obligation with individuals to make, where its charter is permissive and not mandatory, and there is no obligation to make the extensions, arising from a profession of service. Towers v. United R. & Electric Co. (1915) 126 Md. 478, P.U.R.1915F, 474, 95 Atl. 170.

In Public Service Commission v. Philadelphia, B. & W. R. Co. (Md.) supra, the situation was quite similar

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to that in the reported case (ATCHISON, T. & S. F. R. Co. v. RAILROAD COMMISSION, ante, 975), the line desired having been abandoned by the defendant's predecessor in title. The decision is independent of that fact, however.

The Pennsylvania Commission in Scranton v. Scranton R. Co. (Pa.) supra, said that there was no doubt of its power to compel a street railway to extend its lines to every portion of the municipality in which it was authorized by its charter to do business, if the convenience and service of the public required it.

The Constitutions in many of the states provide that municipal consent to the construction of any passenger railway, within the limits of any city, borough, or township, must be procured before such construction may be made. In view of this constitutional provision, the commissions have no power to order extensions, where the consent of the local authorities has not been obtained.

Thus, in Allied Asso. v. Philadelphia Rapid Transit Co. (1917; Pa.) P.U.R. 1917E, 945, the Pennsylvania Commission, after calling attention to the fact that the statute in that state provides that the Commission shall have power to require public utilities, among other things, to make such extensions as shall be reasonably necessary and proper for the safety and convenience of the public, said: "In our opinion the 'power' given therein to this Commission, so far as the 'extensions' mentioned in this section are concerned, must be exercised within the boundaries set by the charters of the corporations which may be affected. To hold otherwise would be to impose our will upon the 'local authorities,' to whom the Constitution gives the absolute right to grant or withhold consent to the construction of any street passenger railway, and to substitute our judgment for that of the 'city, borough, or township,' in its exclusively local affair. We find no warrant of law so to do."

So, in Scranton v. Scranton R. Co. (Pa.) supra, the Pennsylvania Commission said: "The charter of a street railway company specifies its route, and designates the streets upon which it shall be constructed, and also the termini. Before it can construct its route, consent must be obtained from the municipality, which can prescribe conditions under which the franchise is granted. After construction, extensions can only be made by a vote of its stockholders, authorizing said extension; and consent of the municipality is again necessary, if permission to make said extension was not granted in the original franchise. To hold, therefore, that the Commission had power to order a street railway company to make an extension beyond points named in its charter would be in effect to compel the stockholders to authorize the extension, and to require the company to enter into a contract with the municipality, upon any terms which it might impose."

A public service commission has no power to require a street railway to exercise a franchise to occupy city streets, that had been lost by nonuser. State ex rel. United R. Co. v. Public Service Commission (1917) 270 Mo. 429, P.U.R.1917D, 752, 192 S. W. 958, 198 S. W. 872.

In Re Union R. Co. (1916; N. Y.) P.U.R.1916F, 773, it was held that the power of the Commission to require an extension of a street car line depended upon the question whether the company possessed the franchise right to operate over the street on which the extension is desired. And the Commission further held that the fact that two street railway companies are a part of one system under the same management does not confer authority on the Commission to compel one company to operate over a street for which it has no franchise, by making an agreement with the other company, which has a franchise, for the use of its tracks.

The Missouri Commission has held that, although it has no power to grant a franchise or to compel a grant by a city for a street railway extension, where municipal consent is necessary, it may direct the railway to apply to the local authorities, and to take the necessary legal steps to secure the

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franchise and right of way. Hannibal v. Hannibal R. & Electric Co. (1915; Mo.) P.U.R.1916A, 1013.

But in State ex rel. United R. Co. v. Public Service Commission (Mo.) supra, the Missouri supreme court held that an order of the Public Service Commission directing a street railway company to apply to the municipal authorities for franchises to operate a street railway, or extension thereof, in the streets of a municipality, was a mere nullity and inoperative, since the state Constitution prohibited the general assembly from passing any law granting the right to construct and operate a street railway within any city or on any public highway, without first acquiring the consent of the local authorities having control of the street or highway. The court said: "The purpose of the order here sought to be enforced is to require the appellant to extend its road; that this is sought to be accomplished by indirection is not material; the resultant effect is the same. The order, while not directly requiring the appellant to make the extension, does require it to procure the consent of the proper authorities that (using the language of the order) 'the construction of all of said tracks which may be so authorized shall be made within the time herein specified.' The purpose of the order is therefore evident, although it is mandatory more by inference than express declaration. However this may be, the very words of the order carry with them a concession that consent is a prerequisite to its enforcement. Consent such as the law recognizes cannot be the subject of compulsion; its existence depends upon the exercise of the voluntary will of those from whom it is obtained."

It was further stated that the Public Service Commissions Act should clearly define the limits of the powers of the Commission; and the provisions of the Missouri act, authorizing the Commission to require a street railway company "to construct additional tracks and make such changes, improvements, and additions as may promote the security and convenience of the public, and secure adequate service and facilities for the transportation of passengers," is not sufficiently definite and explicit to warrant an order requiring a street railway company to apply to the local authorities for franchises for extensions of its road.

And it was also said by the New York Public Service Commission, First District, in Re Union R. Co. (N. Y.) supra, that the Commission would not recommend that a street railway company apply to the municipal authorities for a franchise to extend service over a street for which it has none, as the determination of this matter is, in the present state of the law, one for the judgment of the company's directors. W. M. G.

MINNIE O. BUCHANAN et al.
v.
BARTON W. JENCKS.

Rhode Island Supreme Court — January 12, 1916.

(38 R. I. 443, 96 Atl. 307.)

Tenant in common — removal of trees — destruction of property.

1. The cutting and removal of matured timber and wood by one cotenant from the common property is not a destruction of the property which will give a right of action to his cotenants.

[*See note on this question beginning on page* 993.]

Same — entry on common property — trespass.

2. One cotenant does not become a trespasser, ipso facto, by entering upon the common property, although he may become such if his acts amount to an ouster or are followed by destruction of the common property.

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Same — power to confer authority on another.

3. A cotenant in the enjoyment of his rights as such may authorize another to do whatever he may lawfully do himself.

Same — right to transfer interest.

4. A cotenant may devest himself of his entire interest in the common property, and thus bring into association with his former cotenants one who had theretofore been a stranger to the title.

Same — waste — statutory action.

5. The removal by one tenant in common of the mature timber from the common property is not within a statute giving a right of action for waste committed on the common property.

Same — timber as income.

6. Wood and timber which have matured so as to be ready to cut, is part of the revenue or income of the estate, rather than of its corpus, and may, therefore, be removed by one tenant in common of the property.

Same — removal of timber — trespass.

7. Trespass quare clausum fregit does not lie in favor of one tenant in common against a grantee of his cotenant for cutting and removing the mature timber from the property.

Same — statutory liability.

8. One entering on property held in common and cutting timber therefrom under license of one of the cotenants is not within the operation of a statute imposing liability upon one who cuts timber without leave of the owner.

Pleading — surplusage — rejection — transforming action.

9. Reference to the statute cannot be eliminated from a complaint seeking double damages under a statute for wrongfully cutting timber, as surplusage, and the action allowed to proceed as for common-law trespass.

Same — surplusage.

10. Surplusage, in a declaration, is the setting up of matter wholly foreign.

EXCEPTIONS by defendant to rulings of the Superior Court for Providence and Bristol Counties made during the trial of an action brought to recover damages for breaking and entering plaintiffs' close and cutting and carrying away wood and timber growing thereon, which resulted in a verdict in their favor. *Sustained.*

The facts are stated in the opinion of the court.

Messrs. Greene & Rousseau, for defendant:

Enoch Thayer, as tenant in common, rightfully sold the standing wood and timber on the common lot.

Dodd v. Watson, 57 N. C. (4 Jones, Eq.) 48, 72 Am. Dec. 577; 17 Am. & Eng. Enc. Law, 671; Gillum v. St. Louis, A. & T. R. Co. 5 Tex. Civ. App. 338, 23 S. W. 717; 30 Am. & Eng. Enc. Law, 340; Martyn v. Knowllys, 8 T. R. 145, 101 Eng. Reprint, 1313; Freeman, Co-Tenancy & Partition, § 251; Arthur v. Lamb, 2 Drew. & S. 428, 62 Eng. Reprint, 683, 12 L. T. N. S. 338; Honywood v. Honywood, L. R. 18 Eq. 306, 43 L. J. Ch. N. S. 652, 30 L. T. N. S. 671, 22 Week. Rep. 749; Huhn v. Peck, 18 Cal. 641; Baker v. Wheeler, 8 Wend. 505, 24 Am. Dec. 66; McCord v. Oakland Quicksilver Min. Co. 64 Cal. 134, 49 Am. Rep. 686, 27 Pac. 863; Alford v. Bradeen, 1 Nev. 230; Williard v. Williard, 56 Pa. 119; Angier v. Agnew, 98 Pa. 587, 42 Am. Rep. 624; Martyn v. Knowllys, 8 T. R. 145, 101 Eng. Reprint, 1313; Patureau v. Wilbert, 44 La. Ann. 355, 10 So. 782; Voyce v. Voyce, Gow, N. P. 201.

If Enoch Thayer had a right, as tenant in common, to sell this product of the common lot, the wood and timber growing thereon, his licensee acquired a perfect title by the sale.

Brown v. Wellington, 106 Mass. 318, 8 Am. Rep. 330.

A tenant in common may license another to do what he himself may do.

17 Am. & Eng. Enc. Law, 674; McGarrell v. Murphy, 1 Hilt. 132; Causee v. Anders, 20 N. C. 388 (4 Dev. & B. L. 246).

The cutting and carrying away under the circumstances could not be trespass quare clausum fregit, for the gravamen of this action is the unlawful entry, and the right of the tenant in common to enter is absolute and unlimited.

Anders v. Meredith, 20 N. C. 349 (4 Dev. & B. L. 199), 34 Am. Dec. 376; Wait v. Richardson, 33 Vt. 190, 78 Am. Dec. 622; Cubitt v. Porter, 8 Barn. & C. 258, 108 Eng. Reprint, 1039, 2 Mann. & R. 267, 6 L. J. K. B. 306; Booth v.

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Sherwood, 12 Minn. 426, Gil. 310; Jones v. Chiles, 8 Dana, 163; Roberts v. McGraw, 11 Bush, 26; Duncan v. Sylvester, 13 Me. 417, 29 Am. Dec. 572; Co. Litt. § 322.

Messrs. William G. Rich, Waterman & Greenlaw, and Charles E. Tilley for plaintiffs.

Vincent, J., delivered the opinion of the court:

The plaintiffs, Minnie O. Buchanan, Milon M. Walling, George H. Day, and Bessie G. Rich, together with one Enoch Thayer, are tenants in common of a certain wood lot situated in the town of Burrillville, containing upwards of 5 acres. This lot does not adjoin, nor is it used in connection with, any other property of the above-named cotenants, or either of them. The several interests of the parties in the lot are as follows: Minnie O. Buchanan, one sixth; Milon M. Walling, one third; George H. Day, one twelfth; Bessie G. Rich, one twelfth; and Enoch Thayer, one third. Some time in the year 1911, Enoch Thayer sold to one H. O. Aldrich the standing timber and wood upon said lot, and authorized him to cut and remove the same. Thereafterwards the said Aldrich transferred to the defendant, Barton W. Jencks, all the right to cut and remove said timber and wood which he had acquired from Thayer. It is not disputed that these sales and transfers were, in each case, made for a valuable consideration. Under these conditions, and acting under the authority thus conferred upon him, the defendant Jencks proceeded to and did cut and remove the timber and wood from the whole of said lot, whereupon the plaintiffs brought the present suit. The plaintiffs' declaration is in two counts. The first count alleges that the defendant with force and arms, without leave of the owners thereof, did cut, destroy, and carry away all the trees, wood, and underwood of the said plantiffs as tenants in common, etc., and concludes with the averment that the defendant by reason thereof became liable, under the statute, for two thirds of twice the value of the trees so cut, destroyed, and carried away, and two thirds of thrice the value of the wood and underwood so cut, destroyed, and carried away. The second count alleges that the defendant with force and arms, and without the leave of the owners thereof, broke and entered the close of the plaintiffs and then and there cut, destroyed, and carried away all the trees, wood, and underwood situated upon said lot belonging to the plaintiffs and the said Thayer, whereby the said defendant, under and by virtue of the statute, became liable to pay to the plaintiffs two thirds of twice the value of the trees so cut, destroyed, and carried away, and two thirds of thrice the value of the wood and underwood so cut, destroyed, and carried away.

It seems to us desirable to determine, in the first instance, whether or not Barton W. Jencks, through the several transfers before mentioned, acquired a right to enter upon this lot and cut wood and timber. It will not be disputed that one cotenant, by an entry upon the common property, does not ipso facto become a trespasser. He may become a trespasser, as some of the authorities hold, if his entry is accompanied by acts which amount to an ouster of his cotenants, or is followed by destruction of the common property. Enoch Thayer, as a tenant in common of this wood lot, had the right to enter upon the same without becoming a trespasser, and he had the right to cut timber and wood there, provided his entry did not amount, as before suggested, to an ouster of his cotenants, or involve the destruction of common property. Whether a cotenant may be required to account for his use of the common property, or what the rights of the other cotenants may be as to an accounting, are questions which we are not called upon to consider in the present proceed-

Tenant in common—entry on common property—trespass.

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ing. We see no reason why a cotenant, in the enjoyment of his rights as such, cannot authorize another to do whatever he might lawfully do himself. A contrary view, if followed to its logical conclusion, would restrict a cotenant's enjoyment of the common property to the sphere of his own personal activities, and would deprive him of the aid of others whom he might desire or need to employ. A cotenant has the right to devest himself of his entire interest in the common estate, and thus bring into association with his former cotenants one who had theretofore been a stranger to the title, and this he can do independently and without the consent of the other interests. This being so, it would seem unreasonable to say that a cotenant could not authorize another to go upon the common land, and do anything that he might do himself. We think therefore that in this case we must apply the same principles to the consideration of the acts of the defendant Jencks which we might have applied to Thayer, the cotenant, had he, in person, committed the acts of which the plaintiffs now complain.

Same—power to confer authority on another.

Same—right to transfer interest.

In Gillum v. St. Louis, A. & T. R. Co. 5 Tex. Civ. App. 338, 23 S. W. 717, it was held that one tenant in common has the right to sell marketable timber growing on the common estate, and pass a clear title thereto to the purchaser, and no right of action accrues to the other cotenants against the vendee, who carries off and uses the same. The court said in its opinion that "all tenants in common have a right to possession of the property, and a right to use and enjoy it. Each has a right to cultivate it, and reap the proceeds of such venture. Each has a right to cut the grass thereon and market it, and each has a right to sell the marketable timber growing thereon."

In Baker v. Wheeler, 8 Wend. 505, 24 Am. Dec. 66, it was held that a tenant in common may cut trees, proper to be cut, on the land held in tenantry in common, and the remedy of the cotenant is an action against the cotenant cutting the timber for his share of the value; and in that case the court also held that if one tenant in common may cut, himself, he may give license to another. This doctrine is also laid down in McCord v. Oakland Quicksilver Min. Co. 64 Cal. 134, 49 Am. Rep. 686, 27 Pac. 863, and in Alford v. Bradeen, 1 Nev. 228. In the latter case the court said: "There can be no doubt Barnes, as a tenant in common, might cut timber himself on the ranch, or he might authorize another to do what he himself could do. . . . Whatever the rights or remedies of the other tenants for recovering their share of the value of the timber cut and sold, they could not take the timber from one to whom Barnes had sold it."

In Causee v. Anders, 20 N. C. 388 (4 Dev. & B. L. 246), it was held that a tenant in common has no right to inflict a battery upon one who enters upon the land under the authority of a cotenant; and in this respect there is no distinction between the cotenant and one entering with him and under his authority.

Martyn v. Knowllys, 8 T. R. 145, 101 Eng. Reprint, 1313, was an action on the case, in the nature of waste, brought by one cotenant against another for cutting down trees of a proper age and growth for being cut. In the lower court a verdict was directed for the plaintiff, but upon motion in the court of King's bench to enter a verdict for the defendant, Lord Kenyon, Ch. J., said: "This verdict has neither principle nor authority for its support. . . . If one tenant in common misuse that which he has in common with another, he is answerable to the other in an action as for misfeasance. But here it does not appear that the defendant committed anything like waste; no injury was done to the inheritance; no timber was improperly felled;

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the defendant only cut those trees that were fit to be cut. And if he were liable in such an action as this, it would have the effect of enabling one tenant in common to prevent the other's taking the fair profits of their estate. In another form of action, the plaintiff will be entitled to recover a moiety of the value of the trees that were cut."

It appears from the testimony that the larger part of the timber and wood upon the lot in question had reached maturity, and was in a condition fit for cutting. The plaintiffs claimed and offered some testimony for the purpose of showing that the defendant, in addition to the wood and timber which had reached maturity, had also cut and removed other wood and undergrowth which had not matured, and contended that as to the latter they were entitled to recover under the statute their proportionate damages, amounting to two thirds of thrice the value of such wood and underwood so cut and removed. The plaintiffs, however, offered no testimony from which the quantity or the value of the undeveloped material alleged to have been cut and removed could be ascertained or determined, and the consideration of that matter is therefore necessarily eliminated.

We come now to the discussion of the rights of the several parties or cotenants, as affected by the acts of the defendant in cutting and removing all of the timber and wood which had reached maturity at the time of the cutting.

If there was anything in the conduct of the defendant, acting within the authority of Thayer, the cotenant, which amounted to the ousting of the cotenant plaintiffs, or if the cutting and removal of the ripe product of the lot was a destruction of some portion of the corpus of the estate, there is ample authority for holding that the defendant, although standing in the place of a cotenant, would be liable in trespass in the same manner and to the same extent as Thayer himself would have been under like circumstances.

We do not find anything in the evidence showing an ouster of the plaintiffs. So far as appears, they were in no way prevented by the defendant or by Thayer from entering upon the premises and cutting and removing timber and wood, had they seen fit to do so, and we do not think that the sale, cutting, and removal of matured timber and wood amounts to a destruction of the property which the law contemplates. If Thayer, or the defendant claiming to act under him, had, for example, wantonly, maliciously, or carelessly caused the burning over of the wood lot in question, either consuming the wood and timber, or rendering it unmarketable and unfit for use, it would be clear that there had been a destruction, at least in part, of the corpus of the estate.

Same—removal of trees—destruction of property.

In our view of the case, the cutting and removal of the matured product of the land, by one cotenant, would not be in contravention of § 2, chap. 333, of the General Laws of 1909, as that section only provides for the recovery of damages from a cotenant who has committed waste on the common estate. The gathering of the wood and timber fit for cutting cannot be considered as waste, and for that reason the section is not applicable to the case at bar, as well as for the further reason that it does not authorize or apparently contemplate an action of trespass.

Same—waste—statutory action.

In the present case the wood and timber has been sold, cut, and removed by the defendant, acting under the authority of the cotenant Thayer, who may or may not be liable, under the statute, to account to his cotenants for their due proportion of the proceeds; but, as before observed, we are not at present concerned with that question. This lot was simply a wood lot whereon trees were allowed to grow until they reached maturity, and were fit

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to cut for timber or firewood. When the crop had matured or ripened, it could be cut, removed, and sold with the same degree of propriety, and with as much reason, as a crop of hay or any other product of the land. To be sure, a crop of hay grows and matures more quickly than trees, and there are yet other crops that develop and ripen more speedily than hay. Because one thing may mature quickly and another require a long period to fully develop, it does not follow that a different principle should be applied in determining the question in the one case than in the other. The crop, whether it be hay in the meadow or trees in the wood lot, is of the income of the property, and to harvest it or gather it at its maturity cannot reasonably be called a destruction of the corpus of the estate.

In 2 Waterman on Trespass, 391, it is stated that "there is a manifest distinction between the cases in which one tenant in common appropriates the proceeds, such as rents, profits, or income of the estate, and where he practically destroys the estate itself, or some portion of it. In the latter, trespass may be maintained; in the former, it cannot."

In support of such statement the author cites, among others, the case of Symonds v. Harris, 51 Me. 14, 81 Am. Dec. 553, which was a case in which one tenant in common took and carried away the machinery of a mill, which formed a part of the common property and which was essential to its operation, and incorporated it into another mill of which he was sole owner, and it was held that the action of the cotenant amounted to a destruction of the common property. So, in another case which the author cites, Blanchard v. Baker, 8 Me. 253, 23 Am. Dec. 504, when a tenant in common took and carried away all the machinery of a mill, his act was held to be tantamount to the destruction of the common property. See also Voyce v. Voyce, Gow, N. P. 201. Other authorities might be cited to the effect that the cutting of trees of a proper age and growth, by one tenant in common, does not furnish any basis for an action of trespass by his cotenant; but further citations on that point are unnecessary. Assuming, as many authorities hold, that an action of trespass will lie by one tenant in common against his cotenant, only where there has been an ouster or the destruction of some portion of the common property, and that the cutting of matured wood and timber is a privilege of the cotenant, it naturally follows that such wood and timber is not of the corpus of the estate, but is of the revenue and income.

Same—timber as income.

The plaintiffs' declaration, as before stated, is in two counts. The second count alleges a trespass quare clausum fregit. We do not think that the plaintiffs' suit is maintainable upon such a count. The gist of the count is that the defendant broke and entered the close of the plaintiffs. But a cotenant cannot be said to be guilty of a trespass quare clausum fregit, for the reason that he has, in common with his cotenants, a right to enter upon the premises, and such entry does not constitute a trespass. Neither could the defendant be guilty of trespass in entering the close, because he entered upon the authority of Thayer, who was a cotenant with the plaintiffs.

Same—removal of timber—trespass.

In Anders v. Meredith, 20 N. C. 339 (4 Dev. & B. L. 199), 34 Am. Dec. 376, the court said: "The possession of one tenant in common is the possession of the other; each has a right to enter upon the land, and enjoy it jointly with the others. If one tenant in common destroys houses, trees, or does any act amounting to waste or destruction in woods or other such property, the other tenant may have an action on the *case* against him. But he never can, in any event, have an action of trespass quare clausum fregit against his cotenant."

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See also 1 Co. Inst. § 323; Wait v. Richardson, 33 Vt. 190, 78 Am. Dec. 622; Booth v. Sherwood, 12 Minn. 426, Gil. 310; Jones v. Chiles, 8 Dana, 163; Duncan v. Sylvester, 13 Me. 417, 29 Am. Dec. 512.

The first count alleges a trespass on the part of the defendant in taking and carrying away trees, wood, and underwood, and converting and disposing of the same to his own use, "whereby and by virtue of the statute in that behalf made and provided" the defendant became liable to pay damages for the same to said plaintiffs, in the proportion of two thirds of thrice the value of the trees so cut and carried away, and two thirds of thrice the value of the wood and underwood, etc. The statute upon which this count is based is chapter 335 of the General Laws of 1909, which is as follows: "Section 1. Every person who shall cut, destroy, or carry away any tree, timber, wood, or underwood whatsoever, lying or growing on the land of any other person, without leave of the owner thereof, shall, for every such trespass, pay the party injured twice the value of any tree so cut, destroyed, or carried away; and for the wood or underwood, thrice the value thereof; to be recovered by action of trespass."

It will be observed that this statute penalizes a defendant who shall, without leave, commit a trespass on the land of another person. We do not think that this statute was intended to apply to a cotenant, or his licensee, who had a right to enter upon the land and to avail himself of its benefits and revenue; but was designed to protect the owners of land from the invasion of those who were strangers to the title.

Same—statutory liability.

The question may now arise as to whether the reference to the statute, as in the first count of the plaintiffs' declaration, may not be eliminated as surplusage, and the remainder thereof stand as a good and sufficient count for a common-law trespass. We do not think that it can be so held. The plaintiffs seek to impose upon the defendant a penalty created by a special statute, and in their count they have so declared. They have, in other words, counted upon the statute, and by their suit have undertaken to avail themselves of its special provisions: "Counting upon a statute consists in making express reference to it—as, by the words, 'against the form of the statute,' or 'by force of the statute in such case made and provided.'" Gould, Pl. 5th ed. 46, note 3.

Pleading—surplusage—rejection—transforming action.

The reference to the statute is essential to the recovery which the plaintiffs are attempting to effect, for without it neither double nor triple damages could be recovered. This court held, in Bell v. Providence Gas Co. 36 R. I. 382, 90 Atl. 743, that, in order to recover double damages under a penal statute, such statute must be declared upon. Therefore, the setting up of the statute being indispensable, that portion of the plaintiff's count which makes reference to it cannot be eliminated or disregarded as surplusage. "Surplusage" in a declaration has been concisely defined as the setting up of matter wholly foreign, as, for example, where a plaintiff brings suit upon one of the covenants of a deed, and sets out in his declaration other covenants wholly irrelevant to the cause. Stephen, Pl. 3d Am. ed. 364.

Same—surplusage.

In 1 Chitty on Pleading, 13th Am. ed. p. 215, the rule is laid down that "if . . . an offense be created by a statute, and a penalty be inflicted, the mere statement of the facts constituting the offense will be insufficient, for there must be an express reference to the statute, as by the words, 'contrary to the form of the statute,' etc., in order that it may appear that the plaintiff grounds his case upon and intends to bring it within the statute."

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And in Gould on Pleading, 5th ed. 143, we find it stated that "if, in declaring upon a public statute, the plaintiff *so* counts upon it as to confine himself to its terms as recited, as by the words, 'contra formam statuti predicti,' but misrecites it in a material part, the declaration is ill in substance. For, though the recital of a public statute is *unnecessary*, yet, it being thus recited and counted upon, the plaintiff must recover upon it, if at all, *as* recited."

Our observations and the authorities cited upon this point are equally applicable to the second count, which, in respect to its reference to the statute, is like the first count.

It seems to us that the plaintiffs, through an erroneous construction of the statute referred to, have been led to base a suit thereon which cannot, in any aspect of it, be maintained.

The parties, both plaintiffs and defendant, have in their briefs discussed several other questions which we deem it unnecessary to consider, as our conclusions already reached demolish the foundation upon which the case rests. We think that the defendant's exception to the refusal of the trial court to direct a verdict for the defendant must be sustained, and that the case must be remitted to the Superior Court, with direction to enter judgment for the defendant.

An opportunity will be given to the plaintiffs to appear before this court on January 26, 1916, at 10 o'clock A. M., if they shall see fit, and show cause, if any they have, why said case should not be remitted to the Superior Court, with direction to enter judgment for the defendant.

Petition for rehearing denied.

ANNOTATION.

Rights of cotenants inter se as to timber.

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I. Scope.

It is the purpose of the present annotation to treat the general question of the rights and liabilities inter se of tenants in common of lands, as to the timber growing thereon, excluding only the general question of partition of such lands. This exclusion is based on the fact that no particular significance generally attaches to the fact that there is timber growing on the common property. However, no cases have been excluded merely because they involved a claim to partition, if they also involved other points which fall within the scope of the present treatment.

II. Rights and privileges.

a. In general.

One tenant in common of lands has no right to cut trees and timber growing on the common property, when such cutting will amount to destructive waste. See the following cases which in effect so hold:

United States.—Prescott v. Nevers (1827) 4 Mason, 326, Fed. Cas. No.

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11,390; Bradley v. Reed (1863) 2 Pittsb. 519, Fed. Cas. No. 1,785.

Indiana.—Stout v. Curry (1886) 110 Ind. 514, 11 N. E. 487.

Iowa.—Dodge v. Davis (1892) 85 Iowa, 77, 52 N. W. 2.

Kentucky.—Nevels v. Kentucky Lumber Co. (1900) 108 Ky. 550, 49 L.R.A. 416, 94 Am. St. Rep. 388, 56 S. W. 969; Burt & B. Lumber Co. v. Clay City Lumber Co. (1901) 111 Ky. 725, 64 S. W. 652; Winchester v. Watson (1916) 169 Ky. 213, 183 S. W. 483; Rush v. Cornett (1916) 169 Ky. 714, 185 S. W. 88; Layne v. Layne (1917) 177 Ky. 592, 197 S. W. 1062; Emmons v. Evans (1917) 178 Ky. 180, 198 S. W. 900.

Massachusetts.—Adams v. Palmer (1856) 6 Gray, 336; Jenkins v. Wood (1888) 145 Mass. 494, 14 N. E. 512.

Michigan.—Benedict v. Torrent (1890) 83 Mich. 181, 11 L.R.A. 278, 21 Am. St. Rep. 589, 47 N. W. 129; Hennes v. Charles Hebard & Sons (1912) 169 Mich. 670, 135 N. W. 1073.

Minnesota. — Shepard v. Pettit (1883) 30 Minn. 119, 14 N. W. 511.

Mississippi.—Leatherbury v. McInnis (1904) 85 Miss. 160, 107 Am. St. Rep. 274, 37 So. 1018.

New Jersey. — Jackson v. Beach (1886) — N. J. Eq. —, 3 Atl. 375.

New York. — Hawley v. Clowes (1816) 2 Johns. Ch. 122; Elwell v. Burnside (1865) 44 Barb. 447.

Rhode Island. — BUCHANAN v. JENCKS (reported herewith), ante, 986.

South Carolina.—Johnson v. Johnson (1835) 2 Hill, Eq. 277, 29 Am. Dec. 72; Hancock v. Day (1840) McMull. Eq. 69, 36 Am. Dec. 293; Thompson v. Bostick (1840) McMull. Eq. 75; Holt v. Robertson (1831) McMull. Eq. 475.

Texas.—Gillum v. St. Louis, A. & T. R. Co. (1893) 5 Tex. Civ. App. 338, 23 S. W. 717; Collier v. Wm. Cameron & Co. (1909) 55 Tex. Civ. App. 153, 117 S. W. 915.

West Virginia.—Hardman v. Brown (1916) 77 W. Va. 478, 88 S. E. 1016.

Wisconsin. — Sullivan v. Sherry (1901) 111 Wis. 476, 87 Am. St. Rep. 890, 87 N. W. 471.

Canada.—Brittain v. Parker (1879) 12 N. S. 589.

England. — Martyn v. Knowllys (1799) 8 T. R. 145, 101 Eng. Reprint, 1313; Hole v. Thomas (1802) 7 Ves. Jr. 589, 32 Eng. Reprint, 237; Twort v. Twort (1809) 16 Ves. Jr. 128, 33 Eng. Reprint, 932; Arthur v. Lamb (1865) 2 Drew. & S. 428, 62 Eng. Reprint, 683, 12 L. T. N. S. 338.

And it is equally well settled that a tenant in common of land has a right to cut wood and timber necessary to the use and enjoyment of the property, and that other tenants in common cannot prevent him from doing so. Hawley v. Clowes (1816) 2 Johns. Ch. (N. Y.) 122; Peck v. Ward (1852) 18 Pa. 506; Brittain v. Parker (1879) 12 N. S. 589; Miller v. Eastern Trust Co. (1910) 44 N. S. 268; Munsie v. Lindsay (1883) 10 Ont. Pr. 173. And see Ewer v. Lovell (1857) 9 Gray (Mass.) 276, and Hastings v. Hastings (1872) 110 Mass. 280.

And a cotenant clearly has a right to go upon the common property and appropriate a portion, at least, of the timber (Hatton v. Bodan Lumber Co. (1909) 57 Tex. Civ. App. 478, 123 S. W. 163); and such portion may correspond in extent with his share of the estate (Hihn v. Peck (1861) 18 Cal. 640; Dodd v. Watson (1858) 57 N. C. (4 Jones, Eq.) 48, 72 Am. Dec. 577), at least, where the cutting is in accordance with proper husbandry (Arthur v. Lamb (1865) 2 Drew. & S. 428, 62 Eng. Reprint, 683, 12 L. T. N. S. 338; Munsie v. Lindsay (1883) 10 Ont. Pr. 173; and see Twort v. Twort (1809) 16 Ves. Jr. 128, 33 Eng. Reprint, 932), and does not amount to a destruction of the property (Brittain v. Parker (1879) 12 N. S. 589).

And a tenant in common has a right to cut the mature or marketable timber on the undivided common property, subject only to account to his cotenants for their share. United States v. Northern P. R. Co. (1887) 6 Mont. 351, 12 Pac. 769; Baker v. Wheeler (1832) 8 Wend. (N. Y.) 505, 24 Am. Dec. 66; BUCHANAN v. JENCKS (reported herewith), ante, 986; Gillum v. St. Louis, A. & T. R. Co. (1893) 5 Tex. Civ. App. 338, 23 S. W. 717; De Witz v. Saner-Whiteman Lumber Co. (1913) — Tex. Civ. App. —, 155 S. W. 980; McDodrill v. Pardee & C. Lumber Co.

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(1895) 40 W. Va. 564, 21 S. E. 878; Martyn v. Knowllys (1799) 8 T. R. 145, 101 Eng. Reprint, 1313.

This is upon the theory that in so cutting the mature timber the cotenant makes no unusual use of the real estate of which he is a tenant in the fee. See Freeman, Cotenancy & Partition, § 251. In other words, each cotenant has a right to possession of the common property, and a right to use and enjoy it in an ordinary manner, and so doing does not constitute a destruction of the estate. United States v. Northern P. R. Co. (1887) 6 Mont. 351, 12 Pac. 769; Gillum v. St. Louis, A. & T. R. Co. (1893) 5 Tex. Civ. App. 338, 23 S. W. 717. And see the reported case (BUCHANAN v. JENCKS 986). To hold otherwise would have the effect of enabling one tenant in common to prevent the others taking the fair profits of the estate. Martyn v. Knowllys (1799) 8 T. R. 145, 101 Eng. Reprint, 1313. And it has been said that it follows from this reasoning that, since in so taking the timber the cotenant only does that which his relation to the other cotenants and to the land from which the timber is taken justifies, he cannot be said in any sense to be a trespasser. De Witz v. Saner-Whiteman Lumber Co. (1913) — Tex. Civ. App. —, 155 S. W. 980. To the same effect is the reported case (BUCHANAN v. JENCKS). Nor is it essential that a cotenant, before taking mature and marketable timber, should first acquire the consent of the other cotenants; for to require this would, in many instances, be practically a denial of any benefit to him from the use of such timber, and would require a partition of the estate before he could exercise any individual control over his interest in that regard. De Witz v. Saner-Whiteman Lumber Co. (Tex.) supra.

Where a tenant in common of land enters thereon, and cuts wood and timber, he is presumed to have done so under his legal title. Whiting v. Dewey (1834) 15 Pick. (Mass.) 428. And see the reported case (BUCHANAN v. JENCKS).

b. Contracts.

Of course, tenants in common may freely contract between themselves regarding timber growing on the common property, and such contracts, if free from fraud, etc., will be enforced. See Prentiss v. Roberts (1860) 49 Me. 127; Boyce v. Boyce (1900) 124 Mich. 696, 83 N. W. 1013; and Harman v. Moss (1917) 121 Va. 399, 93 S. E. 609.

But a conveyance by a tenant in common of timber lands to a stranger, of anything but an undivided interest in the "whole" of the land, is void as to other cotenants to whose rights such interest is prejudicial; hence a sale by a cotenant of his interest in the timber alone, with license to enter and remove the same, does not render the purchaser a cotenant of the nonconveying tenants in common. Benedict v. Torrent (1890) 83 Mich. 181, 11 L.R.A. 278, 21 Am. St. Rep. 589, 47 N. W. 129. So, in Lee v. Follensby (1909) 83 Vt. 35, 138 Am. St. Rep. 1061, 74 Atl. 327, on subsequent appeal in (1913) 86 Vt. 401, 85 Atl. 915, it was held that one tenant in common of undivided lands cannot, as against the other cotenants, convey the timber on a described portion of the property, such an attempted conveyance being void as to such other cotenants. But the conveyance is void only in so far as it affects the cotenants' rights, and is not void as against the grantor, who may be compelled to make his conveyance effectual, as by bringing an action against his cotenants for partition. Mee v. Benedict (1893) 98 Mich. 260, 22 L.R.A. 641, 39 Am. St. Rep. 543, 57 N. W. 175.

c. Licenses.

One tenant in common may license his cotenant to cut and remove the timber from the common lands. Prentiss v. Roberts (1860) 49 Me. 127. But when there is an attempt to justify the cutting by alleging a license of this character, the burden is on the alleged licensee to show, not only that he had a license, but the character and conditions of the same. Ibid.

As to licenses to third parties, the general rule is, that where a cotenant has a right to cut trees "proper" to

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be cut, or "marketable timber," subject only to account for the value of his cotenants' interest, he may license, as against such cotenants, a third person so to cut. Baker v. Wheeler (1832) 8 Wend. (N. Y.) 505, 24 Am. Dec. 66; Gillum v. St. Louis, A. & T. R. Co. (1893) 5 Tex. Civ. App. 338, 23 S. W. 717. This is especially true where the license is given in satisfaction of a demand due both tenants in common. Baker v. Wheeler (N. Y.) supra.

So, in the reported case (BUCHANAN v. JENCKS, ante, 986) it was ruled that one tenant in common may license a stranger to cut the "matured" timber from the common lands.

However, in Baker v. Whiting (1839) 3 Sumn. 475, Fed. Cas. No. 787, it was held that a tenant in common cannot, without the consent of his cotenants, grant permits to third persons to cut timber from the common premises for their own use, for a compensation. The court said that the defendant, as a tenant in common, had "no authority whatsoever, without the consent, express or implied, of his cotenants, to grant any such permits or to authorize any such acts."

And again, in Richey v. Brown (1885) 58 Mich. 435, 25 N. W. 386, it was held that one cotenant of lands on which valuable timber is growing cannot license the removal of the same by a stranger to the title, so as to bind other cotenants who neither authorized nor consented to the removal. The court here proceeded upon the theory that the cotenant who granted the license had no right in himself to make a gift or sale or other transfer of the timber.

Nor can one cotenant of undivided lands license a stranger to cut timber from a described portion of the common property, or to enter for that purpose. Lee v. Follensby (1909) 83 Vt. 35, 138 Am. St. Rep. 1061, 74 Atl. 327, on subsequent appeal in (1913) 86 Vt. 401, 85 Atl. 915.

III. Legal remedies.

a. Generally.

1. In the absence of statute.

At common law one tenant in common had no legal remedy against his cotenant, even for waste. See Bradley v. Reed (1863) 2 Pittsb. 519, Fed. Cas. No. 1,785, and Gulf Red Cedar Co. v. Crenshaw (1902) 138 Ala. 134, 35 So. 50. Unless, perhaps, where one cotenant made the other his bailiff. See Gulf Red Cedar Co. v. Crenshaw (Ala.) supra.

Likewise, it has been held that he had no general right to maintain an action of assumpsit for the mere cutting of trees on the common property. Smith v. Woodman (1854) 28 N. H. 520.

And upon the theory that a cotenant is entitled to the joint use and to possession of the common property, it has been held, generally, that the mere cutting and removal of timber from such property by one cotenant does not render him liable to his cotenants in an action ex delicto, such as tort or trespass. Patureau v. Wilbert (1892) 44 La. Ann. 355, 10 So. 782; Wilsey v. Loveland (1917) 180 App. Div. 279, 167 N. Y. Supp. 546; Darden v. Cowper (1859) 52 N. C. (7 Jones, L.) 210, 75 Am. Dec. 461; McDodrill v. Pardee & C. Lumber Co. (1895) 40 W. Va. 564, 21 S. E. 878.

And the authority, generally, is to the effect that one tenant in common, in the absence of statute or actual ouster, cannot maintain trespass quare clausum fregit against a cotenant for having cut and removed timber from the common lands. Hastings v. Hastings (1872) 110 Mass. 280; Filbert v. Hoff (1862) 42 Pa. 97, 82 Am. Dec. 493; Owen v. Foster (1841) 13 Vt. 263; Wait v. Richardson (1860) 33 Vt. 190, 78 Am. Dec. 622; Kane v. Garfield (1887) 60 Vt. 79, 13 Atl. 800. To the same effect is the reported case (BUCHANAN v. JENCKS, ante, 986), wherein it was said that a cotenant has a right to enter, so that a mere entry cannot constitute a trespass. Nor, it has been held, can a licensee of a cotenant be guilty of trespass quare clausum fregit in entering upon the common property and cutting timber. See the reported case (BUCHANAN v. JENCKS). And in Roberts v. McGraw (1874) 11 Bush (Ky.) 26, it was held that one tenant in common could not maintain an action of trespass against

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his cotenants, for the cutting of timber on the common property, the court applying the doctrine that the unity of interest and possession enjoyed by tenants in common prevents the maintaining of trespass by one against another, as to matters relating to the common property.

And applying the general rule that a tenant in common cannot maintain replevin against a cotenant because they have each and equally a right of possession, it has been held that a tenant in common of timber, who has cut and removed the same without the consent of the owners of the remaining interest, has no such right of possession in it as will sustain an action of replevin against such other owners who have taken possession of it. Bohlen v. Arthurs (1885) 115 U. S. 482, 29 L. ed. 454, 6 Sup. Ct. Rep. 114. And the same rule applies, as against one to whom the cotenant sold the timber. Alford v. Bradeen (1865) 1 Nev. 228.

So, it has been expressly ruled that, since one tenant in common may cut trees "proper" to be cut on the common property, the remedy is not in trover, but in an action against the cotenant cutting the timber for an accounting for his share of the value. Baker v. Wheeler (1832) 8 Wend. (N. Y.) 505, 24 Am. Dec. 66. And in the much cited English case of Martyn v. Knowllys (1799) 8 T. R. 145, 101 Eng. Reprint, 1313, it was expressly held that one tenant in common cannot maintain an action on the case in the nature of waste, against another cotenant, for the cutting down trees on the common property, of a proper age and growth to be cut.

However, an exception to the rule that one cotenant cannot maintain trover against his cotenant for the common property arises, where the latter has lost or destroyed the property, or so converted or appropriated it to his own use as to render any further enjoyment by his cotenant impossible; in consequence of which it has been held that trespass or trover may be maintained, where one tenant in common has converted all the timber upon the common timber lands, by cutting and removing it. Hennes v. Charles Hebard & Sons (1912) 169 Mich. 670, 135 N. W. 1073; Sullivan v. Sherry (1901) 111 Wis. 476, 87 Am. St. Rep. 890, 87 N. W. 471.

So, in Shepard v. Pettit (1883) 30 Minn. 119, 14 N. W. 511, it was held that one cotenant who, without the consent of the others, cuts and sells as his own the timber growing on the common property, is liable to such others for a conversion of their share; the court saying that "standing trees are, ordinarily at least, to be regarded, as between the cotenants, as part of the real estate, and severing and removing them without consent of other cotenants a destruction to that extent of the realty. After the severance they are the property of the cotenants, and by a conversion of them, the cotenant converting them becomes liable to his cotenants, as in case of other personal property."

And in Dodge v. Davis (1892) 85 Iowa, 77, 52 N. W. 2, where one tenant in common ousted his cotenant from possession, denied his right to participate in profits, and claimed the absolute title to the property, it was held that the disseised tenant could maintain an action for damages for waste committed by cutting trees growing on the land, as well as for the value of the use of the land while ousted. And that trespass for the cutting of timber may be maintained by a cotenant who has been unequivocally ousted, see Filbert v. Hoff (1862) 42 Pa. 97, 82 Am. Dec. 493.

It also has been held that, where one tenant in common has sold all the timber growing on the common property and received the proceeds, the other cotenant may maintain assumpsit for money had and received, provided no question is made in regard to the title of the land. Miller v. Miller (1828) 7 Pick. (Mass.) 133, 19 Am. Dec. 264. Here, of course, the maintaining of an action of this character was upheld solely because of the fact that no question was raised which in any way involved the title to the common property.

2. Under statute.

In many jurisdictions tenants in common are, by express statutory pro-

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vision, made liable inter se in damages for waste; and such statutes, of course, apply to timber, the cutting or removing of which amounts to waste. This was the view taken in the following cases: Nevels v. Kentucky Lumber Co. (1900) 108 Ky. 550, 49 L.R.A. 416, 94 Am. St. Rep. 388, 56 S. W. 969 (applying Ky. Stat. § 2332); Burt & B. Lumber Co. v. Clay City Lumber Co. (1901) 111 Ky. 725, 64 S. W. 652 (same statute); Winchester v. Watson (1916) 169 Ky. 213, 183 S. W. 483 (same statute); Emmons v. Evans (1917) 178 Ky. 180, 198 S. W. 900 (applying the same statute, and holding that an action to recover damages for the wrongful sale of timber is not an action in trespass, but for waste under the statute); Benedict v. Torrent (1890) 83 Mich. 181, 11 L.R.A. 278, 21 Am. St. Rep. 589, 47 N. W. 129 (construing Mich. How. Stat. § 7782); Hennes v. Hebard (1912) 169 Mich. 670, 135 N. W. 1073 (referring to 3 Mich. Comp. Laws, § 11,118); Elwell v. Burnside (1865) 44 Barb. (N. Y.) 447 (construing and applying 2 N. Y. Rev. Stat. 334, § 3); BUCHANAN v. JENCKS (reported herewith), ante, 986; McDodrill v. Pardee & C. Lumber Co. (1895) 40 W. Va. 564, 21 S. E. 878 (applying W. Va. Code, chap. 92, § 2); Hardman v. Brown (1916) 77 W. Va. 478, 88 S. E. 1016 (construing and applying W. Va. Code 1913, §§ 2, 4); 5 Bacon, Abr. 306 (quoting Westminster II. chap. 22).

And timber on timber lands has been declared a part of the realty, so that one cotenant cannot, without the consent of his cotenants, devest the latter of their interest in such timber by a sale of all of a particular kind of logs, since the cutting and removal thereof would constitute waste. Nevels v. Kentucky Lumber Co.; Burt & B. Lumber Co. v. Clay City Lumber Co.; Winchester v. Watson, and Emmons v. Evans (Ky.) supra. And in the New York case of Elwell v. Burnside (1864) 44 Barb. (N. Y.) 447, in deciding what cutting and removal of timber constitutes waste under such a statute, it was ruled in effect that any cutting which worked a permanent injury to the common lands constituted waste, except it were cut for necessary firewood, or was timber sufficient and suitable for necessary use on the premises. However, in the reported case (BUCHANAN v. JENCKS, ante, 986), it was expressly ruled that the cutting of "matured" timber from the common property was not waste, within the meaning of the Rhode Island statute. And it has been held that a tenant in common is guilty of committing waste wantonly, within the meaning of § 4, chap. 92, West Virginia Code 1913, when, with knowledge of his cotenants' rights, and in total disregard thereof, and with the design and purpose of ignoring such rights, he purposely, and with intent to appropriate the same, cuts and removes the standing timber from the common property. Hardman v. Brown (1916) 77 W. Va. 478, 88 S. E. 1016.

And, as shown by the adjudications, statutes expressly declaring that a tenant in common must respond in damages for cutting timber on the common estate without giving proper notice, etc., to the other cotenants, have been enacted in a number of jurisdictions. See Prescott v. Nevers (1827) 4 Mason, 326, Fed. Cas. No. 11,390 (construing Maine Act, March 15, 1821, chap. 35, § 2); 1 Smith's Laws (Me.) p. 137); Mills v. Richardson (1857) 44 Me. 79 (construing and applying Me. Rev. Stat. chap. 129, § 7); Hazen v. Wight (1895) 87 Me. 233, 32 Atl. 887 (construing and applying Me. Rev. Stat. chap. 95, § 5); Hall v. Hall (1914) 112 Me. 234, 91 Atl. 949 (construing and applying Me. Rev. Stat. chap. 95, § 5); Jenkins v. Wood (1888) 145 Mass. 494, 14 N. E. 512 (construing Mass. Pub. Stat. chap. 179, §§ 6, 7); Proctor v. Proctor (1903) 182 Mass. 415, 65 N. E. 797 (construing Mass. Pub. Stat. chap. 179, §§ 6, 7; Rev. Laws, chap. 185, §§ 4, 5); Haley v. Taylor (1900) 77 Miss. 867, 78 Am. St. Rep. 549, 28 So. 752 (construing Miss. Code 1892, § 4412); Blake v. Milliken (1843) 14 N. H. 213 (construing New Hampshire Act, July 5, 1834, chap. 164); Smith v. Woodman (1854) 28 N. H. 520 (construing N. H. Rev. Stat. chap. 180, §§ 5, 6); Mooers v. Bunker (1854) 29 N. H. 420 (construe-

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ing N. H. Rev. Stat. chap. 180, §§ 5, 6); Duff v. Bindley (1883) 16 Fed. 178 (construing Pennsylvania Act, May 4, 1869, §§ 1, 2); Wheeler v. Carpenter (1884) 107 Pa. 271 (construing Pennsylvania Act, May 4, 1869); Bush v. Gamble (1889) 127 Pa. 43, 17 Atl. 865 (construing Pennsylvania Act, May 4, 1869, §§ 1, 2).

And in a few instances the remedy by action for damages is provided against a cotenant cutting timber during the pendency of a proceeding for partition. See Maxwell v. Maxwell (1850) 31 Me. 184, 50 Am. Dec. 657, and Mills v. Richardson (1857) 44 Me. 79, both of which construe and apply Me. Rev. Stat. chap. 129, § 7; and Jenkins v. Wood (1888) 145 Mass. 494, 14 N. E. 512, construing Mass. Pub. Stat. chap. 179, § 6.

Some of the statutes expressly provide that the damages shall be recovered in an action of "tort." See for example Jenkins v. Wood (Mass.) supra, and Proctor v. Proctor (1903) 182 Mass. 415, 65 N. E. 797, both of which quote Mass. Pub. Stat. chap. 179, §§ 6, 7; Mass. Rev. Laws, chap. 185, §§ 4, 5.

In Michigan and West Virginia, the tenant in common committing waste by cutting and removing timber from unoccupied lands is expressly declared subject to an action on the case for damages. See Benedict v. Torrent (1890) 83 Mich. 181, 11 L.R.A. 278, 21 Am. St. Rep. 589, 47 N. W. 129; Hennes v. Hebard (1912) 169 Mich. 670, 135 N. W. 1073; and McDodrill v. Pardee & C. Lumber Co. (1895) 40 W. Va. 564, 21 S. E. 878.

In New Hampshire, the statute expressly authorizes the injured party or parties to bring "an action of assumpsit" for the damages sustained. See Blake v. Milliken (1843) 14 N. H. 213; Smith v. Woodman (1854) 28 N. H. 520; and Mooers v. Bunker (1854) 29 N. H. 420.

Under the Pennsylvania statute (Act May 4, 1869, §§ 1, 2) which gives nonconsenting cotenants every remedy in law or equity "which they now have against an entire stranger to the title," it has been held that a nonconsenting cotenant may recover in an action of trover for wrongful conversion the full value, without deductions for labor, etc., of his interest in the lumber into which the timber has been converted. Duff v. Bindley (1883) 16 Fed. 178. Likewise, it has been held that trespass quare clausum fregit may be maintained under the Pennsylvania statute. Wheeler v. Carpenter (1884) 107 Pa. 271; Bush v. Gamble (1889) 127 Pa. 43, 17 Atl. 865.

And under the Maine statutes, above cited, it has been held that trespass quare clausum fregit is the proper form of action in which to recover the damages resulting from a wrongful cuting of timber on common property. Maxwell v. Maxwell (1850) 31 Me. 184, 50 Am. Dec. 657; Mills v. Richardson (1857) 44 Me. 79; Hazen v. Wight (1895) 87 Me. 233, 32 Atl. 887.

It has also been held that the Maine statute (Act March 15, 1821, chap. 35, § 2; 1 Smith's Laws (Me.) p. 137) which punishes waste and cutting down trees by one tenant in common without notice to his cotenants, by treble damages, being highly penal, must be strictly construed, and that it applies only in cases of acknowledged tenancies in common; and, therefore, that it does not cover a case where the title is claimed by the defendant by entirety or disseisin. Prescott v. Nevers (1827) 4 Mason, 326, Fed. Cas. No. 11,390. In this case the court, in applying the rule, held that trespass for cutting down timber trees would not lie where the offender entered under an open and notorious claim of right to the entirety, and not as a tenant in common. And a similar conclusion was reached in Jenkins v. Wood (1888) 145 Mass. 494, 14 N. E. 512, in construing and applying Mass. Pub. Stat. chap. 179, §§ 6, 7.

And it has been held that the Massachusetts statute (Gen. Stat. chap. 138, § 10) does not extend the remedy by action for wilful trespass to cases where an action for trespass would not lie by the common law. Hastings v. Hastings (1872) 110 Mass. 280.

Statutes authorizing one cotenant to bring an action against another for receiving more than his just proportion of the rents or profits have been held not to apply, either to trees cut

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and removed from the lands, or to the proceeds of a sale thereof; the theory being that the same cannot be regarded as "rents or profits," within the meaning of the statute. Shepard v. Pettit (1883) 30 Minn. 119, 14 N. W. 511. But on the other hand, in at least one state, it has been held that a statute allowing an action of account at law by one tenant in common against another, who has received more than his share of the rents and profits, does apply to a removal of timber from common property by one tenant in common. See Strong v. Richardson (1847) 19 Vt. 194.

b. Measure of damages.

In trover, the rule by which the damages are to be measured is a question of law for the court, and not for the jury. Baker v. Wheeler (1832) 8 Wend. (N. Y.) 505, 24 Am. Dec. 66.

But where the statutes provide that the treble damages upon recovery for removal of timber by a cotenant without notice shall be apportioned, one half to the persons who sue, and "the other half to the same persons with all the other cotenants, except the defendant, to be divided amongst them in proportion to their respective interests in the land," it has been held that the measure of damages is three times the amount of the injury to the whole lot, irrespective of the amount of the plaintiff's interest. Proctor v. Proctor (1903) 182 Mass. 415, 65 N. E. 797, construing Mass. Pub. Stat. chap. 179, § 7; Mass. Rev. Laws, chap. 185, § 5.

And it has been held that where the statutory remedy for the wrongful cutting of trees on property owned by tenants in common is joint, the quantum of damages to which any one is entitled as against the defendant is the quantum to which each of the others will be limited. Haley v. Taylor (1900) 77 Miss. 867, 78 Am. St. Rep. 549, 28 So. 752.

c. Limitation of actions.

One tenant in common may disseise another by actually entering into possession, not as a tenant in common, but under an open and notorious adverse claim of right to the entirety, so as to preclude the maintaining of an action of trespass by other cotenants, to recover for timber removed by the occupant, the other cotenants having acquiesced in the occupant's possession for fifty years, and never having done anything from which the court can presume an entry or seisin by them. Prescott v. Nevers (1827) 4 Mason, 326, Fed. Cas. No. 11,390.

And in Owen v. Foster (1841) 13 Vt. 263, it was held that one tenant in common may acquire title against his cotenant by adverse possession, accompanied by the cutting and removal of timber, but that to have such an effect there must have been an ouster.

But it has been held that disseisin sufficient to defeat a writ of entry, sued out by a cotenant to recover an undivided half of timber lands, is not shown by proof that the defendant, for a period of over twenty years, from time to time cut timber for fences from a cedar swamp which was surrounded by cultivated lands, the cutting not occurring every year, and knowledge thereof not having been brought home to the plaintiff. Ewer v. Lovell (1857) 9 Gray (Mass.) 276.

Nor is disseisin shown by proof that one tenant in common, eight or ten times in the course of twenty-five years, although without residence upon the land, cut wood thereon. Peck v. Ward (1852) 18 Pa. 506.

It has been held that statutes which allow treble damages for the cutting of timber by a cotenant without notice to the other cotenants is not a penal statute, within the meaning of a statute requiring that actions for any penalty or forfeiture on a "penal" statute shall be brought within a specified time after the commission of the offense. Hall v. Hall (1914) 112 Me. 234, 91 Atl. 949.

d. Actions.

1. Conditions precedent.

It has been held that a demand by one tenant in common of timber lands, upon a cotenant who has cut and removed the timber, for a settlement with the demandant, is a sufficient demand for the specific articles of property taken to enable him to maintain trover for the value of his interest in

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the timber. Clow v. Plummer (1891) 85 Mich. 550, 48 N. W. 795.

But where, under the common law, an action may be maintained against a tenant in common for trover for conversion of timber from the common property, it has been held that no demand for the specific timber converted is necessary. Hennes v. Hebard (1912) 169 Mich. 670, 135 N. W. 1073.

2. Parties.

In bringing an action under a statute, providing for recovery of damages for the wrongful removal of timber by a cotenant, it is unnecessary to join all the wronged cotenants as plaintiffs in one action, each cotenant being entitled to his several action. Blake v. Milliken (1843) 14 N. H. 213, holding that to rule otherwise would, in many cases, effectually defeat the objects of the statute. But, of course, they may join where the statute provides that the action may be brought by several cotenants for the full amount of the damages they have sustained. Ibid. However, where the statute provides that "any cotenant" may recover for his "just share of the value of the trees destroyed," it has been held that two or more tenants in common cannot join in an action for the value of timber cut by another cotenant. Mooers v. Bunker (1854) 29 N. H. 420.

In an action of trover or trespass for destroying and converting trees, where one of the wrongdoers was a cotenant of the plaintiffs and the other wrongdoers were strangers, the plaintiff may join all the wrongdoers, or sue either separately. Sullivan v. Sherry (1901) 111 Wis. 476, 87 Am. St. Rep. 890, 87 N. W. 471.

3. Pleading.

Where the action is under a statute giving a remedy which did not exist at common law, such as "assumpsit," it has been held that the declaration must be special upon the statute, and that a "general indebitatus assumpsit" cannot be sustained. Smith v. Woodman (1854) 28 N. H. 520; Mooers v. Bunker (1854) 29 N. H. 420.

A cotenant who seeks to justify a cutting of timber under a statute requiring notice, by proof of license or permission, must plead the justification. Hall v. Hall (1914) 112 Me. 234, 91 Atl. 949.

4. Defenses.

Under statutes allowing actions for damages for cutting timber on land owned by parties in common, it has been held no defense that previously the plaintiff cotenant had wrongfully sold stumpage from the same land. Dwinell v. Larrabee (1858) 38 Me. 464.

And it has been held no defense to an action of trover for the wrongful cutting, removal, and manufacture into lumber by one tenant in common, of the timber growing on the common property, that the defendant cotenant, at the commencement of the action, yet had a portion of the lumber in his possession. Clow v. Plummer (1891) 85 Mich. 550, 48 N. W. 795.

So, it has been held that the wrongful cutting, removal, and manufacture into lumber of timber by one cotenant cannot be justified as against the other cotenants, who are seeking to recover damages for such removal, by showing that the timber was liable to destruction by fire. Ibid.

But in an action of trespass for wrongful removal of timber it is a good defense that the defendant and plaintiff are tenants in common, and such a defense may be set up under an answer merely containing a general denial. Hastings v. Hastings (1872) 110 Mass. 280.

And though the estates of tenants in common of woods and timber lands are several, the damages for a wrongful cutting, when done by a stranger to the title, belong to the tenants jointly, wherefore a release by one tenant or a suit to collect damages is binding upon the other. Bradley v. Boynton (1843) 22 Me. 287, 39 Am. Dec. 582; Hodges v. Heal (1888) 80 Me. 281, 6 Am. St. Rep. 199, 14 Atl. 11. And it has been held that the right to sue under a statute, being joint, any defense good as to one is good as to all. Haley v. Taylor (1900) 77 Miss. 867, 78 Am. St. Rep. 549, 28 So. 752.

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e. Miscellaneous.

Where one cotenant has unlawfully sold timber from common property, and has paid another cotenant more than his share of the proceeds, he may recover back the excess. Emmons v. Evans (1917) 178 Ky. 180, 198 S. W. 900.

IV. Equitable remedies.

a. Generally.

The two equitable remedies which generally have been held available, in proper case, to tenants in common, to determine and protect their rights inter se as to timber growing on the common property, are injunction and accounting; injunction being originally a statutory remedy, and equitable accounting one which was always available in equity. These remedies, however, are treated fully in the following subdivisions.

In a few instances, statutes prescribe the equitable remedies available between tenants in common as to timber. For example, in Pennsylvania, the statute (Act May, 4, 1869, §§ 1, 2) makes it unlawful for a cotenant of timber lands to cut or remove any timber therefrom without first obtaining the written consent of all his cotenants, and gives nonconsenting cotenants every remedy in law and equity "which they now have against an entire stranger to the title." See Duff v. Bindley (1883) 16 Fed. 178; Wheeler v. Carpenter (1884) 107 Pa. 271; and Bush v. Gamble (1889) 127 Pa. 43, 17 Atl. 865, all of which construe and apply the Pennsylvania statute.

b. Injunction and estrepement.

The earliest authorities are to the effect that an injunction could not be issued, even to stay waste by a tenant in common cutting timber on the common property, the theory being that a tenant in common could do what he pleased with his own property. See Goodwyn v. Spray (1786) 2 Dick. 667, 21 Eng. Reprint, 431.

But since the statute of Westminster II. (13 Edw. I. chap. 33) giving tenants in common redress inter se for waste, it has been said that courts of equity generally have interposed to protect the corpus of the estate pending partition or other determination of rights. Bradley v. Reed (1864) 2 Pittsb. 519, Fed. Cas. No. 1,785.

In fact, it has been expressly held that an injunction may be issued to restrain, pending partition, the cutting and removal of timber by a cotenant. Obert v. Obert (1846) 5 N. J. Eq. 397; Hawley v. Clowes (1816) 2 Johns. Ch. (N. Y.) 122; Hancock v. Day (1840) McMull. Eq. (S. C.) 69, 36 Am. Dec. 293. And see State ex rel. Hake v. Judge of Fourth Judicial Dist. (1899) 52 La. Ann. 103, 26 So. 769. And again in Bradley v. Reed (Fed.) supra, it was held that the remedy by injunction, restraining one tenant in common from committing waste by removal of timber which constituted the real value of the common property, was peculiarly proper, pending a bill to try title to the land.

And in a number of cases it has since been held, generally, both in England and America, that cotenants who commit waste by cutting timber from the common property may be enjoined at the suit of nonconsenting cotenants. Rush v. Cornett (1916) 169 Ky. 714, 185 S. W. 88; Layne v. Layne (1917) 177 Ky. 592, 197 S. W. 1062; Gillum v. St. Louis, A. & T. R. Co. (1893) 5 Tex. Civ. App. 338, 23 S. W. 717; Twort v. Twort (1809) 16 Ves. Jr. 128, 33 Eng. Reprint, 932, 6 Revised Rep. 195; Arthur v. Lamb (1865) 2 Drew. & S. 428, 62 Eng. Reprint, 683, 12 L. T. N. S. 338; Christie v. Saunders (1851) 2 Grant, Ch. (U. C.) 670. So, in Leatherbury v. McInnis (1904) 85 Miss. 160, 107 Am. St. Rep. 274, 37 So. 1018, where it appeared that one tenant in common was committing unreasonable waste and irreparable injury to the trees growing on the common timber lands, by boxing them for turpentine, and threatening to box the trees on the whole tract, equity, at the suit of the other cotenant, enjoined the threatened waste; but, it appearing that the lands were chiefly valuable for the timber thereon, and that one part was as valuable as the other, it was held that the injunction would be limited so as to confine the defendant's operations

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only to such proportionate part of the total as compared with his interest in the lands. And this rule is especially applicable, where the tenant in common who cuts the timber is insolvent. Stout v. Curry (1886) 110 Ind. 514, 11 N. E. 487.

And in Cotten v. Christen (1903) 110 La. 444, 34 So. 597, upon the theory that one cotenant has no right to cut the timber on the common land without the consent of his cotenants, it was ruled that one who attempts to do so may be enjoined, the wrongful act being regarded as in the nature of a trespass.

So, in Musch v. Burkhart (1891) 83 Iowa, 301, 12 L.R.A. 484, 32 Am. St. Rep. 305, 48 N. W. 1025, where plaintiff and defendant were tenants in common of a row of trees on the boundary line between their tracts of land, it was held that injunction would issue to prevent a threatened removal of the trees, the plaintiff deriving a benefit from the trees, for which it was said he could not be compelled to accept a money consideration.

And in the following actions in equity, brought by one cotenant against another, and based upon the continued removal and sale of timber from the common property, it was held, generally, that the court could enjoin the further unlawful cutting of the timber. Gulf Red Cedar Co. v. Crenshaw (1902) 138 Ala. 134, 35 So. 50; State ex rel. Hake v. Judge of Fourth Judicial Dist. (1889) 52 La. Ann. 103, 26 So. 769.

But it has been held that an injunction will not lie for the cutting of mature timber on property owned by tenants in common, the value of which consists in the utilizing of such timber, the theory being that in cutting such timber the cotenant is simply exercising a natural right, and is not committing waste; so that he, if solvent, is only liable to another cotenant for his just share (United States v. Northern P. R. Co. (1887) 6 Mont. 351, 12 Pac. 769); or unless the cutting amounts to destructive waste (Arthur v. Lamb (1865) 2 Drew. & S. 428, 62 Eng. Reprint, 683, 12 L. T. N. S. 338; Hole v. Thomas (1802) 7 Ves. Jr. 589, 32 Eng. Reprint, 237; Twort v. Twort (1809) 16 Ves. Jr. 128, 33 Eng. Reprint, 932, 6 Revised Rep. 195; Christie v. Saunders (1851) 2 Grant, Ch. (U. C.) 670).

Nor will injunction lie against the cutting of timber for the use of buildings on the land, or even against the sale of a small amount, where such acts do not exceed the defendant's rights as a cotenant, taking into consideration the size of the estate, etc. Dodd v. Watson (1858) 57 N. C. (4 Jones, Eq.) 48, 72 Am. Dec. 577.

Likewise, it has been held that an injunction will not lie against the cutting of timber trees at the suit of one tenant in common against another, where it does not appear either that the defendant was insolvent or that he was cutting more than his share of the timber, each tenant in common having the right to the enjoyment of the common estate, and to cut timber and use or dispose of it; at least, to an extent corresponding to his share of the estate. Hihn v. Peck (1861) 18 Cal. 640.

And in actions to enjoin waste, the injunction should be confined to timber not wanted for the necessary use of the premises. Hawley v. Clowes (1816) 2 Johns. Ch. (N. Y.) 122.

In a few jurisdictions, as shown by the adjudications, the situation under consideration has been made the subject of express statutory regulation. Thus, in Massachusetts, under chapter 371 of the Statutes of 1853, an injunction against committing waste may be issued, pending an action at law under the statute, and this statute applies to the cutting of timber by a tenant in common. See Adams v. Palmer (1856) 6 Gray (Mass.) 336. And in Pennsylvania, by § 3 of the Act of May 4, 1869, any party in interest was given the right to sue out a writ of estrepement to prevent further cutting or removal of timber, where a cotenant had begun such operations without first obtaining the written consent of his cotenants. See Duff v. Bindley (1883) 16 Fed. 178; and Hensal v. Wright (1891) 10 Pa. Co. Ct. 416. In the latter case it was said that "the writ of estrepement is nothing more

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than a writ of injunction issued in a bill in equity."

c. Accounting.

1. Right to remedy.

It has been said that there was always a right to hold a cotenant to account in equity, the usual procedure before the enactment of the early English statutes being to bring an action for an account against the cotenant as bailiff. See Gulf Red Cedar Co. v. Crenshaw (1902) 138 Ala. 134, 35 So. 50.

Applying this rule, it has been expressly held that, where one cotenant in possession has cut and removed timber from the common property, he is subject to account in equity to the other cotenants, at least, to the extent of the amount of their interest destroyed or appropriated (Walling v. Burroughs (1851) 43 N. C. (8 Ired. Eq.) 60; Darden v. Cowper (1859) 52 N. C. (7 Jones, L.) 210, 75 Am. Dec. 461; Gillum v. St. Louis, A. & T. R. Co. (1893) 5 Tex. Civ. App. 338, 23 S. W. 717); especially if the cutting amounted to waste (see Johnson v. Johnson (1835) 2 Hill, Eq. (S. C.) 277, 29 Am. Dec. 72; Thompson v. Bostick (1840) McMull. Eq. (S. C.) 75, and Collier v. Wm. Cameron & Co. (1909) 55 Tex. Civ. App. 153, 117 S. W. 915. But see also Griffies v. Griffies (1863) 8 L. T. N. S. (Eng.) 758, 11 Week. Rep. 943). In such a case it has been said that the action is "not as on an account for rents and profits, but as waste" (Thompson v. Bostick (1840) McMull. Eq. (S. C.) 75, supra), and that the cutting down of whole forests, even when done to clear and improve the land, constitutes waste (Holt v. Robertson (1831) McMull. Eq. (S. C.) 475), as does the mere cutting of timber to clear land, for the purpose of enjoying the property, provided more is cut than is necessary for the purpose (Johnson v. Johnson (1835) 2 Hill, Eq. (S. C.) 277, 29 Am. Dec. 72). Where a tenant in common has committed waste by the cutting of timber on the common property, a court of equity, upon decreeing partition, may ascertain the damages and make allowance therefor. Jackson v. Beach (1886) — N. J. Eq. —, 3 Atl. 375; Hancock v. Day (1840) McMull. Eq. (S. C.) 69, 36 Am. Dec. 293. And it has been held that, although there is concurrent jurisdiction between courts of equity and courts of law as to matters of accounting between tenants in common, either tenant may resort to equity to compel an accounting, especially where the wrongs complained of extended over a considerable period, so as to render an action at law neither adequate nor complete, as where one cotenant of lands cut and sold timber therefrom at intervals over a period of years and appropriated the proceeds, so that the accounts were complicated. Gulf Red Cedar Co. v. Crenshaw (1902) 138 Ala. 134, 35 So. 50. So in McGahan v. National Bank (1894) 156 U. S. 218, 39 L. ed. 403, 15 Sup. Ct. Rep. 347, where defendant excluded his cotenant from certain timber lands under a claim of exclusive right, and cut and removed the timber, it was held that the excluded tenant was entitled to an accounting, and that the wrongdoer was liable for the use of which he had wrongfully deprived his cotenant, as well as chargeable with what he had received for the timber in excess of his just share.

And where a tenant in common, without the consent of his cotenants, permits third persons to cut timber on the common property for a compensation, such other cotenants are entitled to an accounting. Baker v. Whitney (1839) 3 Sumn. 45, Fed. Cas. No. 787; Gillum v. St. Louis, A. & T. R. Co. (1893) 5 Tex. Civ. App. 338, 23 S. W. 717.

2. Measure of damages.

In a bill for an accounting between tenants in common for the removal of timber, the damages should not be assessed as if the parties were trespassers and wholly without right in converting the timber (Gulf Red Cedar Co. v. Crenshaw (1914) 188 Ala. 606, 65 So. 1010); at least, in cases where the act of taking was not wilful, or with intent to deprive the other cotenants of their interest in the timber cut (De Witz v. Saner-White-

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man Lumber Co. (1913) — Tex. Civ. App. —, 155 S. W. 980).

So, in Paepcke-Leicht Lumber Co. v. Collins (1908) 85 Ark. 414, 108 S. W. 511, where a tenant in common in good faith cut and removed large quantities of timber from the land owned in common, and which was chiefly valuable because of such timber, believing that he was the sole owner, it was held that he was liable to his cotenant for the value of the timber in the tree at the time it was cut, with interest, the court saying that the wrongdoer was an equal owner, and was entitled to possession; so that, having acted in good faith, he should not be punished as a trespasser by the loss of one half his time, labor, capital and skill.

And where the trespass is not wilful the rule of valuation is the value of the timber while growing. De Witz v. Saner-Whiteman Lumber Co. (1913) — Tex. Civ. App. —, 155 S. W. 980. And again in Walling v. Burroughs (1851) 43 N. C. (8 Ired. Eq.) 60, it was ruled in an account in equity between tenants in common, for timber cut and sold by one of the cotenants, that the value of the timber while growing was to be taken as the rule of valuation.

Upon an accounting in equity between cotenants for improper use of the property, as by cutting and selling timber, harsh or excessive damages should not be inflicted for failure to disclose facts necessary for consideration in determining the real damage, the withholding being neither wilful nor negligent. Gulf Red Cedar Co. v. Crenshaw (Ala.) supra.

In an equitable action to compel a tenant in common to account for timber wrongfully removed from the common property, the burden is on the plaintiff to prove the amount and value of the timber so cut and removed. Coopwood v. Jeffries (1911) 98 Ark. 609, 136 S. W. 660.

d. Limitation of actions.

A bill in equity seeking relief for the wrongful removal of timber by a cotenant from lands held in common is not barred by staleness or limitations, where the wrongful acts have been carried on down to the time of the filing of the bill. Gulf Red Cedar Co. v. Crenshaw (1902) 138 Ala. 184, 35 So. 50.

And the right to an accounting for waste for the cutting of timber on common property by a cotenant, which is granted as incidental to a partition of the property, is not barred by the Statute of Limitations. Jackson v. Beach (1886) — N. J. Eq. —, 3 Atl. 375.

But it has been held that where the possession of a tenant in common was open and notorious, and during the statutory period he had removed practically all the merchantable timber, and never had made or had been asked for an accounting, his possession was adverse, and all rights of his cotenants are barred. Taylor v. Blackwell (1918) — Tenn. —, 207 S. W. 738.

G. J. C.

GEORGE WALKER et al., Appts.,

v.

HERMAN SUNDERMEYER et al., Respts.

Missouri Supreme Court (Division No. 2) — July 16, 1917.

(271 Mo. 579, 197 S. W. 102.)

Notice — what is public place for posting.

1. The requirements of a statute that notices for the formation of a drainage district shall be posted in five of the most public places in the district are complied with by posting on trees and fences where they would be most likely to be seen by one passing through the district, where there is no postoffice, store, shop, or schoolhouse in the district.

[*See note on this question beginning on page* 1008.]

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Appeal — amendment of report.

2. Under a provision of a statute allowing appeals from a county to a circuit court, that the appellate court shall proceed to hear and determine the same anew and in the same manner as if such cause had originated in such appellate court, it may allow an amendment to a commissioner's report on which the cause was heard in the county court to the same extent that the statute provided for such amendment in the county court.

APPEAL by remonstrators from a judgment of the Circuit Court for Osage County in favor of petitioner in a proceeding to establish a drainage district. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. **Vosholl & Monroe** for appellants.

Messrs. **Gove & Davidson, J. R. Garstang, J. P. Peters, and E. M. Zevely,** for respondents:

The five notices posted by the constable were posted in five of the most public places in the drainage district.

Zeibold v. Foster, 118 Mo. 349, 24 S. W. 155; McNichol v. United States Mercantile Reporting Agency, 74 Mo. 457.

The circuit court did not err in allowing the commissioners appointed to assess benefits and damages, to amend their report at the conclusion of the testimony introduced by respondents, showing the facts as to the action of such commissioners.

Quayle v. Missouri, K. & T. R. Co. 63 Mo. 465; Turlow v. Ross, 144 Mo. 234, 45 N. W. 1125; Moore v. Wingate, 53 Mo. 398; Johnson v. Beazley, 65 Mo. 250, 27 Am. Rep. 276; Acton v. Dooley, 16 Mo. App. 441; Anderson v. Myrtle Twp. 75 Mo. 57; Muldrow v. Bates, 5 Mo. 215; Miles v. Davis, 19 Mo. 415; Holmes v. Hill, 19 Mo. 159; Bunton v. Adams, 65 Mo. App. 6; Crispen v. Hannovan, 86 Mo. 168; Weil v. Simmons, 66 Mo. 617; Holtschneider v. Chicago, R. I. & P. R. Co. 107 Mo. App. 384, 81 S. W. 489; Webster v. Blount, 39 Mo. 500; Mangold v. Dooley, 89 Mo. 111, 1 S. W. 126; Martin v. Castle, 182 Mo. 216, 81 S. W. 426; Cagle v. Chillicothe Town Mut. F. Ins. Co. 78 Mo. App. 431; State ex rel. Brown v. Wilson, 216 Mo. 279, 115 S. W. 549; Bosse v. Thomas, 3 Mo. App. 472; Ranney v. Bader, 48 Mo. 539; State ex rel. Webster v. Knight, 46 Mo. 83; Henley v. Arbuckle, 13 Mo. 209; Judd v. Smoot, 93 Mo. App. 289; Webster v. Blount, 39 Mo. 500; Scruggs v. Scruggs, 46 Mo. 273; Kahn v. Mercantile Town Mut. Ins. Co. 228 Mo. 585, 137 Am. St. Rep. 665, 128 S. W. 995; Stewart v. Stringer, 45 Mo. 113; Fuert v. Caster, 174 Mo. 298, 73 S. W. 576; Long v. Talley, 91 Mo. 305, 3 S. W. 389; Cattell v. Dispatch Pub. Co. 88 Mo. 356; Leonard v. Sparks, 63 Mo. App. 611; Ver Steeg v. Becker-Moore Paint Co. 106 Mo. App. 287, 80 S. W. 346; State v. Chumley, 67 Mo. 41; State ex rel. Nicholson v. Rombauer, 44 Mo. 590; Kreibohm v. Yancey, 154 Mo. 82, 55 S. W. 260; Priest v. Capitain, 236 Mo. 460, 139 S. W. 204.

White, C., filed the following opinion:

The appeal is from a judgment of the circuit court of Osage county, establishing a drainage district in said county known as "Shawnee Creek Drainage District of Osage County," and declaring the same a body corporate. The respondents here were the original petitioners before the county court of Osage county, and the appellants here were remonstrators.

The matter reached the circuit court upon an appeal by the remonstrators from a judgment of the county court, where the report of commissioners, appointed under § 5551, Revised Statutes 1909, was approved, and the objections of remonstrators overruled. The judgment of the circuit court on a trial anew "approved and confirmed" the order and judgment of the county court.

I. Appellants claim that the county court did not acquire jurisdiction of the matter by reason of the failure of the clerks of the county court to post the notices required by § 5549, Revised Statutes 1909. This section provides that the county court, upon filing of the petition for the formation of the district, shall

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cause three weeks' notice of its presentation and filing to be given in three different ways: First, by posting such notice in at least five of the *most public places* in said proposed district; second, by causing a copy of the same to be served on each landowner or person interested, residing in any county affected by the proposed work; and, third, by publishing the notice for three successive weeks in some newspaper. No question is raised as to the proper service of the notice by the second and third methods. It is claimed only that there was a failure to post the five notices in "five of the most public" places in the proposed district.

The same section provides that the "certificate of the clerk or the affidavit of any other credible person, affixed to a copy of said notice, shall be sufficient evidence of the posting," etc. The record shows the affidavit of F. W. Hoehner to the effect that he posted the notices, describing the five places where he put them, and stating that those places were "five of the most public places in Shawnee creek drainage district, as described within the aforesaid notice," etc. It appears that the petitioners were not content to stop with this affidavit, but introduced evidence to show where the notices mentioned in the affidavit were posted. This testimony shows, among other things, that there was no postoffice in the proposed district, no store, no blacksmith shop, no schoolhouse, and no public road; the appellants claim, therefore, that there was no public place in the district at which a notice could be put up. The places mentioned in the affidavit and identified by the witnesses were, a maple tree at a certain point near the line between two of the parties interested, a fence post on the line of one of the parties, and other like places. It was shown that these places were along private roads and places where they would be most likely to be seen by anyone passing through the district, and were, in fact, "the most public places in the district." There were only three families living in the district. Under the construction contended for by the appellant, it would be impossible to give proper notice and form a district unless there were five places in the district which might be called public places. The statute contemplates the formation of drainage districts in places not easily accessible to the public, and for that reason the words, "most public places," were used, instead of "public places" unqualified. The finding by the trial court that the posting of the notices was in compliance with the statute is sustained by the evidence.

Notice—what is public place for posting.

II. Another assignment of error by appellant was the action of the trial court in permitting the commissioners to amend their report. After the case got into the circuit court, and after hearing the testimony, the circuit court ordered the report of the commissioners to be corrected, and it was corrected in open court. The correction related to the description of each tract of land mentioned in the report. The original report correctly gave the boundaries of the district, and correctly stated the number of acres owned by each person, without giving correctly the description of each tract. The amendment made the description of the several tracts more definite and certain, and possibly had the effect, in some instances, of including some parts which had been left out of the specific descriptions in the original report. The changes made did not affect the amount of damages awarded, nor the amount assessed as benefits, nor in any respect tend to affect the purpose of the report.

Section 5560, Revised Statutes 1909, as amended by the Act of 1913, Laws 1913, page 267, provides, among other things, upon a hearing of the report and remonstrance: "If the court finds from a hearing duly had that the report requires modification, the same may be referred to the commissioners, who may be

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required to modify the report in any respect."

This reference, of course, is to a proceeding in the county court, and authorizes that court to modify the report *"in any respect"* which would not violate the substantial rights of the parties.

It is not contended by appellants that the amendment could not have been made in the county court. They only claim that the circuit court was powerless to make it after an appeal there. In that, appellants overlook the effect of an appeal to the circuit court from the judgment of a county court. Section 4091, Revised Statutes 1909, gives the circuit court appellate jurisdiction of judgments and orders of the county court in the following terms: "In all cases of appeal from the final determination of any case in a county court, such appeal shall be prosecuted to the appellate court in the same manner as is now provided by law for the regulation of appeals from justices of the peace to circuit courts, and when any case shall be removed into a court of appellate jurisdiction by appeal from a county court, such appellate court shall thereupon be possessed of such cause, and shall proceed to hear and determine the same anew, and in the *same manner as if such cause had originated in such appellate court.*"

The effect of this statute is to give to the circuit court on appeal, exactly the same authority and jurisdiction in every particular as that enjoyed by the county court from which the appeal is taken, and any amendment, correction, or modification that might be ordered in the commissioners' report in the county court can be ordered in the circuit court. All parties affected were before the court. King's Lake Drainage & Levee Dist. v. Jamison, 176 Mo. l. c. 566, 75 S. W. 679; Allen v. Welch, 125 Mo. App. 278, l. c. 287, 102 S. W. 665; Long v. Talley, 91 Mo. 305, 3 S. W. 389. This statute relating to drainage districts must be "liberally construed, to promote the drainage and reclamation of wet and overflowed lands." This is provided in the act itself, apparently in order to cover irregularities, and the embarrassment caused by mistakes and blunders in a proceeding of this kind. Rev. Stat. 1909, § 5573; Wilson v. King's Lake Drainage & Levee Dist. 257 Mo. l. c. 289, 165 S. W. 734.

Appeal—amendment of report.

No error is discernible in the record; the proceeding seems to have been entirely regular.

The judgment is affirmed.

Roy, C., concurs.

Per Curiam:

The foregoing opinion of **White, C.**, is adopted as the opinion of the court. All of the judges concur.

ANNOTATION.

What is "public place" within requirement as to posting of notices.

I. Generally, 1008.
II. Places held to be public, 1010.
III. Places held not to be public, 1013.

I. Generally.

A public place, within a requirement as to the posting of notices, is usually defined as some place to which the public resorts, so that a notice in such a place may be expected to be seen by persons who are interested therein or affected thereby.

What is a public place is a question partly of fact and partly of law. After the jury has determined the use to which a place has been put, it is for the court to say whether the place is public. Tidd v. Smith (1825) 3 N. H. 178; Myrick v. Kahle (1903) 120 Wis. 57, 97 N. W. 506.

The term "public place" is relative, and not absolute. That which is a public place in a village may not be such in a city or a county. The test

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to be applied, which will generally determine the question, is whether posting in that particular place will fulfil the purpose of giving the publicity required by the nature of the notice.

"A public place is a relative term. What is a public place for one purpose is not for another. A blacksmith shop in the country, or a tree at the intersection of public roads, would be a public place within the contemplation of the statute, if in the vicinity of the lands; but it would clearly be an abuse of discretion thus to advertise town lots in a place 20 miles distant. That is a public place for setting up notices, which is likely to give information to those interested, and who may probably become bidders at the sale." Cummins v. Little (1863) 16 N. J. Eq. 48.

"A public place is a relative term. The manifest object in posting a notice is to attract attention to it; and if it is posted at a place where it would be likely to attract the public attention, so that its contents may become known to the community, such a place should be considered a public place. Hence, within the meaning of the various statutes requiring notices to be posted in a public place, a place where the citizens frequently meet, or resort, or have occasion to be is construed to be a 'public place;' that is, a public and proper place for posting notices, which is likely to give the information designed to be conveyed by it to those interested." Roach v. Eugene (1892) 23 Or. 376, 31 Pac. 825.

"It is quite obvious that the term 'public place,' as used in the statute, is to be interpreted in a relative rather than in an absolute sense, and must be defined by reference to the circumstances and the subject-matter of each particular case. We call that 'public' which is open for general or common use or entertainment, as a public highway or road, a public house; and yet the term is more comprehensive than this definition. . . . The object to be attained by putting up an advertisement is to attract attention to it, so that it may be seen and read; and if the advertisement is set up in a place where it would be likely to attract general attention, so that its contents might reasonably be expected to become a matter of notoriety in the vicinity, such a place should be considered a 'public place,' within the meaning of the statute. A private dwelling, a barn, a shed, or other outbuilding, or even a rock, tree, or fountain, if answering this condition, might be a 'public place.' " Austin v. Soule (1863) 36 Vt. 645.

In Whitworth v. McKee (1903) 32 Wash. 83, 72 Pac. 1046, the statute under consideration provided that notice of an execution sale of real property should be posted by the sheriff in three public places, one of which must be the courthouse door, where the property was to be sold, and one on the land to be sold.

It was held that the term, "public place," was used in the statute in a relative sense, and a notice complied with it if it was posted in a place, which was public, when compared with other places within the prescribed area. To the same effect, see the reported case (WALKER v. SUNDERMEYER, ante, 1005).

In Bouchier v. Hammer (1909) 140 Wis. 648, 123 N. W. 132, the court construed a statute (Stat. 1898, § 1130), requiring the county treasurer to post notices of a tax sale in at least four public places in the county, one copy to be posted in a conspicuous place in his office, and to file an affidavit of such posting. In pursuance of the statute the county treasurer posted notices in five public places, and filed an affidavit to that effect, naming the places at which he had posted the notice, which were public places in the ordinary meaning of the word. It was claimed that this affidavit was insufficient as to the proof of posting, because the affiant had stated a legal conclusion in using the term, "public places." It was held that the expression, "public place," in its legal designation, is the same as that in common and ordinary usage, namely, a place where the public resort, so that the exposure of such a document is likely to give notice, and was as much a statement of fact as a conclusion of

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law, and that the affidavit complied with the law.

II. Places held to be public.

It has been held that courthouses, hotels, inns, meetinghouses, postoffices, railroad stations, and schools are public places. Other places have been held to be public, such as barns, fences, boards, and trees, but these holdings depend on additional circumstances, and it is not possible to note any general rule in regard to them.

Barn.

In Alger v. Curry (1867) 40 Vt. 437, it appeared that personal property had been distrained and posted to be sold, and was sold for the payment of taxes, at "F. W. Baldwin's barn," which was not alleged to be a public place. It was held, following Austin v. Soule (1863) 36 Vt. 645, that the barn was a public place, and that it had in effect been so alleged in the plea, which stated that the notice of the sale of the goods had been posted in a public place, and that the property was sold at the barn. It would be presumed, the court held, that the goods had been posted and sold at the barn, and that the barn was a public place.

Board.

In Seabury v. Howland (1887) 15 R. I. 446, 8 Atl. 341, there was involved a statute of Rhode Island (R. I. Pub. Stat. chap. 52, § 5), which provides that notice of a school district meeting shall be posted in three "public places." It appeared that one of the notices was posted on the schoolhouse, another on a building formerly used as a grain building, and the third on a board 6 feet long and 10 inches wide, fastened in or against the roadside wall, and facing the road. It was contended that this third notice was not posted in a public place, because the place was not safe as well as public, in as much as the board might be thrown down or carried away so that the notice might not remain for the time required by statute. It was held that this was a public place, and that the notice was posted according to law.

City hall.

In Roach v. Eugene (1892) 23 Or. 376, 31 Pac. 825, it appeared that the city recorder was required by statute to post notices of the letting of a city contract in three public places. His affidavit showed that he posted copies of the notice on the bulletin board at the city hall, and at the courthouse, and on a brick building at the intersection of two streets. It was claimed that the affidavit did not show posting in three public places, but the court held that it did.

Courthouse.

In Edwards v. Meadows (1881) 71 Ala. 42, it appeared that the terms of a chattel mortgage provided for the foreclosure of the mortgage, by posting an advertisement of the sale "in two public places in Lee county." It was held that posting of one notice at the courthouse door, and another at the postoffice, was a compliance with the requirement of the mortgage. No two places in the entire county could probably have been selected, the court said, which were more public, or where the attention of more persons would have been called to the intended sale.

In McDaniel v. Wetzel (1914) 264 Ill. 212, L.R.A.1916E, 1140, 106 N. E. 209, it appeared that notice of an execution sale was required to be posted by statute in three of the most public places in the county where the real estate to be sold was situated. The notices were posted on three doors of the courthouse, and it was held that such posting did not comply with the law, but was a posting in only one place instead of three. See also Graham v. Filts (1876) 53 Miss. 307, stated at length, infra, under "Postoffice."

Fence.

In Goss v. Cardell (1880) 53 Vt. 447, under a statute (Rev. Laws, § 1549) which provides for the sale of property on execution, by posting a notice of the sale in a "public place," and selling the property where posted, it appeared that the property was sold at a barn on the public road, and notice of the same posted on the fence of the same premises. It also appeared that there were farmhouses on either side of the premises within half a mile. It was held that the premises were a

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public place within the meaning of the statute.

In the reported case (WALKER v. SUNDERMEYER, ante, 1005), a fence post was held, under the facts there shown, to be a public place.

Hotel.

In Hoitt v. Burnham (1882) 61 N. H. 620, it was held that a hotel and a postoffice were "public places," within the meaning of the statute requiring the posting of notices of an execution sale in public places.

In Pritchard v. Magoun (1899) 109 Iowa, 364, 46 L.R.A. 381, 80 N. W. 512, it was held that city hotels were "public places," within the meaning of the statute requiring notices of an election to be posted in five "public places" in the city.

Gristmill.

In Fletcher v. Lincolnville (1841) 20 Me. 439, the court construed a statute of Maine (Stat. 1834, chap. 129, § 11), which required a notice of school district meetings to be posted "on the schoolhouse, and on one other public place within the limits of said district." The notice was posted on the schoolhouse and on a gristmill within the district. It was held that the gristmill was a public place, the court saying: "The gristmill in that district must, to a common intent, be taken to have been a place to which the citizens had occasion to resort, and therefore a public place, within the fair meaning of the statute."

Meetinghouse.

In Scammon v. Scammon (1874) 28 N. H. 419, it was held that a meetinghouse was prima facie a public place, within the meaning of the statute requiring notice of a town meeting to be posted in a public place.

Newspaper.

In McLin v. McNamara (1838) 22 N. C. (2 Dev. & B. Eq.) 82, a statute required an executor or administrator to advertise (for claims against the estate) at the courthouse, "and other public places." The defendant executor had advertised in two newspapers published and circulated in the county. It was held that this was a substantial compliance with that part of the statute requiring advertisement "at other public places," but was not a substitute for the requirement of advertisement at the courthouse.

Postoffice.

In Hart v. Smith (1878) 44 Wis. 213, wherein it appeared that a statute required a county treasurer to post notices of a tax sale in three public places in the county, and to make an affidavit of the posting thereof, it was held that an affidavit describing the particular places in which the notices were posted, but which did not state that they were public places, was sufficient, where it appeared on the face of the affidavit that the places selected were in fact public places, namely, a postoffice in a city, and one in a village, and a store in another village in the county. The court took judicial notice of the fact that such places were public places.

In Graham v. Fitts (1876) 53 Miss. 307, wherein it appeared that a deed of trust provided for the sale of land, by posting a notice of such sale in three public places for thirty days, it was held that the posting of one at the courthouse door, of another on the inside door of the postoffice, and of a third some place in the county, was a sufficient compliance with such provision. It appeared that the postoffice was closed after 10 o'clock A. M. on Sundays, so that the said notice could not be seen at such times. It was held that this made no difference, as the law does not contemplate that notices of sale will be inspected on Sunday. Three different places of public resort, where people would be likely to see the notices and learn of the sale, were meant by the terms employed in the deed of trust.

See also Hoitt v. Burnham (1882) 61 N. H. 620, stated at length, supra, under "Hotel." Edwards v. Meadows (1881) 71 Ala. 42, stated at length, supra, under "Courthouse."

Public square.

In Carter v. Abshire (1871) 48 Mo. 300, it appeared that a deed of trust provided that, if the trustee should sell, he should give notice by setting up four written handbills in four of the most "public places" in the city.

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The trustee posted the notices of the sale on the four sides of the public square of the city. It was held that this was a compliance with the provisions of the trust deed as to posting in four public places.

Railroad station.

In Whittingham v. Hopkins (1903) 69 N. J. L. 189, 54 Atl. 250, the statute under consideration required that notices of an application for the appointment of surveyors to lay out a public road should be posted in three public places. Two of these notices were posted at railroad stations, and it was claimed that these were not posted in public places, because railroads are private property. It was held that they were public places, the court saying: "Where notoriety is the object to be attained, the most public places are those that afford the most publicity, without regard to the title of the owner of the property."

In Territory v. Lannon (1889) 9 Mont. 1, 22 Pac. 495, it was held that a railroad station, 600 or 700 feet from a proposed highway, was a public place within the meaning of § 1809, division 5, Compiled Statutes, providing for the posting of notices of the intention to lay out the said highway, in three public places in the vicinity thereof.

Registry of deeds.

In Cunningham v. Bright (1917) 228 Mass. 385, 117 N. E. 909, in construing a statute (Rev. Laws, chap. 178, § 28) which provides for the posting of notices of an execution sale in a "public place," it was held that a registry of deeds was a public place, in the same sense as a town hall or postoffice, and the failure of the officer to describe it as a public place on his return of the sale was held not to be material.

Schoolhouse.

In Wilson v. Bucknam (1880) 71 Me. 545, it was held that a schoolhouse was a "public place," within the meaning of the provisions of a statute requiring that notice of an execution sale of property shall be posted in a public place (Rev. Stat. chap. 76).

See also Seabury v. Howland (1887) 15 R. I. 446, 8 Atl. 341, stated at length, supra, under "Board."

Shed.

In Austin v. Soule (1863) 36 Vt. 645, it appeared that, on an execution sale of personal property, the sheriff posted a notice on the inside of a shed at the place where the property was to be sold, and at a store in the village. The notice posted in the shed was in plain view of a public road, but could not be read therefrom. It was held that this was a public place within the meaning of the statute.

Store.

See Hart v. Smith (1878) 44 Wis. 213, stated at length, supra, under "Postoffice."

Tavern.

In People ex rel. Anderson v. Le Grange (1851) 2 Mich. 187, it appeared that the town clerk had posted a notice of the laying out of a road on the inside door of a tavern where the township meeting was held in alternate years. Chapter 25, § 2, Revised Statutes, provided for the posting of notices relating to the establishment, alteration, or discontinuance of a road, on the outer door of the house or building where such township meeting is usually held, or, if there be no such building, then in one of the most public places in the township. It was held that the posting complied with the statute, since the place was a public one, and there was no building where the township meeting was usually held.

Tree.

A Minnesota statute (Gen. Stat. 1894, § 1030) provides as follows: "At the annual town meeting in each year, the legal voters present at each meeting shall determine and designate three places in the town as public or the most public places of such town, and that all legal notices required to be posted in three public, or the most public places of a town, shall be posted up at such places at least, and they shall make provision for the erection and maintenance of suitable posts on which to post up notices [as] aforesaid in all places so designated, in which there is no sufficient natural

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convenience for that purpose." In Lutgen v. Stearns County (1906) 99 Minn. 499, 110 N. W. 1, it appeared that notices had been posted at two places designated as required. As to the third notice, it appeared that the town meeting had provided for the erection of a guidepost at the designated place, but it had not been erected at the time of the posting of the notice. The notice was posted on an elm tree near a schoolhouse in the county. This elm tree had been designated by a prior town meeting as one of the public places for the posting of notices, and was covered with notices. It was held that this tree was a "public place" in the usual acceptance of the term, and such posting was sufficient.

In the reported case (WALKER v. SUNDERMEYER, ante, 1005), a posting on a tree near the line between the property of two of the parties interested was sustained.

III. Places held not to be public.

There are very few cases which have held particular places not to be public. It has been held, however, that a shoemaker's shop is not a public place, and that street corners in some instances are not.

In Tidd v. Smith (1825) 3 N. H. 178, under a statute providing that a notice of a tax sale should be posted in some "public place" in the village for three successive weeks, it appeared that the notice was posted at a tavern, which, shortly after the notice was posted, ceased to be a tavern, and became a shoemaker's shop. It was held that a shoemaker's shop was not a public place within the meaning of the statute. The court said: "It is very clear that the question whether a particular place is to be considered as a public place, within the meaning of the statute, is a question partly of fact and partly of law. The nature and situation of the place, and the uses to which it is applied, are matters of fact to be settled by a jury. But when these are settled, whether the place is to be considered a public place, within the intent of the statute, is purely a question of law. . . . The general understanding of the community on a question of this nature is entitled to much respect; and it is believed this understanding has viewed as public places houses of public worship, inns, and perhaps, in some places, shops where goods are retailed. We are not aware that a mechanic's shop has ever been considered as a public place anywhere."

In Myrick v. Kahle (1903) 120 Wis. 57, 97 N. W. 506, there was involved a statute (Stat. 1898, §§ 1130, 1132) which required the county treasurer to post copies of a notice of tax sales in at least four public places in his county, besides a conspicuous place in his office, and to file an affidavit of such posting. The county treasurer, in his affidavit, stated that he had posted the notices "in a conspicuous place" in his office, on the door of an engine house, and at six street corners, describing their location. He did not state that these places were public places, nor did he state the city or county wherein they were located. It was held that the affidavit was insufficient, and that the sale and tax deed were void. The court said: "Are the places described, in their nature, public places within the meaning of the law? . . . What is a public place within the meaning of the statute . . . resolves itself into a question partly of law and partly of fact. . . . The place of posting should be one accessible to persons as a public, and applied to such uses and purposes where the public resorts, and thereby make them open to public observation. The obvious intention of the statute being to give publicity of the time, place, and lands to be sold, and thereby induce persons to attend the sale. It seems clear that street corners are not necessarily 'public places,' within the requirement of the law. It is a matter of common knowledge that conspicuous places at many street corners in cities are comparatively obscure and secret places, and to post a notice of tax sale in a conspicuous place at such corners would most likely fail to attract observation and meet the public view."

In Cummins v. Little (1863) 16 N. J.

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Eq. 48, it appeared that a statute required that notices of an execution sale of real property should be posted in five public places in the county. Pursuant thereto, the sheriff posted one notice in a store in the township where the farm to be sold was situated, another notice in the clerk's office of a town 14 miles distant, and three in a village 12 miles distant. It was held that the posting was not sufficient. B. F. D.

HOWARD D. LOWBER, Plff. in Err.,

v.

STATE OF DELAWARE.

Delaware Supreme Court — February 28, 1917.

(6 Boyce (Del.) 353, 100 Atl. 322.)

Evidence — entire conversation containing confession.

1. One against whom statements have been admitted in evidence as containing implied confessions of guilt may testify as to what he in fact said at the time alleged.

[*See note on this question beginning on page* 1017.]

Appeal — rejection of evidence — error.

2. Where the jury refused to credit a denial of alleged confessions by accused, it is not reversible error to refuse to permit him to give his version of what was in fact said.

ERROR to the Court of General Sessions for Kent County to review a judgment denying a motion in arrest of judgment, after conviction of defendant of using a female child for immoral purposes, in violation of law. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **Thomas C. Frame, Jr.**, and **Daniel O. Hastings**, for plaintiff in error:

The whole of an alleged confession must be put in evidence, and defendant has a right to put before the jury his own version of any confession put in evidence by the state, whether it be for the purpose of adding to, explaining, or contradicting the state's version.

1 Greenl. Ev. § 218; 2 Whart. Crim. Ev. pp. 1299, 1300; Carver v. United States, 164 U. S. 694, 41 L. ed. 602, 17 Sup. Ct. Rep. 228; Diehl v. State, 157 Ind. 549, 62 N. E. 51; People v. Yeaton, 75 Cal. 415, 17 Pac. 544.

It is not necessary to state what is expected to be proved if it clearly appears that the question is such as may admit of a favorable reply.

Buckstaff v. Russell & Co. 151 U. S. 626, 38 L. ed. 292, 14 Sup. Ct. Rep. 448; Calvert County v. Gantt, 78 Md. 286, 28 Atl. 101, 29 Atl. 610; Stanley v. Beckham, 82 C. C. A. 304, 153 Fed. 152.

If it be shown that excluded evidence goes directly to the main issue, and tends directly to negative defendant's guilt, the appellate court must hold such exclusion reversible error.

People v. Wood, 126 N. Y. 249, 27 N. E. 362.

Mr. **Josiah O. Wolcott**, Attorney General, for the State.

Pennewill, Ch. J., delivered the opinion of the court:

The plaintiff in error was convicted in the court of general sessions in and for Kent county, of a violation of § 4709 of the Code of 1915, which makes it unlawful to take or use a female child under the age of eighteen years for the purpose of sexual intercourse.

(1) The only question argued before this court is raised by the exception to the ruling of the trial court which excluded certain evidence offered by the defendant.

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The evidence of the state comprised the testimony of the prosecuting witness, that the defendant Lowber had sexual intercourse with her on August 15, 1915; and also the testimony of four witnesses respecting statements made to them on separate occasions by the defendant, which statements impliedly admitted that he had committed the act charged against him. The defendant denied the act charged, as well as the testimony of the witnesses respecting the incriminating statements.

Florence Anderson, one of the four witnesses above mentioned, testified for the state as follows: "On February 8, 1916, I sent for Reverend Lowber to come to my home, and he came, and I said: 'You have got Beulah in trouble;' and he said: 'What are you going to do about it?' and I said: 'I ought to ask you what you are going to do; you know you have been intimate with her;' and he said: 'You can defend her; I will defend myself;' and then he said: 'I will bear all expenses, and any time you whisper money to me I will give it to you; anything to keep this from getting out.'"

The defendant was examined and testified as follows:

Q. Did you hear her statement in regard to a conversation you had with her?

A. I did.

Q. On or about February 8, 1916?

A. Yes.

Q. You heard the entire statement made by her from that witness stand?

A. I did.

Q. It is true?

A. It is not.

Q. She said in her examination that on February 8, 1916, "I sent for the Reverend Lowber to come to my house, and he came, and I said: 'You have got Beulah in trouble;' and he said (meaning you): 'What are you going to do about it?' and I said: 'You know you have been intimate with her;' and you said: 'You (meaning Florence Anderson) can defend her; I will defend myself;' and then you said: 'I will bear all expenses, and at any time you whisper money to me I will give it to you; anything to keep this from getting out.'" Did you say that?

A. I did not.

Q. Did you have a conversation?

A. I did.

Q. With Florence Anderson?

A. I did.

Q. On or about February 8, 1916?

A. I did.

Q. Why did you go to her house?

A. She sent for me.

Q. Will you state to the court and jury the entire conversation that took place between you and Florence Anderson on that occasion, in relation to having had any sexual intercourse with Beulah Johnson, or getting Beulah Johnson in trouble?

Mr. Wolcott: I object; the testimony of Florence Anderson is material only in that it contains an implied admission that this man had had intercourse with the girl. He denies that. That is material, but anything beyond that is not material.

Mr. Frame: I want to show the contrast between what he says occurred and what she said occurred.

Boyce, J.: We feel very clear that you have gone as far as you can. You have presented her testimony, and he denies it. (Exception noted for defendant.)

It is solely upon this ruling that the appellant bases his claim to error and reversal.

It is contended that the statements as testified to by said four witnesses constituted an implied confession by the defendant, and such being the case, he should have been permitted to give his recollection of what was said so that the jury might have all the evidence respecting the conversation, and thus be better able to tell the meaning of the language used. It is true the defendant denied that he made the statements testified to by the state's

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witnesses, and it is not at all likely that any narration by him of what he did say would have availed him at the trial, or have added anything to his general denial.

It is possible that what he proposed to say might have been foreign to what he is represented to have said, and therefore inadmissible as evidence. But he was not permitted to do anything more than deny that he made certain statements which the state put in evidence as a confession of his guilt. This court does not know, and cannot tell from the record, what the defendant would have said the conversation was that the state claims to have been a confession. The defendant admits that he was present on the occasion when, the witness Anderson says, he made the statements in question, and he also admits he at that time made certain statements, but not those attributed to him. There is no law better settled than this: "In the proof of confession, as in the case of admissions in civil cases, the whole of what the prisoner said on the subject at the time of making the confession should be taken together." 1 Greenl. Ev. § 218.

This learned writer also says: "If one part of a conversation is relied on as proof of a confession of the crime, the prisoner has a right to lay before the court the whole of what was said in that conversation; not being confined to so much only as is explanatory of the part already proved against him, but being permitted to give evidence of all that was said upon that occasion relative to the subject-matter in issue."

The law upon this subject is very clearly stated also by Mr. Wharton in his work on Criminal Evidence, vol. 2, pp. 1299, 1300, in the following language: "The exact words of the confession need not be proved, but the substance must be given; and the alleged confession must be offered in its entirety, including all that was said relating to the fact in dispute; and the accused at the same time may prove in explanation the whole of what was said that may tend to modify or refute the confession."

Such being the law governing the proof of alleged confessions, and the statements in question being clearly in the nature of a confession, this court is of the opinion that the trial court erred in refusing to admit the testimony of the defendant as to what was said at the time the alleged statements were made.

Evidence—entire conversation containing confession.

It is very probable that if the defendant had testified that the conversation he had with Florence Anderson was very different from that sworn to by her, and in no wise indicated his guilt, the jury would not have accepted his testimony against that given for the state by four disinterested witnesses. But no matter what might be its effect or weight it was nevertheless competent testimony, and should have been admitted for whatever it was worth.

(2) But even though the testimony was competent and admissible, the question remains: Was its rejection by the court so harmful and prejudicial to the defendant as to justify this court in reversing the judgment? In other words, was the refusal of the court to admit the testimony reversible error?

This court in the case of Fisher v. State, 1 Penn. (Del.) 388, 41 Atl. 184, declared the law that should govern appellate courts in criminal cases, viz.:

"It is not every error that will justify reversal, and it is not every mistake that may be made in the hurry of a trial court that will warrant the setting aside of the judgment of that tribunal. . . .

"In this country it is a general rule in criminal cases that a new trial will not be granted for the erroneous admission or rejection of evidence, where it clearly appears that the defendant could not have

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been prejudiced thereby. If, on the whole record, it appears that justice has been done, and there appears no substantial misdirection of the court by which the prisoner's rights were injuriously affected, the court is not justified in reversing the judgment.

"When it appears from the record that the error alleged therein on behalf of the appellant could have worked no injury to him, and could not have changed the result, the judgment of the court below will be affirmed. . . . Courts now undertake to judge for themselves of the materiality of evidence found to have been improperly admitted or rejected, and when satisfied that no injustice has been done, and that the verdict would have been the same, with or without such evidence, they have refused a new trial."

Such was the law in this country at the time the decision was given in the Fisher Case, and it has been not only followed but emphasized by the courts of last resort since that time.

Applying this law to the facts of the present case, the court are clearly of the opinion that a new trial should not be granted. The error complained of could not have been prejudicial to the defendant, because, if the jury were unwilling to believe his general denial of the statements sworn to by the state's witnesses, it is not conceivable they would have credited anything he might have said modifying, contradicting, or altering the sense of said statements. The prosecuting witness testified positively that the defendant committed the offense charged in the indictment, four other witnesses for the state gave testimony respecting statements made by the defendant to them, whereby he impliedly admitted his guilt. The defendant was sworn as a witness in his own behalf, and denied that he committed the offense or made the incriminating statements. While the rejected testimony was, in our opinion, legally admissible, it is impossible to see how its admission could have added anything to the defendant's general denial, or have produced any different result at the trial.

Appeal—rejection of evidence—error.

Being satisfied from an inspection of the entire record that no substantial right of the defendant was injuriously affected by any ruling of the court below, and that the admission of the rejected testimony would not have changed the result of the trial, this court is of the opinion that the judgment entered below should be affirmed.

ANNOTATION.

Proof of entire conversation containing alleged confession.

I. General rule:
 a. Rule stated, 1017.
 b. Application of rule, 1021.
II. Admission of exculpatory statements:
 a. Rule stated, 1022.
 b. Limitation of rule, 1028.
III. Confession showing commission of other offenses, 1029.
IV. Failure to hear and understand entire conversation, 1030.
V. Failure to remember entire conversation, 1034.
VI. Incomplete or interrupted confession, 1037.
VII. Confession in foreign language, 1039.

I. General rule.

a. Rule stated.

In the proof of confessions, the whole of what the accused said on the subject, at the time of making the confession, should be taken together. The prosecution is entitled to show the whole statement, or, if any part is omitted, the accused is entitled to supply it.

United States.—United States v. Prior (1836) 5 Cranch, C. C. 37, Fed.

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Cas. No. 16,092; United States v. Smith (1806) Fed. Cas. No. 16,342a.

Alabama.—Chambers v. State (1855) 26 Ala. 59; Frank v. State (1855) 27 Ala. 37; Corbett v. State (1857) 31 Ala. 329; William v. State (1864) 39 Ala. 532; Parke v. State (1872) 48 Ala. 266; Burns v. State (1873) 49 Ala. 370, 1 Am. Crim. Rep. 324; Levy v. State (1873) 49 Ala. 390; Eiland v. State (1875) 52 Ala. 322; McAdory v. State (1878) 62 Ala. 154; Webb v. State (1893) 100 Ala. 47, 14 So. 865; Davis v. State (1910) 168 Ala. 53, 52 So. 939; Martin v. State (1911) 2 Ala. App. 175, 56 So. 64; Cook v. State (1918) — Ala. App. —, 78 So. 306.

Arkansas.—Frazier v. State (1883) 42 Ark. 70; Williams v. State (1901) 69 Ark. 599, 65 S. W. 103, 12 Am. Crim. Rep. 110.

California.—People v. Navis (1852) 3 Cal. 106; People v. Strong (1866) 30 Cal. 151; People v. Murphy (1870) 39 Cal. 52; People v. Gelabert (1870) 39 Cal. 663; People v. Keith (1875) 50 Cal. 137; People v. Tarbox (1896) 115 Cal. 57, 46 Pac. 896; People v. Luis (1910) 158 Cal. 185, 110 Pac. 580; People v. Tugwell (1915) 28 Cal. App. 348, 152 Pac. 740.

Delaware.—State v. Smith (1888) 9 Houst. 588, 33 Atl. 441; State v. Brinte (1904) 4 Penn. 551, 58 Atl. 258. See the reported case (LOWBER v. STATE, ante, 1014).

Florida.—Thalheim v. State (1896) 38 Fla. 169, 20 So. 938.

Georgia.—Long v. State (1857) 22 Ga. 40; Peterson v. State (1873) 47 Ga. 524; Myers v. State (1895) 97 Ga. 76, 25 S. E. 252.

Illinois.—Hanrahan v. People (1878) 91 Ill. 142.

Indiana.—Morrow v. State (1874) 48 Ind. 432.

Iowa.—State v. Novak (1899) 109 Iowa, 717, 79 N. W. 465; State v. Wright (1900) 112 Iowa, 436, 84 N. W. 541; State v. Busse (1905) 127 Iowa, 318, 100 N. W. 536.

Kentucky.—Berry v. Com. (1873) 10 Bush, 15, 1 Am. Crim. Rep. 272; Mullins v. Com. (1882) 3 Ky. L. Rep. 686; Cable v. Com. (1892) 14 Ky. L. Rep. 253, 20 S. W. 220; Green v. Com. (1904) 26 Ky. L. Rep. 1221, 83 S. W. 638.

Louisiana.—State v. Isaac (1848) 3 La. Ann. 359; State v. Wedemeyer (1856) 11 La. Ann. 49; State v. Gilcrease (1874) 26 La. Ann. 622; State v. Travis (1887) 39 La. Ann. 356, 1 So. 817; State v. Johnson (1895) 47 La. Ann. 1225, 17 So. 789; State v. Gianfala (1904) 113 La. 463, 37 So. 30; State v. Thompson (1906) 116 La. 829, 41 So. 107; State v. Price (1908) 121 La. 54, 46 So. 99.

Massachusetts.—Com. v. Trefethen (1892) 157 Mass. 180, 24 L.R.A. 235, 31 N. E. 961; Com. v. Russell (1893) 160 Mass. 8, 35 N. E. 84.

Michigan.—People v. Bowen (1912) 170 Mich. 129, 135 N. W. 824.

Mississippi.—Coon v. State (1849) 13 Smedes & M. 246; McCann v. State (1850) 13 Smedes & M. 471; Bishop v. State (1910) 96 Miss. 846, 52 So. 21.

Missouri.—State v. Carlisle (1874) 57 Mo. 102; State v. Hollenscheit (1875) 61 Mo. 302; State v. Branstetter (1877) 65 Mo. 149; State v. Curtis (1879) 70 Mo. 594. See also State v. Knowles (1904) 185 Mo. 141 83 S. W. 1083, and State v. Merkel (1905) 189 Mo. 315, 87 S. W. 1186, wherein instructions embodying the general rule were approved without discussion.

Montana.—State v. Lu Sing (1906) 34 Mont. 31, 85 Pac. 521, 9 Ann. Cas. 344.

Nebraska.—Walrath v. State (1878) 8 Neb. 80.

Nevada.—State v. Buster (1896) 23 Nev. 346, 47 Pac. 194.

New York.—People v. Loomis (1904) 178 N. Y. 400, 70 N. E. 919.

North Carolina.—State v. Swink (1836) 19 N. C. (2 Dev. & B. L.) 9; State v. Worthington (1870) 64 N. C. 594.

Ohio.—Blackburn v. State (1872) 23 Ohio St. 146; Morehead v. State (1877) 34 Ohio St. 212; State v. Knapp (1904) 70 Ohio St. 380, 71 N. E. 705, 1 Ann. Cas. 819.

Oklahoma.—Foster v. State (1912) 8 Okla. Crim. Rep. 139, 126 Pac. 835.

Oregon.—State v. Porter (1897) 32 Or. 135, 49 Pac. 964.

South Carolina.—State v. Covington (1831) 2 Bail. L. 569.

South Dakota.—State v. West (1909) 24 S. D. 530, 124 N. W. 751.

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Tennessee.—Young v. State (1826) 2 Yerg. 292; Tipton v. State (1824) Peck, 308; Crawford v. State (1867) 4 Coldw. 190.

Texas.—Conner v. State (1870) 34 Tex. 659; Riley v. State (1878) 4 Tex. App. 538; Sager v. State (1881) 11 Tex. App. 110; Jones v. State (1890) 29 Tex. App. 20, 25 Am. St. Rep. 715, 13 S. W. 990. See also Pharr v. State (1879) 7 Tex. App. 472, wherein a charge to the jury embodying the general rule was held to be correct.

Utah.—State v. Greene (1911) 38 Utah, 389, 115 Pac. 181.

Vermont.—State v. Mahon (1859) 32 Vt. 241; State v. McDonnell (1860) 32 Vt. 491.

Virginia.—Brown v. Com. (1838) 9 Leigh, 633, 33 Am. Dec. 263; Parrish v. Com. (1884) 81 Va. 1.

Wisconsin.—Griswold v. State (1869) 24 Wis. 144; Rounds v. State (1883) 57 Wis. 45, 14 N. W. 865; Emery v. State (1896) 92 Wis. 146, 65 N. W. 848; Fertig v. State (1898) 100 Wis. 301, 75 N. W. 960.

Wyoming.—Mortimore v. State (1916) 24 Wyo. 452, 161 Pac. 766.

England.—The Queen's Case (1820) 2 Brod. & B. 284, 129 Eng. Reprint, 976, 22 Revised Rep. 662, 11 Eng. Rul. Cas. 183; Rex v. Paine (1696) 5 Mod. 165, 87 Eng. Reprint, 584; Rex v. Clewes (1830) 4 Car. & P. 221.

Canada.—Rex v. Martin (1905) 9 Ont. L. Rep. 218, 2 B. R. C. 336, 4 Ann. Cas. 218; Reg. v. Jones (1869) 28 U. C. Q. B. 416.

In Levy v. State (1873) 49 **Ala.** 390, the court stated the rule in the following language: "The whole of a confession or admission must be given in evidence, and taken together; in other words, it must not be garbled. Apart from the manifest injustice to the party of selecting the parts of a confession or admission deemed prejudicial, and disconnecting them from other statements with which they were connected in expression, it would be impossible to fix the true meaning of the parts selected. Therefore, the law requires the whole of an admission or confession to be laid before the jury; as well that which is favorable as that part which is unfavorable."

In King v. State (1915) 117 **Ark.** 82, 173 S. W. 852, the rule was expressed as follows: "It is an elementary rule of law that, when admissions of a defendant in the nature of a confession are allowed in evidence against him, all that he said in that connection must also be permitted to go before the jury."

In Morehead v. State (1877) 34 **Ohio** St. 212, the court said: "Where the state offers in evidence a part of a declaration or conversation of the accused, it is quite true that the whole of such declaration or conversation should be admitted, as well that which is for as that which is against him."

In Com. v. Trefethen (1892) 157 **Mass.** 180, 24 L.R.A. 235, 31 N. E. 961, the court said: "If any part of a conversation with the defendant put in evidence tends to show directly or indirectly that he is guilty of the crime charged, the defendant has the right to have put in evidence all that was said to and by him at the same time, and relating to the same subject, although it is in his favor."

In Coon v. State (1849) 13 Smedes & M. (**Miss.**) 246, it was said: "The rule is well settled that statements or confessions of the party to be affected must be delivered to the jury precisely as they were made; that certain facts cannot be extracted and detailed to the jury, and other parts withheld."

In State v. Porter (1897) 32 **Or.** 135, 49 Pac. 964, the court stated the general rule in the following language: "Confessions must be taken as a whole, and, if one part of a conversation is relied upon as proof of a confession of a crime, the prisoner has a right to lay before the court the whole of what was said in that conversation; and he is not confined to so much only as is explanatory of the part proved against him by the state, but is permitted to give evidence of all that was said upon the occasion, relative to the subject-matter in issue."

In United States v. Smith (1806) **Fed. Cas. No.** 16,342a, the court said: "The confessions of the party must be viewed entire, not in detached parts; the purport and meaning of the decla-

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ration must be collected from a view of the whole conversation at the time."

In Eiland v. State (1875) 52 Ala. 322, the court stated the rule as follows: "Confessions or declarations, whether offered in evidence in a civil or criminal case, must be received as a whole. The part which criminates must be taken connected with that which exculpates. The law does not ascertain the credence which shall be attached to either part, or to the confession or declaration in its entirety. The jury are not bound to attach equal credence to every part; they may, for sufficient reasons, reject a part and give effect to a part; such rejection cannot be capriciously made, nor can credence be capriciously given to a part. That which is favorable to the party should not be rejected merely because it is favorable to him, and because of the motives which may have induced him to make it. The confession should be taken as a whole; the time and circumstances of its making, its harmony or inconsistency with other evidence, and the motives which may have operated on the party in making it, should all be fairly considered by the jury. Then, without regard to whether they are clearly disproved or not, the jury should credit all which they find sufficient reason for crediting, and reject all which they find sufficient reason for rejecting." See to the same effect State v. Brinte (1904) 4 Penn. (Del.) 551, 58 Atl. 258.

In The Queen's Case (1820) 2 Brod. & B. 284, 129 Eng. Reprint, 976, 11 Eng. Rul. Cas. 183, Chief Justice Abbott, in speaking of a confession made by an accused in a conversation and brought forward by the prosecution, said: "The conversations of a party to the suit, relative to the subject-matter of the suit, are, in themselves, evidence against him in the suit, and, if a counsel chooses to ask a witness as to anything which may have been said by an adverse party, the counsel for that party has a right to lay before the court the whole which was said by his client in the same conversation; not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the part introduced upon the previous examination, provided only, that it relate to the subject-matter of the suit; because it would not be just to take part of a conversation as evidence against a party, without giving to the party at the same time the benefit of the entire residue of what he said on the same occasion."

Parts of a conversation having no reference whatever to the issue on trial are not admissible, under the rule that the accused is entitled to the entire conversation connected with a confession. "The rule means only that he is entitled to the entire conversation bearing upon the subject of the controversy." People v. Bowen (1912) 170 Mich. 129, 135 N. W. 824. See to the same effect, Com. v. Campbell (1892) 155 Mass. 537, 30 N. E. 72; State v. Sibley (1918) — Mo. —, 207 S. W. 806.

And it has been held that a jury is not required to reject all of a confession merely because part of a conversation, in no way material to questions involved, has been omitted from the evidence. Com. v. Antaya (1904) 184 Mass. 326, 68 N. E. 331, 12 Am. Crim. Rep. 135.

In State v. Lipscomb (1901) 160 Mo. 125, 60 S. W. 1081, it appeared that the accused said: "Brown, I know I have robbed you; I can't help it. You can put me behind the bars ten years, and when I come out I guess I would do the same thing again. It is just in me." Brown then asked him what he got, and he said: "By God, you won't scare me into telling you that." The defendant claimed that the confession was inadmissible, because the entire conversation was not given, but it did not appear that any part had been excluded by the court. In holding the confession to be admissible, the court said: "Defendant did not even take the witness stand, as he had the right to do, and deny that he made these statements, or, if made, that it was under some promise of immunity or flattery of hope; and was there any evidence from any other source tending to show that such was the case; there is, therefore, not the slightest

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circumstance upon which to base defendant's contention upon this question."

b. Application of rule.

In People v. Navis (1852) 3 Cal. 106, a witness for the state testified on his direct examination that "the defendant came to him on the evening that the Indian was killed, with a knife in his hand, and stated that he had killed the Indian;" and on cross-examination he was asked: "What also did he, the defendant, say at that time?" To this question the counsel for the people objected, and the court sustained the objection. In holding the exclusion of the question error, the appellate court said: "Where the admission or confession of a party is resorted to as evidence, it is error to exclude any portion of it made at the same time as the part which is related."

In Long v. State (1857) 22 Ga. 40, a witness for the state testified that the accused was in possession of a horse, when the witness and others arrested him on suspicion, and that he offered to sell the horse to the witness's father for $80. On cross-examination, the prisoner's counsel asked the witness to state all that was said by the prisoner at the time he offered to sell the horse for $80, to which question the state's counsel objected, and the court sustained the objection. On appeal, it was held that the objection should not have been sustained, and that the evidence should have been admitted under the general rule.

In Mullins v. Com. (1882) 3 Ky. L. Rep. 686, evidence was introduced to show that the accused confessed that the pistol with which the shooting was done was his pistol, but the trial court refused to allow the rest of the conversation to be admitted unless it touched the ownership of the pistol. The appellate court held that the whole conversation, without restriction, should have gone to the jury.

In State v. West (1909) 24 S. D. 530, 124 N. W. 751, a police justice testified that certain admissions and confessions were made to the defendant's mother while she and her son were in the sheriff's office; that at the time the mother asked her son: "Did you have intercourse with this girl, as it says in that paper there?" (pointing to the complaint); that the accused answered: "I did;" that the mother then asked: "More than once?" to which the son answered: "Yes." The defendant called his mother as a witness, and several questions were asked of her which would tend to bring out the entire conversation between her and her son. These questions were objected to, and the objections were sustained. The appellate court held this error, saying: "This was clearly error, as the defense had the right, either by cross-examination of the state's witness or by calling its own witness, to bring before the jury the whole of this conversation, if one was held."

In People v. Murphy (1870) 39 Cal. 52, a homicide case, the accused was sworn as a witness in his own behalf, and gave his version of the affair, and on cross-examination was asked if he had not made certain statements in regard to the homicide, which apparently involved material admissions against himself. To this question the witness answered: "I said words to that effect, but not exactly in that way;" and the defendant's attorney afterwards asked the accused to state the whole conversation he had at the time, and connected with the killing of the deceased. This question was objected to, which objection was sustained by the trial court; and the appellate court, in overruling the lower court, said: "It is difficult to understand how this ruling of the court can be sustained. The portion of the conversation which had been drawn out tended to establish most material admissions on the part of the defendant, and he was clearly entitled to have the exact words constituting the admission stated, if that were possible, and also to give in evidence the whole conversation relating to the same subject-matter. The fact that the witness was also the defendant could make no difference in the operation of the rule. Whether it be considered an attempt to prove a confession, or considered as an admission made on the trial, its ef-

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fect is limited by the language used in the conversation alluded to; and in either case it was plainly the right of the defendant to state the whole conversation upon that subject."

In Bishop v. State (1910) 96 Miss. 846, 42 So. 21, the accused pleaded insanity as a defense to a charge of homicide. A witness was asked the following question: "I will get you to state what took place—the conversation between you and Riddle and Bishop and Travis—up in that room at the depot, at that time?" The question was objected to by the state, and the objection was sustained. The appellate court held that the ruling was error, and said: "All that was said and done in that room of the depot at the time of that confession was plainly competent, as going to show, not only whether the confession was free and voluntary, but also to show whether the defendant was sane or insane."

The rule has been applied where an admission of the accused is the result of his answer to a witness's question, the question being admissible in order to explain what the accused said in reply. State v. Butler (1914) 258 Mo. 430, 167 S. W. 509; State v. Price (1908) 121 La. Ann. 54, 46 So. 99.

In like manner what a third person said to the accused at the time of the confession may be admitted, to make intelligible the words of the accused. Hendley v. State (1917) — Ala. —, 76 So. 904; Powell v. State (1912) 5 Ala. App. 75, 59 So. 530.

Thus, in a seduction case, it appeared that the accused was asked if he "used any preventative, or anything to protect the girl." He said "he didn't, he took it straight." The court said: "This expression would not be intelligible without the entire connection being stated; but, when the whole conversation is related, it amounts to a confession of illicit intercourse." Gleason v. State (1916) 79 Tex. Crim. Rep. 185, 183 S. W. 891. In the same case, a statement of accused that "he would not mind marrying her if he could get a divorce; if he would not have to live with her," and that "if he had to marry her and live with her he would rather go to the pen," was shown. The court said: "This statement, when in the light of the entire conversation, amounted to an admission that he felt legally obligated to marry the girl, and is corroborative of her statement that an engagement to marry existed between the parties."

In Emery v. State (1896) 92 Wis. 146, 65 N. W. 848, the state was allowed to prove a conversation between the accused and the sheriff, in which the sheriff said: "I am satisfied in my own mind that your gun did the shooting;" to which the accused replied: "It looks so, don't it?" It was objected that this evidence was inadmissible, as its effect was to introduce the opinion of the sheriff as to whose gun did the shooting. The appellate court said: "We do not regard the objection as tenable. The answer of Emery partook of the nature of an admission, hence was proper evidence against him; but it could only be understood in connection with the sheriff's remark, to which it was a reply."

In Smith v. State (1916) 80 Tex. Crim. Rep. 221, 189 S. W. 484, it appeared, in a prosecution for manslaughter, that the court admitted a statement of the defendant's wife, the nature of which does not appear, and his reply: "Oh, go back to the house. I have done nothing but kill a damned dog." The court held that the defendant's reply was admissible, saying: "If the remark of the wife had not been necessary to make plain the remark of appellant, her remark would not have been admissible. Certainly no one can contend but that the remark of appellant was admissible."

II. Admission of exculpatory statements.

a. Rule stated.

It is well settled that, if a confession is made under such circumstances as to authorize its admission in evidence, the accused is entitled to have the entire conversation, including any exculpatory or self-serving declarations connected therewith, also admitted. However, it is for the jury to say what weight shall be given to the several parts of the statement, as they may believe that part which

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charges the prisoner, and reject that which tends to exculpate him.

Alabama.—Chambers v. State (1855) 26 Ala. 59; William v. State (1865) 39 Ala. 532; Parke v. State (1872) 48 Ala. 266; Burns v. State (1873) 49 Ala. 370, 1 Am. Crim. Rep. 324; McAdory v. State (1878) 62 Ala. 154; Webb v. State (1893) 100 Ala. 47, 14 So. 865.

Arkansas.—Frazier v. State (1883) 42 Ark. 70; Williams v. State (1901) 69 Ark. 599, 65 S. W. 103, 12 Am. Crim. Rep. 110; King v. State (1915) 117 Ark. 82, 173 S. W. 852.

California.—People v. Strong (1866) 30 Cal. 151; People v. Yeaton (1888) 75 Cal. 415, 17 Pac. 544; People v. Tugwell (1915) 28 Cal. App. 348, 152 Pac. 740.

Delaware.—See the reported case (LOWBER v. STATE, ante, 1014).

Florida.—Thalheim v. State (1896) 38 Fla. 169, 20 So. 938.

Georgia.—Myers v. State (1895) 97 Ga. 76, 25 S. E. 252.

Iowa.—State v. Novak (1899) 109 Iowa, 717, 79 N. W. 465.

Kentucky.—McCandless v. Com. (1916) 170 Ky. 301, 185 S. W. 1100.

Louisiana.—State v. Travis (1887) 39 La. Ann. 356, 1 So. 817; State v. Johnson (1895) 47 La. Ann. 1225, 17 So. 789.

Massachusetts.—Com. v. Trefethen (1892) 157 Mass. 180, 24 L.R.A. 235, 31 N. E. 961.

Michigan.—People v. Bowen (1912) 170 Mich. 129, 135 N. W. 824.

Missouri.—State v. Carlisle (1874) 57 Mo. 102; State v. Napier (1877) 65 Mo. 462; State v. Branstetter (1877) 65 Mo. 149; State v. Curtis (1879) 70 Mo. 594.

North Carolina.—State v. Patterson (1869) 63 N. C. 520.

Ohio.—Blackburn v. State (1872) 23 Ohio St. 146; Morehead v. State (1877) 34 Ohio St. 212.

Oregon.—State v. Porter (1897) 32 Or. 135, 49 Pac. 964.

Texas.—Jones v. State (1854) 13 Tex. 168, 82 Am. Dec. 550; Conner v. State (1870) 34 Tex. 659; Shackelford v. State (1875) 43 Tex. 138; Riley v. State (1878) 4 Tex. App. 538; Shrivers v. State (1879) 7 Tex. App. 450; Pharr v. State (1879) 7 Tex. App. 472; Sager v. State (1881) 11 Tex. App. 110; Harrison v. State (1886) 20 Tex. App. 387, 54 Am. Rep. 529; Bonnard v. State (1888) 25 Tex. App. 173, 8 Am. St. Rep. 431, 7 S. W. 862, 7 Am. Crim. Rep. 462; Jones v. State (1890) 29 Tex. App. 20, 25 Am. St. Rep. 715, 13 S. W. 990.

Utah.—State v. Romeo (1912) 42 Utah, 46, 128 Pac. 530.

Virginia.—Brown v. Com. (1838) 9 Leigh, 633, 33 Am. Dec. 263.

Wisconsin.—Griswold v. State (1869) 24 Wis. 144.

Wyoming.—Mortimore v. State (1916) 24 Wyo. 452, 161 Pac. 766.

England.—The Queen's Case (1820) 2 Brod. & B. 284, 129 Eng. Reprint, 976, 22 Revised Rep. 662, 11 Eng. Rul. Cas. 183.

Canada.—Rex v. Martin (1905) 9 Ont. L. Rep. 218, 2 B. R. C. 336, 4 Ann. Cas. 912.

Thus, in People v. Bowen (1912) 170 Mich. 129, 135 S. W. 824, the court said: "Where admissions of the accused are offered, he has a right to have the whole conversation admitted, whether the same consists of self-serving statements or not; the test being whether they form a part of the conversation proved by the people." See to the same effect, Com. v. Trefethen (1892) 157 Mass. 180, 24 L.R.A. 235, 31 N. E. 961; Com. v. Russell (1893) 160 Mass. 8, 35 N. E. 84.

In Webb v. State (1893) 100 Ala. 47, 14 So. 865, it was said: "The state is not required in the first instance to bring out an entire confession or conversation; but if any part is introduced by the state, the defendant is entitled, on cross-examination, to bring out all that was said at the time, which explained, qualified, or threw any light upon the part introduced by the state."

In Mortimore v. State (1916) 24 Wyo. 452, 161 Pac. 766, the court said: "When a confession is offered and admitted, the defendant is entitled to have all that was said at the time introduced in evidence, including exculpatory statements. And that a statement directly involving guilt does not lose its character as a confession, from the fact that it was accompanied

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by statements of an exculpatory nature, seems to be conceded or recognized in the many cases applying the rule as to confessions, to such statements, without referring to the distinction between a mere admission and a confession. The jury may believe the inculpatory statement and disbelieve what the defendant said, on the same occasion, in his own favor."

In Brown v. Com. (1838) 9 Leigh (Va.) 633, 33 Am. Dec. 263, it was said: "When the confession of a party, either in a civil or criminal case (for the rule is the same in both), is given in evidence, the whole, as well that part which makes for him as that which is against him, must be taken together, and go to the jury as evidence in the case. But, like other evidence, it must be weighed, and believed or disbelieved, in whole or in part, as reason may decide. The jury cannot, by a mere arbitrary exercise of the will, take a part to be true, and reject the residue. If, therefore, there be nothing in the case warranting such a discrimination, the whole must be taken to be true."

In State v. Curtis (1879) 70 Mo. 594, it was said: "In considering what the defendant said after the fatal stabbing, the jury must consider it all together. The defendant is entitled to the benefit of what he said for himself, if true, as the state is anything he said against himself in any conversation proved by the state. What he said against himself in any conversation the law presumes to be true, because against himself; but what he said for himself the jury are not bound to believe, because said in a conversation proved by the state; they may believe or disbelieve it, as it is shown to be true or false by all the evidence in the case."

In Griswold v. State (1869) 24 Wis. 144, the following charge to the jury was held to state correctly the law: "Where one part of a statement inculpates the defendant, and another would excuse him, the whole statement must be considered by the jury, but they are not bound to give equal credit to both branches of the statement; but, if the other evidence requires it, the jury may believe the confession of guilt, and reject that part of the statement exculpating the accused."

In McCandless v. Com. (1916) 170 Ky. 301, 185 S. W. 1100, it was held to be error to exclude that part of the conversation in which the accused stated that he had shot the deceased because it was necessary to save himself. The court said: "The other reason why it was error to exclude the statement of appellant that deceased was attempting to shoot him is, that it is a part of the conversation which the prosecution proved as an admission of the appellant. It would be manifestly unfair to appellant to pick out the incriminating words in the conversation, and put them in evidence against him, and exclude the remainder of the conversation, in which he explains the incriminating statement."

In Burns v. State (1873) 49 Ala. 370, 1 Am. Crim. Rep. 324, it appeared that, when the accused stated to the witness that he had shot the deceased, he also said: "And I fear I have killed him. I would not have done it for the world, but he was trying to kill me, and I couldn't help shooting him." The state objected to the admission of this evidence, and the trial court sustained the objection; and the appellate court, in discussing the admissibility of the evidence, said: "The prisoner offered to prove exculpatory declarations made by him when he returned to the stillhouse after the shooting, which the court excluded. The bill of exceptions does not inform us whether these declarations formed part of the conversation of which the state gave evidence, or whether they were made in another and subsequent conversation. Of course, we cannot say that the court erred in rejecting them. It may be proper for us to repeat the rule by which the court should be governed in determining the admissibility of this evidence. The prisoner cannot give in evidence his own declarations, unless they form part of the res gestæ; but if the state gives evidence of his confessions, declarations, or admissions, it is his right to lay before the jury all that he said

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at the time, referring to the killing and the circumstances attending it. It is the province of the jury to determine the credibility and weight of the declaration or confession. The jury must weigh the whole, rejecting no part unless for some sufficient reason; but they may, in the exercise of their judgment, give more credence to one part than to another, or may deny credence to a part, or to the whole."

In Williams v. State (1901) 69 Ark. 599, 65 S. W. 103, 12 Am. Crim. Rep. 110, the accused, on the cross-examination of a witness to whom he had confessed the commission of a homicide, offered to prove what he stated was his reason for committing the crime. The state objected to the admission of this evidence, and the trial court sustained the objection. The appellate court, however, held that the exclusion of the evidence was error, and said: "It is objected also by the defendant that the court, having admitted the testimony of M. L. Sanders that the defendant confessed to him that he killed old man Charles Williams, should also have admitted the statements of defendant to witness, giving his reasons for killing the old man; and its refusal to admit this testimony was error. In this, also, we are of opinion that defendant's contention should be sustained. There has been much discussion among jurists as what part of the confession should be offered in evidence by the plaintiff, and what part by the defendant, and at what stage of the trial each part should be presented; but there is no difference among them on the proposition that the whole of the confession should be admitted; at least, so much of the statement including it as is relevant."

In State v. Travis (1887) 39 La. Ann. 356, 1 So. 817, it appeared that a witness on the stand was relating a conversation between himself and one of the accused, and, after testifying to a statement made to him by the accused, was about to give the accused's reply, when the reply was objected to as irrelevant. The appellate court, in holding that it was proper to give the entire conversation, said: "There is no rule of law that excludes the reply of a witness to a question, proposition, or remark of an accused. If such reply, or the fact or statement embraced in it, is silently or expressly acquiesced in, it may be just as legitimately used against the accused, and affect him, as if the words were spoken by himself."

In State v. Branstetter (1877) 65 Mo. 149, the state put the sheriff on the stand, and he testified as follows: "Defendant came into my custody about five minutes after the shooting. I asked him why he had shot Lowry. He said he did not know why he had done it; and defendant continued to talk about the matter, when Esquire Brashears told him not to talk so much, or not talk about the matter. I then took defendant to Esquire Brashears's house. He continued to talk all the way down there. We ate supper together, and after an hour or so defendant and I went to bed. Defendant was talking about the matter all the time, from the time I asked him why he had shot Lowry until we went to bed." On cross-examination, he said: "This conversation between defendant and myself, he doing the most of the talking, was continued with but little interruption from the time I asked him why he shot Lowry until we went to bed. After Brashears told him not to talk, the defendant continued the conversation about the shooting as we went along the street to Brashears's house." The defense asked what else defendant said about the shooting of Lowry, but the court sustained an objection to the witness testifying to any of the conversation, except that which passed before Brashears told defendant not to talk about the matter. The appellate court held this to be error, saying: "Although Brashears told him not to talk about the matter, he did not cease to talk in answer to the sheriff's question; and the state had no right to call for a portion of his statement, and have that excluded which followed Brashears's warning. If he had ceased to talk when Brashears told him to do so, and thus broke off an explanation of the killing he was making to the

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sheriff, it was error to admit that fragment of the conversation which preceded the interruption by Brashears. If, on the contrary, he did not heed the interruption, but continued the conversation, the defense was entitled to all he said in answer to the sheriff's inquiry; so that error was committed, in either view of the question."

In Morrow v. State (1874) 48 Ind. 432, it was held to be error to exclude an accused from testifying to what he said, in a whispered conversation with the widow of the man he was accused of killing, two days after the homicide, where the state had put the fact of the conversation in evidence. The court said: "It is exceedingly unjust to an accused party to admit his act in evidence, and to allow it to be insisted that the act is one of criminality or evidence of criminality, and at the same time to exclude what was said by the accused, at the time of and connected with the act, in explanation of its character. The naked act may import or be construed as importing criminality, when, taken in connection with what was said, it may be innocent or even commendable. It must be seen, on a moment's reflection, that what, in this case, was produced by the officer of the state as an inculpatory fact, would, if accompanied by the words sought to be proved by the defendant, have been at once rendered innocent and harmless. It would be no more unjust to the defendant, in such a case, to permit the state's attorney to prove such part of a conversation of the defendant as tended to make out the state's case, and exclude the residue because it was favorable to the defendant."

In Pharr v. State (1879) 7 Tex. App. 472, the court, in referring to the testimony, said: "The whole defense of the defendant rested on the fact that he had said he had killed the deceased, but did it in self-defense, coupled with that other portion of the same statement, drawn out on the cross-examination of the witness who testified to it, and which, coming as it did, was legitimate testimony to go to the jury, to the effect that when the deceased said he would kill the defendant he was attempting to get his pistol, when the defendant raised his gun and fired."

In Riley v. State (1878) 4 Tex. App. 538, a witness testified to the following: "I saw the defendant after McPeak was killed. . . . I met him in the woods, and had a conversation with him at this time. He said: 'John, I had to kill McPeak to keep him from killing me.' That is the substance of our conversation." The court held that the evidence was properly admissible under the rule.

In Jones v. State (1890) 29 Tex. App. 20, 25 Am. St. Rep. 715, 13 S. W. 990, the accused was convicted of murder, mainly on his admissions made soon after the homicide, he stating that he killed the deceased in self-defense. On the trial, his counsel requested a special instruction as follows: "When the admissions or confessions of a party are introduced in evidence by the state, then the whole of the admissions or confessions are to be taken together, and the state is bound by them unless they are shown by the evidence to be untrue. Such admissions or confessions are to be taken into consideration by the jury as evidence, in connection with all the other facts and circumstances of the case." This instruction was refused, and the defendant reserved a bill of exceptions. On appeal, the court said: "We think that, under the facts of this case, the instruction was pertinent, correct in principle, and should have been given. We do not wish to be understood as holding that in all cases where the admissions or confessions of a defendant are admitted in evidence against him that it is necessary to give such or a similar instruction to the jury. What we decide is that in this case, in which the criminating evidence consists almost entirely of defendant's admission that he killed the deceased, the instruction should have been given, in view of the fact that the exculpatory portion of defendant's statements about the homicide were not shown by the state's evidence to be untrue. We are of the opinion, however, that in all cases where admissions and confes-

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sions of a defendant are admitted in evidence against him, and such admissions contain exculpatory or mitigating statements, it would be proper and just to the defendant to instruct the jury as was requested in this case." See also Gibson v. State (1908) 58 Tex. Crim. Rep. 349, 110 S. W. 41.

In Conner v. State (1870) 34 Tex. 659, the state proved by two witnesses that in the morning, before the deceased and the defendant had left their bedroom, a pistol shot was heard in the room, and instantly the defendant ran out, exclaiming to the witnesses: "Oh, my God! I have killed my darling," and, on being asked how it occurred, said: "Accidentally." The trial court, in commenting on the confession of the accused, gave the following instruction to the jury: "If what is said in his own favor is not contradicted by evidence offered by the prosecution, nor is improbable in itself, it will naturally be believed by the jury; but they are not bound to give weight to it on that account." The appellate court held this instruction to be erroneous, saying: "We apprehend that the rule of law which requires the jury to give weight to what is said by the prisoner in his own favor, if not contradicted by other evidence, nor improbable in itself, is too well settled to admit of change or qualification. Roscoe, in his Criminal Evidence, 55, states the doctrine in these words: 'There is no doubt that if the prosecutor uses the words of the prisoner, he must take the whole of it together, and cannot select one part and leave another; and if there be no evidence incompatible with it, the declarations so adduced must be taken as true.' This meets the very point in question —that the jury may not deny the proper weight to what is uncontradicted and probable in itself.'"

In Harrison v. State (1886) 20 Tex. App. 387, 54 Am. Rep. 529, it was held to be error to exclude that part of a defendant's confession wherein he said, "I had to do it to save myself, or to protect myself," and, "I done it to protect my wife and child."

In Frazier v. State (1883) 42 Ark. 70, the state introduced in evidence a voluntary confession made by the accused at an inquest. The accused offered to prove, by the justice of the peace who held the inquest, all that he said in his confession; that, among other things, he had stated that when he fired the first shot he did not know that he was shooting at the deceased; that after he had shot the last time he surrendered himself to the custody of the justice, and that when he fired the second shot he heard a noise, and was afraid that the person might shoot him. The court excluded this evidence, to which the defendant excepted; and the appellate court in holding the evidence to be admissible said: "The state having introduced the confession of appellant, all that he said at the time was competent, and he had the right to prove any part of the confession omitted in the evidence of the state."

In People v. Tugwell (1915) 28 Cal. App. 348, 152 Pac. 740, the following facts, as stated by the court, appeared: Mr. Ford testified that, as the interview between himself and the defendant was closing, the defendant said: "I want to see Phil Kennedy and shake hands with him," and that "we took him upstairs to the cell where Phil Kennedy was confined." Defendant's counsel then asked Ford: "What did you do after you reached the cell where Mr. Kennedy was confined?" Objection to this was sustained, on the ground that the question related to a different time and place than the testimony given on direct examination. The next question was whether or not, in the jail, and within five minutes after this statement which the witness had just read to the jury, the defendant was asked by Mr. Ford: "Are you guilty of the murder of this woman?" And he said: "No, I am not. What I have just said, it is all a lie; it is a frame-up. I didn't kill her." Objection was made to this question, and after some discussion counsel for defendant asked: "Was there any further conversation after you did get up there?" Objection to this question was sustained, apparently on the ground that the

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matter was not cross-examination, nor part of the preceding conversation. The defendant, as a witness in his own behalf, testified to this latter statement, and offered to show the same facts by two other witnesses who were present at Kennedy's cell. Objections to this offered corroborating testimony were sustained. The court said: "The rule is, it must be admitted, that when one part of a statement made by a defendant has been introduced as evidence against him, it is his right to have in evidence the entire statement, including any part of his declaration that would be in his favor. The facts above set forth do not show any substantial break in continuity of the interview between Ford and the defendant, until after they had adjourned to the cell of Kennedy. The evidence rejected was not part of a separate transaction, but was undoubtedly a part of the same transaction, which had been very elaborately described in the Ford testimony. It follows that the court's rulings in this matter were erroneous."

In People v. Yeaton (1888) 75 Cal. 415, 17 Pac. 544, the following facts, as stated by the court, appeared: "One of the confessions introduced was a letter written by defendant, when in jail, to Mrs. Ludwig. Defendant testified that this letter was written at the request and advice of her mother, who visited her at the jail with one Mr. Oxendine, and told her that she (her mother) had consulted an attorney, who had advised the writing of the letter. In connection with this matter, defendant offered to prove by her own testimony, and by the testimony of her mother and said Oxendine, whom she called to the witness stand for that purpose, that at that conference she told her mother and Oxendine that she was entirely innocent of the alleged crime." This testimony was rejected, and the appellate court, in holding it admissible, said: "Under the circumstances, this conference and the writing of the letter should be considered as one transaction, and should all have gone to the jury."

b. Limitation of rule.

To be admissible in evidence, however, it must clearly appear that the exculpatory or self-serving statements were made in the same confession or conversation sought to be introduced in evidence, and were not made on other or separate occasions, or to other witnesses. Morrow v. State (1874) 48 Ind. 432; State v. Gunter (1878) 30 La. Ann. 536; State v. Johnson (1883) 35 La. Ann. 968; State v. Rutledge (1885) 37 La. Ann. 378; State v. Jones (1895) 47 La. Ann. 1524, 18 So. 515; State v. Thompson (1906) 116 La. 829, 41 So. 107; Alfred v. State (1859) 37 Miss. 296; People v. Green (1845) 1 Park. Crim. Rep. (N. Y.) 11; State v. Gates (1902) 28 Wash. 689, 69 Pac. 385.

In State v. Johnson (1883) 35 La. Ann. 968, the court stated the rule as follows: "The rule is undoubted that, when confessions or statements of an accused are offered, they must go in all together; but that only applies to declarations made at one time, or having some connection with each other."

Thus, in State v. Gunter (1878) 30 La. Ann. 536, the trial court refused to receive the evidence of a witness offered by the accused to prove exculpatory statements, made at a different time, and to a person other than the witness who had given evidence for the state of certain confessions made by the same party in regard to the homicide. The appellate court sustained the ruling, saying: "The accused had a right to have offered the whole of the confessions made at the same time with those offered by the state, whether made to the same person or not, if we can conceive of such a case; but he had no right to offer on his own behalf declarations made by him in his own favor at a different time from those offered by the state, no matter to whom made. No connection is shown between the confessions or admissions received and those rejected."

In State v. Jones (1895) 47 La. Ann. 1524, 18 So. 515, it appeared that the accused made certain self-serving declarations to a witness some eight or ten days after his confession. These,

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it was held, were properly excluded, the court saying: "If these declarations had been made at the time that the confession was made, then they should have been admitted as part of said confession; but having been made long subsequent thereto, they were clearly objectionable, and they were, therefore, excluded."

In Alfred v. State (1859) 37 Miss. 296, it appeared that a slave confessed to a stranger that he had killed an overseer, and shortly after his master's arrival repeated to him the confession, stating, as his reason for the homicide, that the overseer had ravished his wife. The court held that the second confession was inadmissible.

In Texas, however, a statute (Code Crim. Proc. art. 751) expands the common-law rule, and does not restrict the explanatory conversation or declaration to the time when the conversation sought to be explained occurred; but extends the rule so as to render such statements admissible, if necessary to a full understanding of, or to explain, the statements introduced in evidence by the adverse party, although they may have transpired at a different time, and at a time so remote as not to be admissible as res gestæ. Greene v. State (1885) 17 Tex. App. 395; Harrison v. State (1886) 20 Tex. App. 388, 54 Am. Rep. 529.

Where inculpatory statements were improperly obtained and were not legally admissible in evidence, it has been held that the accused cannot put in evidence any exculpatory declarations made in connection therewith. Myers v. State (1895) 97 Ga. 76, 25 S. E. 252.

III. Confession showing commission of other offenses.

It has generally been held that, in proving a confession, the prosecution may introduce parts of the conversation which show, or indicate, that the accused has committed other and separate offenses, where such admissions are inseparably connected with the confession of the crime charged. Watts v. State (1911) 8 Ga. App. 694, 70 S. E. 46; Gore v. People (1896) 162 Ill. 259, 44 N. E. 500; State v. Underwood (1881) 75 Mo. 230; Bode v. State (1907) 80 Neb. 74, 113 N. W. 996; People v. Loomis (1904) 178 N. Y. 400, 70 N. E. 919; People v. Rogers (1908) 192 N. Y. 331, 85 N. E. 135, 15 Ann. Cas. 177; State v. Poole (1906) 42 Wash. 192, 84 Pac. 727; State v. Dalton (1906) 43 Wash. 278, 86 Pac. 590.

Thus, in People v. Loomis (1904) 178 N. Y. 400, 70 N. E. 919, the court recognized and asserted the doctrine that there are "cases in which a confession, relevant and competent as to the crime charged, is not rendered inadmissible because it also necessarily relates to another crime;" and that there are cases where "each part of a conversation is so essentially interwoven with every other part that a confession of the crime charged cannot be proved, without admitting evidence of the whole transaction." But the court went on to say that "in such a case the extraneous matter, if it tends to incriminate the defendant, should not be taken as a substantive fact, and should only go to the jury under cautionary instructions from the court."

In Gore v. People (1896) 162 Ill. 259, 44 N. E. 500, the court said: "Objection was made to the admission of evidence, showing defendant made statements as to the commission by him of other crimes than that for which he was on trial. Evidence of confession of other crimes is not admissible as a substantive fact. But it appears, when the confession by defendant as to the crime charged was made, he also admitted in the same conversation that he had committed the other crimes referred to; and when the witness was called upon to give defendant's confession, he stated all defendant said at that time as a part of an inseparable admission or confession. The court correctly instructed the jury as to the purpose for which such statements were admitted, and cautioned them not to consider the statements as to other crimes as evidence of the commission of the crime charged."

In Watts v. State (1911) 8 Ga. App. 694, 70 S. E. 46, the accused was in-

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dicted for killing a man named Parks, and the state offered a witness who testified that the accused had voluntarily said to him: "I killed Joe Parks and a negro." The defendant objected to the admission of this evidence on the ground that the prisoner was on trial for the killing of Joe Parks, and not on trial for the killing of the negro; that the killing of the negro was a specific, distinct offense, and that it was not competent for the state to give in evidence testimony as to distinct and separate offenses. The appellate court held that the testimony of the witness was competent under the general rule.

In State v. Poole (1906) 42 Wash. 192, 84 Pac. 727, the court, in speaking of the commission of other crimes which the accused stated in his confession, said: "It was not intended to show that appellant had been convicted of the crime of vagrancy or grand larceny, with which he had been charged, and the mention of those trials was merely an incident, the confessions which he made having been made in the presence of the officers at the time of the prosecution of these aforementioned trials, viz., for vagrancy and larceny. They were admitted as testimony in the nature of confessions, not a confession of the crimes of which he stood chargeable at the time the confessions were made, but of the crime of which he now stands charged. And we think, under all authority, that such testimony is admissible; that it tended to prove the direct charge contained in the information; and, that being true, it was competent evidence for that purpose, no matter where and under what circumstances the confessions were made, the only limitation being that they must be voluntarily made."

In State v. Dalton (1906) 43 Wash. 278, 86 Pac. 590, the accused was convicted of murder. It appeared that he had made certain confessions to a witness, wherein he stated, in substance, that he had concealed certain burglar's tools and materials, and directed the witness where to find them; he also stated that he had been twice in the penitentiary, had robbed a store, and, if the burglar's tools were found, the officers would know that they were the tools used to burglarize Shinn's safe, and that "nothing would save his neck." It further appeared that the person murdered was a police officer, and was killed at the time a safe belonging to Shinn was broken into. The court held that the confession was admissible.

But when the parts of a conversation connected with a confession of the crime charged can be separated from those relating to other offenses, only those parts which are material to the crime charged should be received in evidence. People v. Spencer (1914) 264 Ill. 124, 106 N. E. 219; Com. v. Wilson (1898) 186 Pa. 1, 40 Atl. 283, 11 Am. Crim. Rep. 261.

In People v. Spencer (1914) 264 Ill. 124, 106 N. E. 219, it was said: "The general rule is, that a statement in the nature of an admission or confession, in order to be admissible, must relate to the offense in question. While the fact that such statement may include another offense as well as that charged does not prevent the confession being received and going to the jury with proper instructions, when there can be no separation of the relevant from the irrelevant parts, when the relevant parts can be separated from the irrelevant, this must be done, and that part only of the confession admitted which is material to the issues on trial."

IV. Failure to hear and understand entire conversation.

While it is true that a confession should be considered in its entirety, and that it is the right of the accused, if any part of his confession is introduced in evidence, to have the whole of what he said admitted, the weight of authority sustains the view that, merely because a witness did not hear or understand all of the conversation, he is not incompetent to testify to what he did hear and understand. The jury are entitled to receive and consider the testimony for what it is worth.

Alabama.—Descrippo v. State (1913) 8 Ala. App. 85, 62 So. 1004.

California.—People v. Daniels

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(1894) 105 Cal. 262, 38 Pac. 720; People v. Tarbox (1896) 115 Cal. 57, 46 Pac. 896; People v. Luis (1910) 158 Cal. 185, 110 Pac. 580.

Georgia.—Westmoreland v. State (1872) 45 Ga. 225; Woolfolk v. State (1890) 85 Ga. 69, 11 S. E. 814.

Iowa.—State v. Elliott (1863) 15 Iowa, 72.

Kentucky.—Green v. Com. (1904) 26 Ky. L. Rep. 1221, 83 S. W. 638.

Louisiana.—State v. Madison (1895) 47 La. Ann. 30, 16 So. 566; State v. Desroches (1896) 48 La. Ann. 428, 19 So. 250.

Massachusetts.—Com. v. Pitsinger (1872) 110 Mass. 101.

Missouri.—State v. Miller (1890) 100 Mo. 606, 13 S. W. 832, 1051.

Montana.—State v. Lu Sing (1906) 34 Mont. 31, 85 Pac. 521, 9 Ann. Cas. 844.

Nebraska.—Clough v. State (1878) 7 Neb. 320.

North Carolina.—State v. Cowan (1847) 29 N. C. (7 Ired. L.) 239.

Pennsylvania.—Com. v. Taylor (1889) 129 Pa. 534, 18 Atl. 558.

South Carolina.—State v. Covington (1831) 2 Bail. L. 569; State v. Gossett (1856) 9 Rich. L. 428.

Thus, in People v. Daniels (1894) 105 Cal. 262, 38 Pac. 720, the court said: "The general rule is, that a witness called to testify to a conversation cannot give a part and withhold a part, but must give the whole conversation, at least in substance. But where a part only of a conversation is heard by the witness, the rule that he must give all that was said applies only to so much as he heard. If what he heard is intelligible and pertinent to the case, the prosecution is entitled to it." See to the same effect People v. Tarbox (1896) 115 Cal. 57, 46 Pac. 896.

In People v. Luis (1910) 158 Cal. 185, 110 Pac. 580, it was said: "It is true, of course, that a confession should be construed as an entirety, and that it is the right of the accused, if any part of a confession made by him is introduced in evidence, to have the whole of what he has said admitted. But this rule does not prevent the substance or part of the confession that the witness heard and remembers being admitted in a proper case."

In Green v. Com. (1904) 26 Ky. L. Rep. 1221, 83 S. W. 638, it was said: "While the appellant had the right to have the witness tell the whole of what was said by him at the time of making the confession, nevertheless what the witness told was competent, if it contained the substance of the conversation."

In State v. Elliott (1863) 15 Iowa, 72, a witness testified to a certain conversation heard by her, between the prisoners, while they were confined in jail; and "after detailing what she heard, she says there was more said which she did not understand; sometimes she could hear them, and sometimes not; that they conversed in a loud whisper, and said many things which she did not hear; but she had given the language as far as she heard it." As to this testimony, the trial court instructed the jury as follows: "While it is true that the declarations, conversations, or statements of a party may be given in evidence against him, it is also true, generally, that the whole of such declaration or conversation should be given. That the law regards such evidence as being unsatisfactory and uncertain, when the recollection of the witness is not distinct as to what the exact words of the party were, or where the whole of the conversation, declaration, or statement could not be or was not heard, or was not fully understood. But it is for the jury to say whether the witness recollected and stated the words that were spoken, or their substance, and what meaning is to be given by the use of such words under the circumstances. If the jury, in the examination of the testimony of Mrs. Gray, find that she did not hear all the conversation between the prisoners, and did not pretend to have understood all they said, her testimony on that account is entitled to much less weight than if she had heard and understood the whole of the conversation upon the same subject. But it is for the jury to say whether she related the words or substance of the

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language used in the conversation, and whether such language was in relation to distinct facts, and how far it tends to prove defendants guilty." The appellate court held that the rule stated in the instruction was sufficiently liberal, and all that the prisoner had a right to ask.

In State v. Covington (1831) 2 Bail. L. (S. C.) 569, the witnesses professed to state all that they heard pass between the accused and a slave, and that they heard them in further conversation, but so indistinctly as not to comprehend what was said. The court admitted their testimony as to what they did hear, saying: "It does not, then, appear that this further conversation had any relation to the subject-matter; and the prisoner has had the full benefit of the rule. That which is heard may be given in evidence, but that which is not heard cannot, from necessity."

In Descrippo v. State (1913) 8 Ala. App. 85, 62 So. 1004, the court, in speaking of the weight to be given a conversation where a witness heard or understood only a part thereof, said: "The competency of the statement is not to be affected because the witness testifying to it cannot give the entire conversation in which it was made, although this fact may tend to weaken its force and effect to a more or less extent, depending upon the circumstances of the particular case. The evidence is competent, and goes to the jury for what it is worth; and it is for the jury to say how greatly it is impaired by the fact that the witness heard or understood only a part of what was said in the conversation."

In Com. v. Pitsinger (1872) 110 Mass. 101, a witness for the prosecution testified that, in passing through a room where the defendants were, he heard one of the defendants say to the other: "Have I not told you that, if I got you with child, I would support you and the child?" On cross-examination the witness testified that he did not hear any remark by either party preceding or following the one to which he testified; and the defendants then asked the court to rule that, as the witness did not hear, and therefore could not testify to, any other portion of the conversation, the evidence of what he did hear was incompetent. The court refused so to rule, and the appellate court held that the evidence was admissible and competent on the issue.

In State v. Miller (1890) 100 Mo. 606, 13 S. W. 832, 1051, it was held that where a witness testified to only a part of a conversation it was admissible, if it was all that the witness heard; "and the law would not require her to testify to more than that, or reject that which she did hear."

In Com. v. Taylor (1889) 129 Pa. 534, 18 Atl. 558, it appeared that the witnesses did not hear the whole conversation, but, as detailed by them, the conversations were complete in themselves, and the court held them to be admissible.

In Clough v. State (1878) 7 Neb. 320, it appeared that a witness was called on behalf of the state to testify to a conversation between the widow of the deceased and the prisoner; and, having stated that he "could not hear all the conversation," it was objected that he should not be permitted, for that reason, to give in evidence what he actually heard. The appellate court held that the objection was properly overruled, saying: "It implied that in no case should a witness be permitted to testify of a conversation between the prisoner and another person, unless he happens to have heard the whole of it. This clearly is not the law. If what the prisoner is heard to say in such a conversation be sufficient to convey an intelligible idea respecting the commission of the offense with which he is charged, it may always be given in evidence against him. To this rule, as applied to voluntary statements, we know of no exception."

In Woolfolk v. State (1890) 85 Ga. 69, 11 S. E. 814, it appeared that the jailer in charge of the accused testified that he overheard him say: "Lord, have mercy upon me for what I have done; the only thing I regret is killing my father." The witness testified that this was all he heard, and that

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the accused might have said something else before he reached his cell. One objection made to the admissibility of this testimony was that the witness did not hear all that the accused said at the time, and that, as he heard only a part of what was said, the confession was inadmissible; for if the witness had heard all that was said, it might have changed materially the meaning of the part the witness heard. The appellate court sustained the ruling of the trial court in admitting the evidence, and held that the witness had testified to all that he heard the prisoner say, and there was no evidence that the prisoner had said any more.

In Westmoreland v. State (1872) 45 Ga. 225, the court held that the fact that a witness did not hear all of the conversation of an accused was no ground of objection to his stating so much of it as he did hear.

But it has been held that where a witness heard only a mere scrap, fragment, or disjointed part of a confession, or of a conversation relating thereto, which is insufficient to give him an intelligible understanding of what was said, his testimony should not be received in evidence. Levison v. State (1875) 54 Ala. 520; People v. Luis (1910) 158 Cal. 185, 110 Pac. 580; State v. Gilcrease (1874) 26 La. Ann. 622; State v. Hughes (1874) 29 La. Ann. 514; State v. Desroches (1896) 48 La. Ann. 428, 19 So. 250.

In State v. Gilcrease (1874) 26 La. Ann. 622, during the trial of the defendant, who was charged with the murder of his infant child, an exception was taken to the admission of testimony to prove a portion of the prisoner's conversation, overheard by the witness; the objection urged being that the admissions or confessions of the accused were inadmissible unless the whole thereof was given. The witness was walking through the yard of the accused, and as she approached the house she heard him talking to his wife, and distinguished the words: "Now don't you never tell that I whipped the child Friday;" and on discovering the witness, the accused stopped speaking, and she did not hear what preceded the sentence. The appellate court, in holding the evidence inadmissible, said: "We think this evidence should have been rejected. Verbal admissions ought always to be received with great caution. Mr. Greenleaf says: 'The evidence, consisting as it does in the mere repetition of oral statements, is subject to much imperfection and mistake; the party himself either being misinformed, or not having clearly expressed his own meaning, or the witness having misunderstood him. It frequently happens also that the witness, by unintentionally uttering a few expressions really used, gives an effect to the statement completely at variance with what the party actually did say.' § 200. Besides, it is a rule of evidence that the whole admission is to be taken together. Here the witness only heard a part of it. 1 Greenl. Ev. § 201."

In State v. Hughes (1877) 29 La. Ann. 514, a witness sworn for the state was asked "whether he had ever heard any statements made by the accused, and, if so, what statements he had heard." The witness stated that "he had overheard a remark made by the accused from the jail window, in the course of a conversation which he [accused] was carrying on with a little boy outside; that though he had noticed these parties in conversation, before he arrived at the jail, and had left them in conversation, he had only heard the single remark to which he testified, while he was passing by the jail, and that he had not heard either the preceding or subsequent portion of the conversation of which this remark formed part." The court held that the admission of this evidence was error, saying: "An admission, confession, or declaration of a party cannot be given in evidence against him, unless the witness testifying thereto can at least state the substance of all that was said. . . . It would be utterly unreliable if fragmentary portions of conversations were received, for then a man might be made to say directly the contrary of what he did say."

If the part of the conversation

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which was not heard or understood by the witness would, in any material respect, explain, modify, or qualify the part heard and understood, the accused is entitled to give it, or to bring it out on cross-examination. Frank v. State (1855) 27 Ala. 37; Bob v. State (1858) 32 Ala. 560; People v. Daniels (1894) 105 Cal. 262, 38 Pac. 720.

Thus in Bob v. State (Ala.) supra, the court said: "The part of the conversation which the witness heard does not appear to have been in itself incomplete; and if further conversation on the same subject, favorable to the defendant, was had after the witness left, it was for the accused to have proved it."

In People v. Daniels (Cal.) supra, it was said: "If the part not heard by the witness would, in any material respect, modify or explain the part he heard, the defendant can give it in explanation."

V. Failure to remember entire conversation.

It has generally been held that the failure of a witness to remember the whole of a conversation, containing an alleged confession, does not preclude him from putting in evidence what he did remember. So, where a witness heard and understood the entire conversation, and it satisfactorily appears that he remembers the substance thereof, he is competent to testify as to what he remembers, even though he cannot recall everything that was said.

Alabama.—Brister v. State (1855) 26 Ala. 107; Pond v. State (1876) 55 Ala. 196; Kendall v. State (1880) 65 Ala. 492.

California.—People v. Luis (1910) 158 Cal. 185, 110 Pac. 580.

Kentucky.—Green v. Com. (1904) 26 Ky. L. Rep. 1221, 83 S. W. 638.

Louisiana.—State v. Thomas (1876) 28 La. Ann. 827; State v. Hughes (1877) 29 La. Ann. 514; State v. Madison (1895) 47 La. Ann. 30, 16 So. 566; State v. Natcisse (1913) 133 La. 584, 63 So. 182.

Michigan.—People v. Bowen (1912) 170 Mich. 129, 135 N. W. 824.

Missouri.—State v. Hopkirk (1884) 84 Mo. 278.

Montana. — State v. Berberick (1909) 38 Mont. 423, 100 Pac. 209, 16 Ann. Cas. 1077.

Washington.—Yelm Jim v. Territory (1854) 1 Wash. Terr. 63.

Wisconsin.—Fertig v. State (1898) 100 Wis. 301, 75 N. W. 960.

In Kendall v. State (1880) 65 Ala. 492, the court said: "It was not a valid objection to the testimony of the witness Hardy that he did not recollect all the conversation had with the prisoner at the time she made the confession. It was competent for the witness to state all that he did recollect, and the weight or sufficiency of the evidence could be judged of by the jury. This in no manner militates against the principle that the whole of what the prisoner said on the subject should be taken together."

In Pond v. State (1876) 55 Ala. 196, it was said: "Because the witness testified that he could not undertake to repeat all that was said by the accused is not a sufficient reason for refusing to receive what he could remember. . . . The jury can generally determine, by the answers upon cross-examination and other evidence in the cause, as well as by what a witness may say on examination in chief, how much value ought to be attributed to his testimony."

In Fertig v. State (1898) 100 Wis. 301, 75 N. W. 960, the court stated the rule in the following language: "The rule that all parts of a conversation bearing on the subject in controversy must be taken together, and that if the whole of it, in substance at least, cannot be given so that its bearing on such controversy, from the standpoint of the party offering it, can be established, the whole shall be excluded, is familiar; but that does not require that a witness testifying to a conversation shall remember it all, either literally or in substance, but only that he shall remember that part relative to the controversy. If a witness can testify to a part of a conversation, sufficiently complete of itself to show its bearing on the fact in issue, or some evidentiary fact in the case, that is sufficient, though other things were said which the opposite party may

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call out on cross-examination, so far as they in any way explain or modify that part testified to in chief, and though the other party to the conversation may be called, and his version of it be given. The rule does not go so far as to exclude damaging admissions or declarations made in a conversation, because all said cannot be remembered."

In Yelm Jim v. Territory (1854) 1 Wash. Terr. 63, the court said: "While admitting the rule, that the defendant is entitled to a full statement of all that he said at the time, in relation to the subject-matter, we are not aware of any rule of law which requires that the witness shall be interrogated as to his memory of the entire conversation, before he details what he does remember. The recollection of the witness, and his liability to tell all that was said, is usually ascertained upon cross-examination."

In State v. Madison (1895) 47 La. Ann. 30, 16 So. 566, it was held that a confession was not necessarily inadmissible, because the person to whom it was made testified that he did not remember all of the confession, but only some of the particular points thereof. See to the same effect, State v. Thomas (1876) 28 La. Ann. 827.

In State v. Natcisse (1913) 133 La. 584, 63 So. 182, a witness was asked whether he could state the substance of all that was said by the accused during the course of an alleged confession. The witness answered: "Not every word; no, sir," and the defendant's counsel asked that the alleged confession be excluded, on the ground that the witness was unable to give the entire substance. The court held the evidence to be admissible, saying: "But the witness had not said that he was unable to give the substance of the confession, and his meaning was put in a clear light by the following questions and answers: Q. 'Now, do you know the statement that this accused made to you as his confession?' A. 'Yes, sir.' Q. 'State it.' A. 'Well, he told me that he was with Marceau and Chiasson, and that he had gotten the flour from the car, and I asked him how he had brought it, and he told me he had brought it on his shoulder, one sack at a time, and he told me how he would do it; he would bring a sack a certain distance, then come back for the other.' Q. 'Is not that the substance of his confession? A. 'Yes sir.' "

In Brister v. State (1855) 26 Ala. 107, a witness stated that he had testified to the substance of all that each of the accused had said in their confessions; "but that they may have stated something that he did not recollect." The court said: "This was as much as the law exacted, to entitle him, as a witness, to testify to any voluntary and admissible confessions of the prisoners."

In State v. Hopkirk (1884) 84 Mo. 278, it was held that where a witness remembered the important points of a confession, although he could not detail the minor matters connected therewith, this was sufficient to render his testimony admissible. The court said: "To require in all cases of a confession that it should be rejected if the witness thereto could not remember all that was said, however unimportant, would be in many, if not in most, instances, to exclude the confession altogether."

In State v. Berberick (1909) 38 Mont. 423, 100 Pac. 209, 16 Ann. Cas. 1077, the court said: "The substance of a conversation is, generally, all that any witness can remember, and we cannot doubt that this is all the law requires in regard to confessions."

In Green v. Com. (1904) 26 Ky. L. Rep. 1221, 83 S. W. 638, the court, in referring to the failure of a witness to remember all the details of a confession, said: "It is also contended by counsel for appellant that the confession made by appellant to Horton ought to have been excluded, because the latter, in answer to a question upon cross-examination, said that he could not state everything that was said by appellant at the time of making the confession. This answer of the witness did not indicate that he failed to remember or state the substance of what was said by appellant. Upon the contrary, the witness had previously been questioned by the

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commonwealth's attorney, upon the direct examination, in a manner that required a full disclosure from him of all that was said by appellant, and the answer of the witness as to what was said by him was so full and complete that it left no doubt of its being the substance of all that appellant said in the conversation; for it explained where the crime was committed, the instrument used, the manner of its use, the taking of the money of the murdered man by appellant, and the subsequent flight of the latter. In other words, the answers of the witness to the questions of the commonwealth's attorney gave the details of the crime, and obviously left nothing of further consequence to tell. Therefore, it was necessarily the substance of what was said to the witness by appellant. While the appellant had the right to have the witness tell the whole of what was said by him at the time of making the confession, nevertheless what the witness told was competent, if it contained the substance of the conversation."

In People v. Bowen (1912) 170 Mich. 129, 135 N. W. 824, it was said: "It is an elementary rule in the trial of criminal cases that, where a confession is introduced by the people, the accused has the right to require that the whole of the conversation containing it shall go to the jury; although, if the witness does not recollect all of the conversation, he may state what he does recollect, and its weight and sufficiency is for the jury."

But in Berry v. Com. (1873) 10 Bush. (Ky.) 15, 1 Am. Crim. Rep. 272, the court said: "If the witness called to prove the confessions of the prisoner says he does not remember all the conversation, and that a great many things were said in the conversation which he did not remember, and is still permitted to testify without even stating that he remembers the substance of all that was said at the time on the subject, it is obvious that the rule is violated, and the humane part of it disregarded."

It is not necessary that a witness should be able to repeat the precise words, or the exact language, used by an accused in making a confession; it is sufficient if he can give the substance of what was said, so far as he can remember it. People v. Luis (1910) 158 Cal. 185, 110 Pac. 580; State v. Donovan (1883) 61 Iowa, 278, 16 N. W. 130, 4 Am. Crim. Rep. 25; State v. Avery (1879) 31 La. Ann. 181; State v. Desroches (1896) 48 La. Ann. 428, 19 So. 250; State v. Gianfala (1904) 113 La. 463, 37 So. 30; State v. Natcisse (1913) 133 La. 584, 63 So. 182; Green v. State (1903) 96 Md. 384, 54 Atl. 104, 12 Am. Crim. Rep. 149; State v. Berberick (1909) 38 Mont. 423, 100 Pac. 209, 16 Ann. Cas. 1077.

Thus, in People v. Luis (1910) 158 Cal. 185, 110 Pac. 580, it was said: "The mere fact that the witnesses could not remember, word for word, the whole conversation between the district attorney and defendant, was not a sufficient ground for the exclusion of their evidence of what they did remember."

In State v. Avery (1879) 31 La. Ann. 181, the court said: "The witnesses who testified to the confessions of the accused stated, in effect, that they could not and would not undertake to swear to the precise words of the prisoner; but that they did remember the substance of his declarations. This was sufficient. To require more would be to effectually close the mouths of conscientious men when called on as witnesses to testify to such confessions."

In State v. Donovan (1883) 61 Iowa, 278, 16 N. W. 130, 4 Am. Crim. Rep. 25, a prosecution for adultery, the state introduced a witness who testified to certain conversations he had with the defendant, in which he admitted having had intercourse with the woman. On cross-examination, he testified that he could not give the language used by the defendant, but could testify only from the impressions received and the ideas formed from the conversation. The court held that the testimony was properly left to the jury, to be given such weight as they might deem it entitled to, in view of the facts elicited on the cross-examination.

In State v. Gianfala (1904) 113 La. 463, 37 So. 30, the court said: "It is

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sufficient if the witness repeats, in the main, all that was said, and if it be evident to the trial judge that no prejudice is done by a slip of the memory here and there in regard to what was said."

But it has been held that a copy of a confession, written nearly two years after it was made, and from recollection only, cannot be received in evidence, as it may not show the precise words used by the accused, and may convey a different meaning than he intended. Austine v. People (1869) 51 Ill. 236.

And where a witness shows that he fails to remember a portion of the words which the accused used to qualify his statement, or which are essential to an understanding of the part given, he cannot testify to the words he did hear and remember. People v. Tarbox (1896) 115 Cal. 57, 46 Pac. 896; People v. Luis (1910) 158 Cal. 185, 110 Pac. 580.

Thus, in People v. Tarbox (Cal.) supra, it appeared that the witness failed to remember a material part of the defendant's confession, in that he could not tell "whether it was to deny the case, deny the charge, deny the act, or what the word was." In holding that the admission of the evidence was insufficient to justify a verdict of conviction, the court said: "It is well settled that the witness may testify to a part of an entire conversation, if he heard only a part, and such part appears to be complete and intelligible; but, if the witness is unable to state what he heard, and especially where the witness states that the word or the part he fails to remember was used to qualify something, or was essential to an understanding of the meaning of the part given, such testimony is not sufficient to justify a verdict of guilty. The witness said: 'And just what one he used to qualify, just what he meant, is more than I can remember.' He could only arrive at the meaning of the defendant from the words he used, and if, from a consciousness that some word or expression which formed part of the statement had escaped his recollection, he felt bound to declare that 'just what he meant is more than I can remember,' it was obviously impossible for the jury to supply his want of recollection, and ascertain what the defendant in fact said or meant."

VI. Incomplete or interrupted confession.

It has been held that, where an accused has made a partial or unfinished confession and was interrupted or prevented before the completion thereof, the confession is not admissible in evidence.

Thus, in William v. State (1864) 39 Ala. 532, it appeared that a slave said to his master, "Master, I have killed Clarissa," and the master exclaimed, "What! where did you kill her?" The accused answered, "At the ginhouse," and the master then asked, "How did you kill her?" and the accused answered, "I cut her throat;" when the master stopped the slave and would not allow him to complete his statement. The court, in holding that it was error to permit the incomplete confession to go to the jury, said: "I have not been able, after careful search, to find any case exactly corresponding with this in its facts; that is, where a prisoner had made a partial or unfinished statement or confession, and was prevented from finishing his statement, or making his confession full, by the command of someone having lawful authority over him. Such cases, in the nature of things, must be rare. But the principle above laid down, that all that the prisoner has confessed at the same time shall be received or none, entirely covers the case. If a magistrate who is required to take down the statement or confessions of a prisoner in writing should hear and take down a part of his statement, and then forbid the prisoner to proceed further, can there be any question that such partial statement, when offered in evidence, would be ruled out? In the case of a slave speaking with his master, the authority over him would be as great, if not greater, than that of the magistrate in the case supposed; and if the slave is forbid by his master to proceed with his statement, all that he has said ought to be rejected. When

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the prisoner said, 'I cut her throat,' and was about to proceed, how can it be known that he was not about to add, if he had been permitted, 'but it was to keep her from cutting mine.' The prisoner confesses an act which, unexplained, makes him guilty of murder. He is about to proceed to make other statements, but is authoritatively forbid. Indulging the presumption in favor of innocence, which the law always does, the presumption would be that he was about to offer some explanation or exculpation of his conduct; and is this to be denied? A partial and unfinished statement of this kind should not be received in evidence. We cannot fairly judge a writer or a speaker on any given topic, upon the most ordinary occasions of life, until we have heard all he has to say on that topic; and when he has spoken, we are required to consider together all he has said, and are not allowed to garble. That which common fairness and justice universally forbid, in the most ordinary and even insignificant affairs of life, the law can never sanction as a rule of evidence."

In State v. Isaac (1848) 3 La. Ann. 359, it appeared that the witness testified that "the accused came to him the morning after the affray, and told him that he had killed the slave Jim, and commenced justifying the act, when the witness stopped him, and told him that he intended to deliver him over to be punished." The appellate court held that it was error for the trial court to admit the confession, saying: "The confession appears to have been voluntary, but should have been excluded on the ground that it was interrupted and never completed. When confessions of guilt are given in evidence, the whole must be taken together. If the parts relied on to establish the guilt of the prisoner be received, the explanations with which they were accompanied cannot be rejected. Although all the parts of the confession are not entitled to equal weight, the whole must be submitted to the jury, who are to determine, under all the circumstances, how much of the entire statement is worthy of belief. 1 Greenleaf on Ev. §§ 201, 218. In the present instance, the prisoner was not permitted to make a full statement. It is evident that he intended to state circumstances in justification, which the witness refused to hear. A full explanation might have established a complete justification, and the narrative might have been so consistent and probable as to command the belief of the jury. Having been deprived of the benefit of the explanations with which he intended to accompany his admission, and which, if they had been made, would have been admissible in evidence, justice requires that his incomplete disclosure, consisting only of the fact unfavorable to himself, should not go to the jury."

But in Levison v. State (1875) 54 Ala. 520, it appeared that the confession came about in this wise: "Witness was sitting in the yard of the Montgomery jail crying, and defendant asked her what she was crying about, and she answered, Because she was in jail. Defendant then said, if that was all, she would not care, and proceeded: 'I do not know that I will ever get out,' and gave as a reason that she was there for killing Mr. Baldwin. Witness asked if she did it, and she said she did, and their conversation was interrupted, and nothing more was said between them." The confession was objected to, but the court refused to exclude it, and the defendant excepted. The appellate court sustained the ruling, saying: "Nor is the confession in itself incomplete—it is full; that the cause of the imprisonment of the accused was the killing of Mr. Baldwin, with an acknowledgment that she had killed him. Whether the accused would have extended the confession further, or, if it had been extended, would have qualified or explained what she had already said, is mere matter of speculation. It is not the fragment or a disjointed part of a conversation which is offered in evidence, but the whole conversation, —all that was said,—and its exclusion is not authorized because of any supposition that, if the interruption had not occurred, she would have said something possibly favorable to her-

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self." See also Frank v. State (1855) 27 Ala. 37.

VII. Confession in foreign language.

Confessions have been excluded, where it appeared that the confession was partly or entirely made in a foreign language, which the witness did not substantially understand, so that he did not comprehend all that the accused said at the time of the alleged confession.

Thus, in People v. Gelabert (1870) 39 Cal. 663, it appeared that the alleged confession was made partly in Spanish and partly in broken English. The witness, when asked as to his knowledge of the Spanish language, said: "I understand a very little, sir;" and then stated that he did not understand all that the accused said in Spanish. The appellate court reversed the ruling of the lower court, admitting the confession, and said: "Here it is certain that, to some extent, the witness failed to comprehend all that the prisoner said: How important the portion not understood may have been we cannot know. It might have, if correctly and fully detailed, relieved the prisoner from the serious contradiction which, as here given, it fixed upon him. . . . Here, as we have seen, the witness never did, even substantially, understand or comprehend all that the prisoner seems to have said to him in making the alleged confession, and under the rule laid down no part of such confession should have been allowed in evidence against him." Compare the California cases set out infra in this subdivision.

In State v. Buster (1896) 23 Nev. 346, 47 Pac. 194, it appeared that the confession was given in a jargon formed by the mixture of Indian and English words, and that the witness did not understand the portion spoken in the Indian's native language, and an interpreter translated it. The trial court granted a motion to strike out all of the testimony of the witness that he understood by the aid of the interpreter, but allowed all the testimony that he understood without his aid. The appellate court said: "The court should have granted appellant's motion, and have stricken out all of the testimony of the witness concerning the confession. But the failure to make the proper order will not result in reversing the judgment, as the same confession was conclusively established by several other witnesses who were familiar with the Indian language, and whose testimony was not attempted to be contradicted; therefore the error was harmless."

In Cortez v. State (1901) 43 Tex. Crim. Rep. 375, 66 S. W. 453, it appeared that the state offered certain confessions of the accused, made in the Spanish language, through a witness who stated that he was not thoroughly familiar with that language, and could not repeat the language used by the accused; but could understand what he said, and correctly translate it in English. The defense objected to the admission of the testimony, on the ground that the witness did not thoroughly understand the Spanish language, and was therefore not qualified to testify as to the confessions, and the appellate court held that the admission of the testimony was error.

In People v. Thoms (1855) 3 Park. Crim. Rep. (N. Y.) 256, it appeared that the accused spoke partly in English and partly in German, and his counsel claimed that his confession was inadmissible, because the person to whom it was made did not understand German; but it did not appear that any portion of the confession was in German. The court held the confession to be admissible, but said: "If the witness had said that a part of the same admission was in German, and a part in English, I think the evidence would have been inadmissible. . . . The general rule being that confessions are admissible, the onus was upon the prisoner's counsel to show that the witness could not give the whole."

On the other hand, there is authority for the proposition that a witness who did not understand the whole of a confession made in a foreign language may testify as to the part of it which he did understand.

Thus, in State v. Lu Sing (1906) 34 Mont. 31, 85 Pac. 521, 9 Ann. Cas. 344,

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it appeared that the witness testified that the accused spoke English very poorly, and that he could not understand all the accused said, but did understand the following words: "If I kill him, me good man. If I no kill him, no good." "If me no kill him, me no good man, and if Tom Sing dead, me die happy." The defense moved to strike out the testimony on the ground that the witness had not understood all the accused said to him, and ought not to be permitted to testify to a portion only. The trial court denied the motion and admitted the testimony, and the appellate court sustained the ruling, saying: "No fault is found with the authorities which hold that, where the state offers only a part of a conversation embodying a confession, the defendant has a right to have the whole of the conversation before the jury; but the great weight of authority and reason hold that, merely because a witness did not hear all of the conversation, or did not understand it all, does not render incompetent what he did hear or understand. The evidence goes to the jury for what it is worth. Its value may be greatly impaired by the fact that the witness heard or understood only a part of what was said. But where the jury is cautioned, as was done in this case, there can be no error in the reception of the evidence, merely because the witness can give only a portion of what was said." The court, in this case, criticized the decision in People v. Gelabert, set out supra in this subdivision, in the following language: "The opinion of People v. Gelabert is very brief, and cites no authorities in support of the conclusion reached. The reason given for the conclusion goes to the weight, rather than to the competency, of the evidence. 1 Greenleaf on Evidence, § 214, is cited, not, however, in support of the conclusion reached by the court, but in support of the oft-repeated declaration of courts and text-writers that evidence of extrajudicial confessions should be received with great caution, because of the danger of mistake of the witness, arising from his misapprehending what the defendant said, his unintentional misuse of a particular word; or, if the witness does not remember the exact words used by the defendant, his failure to express in his own language the meaning intended to be conveyed by the defendant; and, finally, because of the infirmity of memory. But all of this is directed to the weight, rather than the competency, of the evidence; and it is well for the trial court to warn the jury as to the caution to be exercised respecting this character of evidence." And the court also criticized the holding in State v. Buster (Nev.) supra, saying: "The case of State v. Buster is of no weight as a precedent, for the reason that, while the supreme court of Nevada holds that the evidence given by the witness Cozzens, who could not understand all the defendant said, was incompetent, the error in receiving it was, nevertheless, cured by the fact that other witnesses, who did fully understand what the defendant said, corroborated the testimony of Cozzens, apparently overlooking the fact that the jury might have believed the witness Cozzens, and refused absolutely to believe the other witnesses, who corroborated him, with the result, if the court's conclusion was right in the first instance, that the defendant was convicted upon evidence held to be wholly incompetent."

In People v. Ah Wee (1874) 48 Cal. 236, it was held that declarations and admissions between one accused of homicide and the man killed, conducted partly in English and partly in Chinese, could be proved by persons present who understood English only, and those present who understood Chinese, provided the accused and his victim understood both languages.

In People v. Martinez (1916) 31 Cal. App. 413, 160 Pac. 868, the court allowed a witness to state a conversation which he overheard between the defendant and another, while they were confined in jail. It appeared that the conversation was carried on in the Spanish language, and the ground of the objection to the testimony was that the witness did not fully understand that language; but the witness

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testified that he could understand Spanish when spoken, to some extent, and related only that part of the confession which he testified that he clearly understood. Compare People v. Gelabert (1870) 39 Cal. 663, set out supra in this subdivision.

In State v. Moelchen (1880) 53 Iowa, 310, 5 N. W. 186, a witness testified to an altercation between the deceased and the accused, at which time blows were struck, and that the parties spoke in German, which language the witness did not understand, but was able to interpret the word "knife" used by the accused. The defense objected to the admission of the evidence, but the objection was overruled; and the appellate court, in sustaining the ruling, said: "The evidence was competent, because it tended to show that the parties had not lived together agreeably; and because the witness was able to interpret but one word ought not to exclude the testimony as to what she saw, heard, and understood."

In People v. Minisci (1887) 12 N. Y. S. R. 719, the court approved the rule laid down in People v. Gelabert (Cal.) supra, that a witness with a very imperfect knowledge of the language is not competent to testify to a conversation in which a confession was made, if he did not understand the whole of it; but denied its application where the evidence failed to show that the witness did not understand the entire conversation, and his evidence was substantially corroborated by that of the accused himself.

As to confessions made in a foreign language and translated and written out in English, see People v. Gukouski (1911) 250 Ill. 231, 95 N. E. 153, Ann. Cas. 1912B, 297; State v. Demareste (1889) 41 La. Ann. 617, 6 So. 136; State v. Abbatto (1900) 64 N. J. L. 658, 47 Atl. 10; State v. Banusik (1913) 84 N. J. L. 640, 64 Atl. 994.

H. B.

GEORGE TEBEAU, Respt.,

v.

GLOBE & RUTGERS FIRE INSURANCE COMPANY, Appt.

Missouri Supreme Court (Division No. 2) — July 16, 1917.

(271 Mo. 626, 197 S. W. 130.)

Insurance — contingent dower interest — effect on ownership.

1. One who has purchased real estate and received a conveyance from the grantor which does not cover the contingent dower interest of the grantor's wife is the owner in fee, within the meaning of the policy insuring buildings on the property, notwithstanding such outstanding contingent dower interest.

[*See note on this question beginning on page* 1045.]

Same — interest of insured — property included in provision.

2. A provision avoiding an insurance policy if the interest of the insured is not truly stated applies to the building insured, and not to the land on which it stands.

Same — interest of insured — sole ownership — definition.

3. A provision rendering an insurance policy void if the interest of the insured be other than unconditional and sole ownership applies only to the building insured, and not to the ground on which it stands.

Appeal — finding by trial court.

4. A finding by a trial court sitting as a jury, that a fact alleged to have been concealed by an insured in obtaining a policy was immaterial, is, if supported by sufficient evidence binding on appeal.

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APPEAL by defendant from a judgment of the Circuit Court for Jackson County in favor of plaintiff in an action brought to recover the amount alleged to be due on a fire insurance policy. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. E. E. Yates and Claude T. Goble for appellant.

Messrs. Hadley, Cooper, Neel, & Wright for respondent.

Williams, J., delivered the opinion of the court:

This is a suit upon a policy of fire insurance. Trial was had before the circuit court of Jackson county, without a jury, resulting in a judgment in favor of the plaintiff in the sum of $8,400. Thereupon defendant duly perfected an appeal. The important facts may be summarized as follows:

The policy of insurance was issued for one year, beginning December 9, 1911. The fire occurred September 22, 1912. The property covered by insurance was the "frame, concrete, and brick foundation baseball stand, including bleachers, club house, ticket office and fencing," located at Olive and Twentieth streets, Kansas City, Missouri. The total loss from the fire amounted to $20,000, $14,000 of which was covered by insurance, including this policy for $8,000. Said policy contained the following paragraphs:

"(1) This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material facts and circumstances concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated therein. . . .

"(2) This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple."

Originally the plaintiff leased the land upon which this ball park and improvements were located, from the owner, Thomas S. Ridge. The lease contract also contained an option of purchase clause, in favor of the plaintiff. Plaintiff owned all of the insured property at the time of the fire, and concerning this there is no dispute; but defendant does deny that plaintiff owned the fee-simple title to the land, within the meaning of the insurance clause. On this point, the evidence was that in 1909 plaintiff exercised the option of purchase given him by the lease, but that Thomas S. Ridge refused to convey the property. Mr. Ridge's wife did not join in the lease or option contract. Plaintiff then brought suit for specific performance against Ridge, and on April 11, 1910 (which was before this policy was issued), the circuit court of Jackson county found in favor of plaintiff in the suit for specific performance, and decreed the title to this land to be in the plaintiff, upon the payment of the purchase price of some $68,000. The plaintiff, thereupon, immediately deposited the purchase money in court. Afterwards the plaintiff filed a motion in that cause, asking the court to allow him a diminution of the purchase price called for in the option of purchase, by reason of the fact that Mrs. Ridge had an outstanding dower right which could not be controlled by the specific performance decree. The court overruled that motion, and both the defendant Ridge and the plaintiff Tebeau duly appealed from the judgment of the circuit court to this court. The case was pending here on appeal at the time the insurance policy in question was issued and also at the time the fire occurred. Afterwards the case was decided here. Tebeau v. Ridge, 261 Mo. 547, L.R.A.1915C, 367, 170 S. W. 871.

The vice president of the defendant company testified, by deposition, that defendant did not know that the property was involved in litigation at the time the policy was issued, and had it known so it would not have issued the policy.

One other witness testified for the

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defendant that it was the custom of insurance companies not to write policies on property which was involved in litigation.

In rebuttal, plaintiff offered evidence tending to show that it was the custom of insurance companies to write insurance on property involved in litigation of the character here mentioned.

There was also evidence showing that, after this fire, plaintiff rebuilt the grand-stand and baseball properties, and that thereafter insurance companies were informed of the pending litigation; but, notwithstanding said information, they issued policies on said property, and at a reduced rate.

The only declaration of law offered in the case was a declaration in the nature of a demurrer to the plaintiff's evidence, offered by defendant; and the sole question involved upon this appeal is whether or not plaintiff made out a case under the pleadings and evidence.

I. The policy provides that it shall be void "if the interest of the insured in the property be not truly stated." What is the meaning of the word, "property," in the above clause? Does it include property other than that covered by the policy, or does it simply mean the property which is, in fact, protected by the policy? That the latter is the correct meaning we entertain no doubt. The uncontroverted evidence in this record shows that plaintiff was the unconditional owner of the property which was the subject of insurance at the time the policy was issued, and later when the fire occurred. We, therefore, disallow appellant's contention that the insured's interest in the property was not truly stated.

Insurance—interest of insured—property included in provision.

II. The policy further provides: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the *interest of the insured* be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple." What is the meaning of the phrase, "interest of the insured," in the above clause? Here again, we are of the opinion it can mean nothing other than the interest of the insured in the property insured, and that it is not intended as including any interest which the insured might have or not have in the ground upon which the property is located. It is to be presumed, absent language in the policy clearly showing a contrary intention, that the term "interest of the insured" was intended as referring to the interest of the insured in the property which is the very subject-matter of the policy, and the very property which the policy is made to cover. It will be noticed, by reading the latter portion of the above clause, that when the interest of the insured in property other than that covered by the policy is intended to be included, clear and certain language is used showing that such other property is to be considered. If it should be held that the term, "interest of the insured," is sufficient in its scope to cover the interest of the insured in the ground upon which the insured property is located, then it would follow that the use of the subsequent clause, "or if the subject of insurance be a building on ground not owned by the insured in fee simple," was wholly unnecessary, and performed no useful function in the policy. Since, as above stated, the evidence was sufficient to justify the court in finding that the interest of the insured (in the subject of insurance) was that of unconditional and sole ownership, we likewise rule this point against appellant's contention.

Same—interest of insured—sole ownership—definition.

Was the ground upon which these buildings were located owned by the insurer in fee simple, within the meaning of said policy? In other words, did the outstanding contingent dower right of Mrs. Ridge render the title of the insured less than the fee-simple title, within the

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contemplation of said policy? After a careful review of the authorities, we have reached the conclusion that the fee-simple title to said land was vested in the insured, at the date of the policy and subsequent loss, notwithstanding the existence of such outstanding contingent right of dower.

Same—contingent dower interest—effect on ownership in fee.

The correct rule here applicable, and which appears to have the support of the great weight of the authorities on the point, is stated in 2 Clement on Fire Insurance, page 184, as follows: "The fact that the insured has title to the land on which [the] building insured is situated, by a deed from a married man whose wife did not join in the conveyance, does not prevent the insured from being the owner in fee simple; the estate owned by the wife, who did not sign the deed, is an estate in the land itself, and not a mere encumbrance resting upon it; but it is not until the death of the husband that the wife has any claim, legal or equitable, upon the real estate so conveyed, and, if she does not survive her husband, her estate terminates."

To the same effect are the following authorities: 2 Cooley, Briefs on Ins. p. 1352; 16 Am. & Eng. Enc. Law, 931; 19 Cyc. 698, note; Ohio Farmers' Ins. Co. v. Bevis, 18 Ind. App. 17, 46 N. E. 928; Virginia F. & M. Ins. Co. v. Kloeber, 31 Gratt. 749; Commercial Ins. Co. v. Spankneble, 52 Ill. 53, l. c. 57, 4 Am. Rep. 582.

III. The policy further provides: "This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning the insurance or the subject thereof."

Appellant contends that since the insured failed to inform the appellant of the fact that an appeal was pending from the above mentioned decree of the Jackson county circuit court, in the specific performance suit of Tebeau v. Ridge, that such failure upon the part of the insured amounted to a concealment of a material fact, within the meaning of said policy. We are unable to agree with this contention.

In the case of Boggs v. America Ins. Co. 30 Mo. 63, the same being the main case relied upon by appellant in support of the above contention, it was held that a concealment was not material, "unless the disclosure of the facts concealed would have induced the insurer to decline the risk or enhance the premium." And it was further therein held: "The question of the materiality or immateriality of the fact is always for the jury." Id. l. c. 67.

In the case at bar there was evidence upon the part of plaintiff, tending to show that the pendency of said litigation was an immaterial fact in determining the hazard of the risk or the amount of premium. There was evidence offered by appellant to the contrary. This was a lawsuit tried before the court, sitting as a jury. He found for plaintiff, and we are, therefore, to presume that he found that the fact was not a material one. There having been sufficient evidence to support such a finding, it disposes of the point now urged by appellant, and it becomes unnecessary to discuss the proposition as to whether the acts of the insured, as disclosed by this record, would or would not justify a finding that there was or was not concealment, within the meaning of said policy.

Appeal—finding by trial court.

The judgment is affirmed.

All concur.

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ANNOTATION.

Outstanding dower or curtesy right as rendering title of insured under fire insurance policy less than fee simple.

The reported case (TEBEAU v. GLOBE & R. F. INS. CO. ante, 1041) holds that an outstanding contingent dower right does not render the title of an insured less than fee simple, within the meaning of a clause in a policy of fire insurance, providing that it shall be void if the interest of the insured be other than unconditional and sole ownership. This holding has been sustained in the few cases wherein the question has arisen, and may be said to be the general rule on the subject, the courts basing the holding on the doctrine that the courts will refuse to declare a forfeiture except in a clear case. Hix v. Sun Ins. Co. (1910) 94 Ark. 485, 140 Am. St. Rep. 138, 127 S. W. 737; Ohio Farmers' Ins. Co. v. Bevis (1897) 18 Ind. App. 17, 46 N. E. 928; Southern Mut. Ins. Co. v. Kloeber (1879) 31 Gratt. (Va.) 739; Virginia F. & M. Ins. Co. v. Kloeber (1879) 31 Gratt. (Va.) 749. See also Commercial Ins. Co. v. Spankneble (1869) 52 Ill. 53, 4 Am. Rep. 582.

In Ohio Farmers' Ins. Co. v. Bevis (1897) 18 Ind. App. 17, 46 N. E. 928, it appeared that the insured held title by a conveyance from a married man, whose wife did not join therein. It was held that this fact did not defeat a policy, conditioned that "if this assured is not the sole owner in fee simple of the realty upon which this insured building is situate, and having a legal and equitable title thereto, then and in such case this policy shall be void." The court said: "It was only necessary for the assured to answer the question concerning his title in the negative or affirmative. He was not compelled to abstract it for the benefit of the company, and if his answer, conveying the meaning that his title was absolute, was correct, and no facts in relation thereto are shown by the insured which would materially increase the hazard, or cause a greater premium to be charged for the insurance, we cannot see that the insurer is harmed thereby. If appellee had held simply a life estate, or if the land was encumbered, and he answered that it was not, we can readily see why the courts would enforce a forfeiture of that kind."

In Virginia F. & M. Ins. Co. v. Kloeber (1879) 31 Gratt. (Va.) 749, it appeared that the insured held title under a deed executed by a trustee whose wife did not join therein. It was held that her outstanding contingent dower right "was not such an interest as shows that the assured was invested with less than a perfect title in the property insured." See to the same effect, Southern Mut. Ins. Co. v. Kloeber (1879) 31 Gratt. (Va.) 739.

In Hix v. Sun Ins. Co. (1910) 94 Ark. 485, 140 Am. St. Rep. 138, 127 S. W. 737, it appeared that a short time before the policies in suit were issued, a decree of divorce was rendered against the insured. The policies were in the standard form, and liability thereunder was contested on account of an alleged breach of the following condition, stated in each policy, viz: "This entire policy, unless otherwise provided by agreement indorsed thereon or added thereto, shall be void . . . if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the assured in fee simple." The court, in construing the act relating to the property rights of a wife on the rendition of a final decree of divorce in her favor (Kirby's Dig. § 2684, Act of March 28, 1893), held that the statute gave her, for and during her natural life, such an interest in the real estate as would be her dower right in case of the husband's death; and, in applying the general rule that her claim did not change the husband's interest in the insured property from that of sole and unconditional ownership, the court said: "The statute provides that the specific property to which the wife is entitled shall be designated in the de-

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cree for divorce; but, conceding that this may be done afterwards by another decree of the court, until it is done the divorced wife's claim is an unascertained one, which does not change the husband's interest in the property from that of sole and unconditional ownership. He is still the sole and unconditional owner thereof in fee simple, though the divorced wife's undetermined claim exists, and he cannot convey it without her concurrence. The husband cannot sell his homestead before divorce, unless his wife joins in the execution of the conveyance, nor can he convey his other lands free of the wife's inchoate dower right; yet he is the sole and unconditional owner. He is not merely the owner of an undivided interest, but he is the sole and unconditional owner until his wife's interest be asserted and carved out. The title remained vested in the husband solely and unconditionally until it was devested by a decree of the court, designating the specific property to which the wife was entitled."

In Commercial Ins. Co. v. Spankneble (1869) 52 Ill. 53, 4 Am. Rep. 582, the court, in holding that a husband's estate by the curtesy did not render his wife's interest in the insured property less than absolute ownership, said: "No one would say that, under such a provision in a policy issued to a married man, he could not recover, because his wife had a contingent right to dower in the premises."

But in McIntosh v. North State F. Ins. Co. (1910) 152 N. C. 50, 136 Am. St. Rep. 818, 67 S. E. 45, it appeared that the property in question was formerly owned by an intestate, and at his death descended to his daughters, subject to his widow's dower right therein. Subsequently the insured maried the widow, and took out a policy of insurance in which he appeared as the sole owner and beneficiary. The court held that he could not recover under the policy, as he had no title within the meaning of the standard clause.

The general rule heretofore has been applied in the case of a husband's right of curtesy in property owned by the wife, it being held that such right does not render her title less than fee simple, within the requirement of a policy providing that if the interest of the assured is not one of absolute ownership, it must be so stated to the company in writing. Commercial Ins. Co. v. Spankneble (Ill.) supra.

The same rule has been applied where a husband had a homestead interest in property owned by his wife. Sun Ins. Office v. Beneke (1899) — Tex. Civ. App. —, 53 S. W. 98. See also Caldwell v. Stadacona F. & L. Ins. Co. (1882) 11 Can. S. C. 212. H. B.

RUTH K. TAYLOR et al., Appts.,

v.

CITY OF SPOKANE, Respt.

Washington Supreme Court — February 26, 1918.

(100 Wash. 409, 171 Pac. 249.)

Trial — question for jury — wearing high-heeled shoes — negligence.

1. The jury must determine whether one injured by falling on an icy pavement was negligent in wearing upon such pavement a high-heeled shoe which is in evidence before them.

[*See note on this question beginning on page* 1049.]

Same — instructions — character of shoes — separate ground of negligence.

2. An instruction in an action to recover damages for personal injuries caused by a fall on an icy sidewalk does not make the character of shoes worn an independent act of negligence on the part of plaintiff, in telling the jury, after defining the care to be used

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in venturing upon a known icy pavement, that previous knowledge of the condition of the walk, if found, and the fact, if found, that she was wearing high-heeled shoes, is not conclusive of contributory negligence, yet if such acts were found to be acts of negligence contributing to the injury, there might be a finding for defendant.

Municipal corporation — fall on sidewalk — contributory negligence — use of improper shoes.

3. One cannot hold a city liable for injury caused by falling upon an icy sidewalk, if the primary cause of the injury was the fact that, with knowledge of the condition of the walk, she wore shoes improper for such use.

Trial — instruction — weight of evidence.

4. An instruction in an action by one seeking to hold a city liable for injury caused by falling on an icy sidewalk, that the fact, if found, that plaintiff was wearing high-heeled shoes, is not conclusive that she was guilty of contributory negligence, is not equivalent to an instruction that it might be considered as evidence of negligence; nor is it a comment upon the evidence.

Same — question for jury — height of heels.

5. The jury may determine from a shoe in evidence before them, in an action to hold a city liable for injuries caused by a fall on an icy sidewalk, and from evidence that plaintiff attributed the fall to high-heeled shoes, whether or not the heels were higher than those ordinarily worn on the street.

APPEAL by plaintiffs from a judgment of the Superior Court for Spokane County in favor of defendant in an action brought to recover damages for personal injuries, alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **Danson, Williams, & Danson** and **George D. Lantz**, for appellants:

To constitute contributory negligence, there must be want of ordinary care, having in view all the circumstances of the case, and such lack of ordinary care must contribute to the injury as an efficient cause thereof.

Gage v. Springston Lumber Co. 47 Wash. 141, 91 Pac. 558; Bethel v. St. Joseph, — Mo. App. —, 180 S. W. 401; Lynch v. Waldwick, 123 Wis. 351, 101 N. W. 925; Austin & N. W. R. Co. v. McElmurray, — Tex. Civ. App. —, 25 S. W. 325.

It is not the jury's function to speculate and guess as to the cause of injuries.

Ennis v. Banks, 95 Wash. 513, 164 Pac. 58.

The court invaded the province of the jury by commenting upon the item of evidence relating to plaintiff's shoes, and by going even further and conveying to the jury the idea that weight was to be given to it,—a clear expression of opinion.

State v. Walters, 7 Wash. 246, 34 Pac. 938, 1098; Gottstein v. Seattle Lumber & Commercial Co. 7 Wash. 424, 35 Pac. 133; Bardwell v. Ziegler, 3 Wash. 34, 28 Pac. 360; Crooker v. Pacific Lounge & Mattress Co. 84 Wash. 191, 75 Pac. 632.

There was no issue as to respondent's negligence to submit to the jury.

Roe v. Standard Furniture Co. 41 Wash. 546, 83 Pac. 1109.

Messrs. **J. M. Geraghty** and **Alex M. Winston**, for respondent:

Mrs. Taylor's acts were not "conclusive of her negligence," but the jury were properly told that they might find that they were in fact negligent acts.

Sutton v. Snohomish, 11 Wash. 24, 48 Am. St. Rep. 847, 39 Pac. 278; Benson v. Hamilton, 34 Wash. 201, 75 Pac. 805; Gagnier v. Fargo, 12 N. D. 219, 96 N. W. 841.

Where specific instructions are asked upon a certain branch of the case, it is the duty of the court to give them.

Harris v. Brown's Bay Logging Co. 57 Wash. 8, 106 Pac. 152; Duteau v. Seattle Electric Co. 45 Wash. 418, 88 Pac. 755; Dallas Consol. Electric Street R. Co. v. Ison, 37 Tex. Civ. App. 219, 83 S. W. 408; Metropolitan Street R. Co. v. Johnson, 90 Ga. 500, 16 S. E. 51; West Chicago Street R. Co. v. Groshon, 51 Ill. App. 463; St. Louis & S. F. R. Co. v. Crabtree, 69 Ark. 134, 62 S. W. 64; Louisville & M. R. Co. v.

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King, 131 Ky. 347, 115 S. W. 196; Crosby v. Ritchey, 56 Neb. 336, 76 N. W. 895; Campbell v. St. Louis & Suburban R. Co. 175 Mo. 161, 75 S. W. 86; St. Louis Southwestern R. Co. v. Casseday, 92 Tex. 525, 50 S. W. 125; Missouri, K. & T. R. Co. v. McGlamory, 89 Tex. 635, 35 S. W. 1058; Western U. Teleg. Co. v. Morris, 44 C. C. A. 350, 105 Fed. 49; Haines v. Illinois C. R. Co. 41 Iowa, 227.

The question whether respondent was guilty of negligence was for the jury.

Dougan v. Seattle, 76 Wash. 621, 51 L.R.A.(N.S.) 214, 136 Pac. 1165.

Mount, J., delivered the opinion of the court:

Mrs. Ruth K. Taylor, one of the plaintiffs in this action, was injured as the result of a fall upon an ice-covered sidewalk, in the city of Spokane. She and her husband sued the city to recover damages, alleging negligence in permitting the sidewalk to be covered with ice, upon which ashes had been thrown. The city, for answer, denied negligence on its part, and alleged contributory negligence on the part of the plaintiff, Ruth K. Taylor, by reason of the fact that she knew the condition of the walk, and was negligent in going thereon wearing high-heeled shoes. The cause was tried to the court and a jury, a verdict was returned in favor of the defendant, a judgment of dismissal was entered, and the plaintiffs have appealed, alleging error in an instruction of the court to the jury, as follows: "I instruct you that if Mrs. Taylor knew of the alleged dangerous condition of the sidewalk prior to the time of the accident, then the law would require more care on her part to avoid injury than if she knew nothing about it. The degree of care in each case required to be used by Mrs. Taylor would still be ordinary care. She would not be under obligation to use a greater degree of care than ordinary care, but would be required to use that degree of care, to wit, ordinary care, which reasonable prudence and caution would dictate to the ordinary traveler as being proper to be used. When a person knows of a dangerous sidewalk, the law requires of her to exercise such reasonable care as an ordinarily prudent and cautious person would use under like circumstances. If this is done and injury results the person is without fault, and if you find this to be the case, Mrs. Taylor was not guilty of contributory negligence. If this was not done, and the failure so to do proximately contributed to the injury, then Mrs. Taylor was guilty of contributory negligence, and cannot recover. The question of whether, upon all the facts in the case as disclosed from all the evidence, Mrs. Taylor was or was not guilty of contributory negligence, is one for your determination, and while previous knowledge, if you find she had such knowledge, of the condition of the sidewalk, on the part of Mrs. Taylor, and the fact that she was, if you find that she was, wearing high-heeled shoes, is not conclusive that she was guilty of contributory negligence, yet you have a right to, and may, if you find that such acts or omissions on her part were acts of negligence contributing proximately to her injury, find for the defendant."

It is argued by counsel for the appellants that this instruction is erroneous because it makes the character of the shoes worn an independent act of negligence. We think there is no merit in this contention. The instruction tells the jury that, if they found that Mrs. Taylor had knowledge of the condition of the sidewalk, and was wearing high-heeled shoes, and if they found that such acts were acts of negligence, then she could not recover. But even if we were to conclude that the instruction is susceptible of the construction which appellants seek to place upon it, we think it would not in that event be erroneous, since it was a question for the jury to de-

Trial—instructions—character of shoes—separate ground of negligence.

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termine from the character of the shoe, which was placed in evidence by the appellants, whether it was negligence for Mrs. Taylor to wear such shoes upon an icy sidewalk.

Same—question for jury—wearing high-heeled shoes—negligence.

In the case of Armstrong v. Yakima Hotel Co. 75 Wash. 477, 135 Pac. 233, where it was contended that the shoes worn by the respondent in that case had high heels, which caused the accident, and where the defense was one of contributory negligence because the respondent wore a narrow skirt and high-heeled shoes, we said: "Both the skirt and the shoes were in evidence. On such a conflict, it is elementary that the questions of negligence and contributory negligence were both for the jury."

So it was in this case. If either the knowledge of the condition of the sidewalk or the fact that Mrs. Taylor was wearing improper shoes with which to go upon a walk, the condition of which she knew, was the primary cause of the accident, she, of course, was guilty of contributory negligence and could not recover.

Municipal corporation—fall on sidewalk—contributory negligence—use of improper shoes.

Appellants further contend that the statement in the instruction that "the fact that she was, if you find that she was, wearing high-heeled shoes, is not conclusive that she was guilty of contributory negligence," is equivalent to instructing the jury that, if Mrs. Taylor was wearing high-heeled shoes, that was evidence of negligence, and entitled to any weight short of conclusiveness; and it is argued that this was a comment upon the evidence.

We think it was neither a comment upon a fact, nor upon the weight to be attributed to the fact that she was wearing high-heeled shoes. The court simply told the jury that, if they found that it was a fact that she was wearing high-heeled shoes, that fact was not conclusive that she was guilty of negligence. If this statement were held to be error, it would be error in favor of appellants.

Trial—instruction—weight of evidence.

Appellants also argue that there was no evidence that the heels of these shoes were higher than those ordinarily worn upon the street. One of the shoes, admittedly worn by Mrs. Taylor, was introduced in evidence. Mrs. Taylor, when a witness upon the stand, testified that, at the time of her fall, she made a statement that she was afraid her husband would attribute the fall to her high-heeled shoes. A witness for the respondent testified that her statement was that the accident was caused by "those foolish high-heeled shoes." The jury was at liberty to decide from this evidence whether the shoes were the kind usually worn and whether the shoes worn were the primary cause of the accident.

Same—question for jury—height of heels.

The instructions as a whole were fair and clear, and, we think, stated the law properly to the jury.

We find no error in the record, and the judgment is therefore affirmed.

Ellis, Ch. J., Holcomb, Chadwick, and Morris, JJ., concur.

ANNOTATION.

High-heeled shoes or character of apparel, as affecting contributory negligence of woman.

The holding of the reported case (TAYLOR v. SPOKANE, ante, 1046), that the negligence of a pedestrian in going upon an icy sidewalk wearing high-heeled shoes, knowing of the dangerous condition of the walk, is a question for the jury, is supported in Armstrong v. Yakima Hotel Co. (1913) 75 Wash. 477, 135 Pac. 233, where a guest in a hotel, wearing a narrow skirt and

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high-heeled shoes, tripped while descending the stairs, this case being sufficiently set out in the opinion of TAYLOR v. SPOKANE.

So, in Rose v. Kansas City (1910) 141 Mo. App. 278, 124 S. W. 1057, where a woman was injured while alighting from a street car, by stepping on a lose brick in a street, the question whether she was guilty of contributory negligence in wearing high and narrow heeled shoes, known as "French heels," only about 1 inch wide at the bottom, was for the jury.

And the decision in Horan v. Independence (1915) — Mo. App. —, 176 S. W. 1061, held that an instruction, merely requiring a finding that a pedestrian slipped and fell, was erroneous in failing to require a finding that she fell because of the negligent condition of a walk, especially where there was evidence tending to show that she may have been caused to fall solely by reason of the condition of the heels of her shoes, and that she had been walking along a wet cinder path.

One of the rights of a railroad passenger, states the court in Colt v. Sixth Ave. R. Co. (1871) 1 Jones & S. (N. Y.) 189, affirmed in (1872) 49 N. Y. 671, is to be allowed a reasonable time to get off. Subject to all lawful regulations as to the time, place, and manner of stopping, which a railroad company may make, it is their duty, when a passenger desires to get off and indicates such desire to the conductor, to stop the car long enough to allow the passenger to alight. The length of such stoppings will depend upon and be regulated by the circumstances of each case; usually the condition of the passenger, of the car, and of the street at the place of departure. But, regulated by these circumstances, sufficient time must be given; and if the company fails in this respect, they must be held responsible for the injuries which the passengers receive by means of it. It was held in this case that the fact that a passenger, an aged, crippled woman, wore a hoop skirt or a dress that trailed, which caught on the car when it commenced to move and she was alighting, throwing her down, did not contribute to the accident so as to relieve the company from negligence in starting the car before she had safely alighted and was free from the car. The court observed that it could not say, as a matter of law, that she had not a right to wear a hoop skirt, or a dress so long as to trail behind her and rest upon the platform as she was alighting. If, as she believed, her skirt or dress was caught by a nail protruding above the platform, nevertheless, she was thrown down by the too soon starting of the car. Or, even if there was no nail there, and her dress was not thus caught, nevertheless, no one can reasonably doubt that the starting of the car threw her down.

So, where a passenger's dress caught upon the plunger of a street car when she was in the act of alighting, and before it was loosened the car started and dragged her some distance, it was held in Smith v. Kingston City R. Co. (1900) 55 App. Div. 143, 67 N. Y. Supp. 185, 9 Am. Neg. Rep. 152, affirmed in (1902) 169 N. Y. 616, 62 N. E. 1100, that it could not be held, as matter of law, negligence on the part of the passenger to wear a dress so long that it was likely to catch upon appliances extending above the platform.

So, where a passenger caught her hoop skirt on a nail projecting from the platform of a car which started before she had alighted free from the car, so that she was dragged some distance and injured, it was held in Poulin v. Broadway & S. Ave. R. Co. (1872) 2 Jones & S. (N. Y.) 296, affirmed in (1874) 61 N. Y. 621, that the fact that she wore a hoop skirt did not render her guilty of contributory negligence. The court upheld a charge: "I will not undertake to tell the jury that hoop skirts are unsafe. If hoop skirts are worn by such passengers as the railroad company were in the habit of carrying, they were bound to provide for the safety of passengers with that kind of garment on. They are bound to carry such passengers as they take and are in the habit of taking, safely, with as much care and caution as prudent, cautious persons would be bound to exercise." It can hardly be insisted on, further stated

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the court, that it was the duty of the court to have charged the jury that a hoop skirt is an unnecessary article of female apparel, or that an extra degree of caution is required on the part of the wearer, to avoid accidents.

So, it is stated in the syllabus of Patterson v. Inclined Plane R. Co. (1896) 12 Ohio C. C. 274, 5 Ohio C. D. 665, 10 Am. Neg. Cas. 33, that where, in a suit for damages for personal injuries, it appears that the injury was caused by the plaintiff's dress being caught in some way by the door or on the platform of the car, while she was alighting therefrom, and the car being started by the conductor before she could free herself, in consequence of which she was thrown on her side and injured, it would not be proper to charge the jury that the plaintiff's failure to gather up her dress while alighting from the car, which would probably have avoided the accident, if a careful and prudent lady would have done so, was negligence on her part as a matter of law, and would prevent a recovery by her. The following charges on the part of the plaintiff were upheld by the court: "It might, under some circumstances, be contributory negligence for a woman to permit her dress to trail upon the platform of a street car when she was alighting, but this would be true only where there were facts and circumstances surrounding her which she had knowledge of, or ought, by the exercise of common and ordinary care, to have knowledge of, which should cause her to apprehend danger in permitting her dress to trail. . . . If the plaintiff was exercising ordinary care when she was leaving the car, and had no cause to apprehend danger in permitting her dress to trail, she was not guilty of contributory negligence in so permitting it." If the injury to the plaintiff was caused by reason of the fact that her dress was caught upon the step of the car, observed the court, either from her own negligence or want of ordinary care or while she was in the exercise of proper care, and there was no negligence on the part of this company, this, of course, would only be an accident or misadventure, and she would have no right of action against anyone. But if she was entirely free from negligence or fault, and the company was negligent, and thereby caused the injury, it would be liable. It was then a very important question for the consideration of the jury, whether the plaintiff was negligent in allowing her dress to trail, and if she was at the time "exercising ordinary care" in alighting from the car, as the charge asked for assumed, she could not have been guilty of contributory negligence in this respect, so as to prevent her recovering a verdict in the case, if negligence on the part of the company was shown in starting the car before she was free from it, and the injury was thereby brought about. So, the court upheld the charge on the part of the plaintiff: "The plaintiff was not bound to apprehend carelessness upon the part of the defendant. She had a right to rely upon the defendant having its platform in good condition, and free from obstacles of an unusual character upon which her dress might catch. She was not bound to apprehend that the conductor might start the car while her body was in contact with it, or until she was free from it and had reached a position of safety. She was not bound to apprehend that she might do anything that would place her in jeopardy. On the contrary, she had a right to place full reliance on the defendant doing its full duty toward her, and exercising the high degree of care which the law requires of it." So, the court stated that it was error to refuse this charge: "The plaintiff in this case claimed that her dress was held in some way upon the platform of the defendant's car, and that the conductor negligently started the car while it was so held. If it was held upon the platform or step by some object or force, that is a separate and independent fact, and if you think the evidence justifies you in finding such to be the fact, you may do so, without determining how or by what it was held." The court said that the vital questions on this point were these: Was the dress so held in any manner? and, if so, was the conductor negligent in starting the car before her dress was free, and

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did this cause the injury? The manner or way in which it was caught was, in this point of view, not material, and if the evidence justified the jury in finding that it was so caught or held, and that while so held the conductor negligently started the car, it was not essential to a finding in favor of the plaintiff on this point that the jury should know or find how it was held.

In the following cases a passenger was injured in alighting from a car which was moving, or was suddenly started, but there was no discussion of negligence based on her wearing apparel, although it apparently had some connection with the accident. Dunning v. Lake Erie & W. R. Co. (1906) 38 Ind. App. 91, 77 N. E. 1049 (passenger held guilty of contributory negligence, as matter of law, in stepping straight out from train which she knew was moving, without making effort to ascertain its speed, and holding a parcel in one hand and her skirts in the other); La Pointe v. Boston & M. R. Co. (1901) 179 Mass. 535, 61 N. E. 142, 10 Am. Neg. Rep. 600, later hearing in (1902) 182 Mass. 227, 65 N. E. 44 (railroad company held not liable where aged passenger alighted from moving train, wearing a veil, and carrying handbag and bundle); Filer v. New York C. R. Co. (1877) 68 N. Y. 124, 5 Am. Neg. Cas. 162 (verdict for plaintiff sustained where passenger was injured when car suddenly started, catching her clothing).

J. D. C.

PEOPLE OF THE STATE OF ILLINOIS EX REL. HENRY STUCKART, County Treasurer, etc., Appt.,

v.

ROBERT WHITE & COMPANY.

Illinois Supreme Court — December 18, 1918.

(286 Ill. 259, 121 N. E. 553.)

Tax — right to object to assessment — agent.

1. Mere agents in charge of real estate cannot object to a tax assessment thereon, under a statute permitting objection by anyone interested in the property, since such interest must be a property right.

[*See note on this question beginning on page* 1057.]

Same — objection — interest.

2. The interest necessary, under a statute permitting one interested in real estate to make defense against a tax assessment thereon, must be a property right.

Evidence — burden of proof — interest in property.

3. Where property is not assessed in the name of one objecting to a tax assessment thereon, the burden is on him to show his interest in the property.

Tax — objection by agent.

4. Though an agent, if duly authorized, may object to an application for judgment for taxes, he may do so only as agent in the name of the owner.

Evidence — value of property for taxation.

5. The valuation of property for taxation by the assessor is conclusive, in the absence of fraud, and evidence is not admissible, in a proceeding attacking an assessment, of the value of the property at the time the assessment was made.

Tax — power of courts to review.

6. In the absence of a charge or evidence of bad faith in the assessment of real estate for taxation, the courts have no power to review the assessment.

Same — certificate of error — when to be made.

7. A certificate of erroneous assess-

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ment for taxation is too late if made after judgment and order of sale for nonpayment of taxes, where the statute authorizes it to be made only before judgment and order of sale.

Same — time for making correction.

8. Owners of land who have neglected to avail themselves of the means provided by law for correcting the assessment of their property cannot have their assessment corrected after judgment has been rendered against them, as the time for making such correction has passed.

APPEAL by relator from an order of the County Court for Cook County sustaining special objection to and refusing judgment in a proceeding for an order of sale of certain property for delinquent taxes. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Maclay Hoyne, Charles Center Case, Jr., and Joseph P. Ryan for appellant.

Messrs. Daniel S. Wentworth, David B. Maloney, and Nathan E. Utt, for appellee:

The board of review and assessors are presumed to do their duty, and their certificates of error are presumed regular.

People ex rel. Funk v. Keener, 194 Ill. 16, 61 N. E. 1069.

An agent may object to an irregular and improper tax.

37 Cyc. 1310; Simpkin v. Sny Island Levee Drainage Dist. Comrs. 223 Ill. 67, 79 N. E. 38; Chicago City R. Co. v. Bundy, 210 Ill. 39, 71 N. E. 28.

It is not necessary in any objection, for the objector to go into its evidence in detail, and point out the manner of its reasoning or the logic of its objection, nor was it necessary for the appellee to state that it was going to produce and offer in evidence a certificate of error from the board of assessors.

Kirchman v. People, 159 Ill. 265, 42 N. E. 884; Jefferson County v. Mt. Vernon, 145 Ill. 84, 33 N. E. 1091; Creote v. Chicago, 56 Ill. 422.

Where a judgment is entered and a motion to vacate is entered and continued, the court can, at any subsequent term, call the motion up for a hearing and dispose of the same, either by vacating the judgment of a previous term or by overruling the motion to vacate.

Hearson v. Graudine, 87 Ill. 115; Hibbard v. Mueller, 86 Ill. 256; People ex rel. Munson v. Gary, 105 Ill. 264; Windett v. Hamilton, 52 Ill. 180.

Dunn, J., delivered the opinion of the court:

The treasurer and ex officio collector of Cook county applied to the county court, at the July term, 1918, for judgment and an order of sale for taxes against the north half of lot 8, block 35, in original town of Chicago, section 9, town 39, range 14, assessed in the name of T. Smith, and the south half of the same lot, assessed in the name of J. Borden. Objections to judgment were filed by Robert White & Company. There were many objections which were common to numerous objectors, but the judgment in this cause was rendered upon a special objection. The cause was heard upon this objection on July 29th, and an order was entered overruling it, whereupon the objectors made a motion to vacate the order, which motion was entered and continued. No judgment was entered at that time, but on August 1st the cause again came on for hearing, and an order was entered overruling all objections not theretofore sustained or overruled in whole or in part, and a judgment and order of sale were entered against the two half lots, and objectors moved to vacate such judgment and order of sale, which motion was entered of record and continued. On August 19th the court entered an order finding $546.67 was illegally levied against each of the half lots in question, on account of excessive valuations, vacating the previous judgment and order of sale, and ordering that the special objection be sustained and judgment refused. This appeal is from the order refusing judgment.

The objection which was sustained is as follows: "Now comes

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objector, Robert White & Company, by their attorneys, . . . and objects to the jurisdiction of the court herein and objects to the judgment of sale against the following described property to the amount herein set out as follows, to wit: Two thirds of the assessed valuation of the improvement on each of the said lots, that is, a tax of $1,640, is improperly on each of the lots as originally assessed, that the same being in the sum of $1,640; that the amounts are improper and illegal because of the fact that on May 1, 1917, the improvements upon said property were wrecked and of no value, and that thereafter there were no buildings or improvements of value on the said lands; that as the remainder of the said tax upon the improvements and land assessments, the objector objects for the reason that the tax is illegal for reason as before specified herein. The said property, together with the amounts objected to, are set forth in the attached schedule."

No questions are involved in this appeal except those arising on this objection. The date "April 1, 1917," was afterwards substituted for the date "May 1, 1917," by amendment. This objection is obscurely expressed, but in substance it is that the assessment is illegal because of the fact that the improvements on the land were of no value on April 1, 1917—the day with reference to which the law required the assessment to be made.

The facts appearing in the record are these: Lot 8 is at the northwest corner of Dearborn and Randolph streets, in the city of Chicago. Prior to April 1, 1917, there was a building on each half of the lot,—one six stories high, the other five stories. On February 20, 1917, the owners of the buildings entered into a contract for the wrecking of them, for which the wrecking company was to receive $4,250. The wrecking work started on February 9th, and continued until the buildings were destroyed, some time in May. The first work on the new building was begun on March 30th. On April 1st the old buildings were still there and tenants were still in the buildings, though the basement was vacated. Objectors offered to prove that the buildings in their condition on April 1st were a damage to the land, running somewhere from the actual cost of removing the same, which was $4,250, up to the neighborhood of $10,000. The objections were filed by Robert White & Company, a partnership in the real estate business. They were the agents of the buildings, had the management of the property, the collection of rents, and the letting of space. They did not own any part of the land or buildings, and had no interest whatever in either. These facts were shown in the hearing on the special objection, and thereupon the order of July 29th was entered overruling the objection.

The objection was properly overruled for two reasons:

First, the objectors, Robert White & Company, had no interest in the lots. They were not connected with the title in any way, but were merely the agents of the owner. The statute authorizes a defense to be offered by any person interested in any lands or lots. The interest which authorizes anyone to make defense must be a property right, and the objectors had no such right. The property was not assessed in their name, and, where property is not assessed in the name of the objector, the burden is on him to show his interest in the land, and unless he does so his objections will not be considered. People ex rel. Rea v. Cleveland, C. C. & St. L. R. Co. 248 Ill. 440, 94 N. E. 50.

Tax—objection—interest.

Evidence—burden of proof—interest in property.

Counsel for the appellees insist that the agent of the owner of land has a sufficient interest in the land to authorize him to file objections to taxes. An agency for the management of real estate is not an interest in the real estate,

Tax—right to object to assessment—agent.

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and though an agent, if duly authorized, may object to an application for judgment for taxes, he may do so only as agent in the name of the owner. The objections here were filed by Robert White & Company in their own name as objectors.

Same—objection by agent.

Second, evidence was not admissible in regard to the value of the real estate or the improvements on April 1, 1917. The assessor is the officer authorized by law for fixing the valuation of property for the purpose of taxation, and his judgment, in the absence of fraud, is conclusive. The objectors made no charge of fraud, and no evidence of fraud was offered. In such case there is no power in any court to review the assessment. Spencer v. People, 68 Ill. 510; East St. Louis Connecting R. Co. v. People, 119 Ill. 182, 10 N. E. 397; New Haven Clock Co. v. Kochersperger, 175 Ill. 388, 51 N. E. 629. The statute makes it the duty of the assessor in each year other than that of the quadrennial assessment, when there has been a change in the value of land by reason of injury or alteration in or addition to the improvements, to determine the amount, in his opinion, of such change and set it down in the assessment book. If he makes any change, the changed amount is the assessment for that year; but, if he makes none, the previous assessment remains the assessment for the year. His judgment, however erroneous, cannot be reviewed by a court; but the statute has provided for its revision by the board of assessors, and for a further review of the assessment upon the complaint of the owner by the board of review. In the absence of fraud, these are the remedies which are available to the owner for an excessive assessment, and, if they have not been availed of, the courts cannot give relief.

Evidence—value of property for taxation.

Tax—power of courts to review.

The effect of the judgment of August 1st was to overrule the appellees' motion, made on July 29th, to vacate the order of that date. Thereupon the appellees entered a motion to vacate the judgment, and on August 19th the cause again came on for hearing, the motion was allowed, and the objections were sustained to the amount of $546.67 on each half of the lot, and a judgment was entered, from which this appeal was taken. On this hearing the appellees produced the following certificate:

Board of Assessors of Cook County, Ill.
Room 315, Court house—Telephone Franklin 3000.
Chicago, July 1st, 1918.
Charles Krutchkoff, Chief Clerk:
Volume 1 South.

In 1917 this board assessed the property described as N. ½ lot 8 and S. ½ lot 8, block 35, original town of Chicago, in section 9–39–14, as follows:

N. ½ lot 8	Land $280,000,	Improvement 000	Total, $280,000
S. ½ lot 8	518,589	000	518,000

Through clerical error in entering the assessment the improvement was extended $80,000, making the total assessment appear on said warrant as $878,589, the tax extended thereon being $18,016.85. The total tax on the correct assessment against this property, as made by this board and confirmed by the board of review, amounts to $16,371.05, and the tax extended is excessive in the sum of $1,645.80.

George K. Schmidt,
M. K. Sheridan,
Adam Wolf,
Board of Assessors.
William P. Feeney,
Edw. R. Litzinger,
Board of Review.

This certificate purports to be in conformity with the proviso in ¶ 308 of chapter 120 (Hurd's Stat. 1917, p. 2483), which is as follows: "Pro-

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vided, however, that if at any time before judgment or order of sale therefor the said assessors shall discover an error or mistake (other than errors of judgment as to the valuation of any real or personal property) in any assessment of any property belonging to any person or corporation, they shall issue to the person or corporation erroneously assessed a certificate setting forth the nature of such error and the cause or causes which operated to produce the same, which said certificate, when properly indorsed by the majority of board of review, showing their concurrence therein, and not otherwise, may be used in evidence in any court of competent jurisdiction, and when so introduced in evidence such certificate shall become a part of the court record and shall not be removed from the files except on an order of the court."

This proviso authorizes the certificate to be made only before judgment or order of sale, and, while on its face the certificate appears to have been made on July 1st, the evidence discloses that, in fact, it was not issued until after judgment and order of sale, and it was therefore of no effect. The objections were based on the fact that there had been an assessment which was excessive; that the buildings on the property had depreciated in value so that they were worthless on April 1, 1917, and reduced the value of the property instead of increasing it. In the hearing on July 29th counsel for appellees stated that there was an assessment of $40,000 against each of the buildings. Afterward, on the request of the appellees, this certificate was issued. The witness who testified in regard to procuring it stated that it was obtained in August, and that the reason it was dated July 1st was that that is the date when mimeograph forms were obtained. It is clear that the certificate, although dated July 1st, was not issued until after judgment was rendered, and therefore after the time when the board of assessors or the board of review was authorized to issue it.

Same—certificate of error—when to be made.

The owners of land who have neglected to avail themselves of the means provided by law for correcting the assessment of their property, and have relied upon inconsistent defenses, cannot have their assessments corrected after judgment has been rendered against them and the time for making such correction has passed. The statute says that the certificate may be used in evidence in any court of competent jurisdiction,

Same—time for making correction.

but not that it shall be conclusive evidence of the facts stated in it. Errors of judgment as to the valuation of property are expressly excluded from the mistakes which may be corrected by such certificate. The same witness who obtained the certificate testified that he went to see Schmidt and explained to him that objection to the amount of the taxes on buildings covering this property had been filed, and that it had always been customary to get a little equity thrown into these hearings; that he showed him a contract, and said they were taking out the under part and were putting new things there, and that the tenants had evacuated the building; that the reason it was not brought up or filed before the board of review was that the witness represented the property when it was the Borden estate, and they sold it to the Woods Theater people, and a new agent took hold of it, and in the confusion nobody thought the building would be assessed as torn down; that this all came about because no complaint was filed before the board of review; and that the reason they did not come in the spring and ask for a certificate of error was from the fact that in the past, in the county court, when they had got up to the trial of these cases they had always been able to have equity done. After-

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ward the witness, in connection with clerks in the office, got the figures off the field book, and the figures showed $40,000 on each building, in 1917, in the field book. They went right down the line with the assessment books also, and the same thing was confirmed with the board of review, because there was no complaint filed. That was automatic. The occasion for all this figuring, the witness said, was the buildings had been put there in error and should come off, and that there was nothing on the face of the books showing the figures had been put there in error, and the building was there April 1st on the books and on the premises. "A shell may have been there, and as an equitable proposition they have got to use the words 'clerical error.' As to why they have to use the words 'clerical error,' I don't know as I can answer that legally." It is manifest from the evidence that the certificate was issued, not to correct a clerical error, but to correct an erroneous assessment.

The court erred in vacating the judgment of August 1st, and in entering a judgment reducing the amount of the tax.

The judgment will be reversed, and the cause remanded.

Petition for rehearing denied, February 7, 1919.

NOTE.

No decision has been found other than that in the reported case (PEOPLE EX REL. STUCKART v. WHITE, ante, 1052,) upon the right of an agent to object in his own name to sale of real property for taxes. In Hosmer v. People (1880) 96 Ill. 58, however, the court, in sustaining a judgment against lands for taxes, said: "There is nothing before us to show that appellant is the owner of, or has any interest in, the lands or lots embraced in this appeal. If he was not, then he had no right to interpose any objection to the rendition of the judgment. It is not a privilege enjoyed by one person to interfere for the protection of the rights of others in matter in litigation. He can only appear for himself or as the attorney or agent of another."

NETTIE E. HARRINGTON
v.
BOSTON ELEVATED RAILWAY COMPANY.

Massachusetts Supreme Judicial Court — February 28, 1918.

(229 Mass. 421, 118 N. E. 880.)

Constitutional law — impartial judge — suggestion of compromise.

1. A suggestion by the court to defendant's counsel, not in the hearing of the jury, that he ought to settle the case, does not violate a constitutional provision guaranteeing impartial judges, although he names the amount which he thinks should be paid, with the remark that that does not mean that he would set aside a verdict for twice the amount named.

[*See note on this question beginning on page* 1068.]

Evidence — injury to passenger — absence of guard and warning.

2. Upon the question of negligence of a railway company towards a passenger, injured by falling between a temporary platform, erected by the company for its own convenience in making repairs, and a car, evidence is admissible that, although available, there were no guards stationed on the platform and no warning was given by trainmen of the danger.

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Trial — jury — negligence of carrier.

3. The jury must determine whether or not it is negligence on the part of a railroad company which has constructed a temporary platform at a station pending repairs, to fail to provide guards and give warning for the protection of passengers liable to fall between the platform and cars.

Appeal — refusal of instructions — error.

4. In an action to recover damages for injuries caused by the fall of an intending passenger into a space between a temporary platform and a car, it is not error to refuse to rule that the carrier was not required to give any notice of the space, and that if the space was only of a certain width there could be no recovery.

Evidence — circumstances of injury.

5. All the circumstances under which an injury was received ordinarily may be put in evidence, in an action to recover damages for the injury.

Appeal — admission of evidence as to ability to hear warning.

6. It is not reversible error to permit, upon the question whether or not a warning was given of a space between the station platform and the car, a person injured by falling into the space to state whether or not he was in a position where he would have heard a warning if given.

Evidence — temporary station platform — approval by Railroad Commission.

7. In an action for damages for injuries by falling between a temporary station platform and a car, plaintiff may show by defendant's engineer that the plan for the platform had not been approved by the Railroad Commission.

Same — expert — condition of platform.

8. An expert engineer may testify that a temporary platform, constructed by a railroad company at its station pending changes in its permanent structure, was not a reasonably proper one, in an action by a passenger to recover for injuries caused by falling between the platform and a car.

Appeal — evidence as to qualification of experts.

9. It is not reversible error, although not good practice, to permit an expert engineer, testifying as to the propriety of the plan of a temporary platform at a railroad station, in an action for damages by a passenger who fell between it and a car, to testify that he had been employed by defendant as an expert in engineering.

Same — exclusion of evidence — absence of knowledge.

10. It is not reversible error to refuse to permit a motorman employed by defendant to testify as to the character of trains run by it, in an action to recover damages for injuries caused by falling between a station platform and a car, if his knowledge of train operations is not shown to have been sufficiently comprehensive to make his testimony of value.

Evidence — practice after accident.

11. Upon the question of the weight to which evidence of defendant's engineers is entitled, in an action to recover damages for injuries to a passenger by falling between a platform and a car, to the effect that they did not know of any place where a movable platform was used to bridge a space less than 15 inches wide, evidence is admissible that, after the accident, such platform was used to bridge a space 11 inches wide.

Trial — jury — movable bridge.

12. The jury must determine whether or not it is negligence for a railroad company to fail to construct a movable platform to bridge the space between a temporary platform at a station, and its cars.

Carrier — duty with respect to space between platform and train.

13. The duty of a carrier with respect to a space between a temporary platform and its train is not the same as in case of a permanent platform.

Trial — duty to give warning.

14. The jury must determine whether or not it is negligence for the carrier to call out, or fail to call out, "Wide step," when a car draws up to a temporary platform at a station having considerable space between it and the car.

Same — question for jury — negligence of passenger.

15. The jury must determine whether or not a passenger was negligent, under all the circumstances, in attempting to enter the car she did, where there was a space between the station platform and the car.

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Same — ruling on evidence — facts in dispute.

16. A ruling of law cannot be predicated upon an assumption that facts have been proved, if the evidence in support of them is not indisputable.

Appeal — instructions — reference to testimony.

17. It is not reversible error for the court to refer, in its charge, in an action to hold a railroad company liable for injuries to a passenger falling between a station platform and a car, to testimony of other witnesses respecting what occurred on other nights, as bearing upon the credibility of the testimony of a trainman that, at the time of the accident, he called out to the passengers to step wide.

Same — refusal of instructions — error.

18. Refusal of requested instructions is not reversible error, if the subject-matter is adequately covered by the instructions given, or relates to details or fragments of evidence, concerning which instructions could not be required.

Same — allowance of exceptions — reason.

19. Where, by statute, the trial judge is authorized to allow exceptions only when they are conformable to the truth, he cannot allow untrue exceptions to prevent delay which would be caused by sending them to a commissioner for establishment.

Same — denial of new trial — exception.

20. The granting or denial of a motion for new trial rests in the sound discretion of the trial judge.

Same — want of exception — effect.

21. Any error in a suggestion of compromise by the trial judge is waived by failing to except at the time, or move for discharge of the jury.

EXCEPTIONS by defendant to rulings of the Superior Court for Suffolk County made during the trial of an action brought to recover damages for personal injuries, alleged to have been caused by defendant's negligence, which resulted in a verdict for plaintiff, and petition for the establishment of the truth of its exceptions. *Petition for establishment of exceptions allowed and exceptions overruled.*

The facts are stated in the opinion of the court.

The rulings asked for by defendant, and which the judge refused to make, were as follows:

"4. The fact that the defendant had not installed a movable platform at the place where the accident happened is not evidence of negligence.

"5. It was not negligence for the guard to call out, 'Wide step.'

"6. It was not negligence for the guard to fail to call out, 'Wide step.'

"7. No duty rested upon the defendant to give the plaintiff notice of the space between the car and the platform.

"8. If the space into which the plaintiff stepped was only 10 inches or less in width, then the plaintiff cannot recover.

"9. If the plaintiff met with her accident at the rear door of the first car, after it had stopped at its regular stopping place, then she cannot recover."

Mr. John T. Hughes, for defendant:

It was not negligence for the defendant to omit to warn passengers of space between the cars and the platform, or between cars of a train.

Welch v. Boston Elev. R. Co. 187 Mass. 118, 72 N. E. 500; Falkins v. Boston Elev. R. Co. 188 Mass. 153, 74 N. E. 338; Willworth v. Boston Elev. R. Co. 188 Mass. 220, 74 N. E. 333, 18 Am. Neg. Rep. 463; Hilborn v. Boston & N. Street R. Co. 191 Mass. 14, 77 N. E. 646; Hawes v. Boston Elev. R. Co. 192 Mass. 324, 78 N. E. 480; Hogan v. Boston Elev. R. Co. 195 Mass. 313, 81 N. E. 198; Field v. Boston Elev. R. Co. 188 Mass. 222, note, 74 N. E. 334; Anshen v. Boston Elev. R. Co. 205 Mass. 32, 91 N. E. 157; Seale v. Boston Elev. R. Co. 214 Mass. 59, 100 N. E. 1020; Ryan v. Manhattan R. Co. 121 N. Y. 126, 23 N. E. 1131, 5 Am. Neg. Cas. 329; Fox v. New York, 70 Hun, 181, 24 N. Y. Supp. 43, 5 Am. Neg. Cas. 683; Rothchild v. Central R. Co. 163 Pa. 49, 29 Atl. 702, 6 Am. Neg. Cas. 382; Carney v. Boston Elev. R. Co. 219 Mass. 552, 107 N. E. 411.

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It was for the jury to say whether the plaintiff would have heard anything if anything had been said to her.

Com. v. Cooley, 6 Gray, 350.

Whether a space of 12½ inches to 14 inches was a dangerous space to leave between a car and a platform, for a passenger to step over, was not a matter of expert knowledge.

Pierce v. Boston, 164 Mass. 92, 41 N. E. 227; White v. Ballou, 8 Allen, 408; Amstein v. Gardner, 134 Mass. 5; Mulry v. Mohawk Valley Ins. Co. 5 Gray, 541, 66 Am. Dec. 380; Luce v. Dorchester Mut. F. Ins. Co. 105 Mass. 298, 7 Am. Rep. 522; Perkins v. Augusta Ins. & Bkg. Co. 10 Gray, 312, 71 Am. Dec. 654; Hovey v. Sawyer, 5 Allen, 554; Connelly v. Hamilton Woolen Co. 163 Mass. 156, 39 N. E. 787; Gleason v. Smith, 172 Mass. 50, 51 N. E. 460; Edwards v. Worcester, 172 Mass. 104, 51 N. E. 447; Wolfe v. New Bedford Cordage Co. 189 Mass. 591, 76 N. E. 222; Walker v. Williamson, 205 Mass. 514, 91 N. E. 885; Boisvert v. Ward, 199 Mass. 594, 85 N. E. 849; Doherty v. Booth, 200 Mass. 522, 86 N. E. 945; New England Glass Co. v. Lovell, 7 Cush. 319; Whalen v. Rosnosky, 195 Mass. 545, 122 Am. St. Rep. 271, 81 N. E. 282; Lynch v. C. J. Larivee Lumber Co. 223 Mass. 340, 111 N. E. 861.

The admission of testimony objected to in regard to an appliance in use at some other place, over seven years later, was inadmissible.

Dacey v. New York, N. H. & H. R. Co. 168 Mass. 479, 47 N. E. 418, 3 Am. Neg. Rep. 183; Whelton v. West End Street R. Co. 172 Mass. 555, 52 N. E. 1072, 5 Am. Neg. Rep. 615; Stevens v. Boston Elev. R. Co. 184 Mass. 476, 69 N. E. 338, 15 Am. Neg. Rep. 338.

The fact that the defendant did not install a movable platform at the place where the accident happened is not evidence of negligence.

Anshen v. Boston Elev. R. Co. 205 Mass. 32, 91 N. E. 157; Plummer v. Boston Elev. R. Co. 198 Mass. 499, 84 N. E. 849.

Defendant was entitled to have the ruling given that it was not negligence for the guard to call out, "Wide step."

Hogan v. Boston Elev. R. Co. 195 Mass. 313, 81 N. E. 197.

A fair and impartial trial did not take place, and therefore, as a matter of law, the defendant's motion for a new trial should have been granted.

Campanello v. New York C. & H. R. R. Co. 39 N. Y. S. R. 274; Ogden v. Aspinwall, 220 Mass. 100, 107 N. E. 448; Simmons v. Fish, 210 Mass. 572, 97 N. E. 102, Ann. Cas. 1912D, 588.

Messrs. J. Weston Allen and Henry W. Packer, for plaintiff:

Wide latitude is allowed by a court in admitting evidence of all the circumstances under which an alleged act of negligence occurs.

Gilman v. Deerfield, 15 Gray, 577; Hinckley v. Cape Cod R. Co. 120 Mass. 257; Maguire v. Fitchburg R. Co. 146 Mass. 379, 15 N. E. 904; Gaynor v. Old Colony & N. R. Co. 100 Mass. 208, 97 Am. Dec. 96; Mayo v. Boston & M. R. Co. 104 Mass. 137, 3 Am. Neg. Cas. 773; 1 Wigmore, Ev. pp. 59, 60, note 21.

Since the evidence of defendant's witnesses established the duty to warn, evidence of absence of warning on the night in question would be admissible, to show negligence on the part of the defendant.

Stevens v. Boston Elev. R. Co. 184 Mass. 476, 69 N. E. 338, 15 Am. Neg. Rep. 338.

The fact that the defendant had been accustomed to have a guard near where the plaintiff was injured, and to give warning to passengers of the existence of the space between the car and station platform, is a recognition by the defendant of the dangerous character of the place; and the failure to guard and warn at the time the plaintiff was injured is evidence of negligence for the jury.

Barnum & R. Mfg. Co. v. Wagner, 64 Ill. App. 375; Franklin v. Engel, 34 Wash. 480, 76 Pac. 84; Lake Street Elev. R. Co. v. Burgess, 99 Ill. App. 499; 1 Wigmore, Ev. p. 61.

The negative testimony of the plaintiff and her witnesses, that they heard no words of warning, would be evidence for the jury that no words of warning were spoken, because they were obviously in positions where, if warnings had been given, they might be expected to notice them and to recall the fact.

McDonald v. New York C. & H. R. R. Co. 186 Mass. 474, 72 N. E. 55; Slattery v. New York, N. H. & H. R. Co., 203 Mass. 453, 133 Am. St. Rep. 311, 89 N. E. 622; Davis v. New York, N. H. & H. R. Co. 159 Mass. 532, 34 N. E. 1070; Boyce v. Manhattan R. Co. 118 N. Y. 314, 23 N. E. 304, 5 Am. Neg. Cas. 304; Windels v. Interborough Rapid Transit Co. 49 Misc. 646, 98 N. Y. Supp. 854.

Evidence is admissible from a properly qualified expert, who heard the testimony of the defendant's engi-

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neers, who had the detailed plans before him at the time he testified, and who was also personally familiar with the location in question.

Lang v. Terry, 163 Mass. 138, 39 N. E. 802; Gila Valley, G. & N. R. Co. v. Lyon, 203 U. S. 465, 51 L. ed. 276, 27 Sup. Ct. Rep. 145; Bourbonnais v. West Boylston Mfg. Co. 184 Mass. 250, 68 N. E. 232; Hutchinson Cooperage Co. v. Snider, 46 C. C. A. 517, 107 Fed. 633; Prendible v. Connecticut River Mfg. Co. 160 Mass. 131, 35 N. E. 675; Poole v. Dean, 152 Mass. 589, 26 N. E. 406.

Evidence offered by a party on redirect examination, as a part of his case, which does not directly contradict any of the testimony elicited on cross-examination, and which ought, in strictness, to have been offered on the direct examination, is admissible in the discretion of the trial judge.

Morse v. Potter, 4 Gray, 292; Kendall v. Weaver, 1 Allen, 277; Wallace v. Taunton Street R. Co. 119 Mass. 91; McCooe v. Dighton, S. & S. Street R. Co. 173 Mass. 117, 53 N. E. 133; Dole v. Wooldredge, 142 Mass. 161, 7 N. E. 832.

Plaintiff had the right to assume that the defendant had performed its duty of making entrance to the car in question reasonably safe.

Louisville, N. A. & C. R. Co. v. Lucas, 119 Ind. 583, 6 L.R.A. 193, 21 N. E. 968, 3 Am. Neg. Cas. 240; Plummer v. Boston Elev. R. Co. 198 Mass. 499, 84 N. E. 849; Lake Street Elev. R. Co. v. Burgess, 99 Ill. App. 499.

The court correctly left it to the jury to say whether, under all the circumstances, the defendant was negligent; but it would be competent evidence of negligence if there was a dangerous distance between the platform and the car, which might have been obviated by some practical method which has been suggested by the plaintiff.

Poole v. Boston & M. R. Co. 216 Mass. 12, 102 N. E. 918; Jaquith v. Rogers, 179 Mass. 192, 60 N. E. 486; Kenny v. Ipswich, 178 Mass. 368, 59 N. E. 1007; Hunt v. Boston Terminal Co. 212 Mass. 99, 48 L.R.A.(N.S.) 116, 98 N. E. 786; Ayers v. Ratshesky, 213 Mass. 589, 101 N. E. 78; Roach v. Hinchcliff, 214 Mass. 267, 101 N. E. 383; McDonough v. Miller, 114 Mass. 94; Moseley v. Washburn, 167 Mass. 345, 45 N. E. 753; Williamson v. Old Colony Street R. Co. 191 Mass. 144, 5 L.R.A.(N.S.) 1081, 77 N. E. 655.

Requests by defendant, so worded that they appear inconsistent and would tend to mislead the jury, were rightly refused.

Dixon v. New England R. Co. 179 Mass. 242, 60 N. E. 581; Hoben v. Burlington & M. River R. Co. 20 Iowa, 562; Brusseau v. Lower Brick Co. 133 Iowa, 245, 110 N. W. 577; Stevens v. Boston Elev. R. Co. 184 Mass. 476, 69 N. E. 338; 15 Am. Neg. Rep. 338.

The verdict was not the result of any suggestions relating to settlement, but any such suggestions were the result of the court's knowledge that the verdict was inevitable, in view of the signal failure of the defendant to meet the plaintiff's case, both upon the question of liability, and also upon the question of damages.

Crosby v. Blanchard, 7 Allen, 385; Fox v. Hazelton, 10 Pick. 275; Rice v. Bancroft, 11 Pick. 469; Orrok v. Commonwealth Ins. Co. 21 Pick. 456; Kent v. Charlestown, 2 Gray, 281; Whittaker v. West Boylston, 97 Mass. 273; Breed v. Breed, 110 Mass. 532; Holdsworth v. Tucker, 147 Mass. 572, 18 N. E. 430; Loveland v. Rand, 200 Mass. 142, 85 N. E. 948; Muskogee Electric Traction Co. v. Reed, 35 Okla. 334, 130 Pac. 157; Spatz v. Singer, 116 N. Y. Supp. 576; Western U. Teleg. Co. v. Lewelling, 58 Ind. 367; Langley v. Simmons, 143 Ga. 699, 85 S. E. 832; Agnew v. Mathieson, 26 Colo. App. 59, 140 Pac. 484; McDuffie v. Weeks, 9 Ala. App. 282, 63 So. 739; Ex parte Ferguson, 19 N. B. 117; Richter v. United R. Co. 145 Mo. App. 1, 129 S. W. 1055; Robbins v. Brockton Street R. Co. 180 Mass. 51, 61 N. E. 265.

The granting of a new trial on motion is within the discretion of the trial judge, and is not the subject of exception.

Manzigian v. Boyajian, 183 Mass. 125, 66 N. E. 413; Com. v. Morrison, 134 Mass. 189.

Rugg, Ch. J., delivered the opinion of the court:

This is an action of tort to recover damages for personal injuries, received by the plaintiff while attempting to board a car upon an elevated train of the defendant at the North Station, in Boston, shortly before midnight, at a time when extensive changes were under way, rendered necessary by the construction of the Washington street tunnel. The location of the tracks and the platform was temporary, and

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the plaintiff received injuries by stepping into a space between the station platform and the car. It was held, when the case was here before, as reported in 221 Mass. 299, 108 N. E. 943, that the plaintiff was entitled to go to the jury. The main facts there are narrated, and need not be repeated. Different questions of law are presented now.

1. The plaintiff was permitted, subject to the exceptions of the defendant, to show that there were several persons in uniform, and apparently employees of the defendant, standing in a group outside of the door from the station to the platform; that after passing them she saw no other employee or person in uniform on the platform, and that a brakeman or guard, standing between two cars near where she went into the hole, said nothing to her in the way of warning. In this there was no error. The design of the platform, the space between it and the cars, and the relation of the rails to the platform were not permanent, and were established by the defendant in accordance with its own plans. These plans were not approved by any public board. They were not inflexible, nor imperatively required in that precise form by the scheme adopted by the public authorities and imposed on the defendant. There was considerable latitude of choice to the defendant in the determination of these details. The relation of tracks to platform, as it had been before the construction of the changes had begun, was more nearly straight, and there was less space for the passenger to step over in going from the platform to the car. This was the first time the plaintiff had been at this station since the changes had been in progress. Whether, under these transient conditions, it was reasonable for the defendant, in the performance of the duty owed by it to its passengers, to provide guards or to give warning, were questions of fact for the jury. Plummer v. Boston Elev. R. Co. 198 Mass. 499, 508, 510, 84 N. E. 849; Brisbin v. Boston Elev. R. Co. 207 Mass. 553, 93 N. E. 572.

Evidence—injury to passenger—absence of guard and warning.

Trial—jury negligence of carrier.

The case is quite different from those of which Falkins v. Boston Elev. R. Co. 188 Mass. 153, 74 N. E. 338; Willworth v. Boston Elev. R. Co. 188 Mass. 220, 74 N. E. 333, 18 Am. Neg. Rep. 463; Hawes v. Boston Elev. R. Co. 192 Mass. 324, 78 N. E. 480, and Searle v. Boston Elev. R. Co. 214 Mass. 59, 100 N. E. 1020, are examples, where it has been held that, the platform being constructed by the Transit Commission, the defendant is not responsible for space between it and the cars, even though the stop may be made opposite a curve, and that there is no obligation resting upon the defendant, in the absence of disorder, to give warning of the space to persons about to enter or alight from cars. The extent of the space between the car and the platform is not the sole test. Where the structures are permanent, a much wider space than that here disclosed is of no consequence, in view of the conditions laid upon the defendant by the various statutes. Hilborn v. Boston & N. Street R. Co. 191 Mass. 14, 77 N. E. 646; Anshen v. Boston Elev. R. Co. 205 Mass. 32, 91 N. E. 157. See also Ryan v. Manhattan R. Co. 121 N. Y. 126, 23 N. E. 1131, 5 Am. Neg. Cas. 329. But the circumstances of the case at bar are quite different. The relation of the platform to the track was not intended to remain the same for a long time. It was unlike what it had been before. There was evidence that the space between car and platform might have been much reduced. Perhaps it was deeper, and hence more dangerous, than the spaces commonly disclosed in this class of cases.

For the same reason it was not error to deny the defendant's re-

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quests for rulings to the effect that the defendant was not required to give any notice of the space, and that, if the space was only 10 inches, the plaintiff could not recover. Harrington v. Boston Elev. R. Co. 221 Mass. 299, 108 N. E. 943.

Appeal—refusal of instructions—error.

Moreover, a considerable discretion was vested in the presiding judge in admitting evidence to show the incidents immediately preceding and attendant upon the accident. Such facts cannot be said to be without bearing upon the due care of the plaintiff, and may have been of assistance in enabling the jury to understand the conditions which confronted her. All the circumstances under which an injury is received ordinarily may be put in evidence.

Evidence—circumstances of injury.

2. The admission of the question, whether the plaintiff, as she was about to enter the car, was "in a position where" she "would have heard if anything had been said in regard to the space," was not reversible error. The pertinent inquiry in that connection was her precise position with reference to the brakeman. Where she stood and what was her posture, like facts respecting him, and the distance between the two, were material. While it would have been better practice, because less liable to run into an incompetent field, to have developed these basic facts by appropriate interrogatories, an abbreviated question including all these circumstances, subject as it was to cross-examination, does not appear to have been injurious to the defendant. See Slattery v. New York, N. H. & H. R. Co. 203 Mass. 453, 457, 133 Am. St. Rep. 311, 89 N. E. 622. It is distinguishable from the question, whether she would have been likely to hear if anything had been said, held incompetent, because a mere matter of opinion, in Com. v. Cooley, 6 Gray, 350.

Appeal—admission of evidence as to ability to hear warning.

3. There was no reversible error in permitting the plaintiff to show, by examination of the defendant's engineer, that plan 3, which delineated the temporary location of platform and tracks as they were for a period of about eight weeks, including the time of the plaintiff's accident, was not approved by the Railroad Commission. It was pertinent as indicating that the defendant was not entitled, respecting these structures, to the protection against liability established by the decisions as to permanent structures, such as Collins v. Boston Elev. R. Co. 217 Mass. 420, 51 L.R.A.(N.S.) 1154, 105 N. E. 353, where earlier cases are collected. Since the presiding judge ruled that there was no duty resting on the defendant to have the plan approved, and hence no negligence in not securing such approval, it is not necessary to consider whether Stat. 1897, chap. 500, § 6, requiring approval in certain instances, applies tc this kind of construction.

Evidence—temporary station platform—approval by Railroad Commission.

4. An expert engineer was permitted to testify that in his opinion the temporary platform in use at the time of the plaintiff's accident was not a reasonably proper construction. This was not a mere opinion about common things of ordinary construction, as to which the simplicity of common sense is a safer guide than the niceties of technical learning. Whalen v. Rosnosky, 195 Mass. 545, 122 Am. St. Rep. 271, 81 N. E. 282; Gleason v. Smith, 172 Mass. 50, 51 N. E. 460; Walker v. Williamson, 205 Mass. 514, 91 N. E. 885; Lynch v. C. J. Larivee Lumber Co. 223 Mass. 335, 340, 111 N. E. 861; Amstein v. Gardner, 134 Mass. 5, 9; Spokane & I. E. R. Co. v. United States, 241 U. S. 344, 351, 60 L. ed. 1037, 1041, 36 Sup. Ct. Rep. 668. It involved, as a necessary element of an intelligent answer, engineering skill directed to complicated conditions, under which the platform, the

Same—expert—condition of platform.

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curves, grades, and alignment of tracks for the temporary uses must be constructed and maintained. His answer means that under these conditions an arrangement of structures might have been designed and built, offering less hazard to the traveler than those adopted by the defendant. Manifestly, this was outside the range of common knowledge. It was not an inference from proved facts, as to which men of ordinary experience would not be left in doubt. New England Glass Co. v. Lovell, 7 Cush. 319, 321; Lang v. Terry, 163 Mass. 138, 143, 39 N. E. 802; Bourbonnais v. West Boylston Mfg. Co. 184 Mass. 250, 254, 68 N. E. 232; Roberts v. Vroom, 212 Mass. 168, 98 N. E. 687.

5. A witness called as an expert engineer, having given evidence at length respecting matters within his special department of knowledge, on redirect examination, was permitted to testify that he had been employed by the defendant as an expert in engineering. It is not an uncommon practice to examine a witness, offered as an expert, respecting his experience and the various persons who have availed themselves of his superior knowledge. Much must be left to the discretion of the presiding judge. The question and answer here complained of cannot be said, as matter of strict law of evidence, to have been incompetent. It would have been a much better exercise of judicial discretion to have excluded the evidence. It is difficult to conceive of a case where it would not be wiser discretion in the presiding judge to exclude such an inquiry altogether, whenever put. Ordinarily, it is preferable practice, for manifest reasons, not to receive such evidence. But, even where testimony has been regarded as "very objectionable" in this particular, its admission is not treated as reversible error if there is any justification whatever for the conduct of the presiding judge. Conness v. Com. 184 Mass. 541, 544, 69 N. E. 341; Randall v. Peerless Motor Car Co. 212 Mass. 352, 385, 99 N. E. 221; Fourth Nat. Bank v. Com. 212 Mass. 66, 69, 98 N. E. 686. The present inquiry falls within that principle.

Appeal—evidence as to qualification of experts.

6. A witness called by the defendant, and at the time of the accident a motorman in its employ, was asked whether the defendant ran any trains of five cars between 11 and 12 o'clock at night. The exclusion of this question is not reversible error. It does not appear that his knowledge of the train operations of the defendant was so comprehensive as to make his testimony of any value. Moreover, no offer of proof was made. Cook v. Enterprise Transp. Co. 197 Mass. 7, 10, 83 N. E. 325.

Same—exclusion of evidence—absence of knowledge.

7. One question raised at the trial was whether the defendant ought, in the exercise of due care, to have installed a sliding platform in order to bridge the space between the immovable platform and the car door, at which the plaintiff testified she was injured. There was also testimony that the distance between the platform and the car door was the basis for the use by the defendant of movable platforms, that they were not regarded as desirable, and were put in only where the space was so great as to overcome, by added convenience, objections to their use. As bearing upon this point, the defendant had introduced testimony to the effect that its expert did not know of any place where sliding platforms were used for a 10-inch space, or for any space less than 15 or 16 inches. Evidence that, at another station of the defendant, a sliding platform to bridge a space of 11 inches had been in use several years after the accident cannot be said to have been entirely incompetent in this posture of the case. It bore upon the weight to be given to the witnesses called

Evidence—practice after accident.

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by the defendant. It is quite distinguishable from evidence of precaution taken by a defendant after an accident, which plainly is inadmissible.

8. There was no error in the refusal to give the several requests presented by the defendant. Whether due care required the defendant to install a movable platform at the place of injury, as a part of its temporary structures, was a question of fact. As has been pointed out, the same rule of liability did not govern the obligation of the defendant as in the subway decision cases. The statement of legal obligation in Plummer v. Boston Elev. R. Co. 198 Mass. 499, 509, 84 N. E. 849, is not relevant to these different facts. There was testimony to the effect that it would have been good engineering to have used such a platform under the conditions here disclosed at the particular place of injury. The criticism urged by the defendant to this testimony affected its weight rather than its competency. It could not have been ruled, as matter of law, that it would have been negligence for the defendant's guard to call out, or to fail to call out, "Wide step." Here, again, the general principles applicable to the subway and tunnels (Hogan v. Boston Elev. R. Co. 195 Mass. 313, 81 N. E. 198) do not necessarily govern duties of the defendant in the situation at bar.

Trial—jury—movable bridge.

Carrier—duty with respect to space between platform and train.

Trial—duty to give warning.

9. Whether the train consisted of four or five cars was a question of fact, on all the evidence. Whether the plaintiff could recover if she attempted to go upon the first car at a regular stopping place was also for the jury, upon all the evidence. If it were a train of four cars, the plaintiff contended, with some show of support in evidence, that the first car might have been found to have stopped at the place where the first car of a train of five cars would have stopped. Although it was or might have been important for the jury to determine these facts in arriving at a conclusion as to liability, the evidence respecting them was not so indisputable that a ruling of law rightly could be predicated upon the assumption that they were proved one way or the other. The presiding judge fairly and adequately dealt with this matter in his charge.

Same—question for jury—negligence of passenger.

Same—ruling on evidence—facts in dispute.

10. There was no error in the charge respecting the testimony of the witness Farrington to the effect that he stood between the two cars and called out to the passengers to "step wide." If this had been found to be the fact, there could hardly have been negligence on the part of the defendant. But whether he did so call out on the night in question was a point as to which the evidence was conflicting. The reference in the charge to testimony by other witnesses, respecting what had occurred on other nights as compared with the night in question, bore merely upon the weight to be given to Farrington's testimony. It is not open to exception.

Appeal—instructions—reference to testimony.

11. So far as the subjects to which the requests of the defendant related were necessary parts of the charge, they were adequately covered, and, so far as they were refused, they either were not correct or were directed to details or fragments of evidence, concerning which the presiding judge would not be required to give instructions. Ayers v. Ratshesky, 213 Mass. 589, 101 N. E. 78.

Same—refusal of instructions—error.

12. The presiding judge, early in the trial, inquired of counsel whether they had talked as to the settlement of the case, and said that they ought to consider that matter. Lat-

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er the judge "called the defendant's counsel to the bench, and, not in the hearing of the plaintiff's counsel, and not in the hearing of the jury, but while the jury were in their seats, told the defendant's counsel that he ought to settle the case, that he ought to be willing to pay anywhere from $3,750 to $5,000 to settle the case, adding that that did not mean that the court would set aside a verdict for twice that amount." This statement was inserted in the defendant's second bill of exceptions, relating to matters arising on its motion for a new trial. The judge indorsed upon the exceptions that this statement was without foundation in fact, but "I allow it as a statement of fact, to prevent the delay which would be caused by sending this case to a commissioner." This was irregular. The judge, in the performance of his duty, can allow exceptions only after making a preliminary finding that they "are conformable to the truth." Rev. Laws, chap. 173, § 106, as amended by Stat. 1911, chap. 212, § 1. If exceptions are not conformable to the truth, the presiding judge has no authority to allow them. He certainly had no power to allow them for any such cause as is stated in the present certificate. Justice can be done only when the truth, and nothing but the truth, is made the basis of adjudication. This court cannot attempt to pass upon the rights of parties upon a record which is in any material particular unfounded in fact. Therefore, the petition of the defendant to establish the truth of his exceptions rightly was presented. The report of the commissioner shows that, in susbtance, that bill of exceptions is conformable to the truth. It is established. Re Moneyweight Scale Co. 225 Mass. 473, 114 N. E. 741.

Same—allowance of exceptions—reason.

13. "It is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit." Declaration of Rights, art. 29. The conduct of the presiding judge did not violate the justly strict and lofty standard of our Constitution. It is not necessarily a transgression of judicial propriety to suggest to parties, in appropriate instances, the wisdom of a compromise of conflicting contentions.

Constitutional law—impartial judge—suggestion of compromise.

It is a suggestion which always should be ventured from the bench with caution. There are cases where the right or obligation at stake is not susceptible of concession, without the profanation of principles which rightly may be held inviolable by one or more of the parties. Ordinarily, a judge may presume in these days that the possibility of compromise has not been ignored by counsel or parties, in cases where compromise is feasible or just. In Re Nevitt, 54 C. C. A. 622, 117 Fed. 448, it appeared that a judge had for several years "endeavored to persuade the parties to the controversy to compromise the litigation." It was said respecting that conduct, when urged as a disqualification to a decision of the case on its merits by the same judge, that (p. 626) "his earnest and systematic endeavors to effect a compromise of this controversy bespeak for him emphatic commendation. The policy of the law has always been to promote and sustain the compromise and settlement of disputed claims." This laudation goes rather far. But it shows that an intimation as to the practical sagacity of harmonizing adjustable differences is not, of itself, an impairment of the judicial function.

The judge well might have refrained from voluntarily naming an amount which he thought could be paid by the defendant in settlement of the plaintiff's claim, in the absence of any invitation to this end from the parties. Manifestly, every judge should be deeply solicitous not only to hold himself

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wholly impartial between contending litigants, but he should likewise be ever alert and careful to avoid every appearance, by word or deed, reasonably susceptible of being construed by those in the heat of partisanship as expressions of bias or prejudgment. On the other hand, under our system, "the judge who discharges the functions of his office is . . . the directing and controlling mind at the trial, and not a mere functionary to preserve order and lend ceremonial dignity to the proceedings." His demeanor should not be "hesitatingly barren or ineffective." Whitney v. Wellesley & B. Street R. Co. 197 Mass. 495, 502, 84 N. E. 95; Tildsley v. Boston Elev. R. Co. 224 Mass. 117, 119, 112 N. E. 499. He ought to know human nature and be familiar with practical affairs. His insight into the merits of the controversies pending before him needs to be clear, sympathetic, accurate. He should be strong, patient, learned, and, above all, unflinchingly courageous. It is the prevalent impression that it adds to the efficiency of a judge if, at the same time, his manner is dignified, his conduct tactful, and his speech courteous. But however that may be, bluntness is not error of law. The essentials of sound judicial character lie far deeper than superficial deportment. The expression complained of in the case at bar, fairly construed, does not mean that the cause had been prejudged or that a motion to set aside the verdict, if one should be made, would not be considered according to its just deserts. The remarks made by the judge in denying the motion to set aside the verdict show that that decision was based upon a full consideration of its merits, without partiality. See, in this connection, Utz & D. Co. v. Regulator Co. 130 C. C. A. 17, 20–22, 213 Fed. 315; State v. Bohan, 19 Kan. 28, 50–53; Re Cameron, 126 Tenn. 614, 650, 655, 660, 151 S. W. 64; Elliott v. Hipp, 134 Ga. 844, 848, 137 Am. St. Rep. 272, 68 S. E. 736, 20 Ann. Cas. 423; Lafayette v. Milton, 129 La. 678, 56 So. 635.

14. It follows from what has been said that there is no error of law disclosed in the proceedings on the motion for a new trial. The general rule prevails that the granting or denial of such motion rests in the sound discretion of the trial judge. Simmons v. Fish, 210 Mass. 563, 572, 97 N. E. 102, Ann. Cas. 1912D, 588; Edwards v. Willey, 218 Mass. 363, 105 N. E. 986. That rule applied in the case at bar. It is only when there is an abuse of sound judicial discretion, or excess of jurisdiction, or some similar error of law, that this court can revise the discretion of the trial judge. The several requests for rulings and grounds of exception need not be reviewed one by one. For the reasons stated, no error is disclosed in the refusal of all of them, either as not sound in law or not applicable to the facts.

Appeal—denial of new trial—exception.

15. The defendant did not take exception to the remarks of the judge when made, or move that the trial be suspended, or that the jury be discharged. As was said in Crosby v. Blanchard, 7 Allen, 385, 387, parties cannot "take their chance for a favorable verdict, reserving a right to impeach it or set it aside, if it happens to be against them, for a cause which was previously well known to their counsel." Fox v. Hazelton, 10 Pick. 275; Gray v. Boston Elev. R. Co. 215 Mass. 143, 150, 102 N. E. 71, 8 N. C. C. A. 602; Orrok v. Commonwealth Ins. Co. 21 Pick. 456, 32 Am. Dec. 271.

Same—want of exception—effect.

16. The defendant has argued that the record, taken as a whole, shows such an element of prejudice against it on the part of the presiding judge that a trial fair to it could not have been had. The case has been considered on the footing that such contention is open, even though no exception was taken. See Noyes v. Noyes, 224 Mass. 125, and cases cited at page 134, 112 N.

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E. 850. It is not necessary to narrate the numerous expressions, scattered through the record of a long trial, upon which reliance is placed. Whatever else may be said respecting them, a careful examination of the entire record fails to reveal such conduct as constitutes reversible error. We are not convinced that the defendant did not receive fair treatment at the trial.

The result is that the petition for the allowance of exceptions is allowed and that each bill of exceptions is overruled.

So ordered.

ANNOTATION.

Suggestion by judge during trial as to advisability of compromise as error.

The reported case (HARRINGTON v. BOSTON ELEV. R. Co. ante, 1057), which appears to be the only decision passing directly on the question, holds that a suggestion by the trial judge, not in the presence of the jury, that the defendant ought to settle the case by paying a stated sum, is not necessarily reversible error.

In Reed v. Hearst's Chicago American (1911) 162 Ill. App. 287, an action to recover damages for a personal injury, the location of the lights in the room where the accident occurred became material at the trial. The judge made a suggestion in regard thereto, the tenor of which does not appear from the report. Holding that it did not constitute reversible error, the court said: "While we think that the suggestions of the court and counsel for appellee in regard to the location of the lights at the place where appellee was injured, and that that was a proper matter for agreement between counsel, might more properly have been made out of the hearing of the jury, and perhaps not in the presence of the jury, still we cannot say that there was reversible error in the suggestions made by court or counsel upon that subject."

In Livermore v. Bainbridge (1873) 44 How. Pr. (N. Y.) 357, affirmed in 14 Abb. Pr. N. S. 227, it appeared that after an action, wherein a counterclaim was made, had been heard by a referee, and before the report was made, the referee called on the plaintiff and suggested that he settle with the defendant by paying him a certain sum. Thereafter the referee filed a report, finding for the defendant on his counterclaim for nearly four times the sum suggested. In setting aside the report, the court said: "A referee should not attempt to exercise the functions of a negotiator. However honest his intentions or well-meant his endeavors, the failure of the attempt may be ground for the supposition that his subsequent judgment was, in some degree, influenced by it."

R. C. L.

STATE OF FLORIDA EX REL. JAMES FRANCES, Plff. in Err.,
v.
D. W. MORAN, Sheriff.

Florida Supreme Court — August 13, 1918.

(— Fla. —, 79 So. 753.)

Intoxicating liquor — possession for personal use.

1. An information charging in six separate counts that the defendant:

(1) Did unlawfully transport from a county in this state where the sale of intoxicating liquors is lawful, into a county where such sales were

Headnotes by TAYLOR, J.

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prohibited by an election held to decide such question of prohibition, 2 quarts of whisky and 4 quarts of wine intended for the personal use of the defendant.

(2) The second count is a duplicate of the first count, except that it omits the allegation that the liquors transported were intended for the personal use of the defendant.

(3) That the defendant in said county where the sale of such intoxicating liquors had been prohibited by an election held to establish prohibition therein did possess 2 quarts of whisky and 4 quarts of wine, that were received by him from a carrier within a thirty-day period; the said liquors so possessed being then and there intended for the defendant's personal use.

(4) The fourth count is a duplicate of the third count, except that it omits the allegation that the liquors so possessed were intended for the personal use of the defendant.

(5) That the defendant did personally transport into said prohibition territory for his own personal use 2 quarts of whisky and 4 quarts of wine.

(6) The sixth count is a duplicate of the fifth count, except that the allegation that the liquors transported were for the defendant's own use is omitted.

Held, to charge no offense in any count thereof under any valid law of this state. Held, further, that chapter 7284, Laws approved May 1, 1917, undertaking to penalize the acts charged against the defendant in said information, is unconstitutional and void.

[*See note on this question beginning on page* 1085.]

Same — property.

2. Intoxicating liquor is "property that is the subject of private ownership" as such, and the legislature has no authority to prohibit its ownership, possession, transportation, or personal use by the citizen, either in a prohibition county or a county where prohibition is not established, unless in either of said counties it is shown that its possession is intended for the illicit sale thereof.

(Whitfield and West, JJ., dissent.)

ERROR to the Circuit Court for Dade County to review a judgment denying a writ of habeas corpus to secure relator's release from custody, to which he had been committed for violation of a statute regulating the possession of intoxicating liquors. *Relator discharged.*

The facts are stated in the opinion of the court.

Messrs. **Atkinson & Burdine, Bart. A. Riley,** and **Taylor & Taylor,** for plaintiff in error:

The entire law is unconstitutional because the legislature has undertaken to arbitrarily, radically, and drastically exercise its police power in contravention of article 19 of the Constitution of the state of Florida.

Joyce, Intoxicating Liquors, § 79, p. 93; State v. Kane, 15 R. I. 395, 6 Atl. 783; 15 R. C. L. p. 260; Com. v. Campbell, 133 Ky. 50, 34 L.R.A.(N.S.) 172, 117 S. W. 383, 19 Ann. Cas. 159; Keller v. State, — Tex. Crim. Rep. —, 1 L.R.A.(N.S.) 489, 87 S. W. 669; State ex rel. West v. Butler, 70 Fla. 142, 69 So. 771; Ex parte Brown, 38 Tex. Crim. Rep. 295, 70 Am. St. Rep. 743, 42 S. W. 554; Holley v. State, 14 Tex. App. 505; Stallworth v. State, 16 Tex. App. 345; Steele v. State, 19 Tex. App. 425; Ninenger v. State, 25 Tex. App. 449, 8 S. W. 840; State v. Gilman, 33 W. Va. 146, 6 L.R.A. 847, 10 S. E. 283; Ex parte Massey, 49 Tex. Crim. Rep. 60, 92 S. W. 1086; Ex parte Hackney, — Tex. Crim. Rep. —, 92 S. W. 1092; Carter v. State, — Tex. Crim. Rep. —, 92 S. W. 1093; Ex parte Brown, 38 Tex. Crim. Rep. 295, 70 Am. St. Rep. 743, 42 S. W. 554; People ex rel. Mooney v.

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Hutchinson, 172 Ill. 486, 40 L.R.A. 770, 50 N. E. 599; Ex parte Pricha, 70 Fla. 265, 70 So. 411.

The legislature is without power to pass a law prohibiting the possession of liquor for private use in a dry county, if such liquor is not to be used in violation of the laws against its illegal sale.

Com. v. Campbell, 19 Ann. Cas. 163, note; Henderson v. Heyward, 109 Ga. 373, 47 L.R.A. 366, 77 Am. St. Rep. 384, 34 S. E. 590; Blunk v. Waugh, 32 Okla. 616, 39 L.R.A.(N.S) 1093, 122 Pac. 717; Eidge v. Bessemer, 164 Ala. 599, 26 L.R.A.(N.S.) 394, 51 So. 246; Shreveport v. Hill, 134 La. 352, 64 So. 137, Ann. Cas. 1916A, 283; Preston v. Drew, 33 Me. 558, 54 Am. Dec. 639; Kansas v. Mugler, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Ex parte Brown, 38 Tex. Crim. Rep. 295, 70 Am. St. Rep. 743, 42 S. W. 554; State v. Gilman, 33 W. Va. 146, 6 L.R.A. 847, 10 S. E. 283; Joyce, Intoxicating Liquors, § 85, p. 104; Freund, Pol. Power, §§ 453, 454; Lincoln v. Smith, 27 Vt. 328; Beebe v. State, 6 Ind. 501, 63 Am. Dec. 391; Fears v. State, 102 Ga. 274, 29 S. E. 463.

A mere possession of intoxicating liquor, kept for one's own use, is not inherently injurious to the health, morals, or safety of the public, and therefore legislation prohibiting such keeping in possession is not a legitimate exercise of the police power, but an abridgment of the privileges and immunities of the citizens without any legal justification, and, as such, void.

French v. Birmingham, 165 Ala. 669, 51 So. 254; Sullivan v. Oneida, 61 Ill. 242; State v. McIntyre, 139 N. C. 599, 52 S. E. 63; State v. Williams, 146 N. C. 618, 17 L.R.A.(N.S.) 299, 61 S. E. 61, 14 Ann. Cas. 562; Titsworth v. State, 2 Okla. Crim. Rep. 268, 101 Pac. 288; State v. Gilman, 33 W. Va. 146, 6 L.R.A. 847, 10 S. E. 283; Wynehamer v. People, 13 N. Y. 384; Partridge v. State, 88 Ark. 267, 20 L.R.A.(N.S.) 321, 129 Am. St. Rep. 100, 114 S. W. 215; State v. White, 71 Kan. 356, 80 Pac. 589, 6 Ann. Cas. 132; Preston v. Drew, 33 Me. 558, 54 Am. Dec. 639; Henderson v. Heyward, 109 Ga. 373, 47 L.R.A. 366, 77 Am. St. Rep. 384, 34 S. E. 590; Re Luera, 28 Cal. App. 185, 152 Pac. 738; Adams Exp. Co. v. Com. 154 Ky. 462, 48 L.R.A.(N.S.) 342, 157 S. W. 908; Flowers v. State, 8 Okla. Crim. Rep. 502, 129 Pac. 81.

The legislature is also without authority to enact legislation restricting or regulating the manner in which intoxicating liquors may be received by a person in a "dry" county, when such liquor is not received, possessed, or used in violation of law.

Joyce, Intoxicating Liquors, § 377, p. 431; State v. Lynch, 81 Ohio St. 336, 28 L.R.A.(N.S.) 334, 90 N. E. 935; State v. Wirick, 81 Ohio St. 343, 90 N. E. 937; Longmire v. State, 75 Tex. Crim. Rep. 616, 171 S. W. 1165, Ann. Cas. 1917A, 727; State v. Williams, 146 N. C. 618, 17 L.R.A.(N.S.) 299, 61 S. E. 61, 14 Ann. Cas. 562.

Where the Constitution gives to the people of any locality the right to prohibit sales within its limits, the legislature cannot forbid sales outside to be shipped into local option territory.

15 R. C. L. § 14, p. 260; Com. v. Campbell, 19 Ann. Cas. 163, note; Keller v. State, — Tex. Crim. Rep. —, 1 L.R.A.(N.S.) 489, 87 S. W. 669.

Forbidding anyone to carry into a county where the sale of intoxicating liquor is prohibited more than a half gallon of liquor on any one day deprives him of his constitutional rights, in case he has no intent to sell it.

15 R. C. L. § 20, p. 266; State v. Williams, 146 N. C. 618, 17 L.R.A. (N.S.) 299, 61 S. E. 61, 14 Ann. Cas. 562; Fears v. State, supra; Vance v. W. A. Vandercook Co. 170 U. S. 439, 42 L. ed. 1101, 18 Sup. Ct. Rep. 674.

Messrs. **Van C. Swearingen**, Attorney General, and **C. O. Andrews**, Assistant Attorney General, for the State.

Taylor, J., delivered the opinion of the court:

James Frances, who is referred to herein as the relator, was arrested and deprived of his liberty under a capias issued by the criminal court of record of Dade county from an information filed by the county solicitor, which information charges in six separate counts as follows:

"(1) Did unlawfully transport from the county of Monroe, state of Florida, into the county of Dade, state of Florida, which said county of Dade, state of Florida, had theretofore voted against the sale of intoxicating liquor, wines, or beer, certain intoxicating liquors, wines or beer, to wit, 2 quarts of whisky and 4 quarts of wine, for the personal use of said James Frances,

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contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Florida.

"(2) And the said Fred W. Pine, county solicitor for the county of Dade as aforesaid, prosecuting for the state of Florida in said county, under oath, further information makes that James Frances of the county of Dade and state of Florida, on the 29th day of September in the year of our Lord 1917, in the county and state aforesaid, did transport from the county of Monroe, state of Florida, into the county of Dade, state of Florida, which said county of Dade, state of Florida, had theretofore voted against the sale of intoxicating liquor, wines, or beer, certain intoxicating liquors, wines, or beer, to wit, 2 quarts of whisky and 4 quarts of wine, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Florida.

"(3) And the said Fred W. Pine, county solicitor for the county of Dade as aforesaid, prosecuting for the state of Florida in said county, under oath, further information makes that James Frances of the county of Dade and state of Florida, on the 29th day of September in the year of our Lord 1917, in the county and state aforesaid, did possess intoxicating liquor, wines, or beer, to wit, 2 quarts of whisky and 4 quarts of wine, which said liquors were received by said James Frances subsequent to May 2, A. D. 1917, within a thirty-day period, from a carrier in the county of Dade, state of Florida, which said county of Dade, state of Florida, had theretofore voted against the sale of intoxicating liquor, wines, or beer, the said liquor so possessed being then and there intended for personal use, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Florida.

"(4) And the said Fred W. Pine, county solicitor for the county of Dade as aforesaid, prosecuting for the state of Florida in said county, under oath, further information makes that James Frances of the county of Dade and state of Florida, on the 29th day of September in the year of our Lord 1917, in the county and state aforesaid, did possess intoxicating liquors, wine, or beer, to wit, 2 quarts of whisky and 4 quarts of wine, which said liquors were received by said James Frances subsequent to May 1, A. D. 1917, within a thirty-day period, from a carrier in the county of Dade, state of Florida, which said county of Dade, state of Florida, had theretofore voted against the sale of intoxicating liquors, wines, or beer, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Florida.

"(5) And the said Fred W. Pine, county solicitor for the county of Dade as aforesaid, prosecuting for the state of Florida in said county, under oath, further information makes that James Frances of the county of Dade and state of Florida, on the 29th day of September in the year of our Lord 1917, in the county and state aforesaid, did personally transport from the county of Monroe, state of Florida, into the county of Dade, state of Florida, which said county of Dade, state of Florida, had theretofore voted against the sale of intoxicating liquor, wines, or beer, for his personal use, certain intoxicating liquors, wines, or beer, to wit, 2 quarts of whisky and 4 quarts of wine, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Florida.

"(6) And the said Fred W. Pine, county solicitor for the county of Dade as aforesaid, prosecuting for the state of Florida in said county, under oath, further information makes that James Frances of the county of Dade and state of Florida, on the 29th day of September in the year of our Lord 1917, in the county and state aforesaid, did personally transport from the county of Monroe, state of Florida, into the county of Dade, state of Florida, which said county of Dade had theretofore

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voted against the sale of intoxicating liquor, wines, or beer, certain intoxicating liquors, wines, or beer, to wit, 2 quarts of whisky and 4 quarts of wine, contrary to the statute in such case made and provided, and against the peace and dignity of the state of Florida."

Thereupon the relator sued out a writ of habeas corpus from the circuit court; the petition for the writ, omitting its formal parts being as follows:

"(5) That the said imprisonment, detention, confinement, deprivation and restraint are illegal, and that the illegality thereof consists in this, to wit:

"(a) That the information filed against the petitioner herein is based upon an act passed at the 1917 session of the Florida legislature, chapter 7284, Laws of 1917, the title to which begins as follows, to wit:

"'An Act Prohibiting the Receipt of Intoxicating Liquors, Wines, or Beer from a Common or Other Carrier; Prohibiting the Possession of Such Liquors Hereafter Received from a Common or Other Carrier, and Prohibiting the Shipment and Personal Transportation of Such Liquors into Counties or Election Precincts in This State Which Have or May Hereafter Vote against the Sale of Such Liquors, etc.,' and that said act is void, ineffectual, and inoperative because it is in conflict with the provisions of the Constitution of the state of Florida in this, to wit: Said act only applies to counties which have voted against the sale of intoxicating liquors, and permits the possession thereof in quantities exceeding 1 quart in counties wherein the sale of intoxicating liquors is authorized, thereby discriminating between the citizens possessing intoxicating liquors in wet counties and those possessing intoxicating liquors in dry counties.

"(b) That said act is in conflict with the Constitution of the state of Florida in this, to wit: That it makes it unlawful for a person to personally transport from without or within the state of Florida into dry counties exceeding the quantity of 1 quart of intoxicating liquors or wine during any period of thirty consecutive days, while it allows a person to transport into a wet county of the state of Florida more than 1 quart in thirty days, of intoxicating wine or beer.

"(c) That said act is in conflict with the provisions of the Florida Constitution in this, to wit: That it makes it unlawful for any person residing in a dry county to receive directly or indirectly from a common or other carrier, intoxicating liquors, wine, or beer exceeding the quantity of 1 quart during any period of thirty consecutive days, while a person in a wet county in the state of Florida may receive more than 1 quart of intoxicating liquor or wine during any period of thirty consecutive days.

"(d) That the said statute is in conflict with the provision of the Constitution of the state of Florida in this, to wit: That it makes it unlawful for any carrier or person to ship or transport into dry counties intoxicating liquors, wines, or beers exceeding 1 quart of intoxicating liquor or wine during any period of thirty consecutive days, while a carrier or person is allowed to ship or transport more than said amount of intoxicating liquors, wines, or beer into a wet county.

"(e) That said law is unconstitutional in this, to wit: That it makes it unlawful for any person in a dry county of the state of Florida to receive, possess, ship, or transport into said county for his personal use exceeding 1 quart of intoxicating liquor or wine during any period of thirty consecutive days, while it permits citizens of wet counties to receive, possess, ship, or transport into such wet counties intoxicating liquor or wine in excess of said 1 quart during any period of thirty consecutive days.

"(f) That said law, as indicated in subheads (a) to (e) of this petition, is in direct conflict with § 20 of article 3 of the Constitution of the state of Florida, which prohibits the passage of special or local laws

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for the punishment of crime or misdemeanor.

"(g) That that portion of the Constitution of the state of Florida which provides for the holding of an election to determine whether or not intoxicating liquors, wines, or beers shall be prohibited, does not authorize or empower the people of any community or municipality to call an election for the purpose of determining whether or not nonintoxicating liquors shall be received, possessed, shipped, or transported into wet counties for personal use.

"(h) That §§ 1, 2, 3 and 4 of said act are in violation of §§ 1 and 12 of the Declaration of Rights of the Constitution of the state of Florida, and in violation of § 16 of article 3 of the Constitution of the state of Florida, and in violation of article 19 of the Constitution of the state of Florida.

"(i) That the people of Dade county, Florida, have voted against the sale of intoxicating liquors, but have not voted against the possession of intoxicating liquors for personal use.

"(j) That no election has been called or held in Dade county, Florida, since the passage of the act above referred to, prohibiting the possession for personal use of intoxicating liquors in said Dade county.

"(k) That said act seeks to cancel and terminate the ownership of private individuals in intoxicating liquors without compensating them for the loss thereby sustained.

"(l) That said act is of such a nature and character that it cannot be sustained or upheld under the police powers of the state, in that it is not applicable to the entire state of Florida or to all the people of the state of Florida.

"(m) That said act is void as an unjustified abridgment of the privileges and immunities of the citizens in a dry county.

"(n) The legislature under the police powers has no right to forbid the possession of intoxicating liquors in a county voting against the sale of intoxicating liquors, when such liquors are possessed for personal use.

"(o) The legislature has no power under article 19 to pass laws forbidding the possession of intoxicating liquors in counties voting against the sale thereof unless said liquor is possessed for the purpose of illegal sale.

"(p) The prohibition of the possession of more than 1 quart of intoxicating liquors or wines in any period of thirty consecutive days is unconstitutional, because it is unreasonable and arbitrary.

"(q) The prohibition against the keeping, receiving, or possessing of intoxicating liquors in se is not a legitimate exercise of the police power.

"(r) The seizure under the statute and the destruction thereunder are in contravention of the constitutional rights that one's property shall not be taken without due process of law.

"(s) The said act is violative of the 14th Amendment to the Constitution of the United States.

"(t) That said act is unreasonable because the mere possession of intoxicating liquor kept for one's own use is not inherently injurious to the health, morals, or safety of the public, and therefore such legislation prohibiting the keeping in excess of 1 quart is not a legitimate exercise of the police power.

"(u) That said act is a violation, not only of the constitutional rights of the petitioner, but of his inherent rights.

"(v) The said law is unconstitutional because, in the absence of any unlawful intent to dispose thereof, it makes the possession of more than 1 quart of intoxicating liquor or wine in any period of thirty consecutive days, unlawful."

At the hearing before the circuit judge, he made an order remanding the relator to custody, and dismissed his petition for the writ. For review of this judgment writ of error from this court was allowed and issued.

The case presents the question of

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the constitutionality of chapter 7284, Laws approved May 1, 1917.

In short, this act undertakes to prohibit, under penalties, the possession or ownership by any citizen in slang-called "dry" counties and territory, during any period of thirty days, exceeding 1 quart of spirituous or vinous liquors and 6 quarts of malt liquors for their own personal use, or otherwise, while it permits citizens in so-called "wet" counties and territory to possess and own as much liquor of all kinds as they see fit. The act further undertakes to prohibit, under penalties, the receipt in such dry territory from any carrier, public or private, of any such liquors exceeding such limited amount, during any period of thirty days, and further prohibits, under penalties, the carriage by any citizen personally into any such dry territory, during any period of thirty days, any such liquors exceeding such limited amount, whether for his own personal use or otherwise; and the act further provides for the summary seizure, confiscation, and destruction of any such liquors found in the possession of anyone in such dry territory exceeding such limited amount, whether possessed or owned for the personal use of the possessor or owner thereof, or otherwise.

Intoxicating liquor—possession for personal use.

We have no hesitation in saying that the features of this act above mentioned are clearly violative of § 1 of the Declaration of Rights of our Constitution, that provides as follows: "All men are equal before the law, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing happiness and obtaining safety."

And it is also violative of §§ 1 and 2 of art. 19 of our Constitution.

That intoxicating liquor is "property that is the subject of private ownership" there is no question. Our Constitution, art. 19, recognizes it as such, and indeed the act of our legislature under discussion recognizes it as such in permitting it to be brought into the dry territory in the limited quantities it provides, and in the unlimited quantities it permits to be brought into such territory for druggists, hospitals, ministers for sacramental purposes, etc.; and yet this act, in the teeth of our Declaration of Rights, undertakes to prohibit one part of our citizenship who happen to reside in dry territory from harmlessly acquiring, possessing, and protecting this property for their own personal and private use.

Same—property.

In Joyce on Intoxicating Liquors, § 79, it is said: "A constitutional provision that 'laws may be passed regulating or prohibiting the sale of intoxicating liquors' is held to impose a restraint upon the plenary and unrestricted power of a legislature to deal with the subject of such liquors in any manner it chooses to. In such a case it is declared that the purpose and effect of the provision is to restrict and limit the legislative authority to the powers expressly granted therein, that is, to the power to regulate and prohibit the sale, the rule being said to be simply an application of the maxim, Expressio unius est exclusio alterius."

Section 1 of art. 19 of our Constitution reserves to the people the right, by their direct vote, to prohibit the sale only of intoxicating liquors, not their ownership, possession, or individual use by the citizen, and by the second section of the article the legislature is expressly authorized and required to enact laws to carry out the provisions of § 1; that is, to enforce the prohibition against the sale. And when the legislature goes outside of the realm of law aimed at prohibiting the unlawful sale of such liquors, by inhibiting their private ownership, possession, or personal use, it transcends its authority under the Constitution, and its act is void.

In 15 R. C. L. § 19, it is said: "Generally speaking, it is the traffic

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and not the liquor itself which is subject to the police power; and the property right, the privilege of the individual to acquire and use liquors to satisfy his own personal tastes and appetites, should remain inviolate. It has been held generally that the mere possession and use for such purposes are not inherently injurious to the health, morals, or safety of the public; and therefore that legislation prohibiting such acts is not a legitimate exercise of police power, but, on the contrary, is an abridgment of the privileges and immunities of the citizen without any legal justification, and, as such, void." Ex parte Brown, 38 Tex. Crim. Rep. 295, 70 Am. St. Rep. 743, 42 S. W. 554; Cortland v. Larson, 273 Ill. 602, L.R.A.1917A, 314, 113 N. E. 51, Ann. Cas. 1916E, 775; Fears v. State, 102 Ga. 274, 29 S. E. 463; Henderson v. Heyward, 109 Ga. 373, 47 L.R.A. 366, 77 Am. St. Rep. 384, 34 S. E. 590; Steele v. State, 19 Tex. App. 425; Stallworth v. State, 16 Tex. App. 345; Holley v. State, 14 Tex. App. 505.

We commend to our legislators especially the ninth and tenth headnotes to the case of Sullivan v. Oneida, 61 Ill. 242. Preston v. Drew, 33 Me. 558, 54 Am. Dec. 639; State v. Williams, 146 N. C. 618, 17 L.R.A. (N.S.) 299, 61 S. E. 61, 14 Ann. Cas. 562; Ninenger v. State, 25 Tex. App. 449, 8 S. W. 480; Titsworth v. State, 2 Okla. Crim. Rep. 268, 101 Pac. 288; Adams Exp. Co. v. Com. 154 Ky. 462, 48 L.R.A.(N.S.) 342, 157 S. W. 908; Com. v. Campbell, 133 Ky. 50, 24 L.R.A.(N.S.) 172, 117 S. W. 383, 19 Ann. Cas. 159; Shreveport v. Hill, 134 La. 352, 64 So. 137, Ann. Cas. 1916A, 283; Eidge v. Bessemer, 164 Ala. 599, 26 L.R.A.(N.S.) 394, 51 So. 246; State v. Gilman, 33 W. Va. 146, 6 L.R.A. 847, 10 S. E. 283; State v. McIntyre, 139 N. C. 599, 52 S. E. 63; Re Luera, 28 Cal. App. 185, 152 Pac. 738.

Since the information in this case charges that the defendant received in dry territory the forbidden quantity of liquor for his own personal use, and not for sale or any other lawfully interdicted purpose, it follows that the defendant or relator is held in custody without authority of law, and should be and is hereby discharged from custody at the cost of the state.

Browne, Ch. J., and Ellis, J., concur.

Whitefield and West, JJ., dissent.

Browne, Ch. J., concurring:

I fully concur in the decision in this case. I am also quite convinced that the act is obnoxious to § 20, art. 3, of the Constitution, which provides that "the legislature shall not pass special or local laws in any of the following enumerated cases: . . . For the punishment of crime or misdemeanor," etc.

Chapter 7284 is a local law, and is effective in some counties and not in others. The fact that it is operative in all but four does not make it less a local law than if, as might be, it were operative in only one. It is also an act for the punishment of crime. It declares certain acts to be unlawful, and for any violation of its provisions a fine of not less than $50 nor more than $500, or imprisonment in county jail for not more than six months, or both fine and imprisonment, may be imposed.

It conflicts with the quoted provision of the Constitution, and, under the decision of this court in Snowden v. Brown, 60 Fla. 212, 53 So. 548, is unconstitutional and void.

The discrimination made by this act between the quantity of intoxicating liquors a person may have for his own use in the different counties of the state finds no justification, either in the Constitution or in a valid exercise of the state's police power. Some courts have held that limiting the quantity of intoxicating liquors a person may have in his possession is an exercise of police power to protect the individual from himself and his uncontrollable appetite, but that is not the purpose of this act. It does not limit the quantity of liquor every person in the state may have in his possession for his own use, nor does it prohibit carriers from delivering

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to them liquor in any quantity. A carrier may transport an unlimited quantity of intoxicating liquors for some person, and they may have it in their possession for their own use in some counties, but not in others; in Escambia county, for instance, but not in the adjoining county of Santa Rosa. Can it be contended that a person needs protection from himself in Santa Rosa county, but not in Escambia county? Clearly not. Then why did not the legislature prohibit its possession in all the counties of the state?

The attempt to find justification for the discrimination between persons in different counties, or the same person in different counties, by the provisions of article 19 of the Constitution, is futile, as that article relates only to the prohibition of the sale of intoxicants. That is the sole question submitted to the people, and, when the legislature says that, upon the people of a county voting against the sale of intoxicating liquor, the ownership and possession of more than a stated quantity, "for personal use," shall also be prohibited, it attempts to amend the Constitution by legislative enactment.

It is true, this court held that the legislature, in enforcing the provisions of article 19, may prohibit the sale of intoxicating beverages in imitation of, or intended as substitutes for, certain intoxicating liquors, because their sale may be used as a cover to violation of the law against the sale of intoxicating liquors. Fine v. Moran, — Fla. —, 77 So. 533. I did not concur in that decision, but I see a very clear distinction between the two statutes. Here the law in express terms restricts the possession of more than a stated quantity, "whether intended for personal use, or otherwise." The very words, "for personal use, or otherwise," precludes the idea that the prohibition of the possession for personal use of more than a quart of liquor and 6 quarts of malt beverages was intended as a means of enforcing the law against the sale of intoxicants. The words, "whether intended for personal use, or otherwise," are used in the title, and repeated in the first, second, third, and fourth sections of the act. In the fifth section, as if to make it clearer that the statute was directed at the personal use, and not at the possession for sale or other unlawful purpose, these words are used. "For personal use of such person, or for the use of members of his family residing with him." It is possible that the possession of a large quantity of liquors, under certain circumstances, may be prohibited as a means of preventing its illegal sale; but, if that had been the purpose of this act, such possession would have been prohibited to all persons and in all the counties of the state, because illegal sales may occur in counties where the sale is permitted, as well as in those where it is prohibited.

The words, "for personal use," and the fact that the prohibition of the possession of more than a stated quantity affects persons in some counties and not in others, show clearly that the purpose of this provision was to limit individual use, and not to limit the possession because it could be made a cover for violation of laws against their sale.

Whitfield, J., dissenting:

The Georgia and Illinois decisions relied on by the court as authority relate to the powers of municipalities. The others do not appear to be controlling, in view of recent adjudicated cases in the highest state and Federal courts.

Courts may determine whether a statute conflicts with organic law, but only questions of legislative power are considered. Questions of wisdom, policy, reasonableness, necessity, or expediency are foreclosed by the legislative will, constitutionally expressed. An act of the legislature prescribing police regulations, when attacked on constitutional grounds, should not be declared to be inoperative unless it clearly and inevitably violates some provision of organic law. McNeil v. Webeking, 66 Fla. 407, 63 So. 728; Ex parte Pricha, 70 Fla. 265, 70 So.

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406; Jacksonville v. Bowden, 67 Fla. 181, L.R.A.1916D, 913, 64 So. 769, Ann. Cas. 1915D, 99; State ex rel. Young v. Duval County, — Fla. —, 79 So. 692; Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 57 L. ed. 184, 33 Sup. Ct. Rep. 44; State ex rel. Blount v. Simmons, 120 N. C. 19, 26 S. E. 649; Hayes v. Walker, 54 Fla. 163, 44 So. 747; Dutton Phosphate Co. v. Priest, 67 Fla. 370, 65 So. 282.

All property rights are subject to lawful governmental regulations, under the police power of the state, to conserve the peace, health, safety, morals, and general welfare of the people. State ex rel. Simpson v. Ackerly, 69 Fla. 23, 67 So. 232; Dutton Phosphate Co. v. Priest, 67 Fla. 370, 65 So. 282; Crowley v. Christensen, 137 U. S. 86, text 89, 34 L. ed. 620, 621, 11 Sup. Ct. Rep. 13; 6 R. C. L. 193; 12 C. J. 947; Cureton v. State, 135 Ga. 660, 49 L.R.A.(N.S.) 182, 70 S. E. 332; Preston v. Drew, 33 Me. 558, 54 Am. Dec. 639; West Virginia v. Adams Exp. Co. L.R.A. 1916C, 291, 135 C. C. A. 464, 219 Fed. 794; Barbour v. State, 146 Ga. 667, 92 S. E. 70; Joyce Intoxicating Liquors, § 80; Health Dept. v. Trinity Church, 145 N. Y. 32, 27 L.R.A. 710, 45 Am. St. Rep. 579, 39 N. E. 833.

The police power is governmental authority to regulate personal conduct and personal property rights for the general welfare. This power is inherent in sovereign governments. Limitations of this authority in America are found in the organic guaranties of personal and property rights. Duly prescribed regulations of the use of property that are appropriate to conserve the public good, and are not mere arbitrary or needless encroachments upon private rights, do not deprive anyone of property without due process of law; nor are such regulations a taking of property that requires compensation, since all private rights, though secured by the Constitution, are, under the police power of the state, subject to regulations that restrict the enjoyment of such rights to promote the public good. Hadacheck v. Sebastian, 239 U. S. 394, 60 L. ed. 348, 36 Sup. Ct. Rep. 143, Ann. Cas. 1917B, 927, This principle applies to the right to acquire, possess, and protect property, as well as to the right to enjoy and defend liberty and to obtain safety.

When the use of property is only appropriately regulated under the police power for the public good, there is no deprivation or taking of property within the inhibition of the Constitution, state or Federal, even though such regulations may circumscribe the use of property. Regulations predicated upon substantial differences in property and its uses, as they affect the general welfare, do not deny equal protection of the laws in violation of the Constitution, where classes of persons, similarly situated or conditioned with reference to the subject regulated, are not arbitrarily discriminated against by the regulations. The organic guaranties of equal rights and equal protection of the laws require substantial, not exact, equality in appropriate regulations under the police power of the state. Gardner v. Michigan, 199 U. S. 325, 50 L. ed. 212, 26 Sup. Ct. Rep. 106; Eberle v. Michigan, 232 U. S. 700, 58 L. ed. 803, 34 Sup. Ct. Rep. 464; Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989.

Property rights in harmful and dangerous articles are not the same as those in harmless and useful articles. The difference in the rights has a basis in the necessity for the protection and security of individuals and communities. Where the unrestricted use of any species of property is dangerous or injurious to the welfare of the people, severally or in the aggregate, governmental regulation of the use of such property does not violate organic property rights, since all property is held and enjoyed subject to lawful regulation for the public good. The people of this country regard the unrestricted use of intoxicating liquors as being seriously detrimental to the health, peace, morals, safety, and general

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welfare of the people, individually and collectively. This affords a proper basis for the exercise of the police power of the state in a matter that is peculiarly within its province. Crane v. Campbell, 245 U. S. 304, 62 L. ed. 304, 38 Sup. Ct. Rep. 98; Ex parte Peede, 75 Tex. Crim. Rep. 247, 170 S. W. 749; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Re Crane, 27 Idaho, 671, L.R.A.1918A, 942, 151 Pac. 1006; Clark Distilling Co. v. Western Maryland Co. 242 U. S. 311, 332, 61 L. ed. 326, 341, L.R.A. 1917B, 1218, 37 Sup. Ct. Rep. 180, Ann. Cas. 1917B, 845.

It is obvious that the improper or excessive use of intoxicating liquor is regarded by the lawmaking power of the state as being an evil that is detrimental to the general welfare. Under the police power of the state, the use of such liquors may be regulated to avoid the recognized evil; and any means that are appropriate to the desired end may be adopted, within the discretion of the lawmaking power. Where regulations or prohibitions of traffic in such liquors are inadequate to accomplish the desired result of limited and proper use, the legislature may regulate the quantities that a person may transport or have in his possession, with a view of remedying the evil that flows from the improper or excessive use of intoxicating liquor. Such regulations do not abridge the privileges or immunities of citizens of the United States, or deprive any person of property without due process of law, or deny to anyone the equal protection of the laws, in violation of the Federal Constitution (Crane v. Campbell, 245 U. S. 304, 62 L. ed. 304, 38 Sup. Ct. Rep. 98), even though the use of private property is thereby circumscribed; since all personal and property rights are subject to appropriate governmental regulation for the public good (Chicago & A. R. Co. v. Tranbarger, 238 U. S. 67, 59 L. ed. 1204, 35 Sup. Ct. Rep. 678).

Under the 14th Amendment of the Federal Constitution, citizens of the United States are citizens of the state in which they reside; and, where appropriate regulations by the state, restricting the possession and transportation of intoxicating liquors, do not abridge the rights of citizens of the United States under the Federal Constitution, such regulations certainly do not abridge the rights of citizens of the state, who are also citizens of the United States. The guaranties under the state Constitution, that all men are equal before the law and have inalienable rights to acquire, possess, and protect property, do not so differ from the rights secured by the Federal organic law as to make individual rights in the use of intoxicating liquors superior to the state organic right of the public to have governmental regulations "for the protection, security, and benefit of the citizens" of the state. Regulations "for the protection, security and benefit of the citizens" of the state are certainly "for the protection, security, and benefit of the public, or of the people of the state."

There are no such fundamental rights in intoxicating liquors that they may not be regulated for the public good. State v. Brown, — S. D. —, 167 N. W. 400.

Every provision of organic law should be given its intended effect. One organic provision may qualify abstract rights secured by other organic provisions. The rights secured by § 1 of the Declaration of Rights of the state Constitution are to be construed with reference to the provisions of § 2 thereof, that governmental power is inherent in the people and may be exerted for the protection, security, and benefit of the citizens. State v. Cummins, 30 Idaho, 411, 165 Pac. 216. Under our system of government, all property rights are subject to regulation. The governmental power reserved to the people extends to all matters not forbidden by organic law.

Nothing in the Constitution gives unrestricted rights in intoxicating liquors, but all rights therein, as in other property having peculiarly

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harmful qualities, are subject to regulation for the general welfare.

In the absence of controlling organic provisions, statutory regulations are the law of the land. Individual opinions must yield to the mandates of the law. No one may rightfully do that which the lawmaking power, upon reasonable grounds, declares to be prejudicial to the general welfare. Mugler v. Kansas, 123 U. S. 653, 31 L. ed. 207, 8 Sup. Ct. Rep. 273; State v. Marastoni, 85 Or. 37, 165 Pac. 1177.

The right of "acquiring, possessing, and protecting property" is declared by § 1, Declaration of Rights, to be "inalienable;" that is, not transferable to another. This right is not absolute as against the collective rights of organized society, as represented by a sovereign government. The organic right to acquire, possess, and protect property does not confer or secure an unrestricted right to possess and to transport intoxicating liquors, a class of property the improper or excessive use of which is regarded by the lawmaking power of the state, and by dominant public opinion, as being detrimental to the health, peace, morals, safety, and general welfare of the people; and personal and property rights in such liquors are subject to legislative regulation for the public good under the police power of the state, whose "government is instituted for the protection, security, and benefit of the citizens," as expressly declared by § 2, Declaration of Rights. Lawful regulations of the possession, transportation, or use of property, the unrestricted use of which the lawmaking power regards as not being conducive to the general welfare or "for the protection, security, and benefit of the citizens" of the state, do not "deprive" any person of property without due process of law, nor is property thereby "taken" in violation of § 12, Declaration of Rights.

The organic provisions declaring that "all men are equal before the law," and securing to all persons "the equal protection of the laws," relate to arbitrary discriminations, and to oppressive exercise of governmental power against persons or classes of persons, and do not forbid discriminatory regulations of different species of property that affect alike all persons similarly situated with reference to the subject and the regulations. The exemptions provided for in § 5 of chap. 7284, Acts of 1917, are not unlawful discriminations. State v. Grier, 4 Boyce (Del.) 322, 88 Atl. 579; Van Winkle v. State, 4 Boyce (Del.) 578, 91 Atl. 385, Ann. Cas. 1916D, 104; Eberle v. Michigan, 232 U. S. 700, 58 L. ed. 803, 34 Sup. Ct. Rep. 464; Kidd v. Pearson, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; Theisen v. McDavid, 34 Fla. 440, 26 L.R.A. 234, 16 So. 321; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 55 L. ed. 369, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; Rast v. Van Deman & L. Co. 240 U. S. 342, 60 L. ed. 679, L.R.A.1917A, 421, 36 Sup. Ct. Rep. 370, Ann. Cas. 1917B, 445; Price v. Illinois, 238 U. S. 446, 59 L. ed. 1400, 35 Sup. Ct. Rep. 892; Miller v. Wilson, 236 U. S. 373, 59 L. ed. 628, L.R.A.1915F, 829, 35 Sup. Ct. Rep. 342; Dutton Phosphate Co. v. Priest, 67 Fla. 370, 65 So. 282; Noble v. State, 68 Fla. 1, 66 So. 153; State ex rel. Clarkson v. Philips, 70 Fla. 340, 70 So. 367, Ann. Cas. 1918A, 138; Peninsular Industrial Ins. Co. v. State, 61 Fla. 376, 55 So. 398.

Article 19 of the state Constitution is as follows:

Article XIX.

Local Option.

Section 1. The board of county commissioners of each county in the state, not oftener than once in every two years, upon the application of one fourth of the registered voters of any county, shall call and provide for an election in the county in which application is made, to decide whether the sale of intoxicating liquors, wines or beer shall be prohibited therein, the question to be determined by a majority vote of those voting at the election called

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under this section, which election shall be conducted in the manner prescribed by law for holding general elections; provided, that intoxicating liquors, either spirituous, vinous, or malt, shall not be sold in any electric district in which a majority vote was cast against the same at the said election. Elections under this section shall be held within sixty days from the time of presenting said application, but if any such election should thereby take place within sixty days of any state or national election, it shall be held within sixty days after any such state or national election.

Sec. 2. The legislature shall provide necessary laws to carry out and enforce the provisions of section one of this article.

This article is not a grant of power to the legislature; but it is a limitation upon the general lawmaking power of the legislature in a single particular. It prescribes local option provisions for determining "whether the sale of intoxicating liquors, wines, or beer shall be prohibited" in the different counties of the state, and requires the legislature to enact laws to make the article effective. If the rule, Expressio unius exclusio alterius, be applied to article 19, it would not restrict a grant of power, but would restrain a limitation upon the lawmaking power of the legislature, which limitation, in any event, should not be extended beyond the intent shown by the language used. Article 19 does not restrain the general lawmaking power of the legislature, except as to the method of effectuating prohibition of the sale of intoxicating liquors, wines, or beer. All other matters affecting such intoxicants are left for legislative regulation, with a mandate contained in § 2, art. 19, that "the legislature shall provide necessary laws to carry out and enforce the provisions of" the article. See State v. Brown, — S. D. —, 167 N. W. 400.

Article 19 of the state Constitution, in recognition of the evils that are peculiar to the traffic in intoxicating liquors, provides a means for prohibiting the sale of such liquors in every county of the state; and the legislature, recognizing the evils that are peculiar to the possession, transportation, or use of intoxicating liquors, has provided regulations of such transportation and possession in counties where the sale of such liquors is made unlawful under article 19 of the Constitution, the regulations not being operative in counties where the sale of intoxicating liquors is lawful. These regulations supplement, but do not conflict with, the operation of article 19 in counties where the sale of intoxicating liquors is made unlawful. Article 19 does not, by implication, limit the legislative power to regulate the transportation and possession of intoxicating liquors in dry counties. See Van Pelt v. Hilliard, — Fla. —, L.R.A.1918E, 639, 78 So. 693.

Regulations limiting the quantity of intoxicating liquors that may be transported or had in possession, thereby preventing opportunities for unlawful sales, may tend to make effective the provisions of article 19 in counties where the sale of intoxicating liquors is unlawful, pursuant to the requirements of § 2, art. 19, that "the legislature shall provide necessary laws to carry out and enforce the provisions of § 1 of this article." Fine v. Moran, — Fla. —, 77 So. 533. Such regulations do tend to curtail the evils consequent upon the excessive or improper use of intoxicating liquors, in the interest of peace, health, morals, safety, and the general welfare, "for the protection, security and benefit of the citizens" of the state, as contemplated by the quoted declaration of the Constitution. The quantity, as well as any other feature of the use of intoxicating liquors, may be regulated by statute in the interest of the common good. The reasonableness of the quantity designated by the statute is not subject to judicial review.

While regulations as to the possession and transportation of intox-

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icating liquors in counties where the sale thereof is unlawful may contribute towards making the prohibition of sales under article 19 effective, that article of the Constitution does not relate to the possession or transportation, but only to the sale, of intoxicating liquors. There being no express or implied or organic limitations on the subject, the legislature has full power to regulate, by due course of law, the possession and transportation of intoxicating liquors in counties where the sale thereof is unlawful, when the regulations are appropriate to the object, and no class of persons is thereby arbitrarily discriminated against, and property is not thereby unlawfully "taken." The due process of law and just compensation provisions of the organic law may not be violated when property rights are forfeited through violation of law. Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273.

A legislative determination of a proper subject for the exercise of the police power, and of the manner of the exercise, by enacting regulations covering the matter, should not be disturbed by the courts, unless clearly some mandate of the Constitution is thereby inevitably violated. See Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714; International Harvester Co. v. Missouri, 234 U. S. 199, 204, 58 L. ed. 1276, 1279, 52 L.R.A.(N.S.) 525, 34 Sup. Ct. Rep. 859; Keokee Consol. Coke Co. v. Taylor, 234 U. S. 224, 58 L. ed. 1288, 34 Sup. Ct. Rep. 856; Missouri, K. & T. R. Co. v. Cade, 233 U. S. 642, 58 L. ed. 1135, 34 Sup. Ct. Rep. 678; Noble v. State, 68 Fla. 1, 66 So. 153; Dutton Phosphate Co. v. Priest, 67 Fla. 370, 65 So. 282.

The provisions of chapter 7284, Acts of 1917, here considered, are as follows:

"Section 1. That it shall be unlawful for any person, firm or corporation to receive, directly or indirectly, intoxicating liquors, wines or beer, from a common or other carrier, in counties or election precincts within this state which have or may hereafter vote against the sale of intoxicating liquors, wines or beer, in such county or election precinct, whether intended for personal use or otherwise, and whether interstate or intrastate shipments or transportation, except as hereinafter provided.

"Sec. 2. That it shall be unlawful for any person, firm or corporation to possess intoxicating liquors, wines or beer, hereafter received, directly or indirectly, from a common or other carrier in the counties or election precincts of this state which have or may hereafter vote against the sale of intoxicating liquors, wines or beer in such county or election precinct, whether intended for personal use or otherwise, and whether interstate or intrastate shipments or transportation, except as hereinafter provided.

"Sec. 3. That it shall be unlawful for any express company, railroad company, or any common carrier or person to ship or transport into the counties or election precincts of this state which have or may hereafter vote against the sale of intoxicating liquors, wines or beer in such county or election precinct, any intoxicating liquors, wines or beer, or from a place in this state to any county or election precinct in this state which has or may hereafter vote against the sale of such liquors, in such county or election precinct, any intoxicating liquors, wines or beer for any person, firm, club, association or corporation, whether in original packages or otherwise, and whether intended for personal use or otherwise, except as hereinafter provided.

"Sec. 4. That it shall be unlawful for any person to personally transport from without or within this state into counties or election precincts in this state which have or may hereafter vote against the sale of intoxicating liquors, wines or beer, whether the same is intended for personal use or otherwise, any intoxicating liquors, wines or beer in any quantity whatsoever, except as hereinafter provided.

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"Sec. 5. That nothing in this act shall make it unlawful:

"(1) For druggists to receive and possess alcohol and other intoxicating liquors and such preparations as may be sold by druggists for the special purpose and in the manner as now or hereafter provided by law, or for the manufacturers of medicines that conform to the provisions of the Pure Food and Drug Act of this state and the United States or for bona fide hospitals, or for manufacturers of perfumery and toilet articles to receive and possess alcohol, for the use of bona fide patients of such hospitals, or in the manufacturing of such medicines, or flavoring extracts, or perfumery and toilet articles, or for any common or other carrier to ship or transport such liquor or alcohol for said purposes to such druggists or hospitals, or manufacturers of medicines, or of flavoring extracts, or of perfumery or of toilet articles in the counties of this state which have or may hereafter vote against the sale of intoxicating liquors, wines or beer; provided that such consignee or addressee or his or its duly authorized agent shall at the time of delivery to him of said alcohol or liquors make an affidavit and deliver to such common or other carrier that such alcohol or liquors is ordered for and will be used for the purposes specified herein, and he shall in said affidavit name the purpose of those specified herein for which same will be used and that it will be used for no other purpose.

"(2) For any person for the use of himself or for the use of his own family residing with him, to personally transport to his own home, or to possess or to receive from any common or other carrier, shipped from without the counties or election precincts which have or may hereafter vote against the sale of intoxicating liquors, wines, or beer, not exceeding . . . one quart of intoxicating liquor or wine and not exceeding six quarts of beer or malt where said beer or malt does not contain more than five per centum of alcohol during any period of thirty consecutive days, or for any common or other carrier to ship or transport to any person in any county or election precinct in this state which has or may hereafter vote against the sale of intoxicating liquors, wines or beer for the personal use of such person, or for the use of the members of his family residing with him, not exceeding one quart of intoxicating liquor or wine and not exceeding six quarts of beer or malt where said beer or malt does not contain more than five per centum of alcohol during any period of thirty consecutive days.

"(3) For any priest or minister of any religious denomination or sect to receive and possess wines, for sacramental purposes, or for any common carrier, or other carrier, to ship or transport for said purposes to any priest or minister of any religious denomination or sect.

"(4) For any person, firm or corporation to receive and possess alcohol to be used in chemical laboratories for scientific purposes, or for any common carrier or other carrier to ship, transport and deliver for said purposes to any person, firm or corporation. [Added by Acts 1917, chap. 7285.]"

"Sec. 7. That any person, firm, club, association or corporation and/or the agent or agents, employee or employees of either violating any of the provisions of this act, shall, upon conviction, be fined not less than fifty dollars nor more than five hundred dollars, or be imprisoned in the county jail for a period of time not more than six months or by both fine and imprisonment."

Chapter 7284, Acts of 1917, is a general law applicable to every county in the state in which the sale of intoxicating liquors, wines, or beer is duly forbidden under article 19 of the Constitution; it is therefore not in conflict with §§ 20 and 21 of article 3 of the Constitution, forbidding the enactment of "special or local laws" "for the punishment of crime or misdemeanor." Re Crane,

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27 Idaho, 671, L.R.A.1918A, 942, 151 Pac. 1006; Carlton v. Johnson, 61 Fla. 15, 55 So. 975; Fine v. Moran, — Fla. —, 77 So. 533; Ex parte Wells, 21 Fla. 280; Randall v. Tillis, 43 Fla. 43, 29 So. 540; Collier v. Cassady, 68 Fla. 390, 57 So. 617.

An act of the legislature relating to counties of a certain class, general in its terms and founded upon a proper and legitimate basis of classification, is general and not special legislation, though but a single county is embraced within the class affected by the legislation. Givens v. Hillsborough County, 46 Fla. 502, 110 Am. St. Rep. 104, 35 So. 88. The classification here has basis in article 19 of the Constitution. See Fine v. Moran, — Fla. —, 77 So. 533.

A statute is a general law if it is potentially applicable to every county in the state, though at the time of its passage it applies to only some of the counties. Collier v. Cassady, supra.

Tough the sale of intoxicating liquors may not be unlawful in all the counties of the state, such sales may, under article 19, be made unlawful in all the counties, and chapter 7284 is uniform in its application to "counties or election precincts within this state which have or may hereafter vote against the sale of intoxicating liquors." Therefore, the act is a general law, since by its terms it is potentially applicable to all the counties and election districts of the state, and it applies uniformly to the condition calling for its enactment. Clark Distilling Co. v. Western Maryland R. Co. 242 U. S. 311, 61 L. ed. 326, L.R.A.1917B, 1218, 37 Sup. Ct. Rep. 180, Ann. Cas. 1917B, 845; Collier v. Cassady and Fine v. Moran, supra; Randall v. Tillis, 43 Fla. 43, 29 So. 540.

Even if chapter 7284 may be regarded as a "special or local law," within the provisions of § 20 of art. 3 of the Constitution, forbidding "special or local laws" "for the punishment of crime or misdemeanor," the section of the chapter prescribing the punishment may be eliminated, and the remainder will be operative under the express provisions of § 14 of the act that "if, for any reason, any section or part of this act shall be held unconstitutional or invalid, then that fact shall not invalidate any other part of this act, but the same shall be enforced without reference to the part so held to be invalid."

Punishment in such cases is provided for in chap. 6222, Acts of 1911, a general law. See Stinson v. State, 63 Fla. 42, 58 So. 722; Douglas v. Smith, 66 Fla. 460, 63 So. 844; Fine v. Moran, supra. In Snowden v. Brown, 60 Fla. 212, 53 So. 548, the penalty section of a local statute was eliminated, leaving the remainder of the statute in force, though there was then no general law providing a penalty, as in the later cases of Stinson v. State, and Douglas v. Smith, supra. See Fine v. Moran, supra.

The Constitution does not limit the power of the legislature to regulate the transportation and possession of intoxicating liquors, wines, or beer in dry counties; and, the improper or excessive use of intoxicating liquors, wines, or beer being regarded as detrimental to the public welfare, the legislature, in the light of adjudged cases, has the power to enact the provisions of chapter 7284, Acts of 1917, regulating the quantity of intoxicating liquors, wines, or beer that a person may transport or have in his possession within a given time, in counties where the sale of intoxicating liquors is unlawful, without violating the 14th Amendment of the Federal Constitution, or the state organic right of "acquiring, possessing and protecting property," or article 19 of the state Constitution. The statute has appropriate relation to a purpose within the police power of the state; it does not arbitrarily discriminate (State v. Grier, 4 Boyce (Del.) 322, 88 Atl. 579; Van Winkle v. State, 4 Boyce (Del.) 578, 91 Atl. 385, Ann. Cas. 1916D, 104); and interstate commerce is not unlawfully involved.

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See Southern Exp. Co. v. Whittle, 194 Ala. 406, L.R.A.1916C, 278, 69 So. 652; Southern Exp. Co. v. State, 188 Ala. 454, 66 So. 115; Clark Distilling Co. v. Western Maryland R. Co. 242 U. S. 311, 61 L. ed. 326, L. R.A.1917B, 1218, 37 Sup. Ct. Rep. 180, Ann. Cas. 1917B, 845; State v. Certain Intoxicating Liquors, — Utah —, L.R.A.1918E, 943, 172 Pac. 1050; State v. Phillips, 109 Miss. 22, L.R.A.1915D, 530, 67 So. 651; Delaney v. Plunkett, 146 Ga. 547, L.R. A.1917D, 926, 91 S. E. 561, Ann. Cas. 1917E, 685; Barbour v. State, 146 Ga. 667, 92 S. E. 70; Glenn v. Southern Exp. Co. 170 N. C. 286, L.R.A.1918B, 438, 87 S. E. 136; State v. Carpenter, 173 N. C. 767, 92 S. E. 373; Re Crane, 27 Idaho, 671, L.R.A.1918A, 942, 151 Pac. 1006; Crane v. Campbell, 245 U. S. 304, 62 L. ed. 304, 38 Sup. Ct. Rep. 98; State v. Brown, — S. D. —, 167 N. W. 400; Fitch v. State, — Neb. —, 167 N. W. 417; Kunsberg v. State, 147 Ga. 591, 95 S. E. 12; Claunch v. State, — Tex. Crim. Rep. —, 199 S. W. 483; Delta v. Charlesworth, — Colo. —, 170 Pac. 965; State v. Fabbri, 98 Wash. 207, L.R.A.1918A, 416, 167 Pac. 133; Seaboard Air Line R. Co. v. North Carolina, 245 U. S. 298, 62 L. ed. 299, 38 Sup. Ct. Rep. 96; State v. Missouri P. R. Co. 96 Kan. 609, 152 Pac. 777, Ann. Cas. 1917A, 612; Kansas City v. Jordan, 99 Kan. 814, 163 Pac. 188, Ann. Cas. 1918B, 273; O'Rear v. State, — Ala. App. —, 72 So. 505; State v. Sixo, 77 W. Va. 243, 87 S. E. 267; West Virginia v. Adams, Exp. Co. L.R.A.1916C, 291, 135 C. C. A. 464, 219 Fed. 794; State v. Marastoni, 85 Or. 37, 165 Pac. 1177; Ohio ex rel. Lloyd v. Dollison, 194 U. S. 445, 48 L. ed. 1062, 24 Sup. Ct. Rep. 703; Eberle v. Michigan, 232 U. S. 700, 58 L. ed. 803, 34 Sup. Ct. Rep. 464; Theisen v. McDavid, 34 Fla. 440, 448, 26 L.R.A. 234, 16 So. 321; Eiger v. Garrity, 246 U. S. 97, 62 L. ed. 596, 38 Sup. Ct. Rep. 298; United States ex rel. Zimmerman v. Oregon-Washington R. & Nav. Co. (D. C.) 210 Fed. 378; Kirtley v. Oregon Short Line R. Co. — Idaho, —, 169 Pac. 172; State v. Farrand, 197 Mo. App. 589, 198 S. W. 77; Kracken v. State, 147 Ga. 198, 93 S. E. 198; Seattle v. Brookins, 98 Wash. 290, 167 Pac. 940; Liquor Transp. Cases, 140 Tenn. 582, 205 S. W. 423.

The rule enacted in § 14 of chapter 7284 would give effect to the provisions contained in §§ 1, 2, 3, and 4 of the act, even if any portion or all of § 5, or any other portion of the statute, should be held to be inoperative; since in view of the positive language of § 14 of the act it cannot be said the legislature would not have enacted §§ 1, 2, 3, and 4 without any other provision, no matter which one, of the act that may be held to be inoperative. See Hayes v. Walker, 54 Fla. 163, 44 So. 747; Hillsborough County v. Savage, 63 Fla. 337, 58 So. 835; State ex rel. Lamar v. Dillon, 32 Fla. 545, 22 L.R.A. 124, 14 So. 383.

The enacting clause is in the language required by the Constitution, and it is assumed that the constitutional requirements as to title and enactment were complied with.

Where a statute contains the rule expressly enacted in § 14 of this act, as set out herein, the judicial rule of construction announced in State v. Patterson, 50 Fla. 127, 39 So. 398, 7 Ann. Cas. 272; State ex rel. Loftin v. McMillan, 55 Fla. 246, 45 So. 882; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431, is not permissible. The judicial rule is, that where the elimination of an unconstitutional portion of a statute will cause material results not intended by the legislature, the entire act fails. This rule may be excluded by express provision contained in an enacted law. American Exp. Co v. Beer, 107 Miss. 528, L.R.A.1918B, 446, 65 So. 575, Ann. Cas. 1916D, 127. The rule enacted in the statute itself precludes the application of the judicial rule, which, if applied in violation of the statute, would not prevent, but would itself cause, material results not intended by the legislature; and the application of the judicial rule would frustrate the

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definitely expressed legislative intent which is the essence of the law (State ex rel. Johnson v. Patterson, 67 Fla. 499, 65 So. 659); and it is the duty of the courts, in appropriate proceedings duly taken, to give effect to the lawmaking intent (Tylee v. Hyde, 60 Fla. 389, 52 So. 968; State v. Hilburn, 70 Fla. 55, 69 So. 784, Ann. Cas. 1916D, page 9 note).

Among the amendments to the Federal Constitution are:

Article 9: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Article 10: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

The provision of § 1, Declaration of Rights of the state Constitution, that "all men . . ." have the inalienable right "of . . . acquiring, possessing, and protecting property," is immediately followed by the equally positive declaration, in § 2, that "all political power is inherent in the people. Government is instituted for the protection, security, and benefit of the citizens, and they have the right to alter or amend the same whenever the public good may require it; but the paramount allegiance of every citizen is due to the Federal government, and the people of this state have no power to dissolve its connection therewith."

These organic declarations recognize and preserve the ancient principle of the common law, that the welfare of the people is the supreme law, as expressed in the Latin maxim, "Salus populi est suprema lex." "The right to alter or amend the laws, whenever the public good may require it," is emphasized by the significant declaration of § 24, Declaration of Rights, state Constitution, that "this enunciation of rights shall not be construed to impair or deny others retained by the people." Under these express organic provisions, the lawmaking power of the people, vested by article 3 of the Constitution in the legislature, may enact any law "the public good may require" that is not inevitably in positive conflict with some controlling provision of the state or Federal Constitution.

The cited state and Federal decisions sustain this act.

West, J., concurs.

Rehearing denied, October 11, 1918.

ANNOTATION.

Power to prohibit the possession of intoxicating liquor, irrespective of any intention to traffic therein.

I. Introductory, 1085.
II. Theory that possession may be prohibited:
a. In general, 1086.
b. Particular constitutional objections, 1089.
III. Theory that possession cannot be prohibited, 1091.
IV. Possession of interstate shipments, 1094.

I. Introductory.

Statutes relating to the regulation or prohibition of intoxicating liquors have assumed two general characters: (a) There are the statutes directed at the traffic in intoxicants. Such statutes restrict or prohibit the sale, manufacture and sale, furnishing, giving away, etc., of intoxicants. The early statutes in general took this form. (b) Later statutes have been enacted which go beyond a prohibition of the traffic in intoxicating liquor, and prohibit its possession, irrespective of any intention to traffic therein; in fact, even if it is intended for the personal use of the possessor. Some such statutes are clearly intended to prevent the use of intoxicants, while others, especially the third class mentioned

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in the next subdivision, have been viewed by the courts as having a relation to the prohibition of the traffic.

II. Theory that possession may be prohibited.

a. In general.

The statutes directed against the possession of intoxicating liquors, irrespective of any intention to traffic therein, assume three general forms. There are (1) statutes prohibiting generally the possession of such liquors; (2) statutes prohibiting possession of more than a limited quantity; and (3) statutes prohibiting possession in certain specified places. The courts are not agreed upon the power of the legislature thus to prohibit the possession of intoxicants. While the tendency of a majority of the earlier decisions was to deny to the legislature this power, at the present time statutes in one or another of such forms are upheld in a majority of jurisdictions.

United States.—Clark Distilling Co. v. Western Maryland R. Co. (1917) 242 U. S. 311, 61 L. ed. 326, L.R.A. 1917B, 1218, 31 Sup. Ct. Rep. 98, Ann. Cas. 1917B, 845; Crane v. Campbell (1917) 245 U. S. 304, 62 L. ed. 304, 38 Sup. Ct. Rep. 98; Barbour v. Georgia (U. S. Adv. Ops. 1918–19, p. 393), 249 U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. —.

Alabama.—Southern Exp. Co. v. Whittle (1915) 194 Ala. 406, L.R.A. 1916C, 278, 69 So. 652; O'Rear v. State (1916) — Ala. App. —, 72 So. 505, certiorari denied by supreme court in (1916) — Ala. —, 73 So. 1001; Howard v. State (1916) — Ala. App. —, 73 So. 559; Frazier v. State (1917) — Ala. App. —, 73 So. 764; Edmunds v. State (1917) — Ala. —, 74 So. 965.

Georgia. — Delaney v. Plunkett (1917) 146 Ga. 547, L.R.A.1917D, 926, 91 S. E. 561, Ann. Cas. 1917E, 685; BARBOUR v. STATE (reported herewith) post, 1095, affirmed by the United States Supreme Court, U. S. Adv. Ops. 1918–19, p. 393), 249 U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. —; Kracken v. State (1917) 147 Ga. 198, 93 S. E. 198; Jackson v. State (1918) — Ga. —, 96 S. E. 1001; Saddler v. State (1918) — Ga. —, 97 S. E. 79.

Idaho.—Re Crane (1915) 27 Idaho, 671, L.R.A.1918A, 942, 151 Pac. 1006, affirmed in (1917) 245 U. S. 304, 62 L. ed. 304, 38 Sup. Ct. Rep. 98.

Nebraska.—Fitch v. State (1918) — Neb. —, 167 N. W. 417.

Nevada.—Ex parte Zwissig (1919) — Nev. —, 178 Pac. 20.

North Carolina.—Southern Exp. Co. v. High Point (1914) 167 N. C. 103, 83 S. E. 254 (dictum of Clark, Ch. J.); State v. Carpenter (1917) 173 N. C. 767, 92 S. E. 373; Glenn v. Southern Exp. Co. (1915) 170 N. C. 286, L.R.A. 1918B, 438, 87 S. E. 136.

South Carolina.—Brennen v. Southern Exp. Co. (1916) 106 S. C. 102, 90 S. E. 402.

Tennessee.—Liquor Transp. Cases (1918) 140 Tenn. 582, 205 S. W. 423.

Utah.—State v. Certain Intoxicating Liquors (1918) — Utah, —, L.R.A. 1918E, 943, 172 Pac. 1050.

Washington.—Seattle v. Brookins (1917) 98 Wash. 290, 167 Pac. 940.

See State v. Brown (1918) — S. D. —, 167 N. W. 400, infra.

Thus, statutes prohibiting entirely the possession of intoxicants have been sustained. Saddler v. State (1918) — Ga. —, 97 S. E. 79; Re Crane (1915) 27 Idaho, 671, L.R.A.1918A, 942, 151 Pac. 1006, affirmed in (1917) 245 U. S. 304, 62 L. ed. 304, 38 Sup. Ct. Rep. 98; State v. Certain Intoxicating Liquors (1918) — Utah, —, L.R.A. 1918E, 943, 172 Pac. 1050. See State v. Brown (S. D.) infra.

That the state has power to prohibit the transportation into the state of intoxicating liquor, for the personal use of the person thus transporting it, has been affirmed in the recent case of Lucchesi v. Com. (1918) — Va. —, 94 S. E. 925. The power to prohibit transportation, however, has not been considered herein.

A statute prohibiting the possession, not only of intoxicating liquors, but also of "any alcoholic compound or malt or liquors whether intended for beverage purposes or not, but which can be diluted, and when so diluted may be used as a beverage and will produce intoxication," has been sustained. Jackson v. State (1918) — Ga. —, 96 S. E. 1001.

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Some statutes prohibit possession in certain locations only. A statute making it unlawful "for any person to have, possess or permit any intoxicating liquor to be in, upon or about any room, office, building or in any other place except in such person's private dwelling house, and except when and where and in the manner especially authorized as herein otherwise provided," has been sustained. Fitch v. State (1918) — Neb. —, 167 N. W. 417. In Ex parte Zwissig (1919)— Nev. —, 178 Pac. 20, a statute making it unlawful "for any person, to keep, or have for personal use or otherwise, or to use, or permit another to have, keep, or use, intoxicating liquors at any restaurant, store, office building, club, place where soft drinks are sold (except a drug store may have and sell alcohol and wine, as provided by §§ 4 and 24), fruit stand, news stand, room, or place where bowling alleys, billiard or pool tables are maintained, livery stable, public building, park, road, street or alley," was sustained. A statute making it unlawful "for any person to keep or have for personal use, or otherwise, or to use . . . intoxicating liquors in any road, street, alley or other public place," was sustained in State v. Brown (1918) — S. D. —, 167 N. W. 400. The court in this case takes the broad view that the state has power to prohibit the possession of intoxicating liquor, although, as pointed out, the statute involved in this case merely made it unlawful to possess liquor in certain public places. The United States Supreme Court had before it for consideration in Clark Distilling Co. v. Western Maryland R. Co. (1917) 242 U. S. 311, 61 L. ed. 326, L.R.A.1917B, 1218, 37 Sup. Ct. Rep. 180, Ann. Cas. 1917B, 845, a statute making it unlawful "for any person to keep or have for personal use or otherwise, or to use, or permit another to have kept or used, intoxicating liquors," at certain designated public places. It was expressly provided that "nothing contained in this section shall prevent one in his own home from having and there giving to another intoxicating liquors when such having or giving is in no way a shift, scheme or device to evade the provisions of the act." A subsequent section of the statute made it unlawful "for any person . . . to possess intoxicating liquors, received directly or indirectly from a common or other carrier in this state." This section expressly provided that it should apply to such liquors intended for personal use, as well as otherwise. The court approached the question raised under this statute from the standpoint of the right to forbid its personal use. In argument, it is said not to be open to controversy that governments can, consistently with the due process clause, forbid the manufacture and sale of liquor, and regulate its traffic, and that there goes along with this power full police authority to make it effective. Continuing, the court states: "Whether the general authority includes the right to forbid individual use, we need not consider, since clearly there would be power, as an incident to the right to forbid manufacture and sale, to restrict the means by which intoxicants for personal use could be obtained, even if such use was permitted."

It has been held that a state does not unconstitutionally deprive one of equal protection of the laws, by forbidding the keeping of intoxicating liquor in any locker, or other place, in any social club, or carrying it to such club, although a property right in such liquors is recognized by the law. State v. Phillips (1915) 109 Miss. 22, L.R.A. 1915D, 530, 67 So. 651.

See State v. Clark (1854) 28 N. H. 176, 61 Am. Dec. 611, infra.

In some of the foregoing cases, the decision is expressly based upon the theory that such a statute has a reasonable relation to the enforcement of the laws against the traffic in intoxicating liquor. Fitch v. State (1918) — Neb. —, 167 N. W. 417. Ex parte Zwissig (Nev.) supra. It is stated, however, by the court, that the purpose of the Prohibition Act was not only to suppress traffic in intoxicating liquors, but mainly to suppress their consumption, except where otherwise indicated; and that, this being true, it is clear that the act intended to pre-

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vent a person from having intoxicating liquor upon the street for personal use, or any use other than that contemplated by the act itself.

Some statutes prohibit the possession, merely, of more than a limited amount of intoxicants. These statutes likewise have been sustained. Southern Exp. Co. v. Whittle (1915) 194 Ala. 406, L.R.A.1916C, 278, 69 So. 652 (sustaining a statute making it unlawful for any person, firm, or corporation "to receive or accept delivery of, or to possess or to have in possession at any one time, whether in one or more places, and whether in original packages or otherwise, more than [a limited quantity of liquor]"); O'Rear v. State (1916) — Ala. App. —, 72 So. 505, certiorari denied by the supreme court (1916) — Ala. —, 73 So. 1001; Frazier v. State (1916) — Ala. App. —, 73 So. 764; Howard v. State (1916) — Ala. App. —, 73 So. 559; Frazier v. State (1917) — Ala. App. —, 73 So. 764; Delaney v. Plunkett (1917) 146 Ga. 547, L.R.A.1917D, 926, 91 S. E. 561, Ann. Cas. 1917E, 685; BARBOUR v. STATE (reported herewith), post, 1095, affirmed by the United States Supreme Court (U. S. Adv. Ops. 1918–19, p. 393), 249 U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. —; Kracken v. State (1917) 147 Ga. 198, 93 S. E. 198; Seattle v. Brookins (1917) 98 Wash. 290, 167 Pac. 940 (involving a municipal ordinance).

See State v. Carpenter (1917) 173 N. C. 767, 92 S. E. 373, and Glenn v. Southern Exp. Co. (1915) 170 N. C. 286, L.R.A.1918B, 438, 87 S. E. 136, infra.

Statutes limiting the amount that may lawfully be possessed, as well as those absolutely prohibiting possession, have been sustained, even as applied to liquor lawfully acquired before the enactment of the statute (Edmunds v. State (1917) — Ala. —, 74 So. 965), or before the statute went into effect (O'Rear v. State (1916) — Ala. App. —, 72 So. 505, certiorari denied by the supreme court in (1916) — Ala. —, 73 So. 1001; BARBOUR v. STATE (reported herewith), post, 1095, affirmed by United States Supreme Court (U. S. Adv. Ops. 1918–19, p. 393), 249 U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. —; State v. Certain Intoxicating Liquors (1918) — Utah, —, L.R.A. 1918E, 943, 172 Pac. 1050).

The United States Supreme Court in affirming the decision of the supreme court of Georgia in BARBOUR v. STATE, assumes that the liquor was acquired between the date of the enactment of the statute and its taking effect, and states that "a state having the power to forbid the manufacture, sale, and possession of liquor within its borders may, if it concludes to exercise the power, obviously postpone the date when the prohibition shall become effective, in order that those engaged in the business and others may adjust themselves to the new conditions. Whoever acquires, after the enactment of the statute, property thus declared noxious, takes it with full notice of its infirmity and that after a day certain its possession will, by mere lapse of time, become a crime. It is well settled that the Federal Constitution does not enable one to stay the exercise of a state's police power by entering into a contract under such circumstances. . . . Nor can he do so by acquiring property."

Prohibitory statutes have been enacted which combine receipt and possession; such statutes have been also sustained. Brennen v. Southern Exp. Co. (1916) 106 S. C. 102, 90 S. E. 402 (statute restricted the amount that might lawfully be received and possessed). A statute which prohibited the receipt of intoxicating liquors by a common or other carrier, and the possession of intoxicating liquors so received, and which also made it unlawful for any person to personally transport into the state, or from one point to another within the state, even when intended for personal use, intoxicating liquor, was sustained generally in Liquor Transp. Cases (1918) 140 Tenn. 582, 205 S. W. 423; but the chief emphasis is laid, in the opinion, upon the prohibition against transportation. The Alabama statute involved in Southern Exp. Co. v. Whittle (Ala.) supra, prohibited receipt and possession, but the court emphasizes the prohibition of possession.

According to the foregoing cases,

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the enactment of statutes prohibiting possession, or limiting the amount that may be possessed, is a valid exercise of the police power. The fact that intoxicating liquor is property does not answer the question as to the validity of a prohibition of the possession thereof, for property in intoxicants is subject to the police power, and the inquiry is whether the statute is a reasonable exercise of the police power with reference thereto; not alone whether a personal or property right will be affected by the enactment. Ibid.

In some cases dealing with municipal ordinances, the broad ground is taken that a limitation of the amount of intoxicating liquor that may be possessed is within the police power of the legislative branch of government, whether municipal or state. Seattle v. Brookins (Wash.) supra. A city ordinance enacted by a municipality, which had broad powers conferred upon it by the legislature, prohibiting the using or keeping of intoxicating liquors in any refreshment saloon or restaurant, was sustained in State v. Clark (1864) 28 N. H. 176, 61 Am. Dec. 611. An ordinance prohibiting the owner or keeper of a retail grocery store from keeping on the premises connected therewith any spirituous liquors, until licensed by the city to retail the same, was sustained in Heisembrittle v. Charleston (1842) 2 McMull. L. (S. C.) 233, under charter authority to pass any by-laws or requirements that shall appear requisite for the city, or for preserving peace, order, and good government.

b. Particular constitutional objections.

The constitutional provisions that have been considered in the foregoing cases, and held not to be violated by such legislation, are numerous. Such statutes are held not to violate the prohibition of the Federal Constitution against abridging the privileges and immunities of citizens of the United States. Crane v. Campbell (1917) 245 U. S. 304, 62 L. ed. 304, 38 Sup. Ct. Rep. 98, affirming (1915) 27 Idaho, 671, L.R.A.1918A, 942, 151 Pac. 1006; Southern Exp. Co. v. Whittle (1915) 194 Ala. 406, L.R.A.1916C, 278, 69 So. 652; Saddler v. State (1918) — Ga. —, 97 S. E. 79; Ex parte Zwissig (1919) — Nev. —, 178 Pac. 20.

A statute prohibiting the possession of intoxicating liquors does not violate a provision of the state Constitution which declares that "all citizens of the United States, resident in this state, are hereby declared citizens of this state; and it shall be the duty of the general assembly to enact such laws as will protect them in the full enjoyment of the rights, privileges, and immunities, due to such citizenship." Saddler v. State (1918) — Ga. —, 97 S. E. 79.

Nor does a statute prohibiting possession contravene that portion of the Constitution of the United States (art. 4, § 2, cl. 1) which provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," in that the statute deprives the accused of "having intoxicating liquors, as citizens in other states are allowed, under reasonable regulation, to have the same." Ibid.

The guaranty of the Federal Constitution of due process of law is not violated (Crane v. Campbell (U. S.) and Saddler v. State (Ga.) supra; Ex parte Zwissig, — Nev. —, 178 Pac. 20); nor the guaranty of due process of law in a state Constitution (Jackson v. State (1918) — Ga. —, 96 S. E. 1001 (see supra for form of statute); Re Crane (1915) 27 Idaho, 671, L.R.A.1918A, 942, 151 Pac. 1006).

A statute making it unlawful for any person to personally transport intoxicating liquor into a state, or from one point to another within the state, even when intended for personal use, has been held not to deprive such person of his liberties or privileges, otherwise than by the law of the land. Liquor Transp. Cases (1918) 140 Tenn. 582, 205 S. W. 423.

The prohibition in the Federal Constitution against a denial of the equal protection of the laws is not contravened. Saddler v. State (1918) — Ga. —, 97 S. E. 79; Re Crane (Idaho) supra; State v. Phillips (1915) 109 Miss.

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22, L.R.A.1915D, 530, 67 So. 651, see supra; Ex parte Zwissig (1919) — Nev. —, 178 Pac. 20.

A statute making it unlawful for any person to have, possess, or permit any intoxicating liquor to be in, upon, or about any room, office, building, or in any other place, except in such person's private dwelling house, does not deny to one who owns no private dwelling house, but lives in a hotel, boarding house, rents a room, etc., the equal protection of the law. The statute involved in this case, however, is assumed by the court to have for its purpose the putting into effect of a policy against traffic in liquor. Fitch v. State (1918) — Neb. —, 167 N. W. 417.

The inclusion in an act prohibiting the possession of intoxicating liquor, of a clause prohibiting the possession of any "alcoholic compound or malt or liquors, whether intended for beverage purposes or not, but which can be diluted, and when so diluted may be used as a beverage and will produce intoxication," does not render the statute obnoxious to the provision of a state Constitution, which declares that protection to person and property is the paramount duty of government, and shall be impartial and complete. Jackson v. State (1918) — Ga. —, 96 S. E. 1001.

In Crane v. Campbell (1917) 245 U. S. 304, 62 L. ed. 304, 38 Sup. Ct. Rep. 98, the United States Supreme Court had before it the validity of the Idaho statute, prohibiting the possession of intoxicating liquors. It was held that the statute, in so far as it undertook to render criminal the mere possession of intoxicating liquor for personal use, does not conflict with that portion of the 14th Amendment which declares that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law." In sustaining the statute, the court states: "It must now be regarded as settled that, on account of their well-known noxious qualities and the extraordinary evils shown by experience commonly to be consequent upon their use, a state has power absolutely to prohibit manufacture, gift, purchase, sale, or transportation of intoxicating liquors within its borders, without violating the guaranties of the 14th Amendment. . . . As the state has the power above indicated to prohibit, it may adopt such measures as are reasonably appropriate or needful to render exercise of that power effective. . . . And, considering the notorious difficulties always attendant upon efforts to suppress traffic in liquor, we are unable to say that the challenged inhibition of their possession was arbitrary and unreasonable, or without proper relation to the legitimate legislative purpose. We further think it clearly follows, from our numerous decisions upholding prohibition legislation, that the right to hold intoxicating liquors for personal use is not one of those fundamental privileges of a citizen of the United States which no state may abridge." It seems, therefore, that so far as the 14th Amendment to the Federal Constitution is concerned, the power to prohibit the possession of intoxicating liquor for personal use is settled. The Supreme Court of the United States, in this decision, expressly recognizes that the validity of such legislation under the state Constitution is not open for the consideration of the Federal court. It may be observed that the permit referred to in the statute involved in this case has relation to wine or alcohol for sacramental, scientific, or medicinal purposes, and not for beverage purposes.

It has been held that a statute restricting the amount that one may lawfully have in his possession does not violate the above provisions of the 14th Amendment of the Federal Constitution, even though the statute provides for the destruction of liquor kept in violation thereof, without providing for a hearing before a judicial tribunal. Delaney v. Plunkett (1917) 146 Ga. 547, L.R.A.1917D, 926, 91 S. E. 561, Ann. Cas. 1917E, 685, supra.

That such a statute does not violate the provisions of the 14th Amendment to the Federal Constitution has been

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held, even though applied to the possession of liquor lawfully acquired before the law went into effect. O'Rear v. State (1916) — Ala. App. —, 72 So. 505, supra. BARBOUR v. STATE (reported herewith) post, 1095, affirmed by the United States Supreme Court (U. S. Adv. Ops. 1918–19, p. 393), 249 U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. —. Nor does it violate §§ 1 and 35 of the Alabama Constitution. O'Rear v. State (Ala.) supra.

A statute prohibiting possession does not contravene a provision that "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." Saddler v. State (Ga.) supra.

A statute prohibiting the possession of intoxicating liquor does not violate a provision of a state Constitution that "the enumeration of rights herein contained as a part of this Constitution shall not be construed to deny to the people any inherent rights which they have hitherto enjoyed." Ibid.

A statute prohibiting the possession of intoxicating liquors does not contravene a provision of a state Constitution that "the general assembly shall have power to make all laws and ordinances consistent with this Constitution, and not repugnant to the Constitution of the United States, which they shall deem necessary and proper for the welfare of the state." Ibid.

A statute prohibiting the possession of intoxicating liquor is not contrary to a provision of a state Constitution that "all rights, privileges, and immunities which may have been vested in or accrued to, any person or persons or corporation in his, her or their own right, or in any fiduciary capacity under and in virtue of any act of the general assembly, or any judgment, decree, or order, or other proceeding of any court of competent jurisdiction in this state, heretofore rendered, shall be held inviolate by all courts before which they may be brought in question unless attacked for fraud." Ibid.

A statute limiting the amount of intoxicating liquor a citizen may receive in dry territory is not void for unreasonableness. Southern Exp. Co. v. Whittle (1915) 194 Ala. 406, L.R.A. 1916C, 278, 69 So. 652.

III. Theory that possession cannot be prohibited.

According to other authorities, possession of intoxicants, or of more than a limited quantity thereof, cannot be prohibited. Re Luera (1915) 28 Cal App. 185, 152 Pac. 738; STATE EX REL. FRANCES v. MORAN (reported herewith) ante, 1068; Com. v. Campbell (1909) 133 Ky. 50, 24 L.R.A.(N.S.) 172, 117 S. W. 383, 19 Ann. Cas. 159; Com. v. Smith (1915) 163 Ky. 227, L.R.A.1915D, 172, 173 S. W. 340; Barber v. Com. (1918) — Ky. —, 206 S. W. 290 (statute made it unlawful to bring intoxicating liquor into, or distribute it in, prohibition territory). Ex parte Wilson (1911) 6 Okla. Crim. Rep. 457, 119 Pac. 596; Flowers v. State (1913) 8 Okla. Crim. Rep. 502, 129 Pac. 81; Ex parte Brown (1897) 38 Tex. Crim. Rep. 295, 70 Am. St. Rep. 743, 42 S. W. 554; State v. Gilman (1886) 33 W. Va. 146, 6 L.R.A. 847, 10 S. E. 283 (statute provided that no person without a state license should "keep in his possession for another, spirituous liquors"). The statute involved in Com. v. Smith (1915) 163 Ky. 227, L.R.A.1915D, 172, 173 S. W. 340, made it unlawful "for any person to keep, store, or possess any such liquors in any room, building or structure, other than the private residence of such person, and which is not used as a place of public resort."

A statute forbidding one, under penalty, to carry into a county where the sale of intoxicating liquor is prohibited, more than a half gallon of such liquor in any one day, has been held to deprive him of his constitutional property rights, in case he has no intent to sell it. State v. Williams (1908) 146 N. C. 618, 17 L.R.A.(N.S.) 299, 61 S. E. 61, 14 Ann. Cas. 562. In the earlier North Carolina case of State v. McIntyre (1905) 139 N. C. 599, 52 S. E. 63, a doubt was expressed as to the power of the legislature to make the mere ownership or possession of a given amount of whisky, in itself, a crime, and it is stated that only in the rarest instances can the police power be called on to regulate or control the

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conduct of individuals in the privacy of their own homes, or when not involving any relationship to others, or to the public. The power of the legislature in this regard, however, was not decided in that case. The late decisions in this state clearly sustain the power of the legislature to prohibit possession. In the late North Carolina case of State v. Carpenter (1917) 173 N. C. 767, 92 S. E. 373, some doubt is thrown upon the inference of the earlier decisions as to the power of the legislature in prohibiting the possession of intoxicating liquors. In the Carpenter Case, a statute making it unlawful "for any person, firm or corporation at any one time, or in any one package to receive at a point within the state of North Carolina for his or her use or for the use of any person, firm, or corporation, or for any other purpose, any spirituous or vinous liquors or intoxicating bitters in a quantity greater than one quart, or any malt liquors in a quantity greater than five gallons," was sustained as constitutional, in the case of the prosecution of one who admitted that he bought a glass jug containing 1 gallon of whisky, and also 4 quarts in separate bottles, from a man who was driving an automobile in the state, and that it was there delivered to and received by him and put in his buggy, and found in his possession by the officers. The court refers to State v. Williams (N. C.) supra, and says that that case is not in point; that it must be remembered that the defendant in the Carpenter Case received the liquor from an unlicensed dealer, or an unlawful vendor of it. In Glenn v. Southern Exp. Co. (1915) 170 N. C. 286, L.R.A.1918B, 488, 87 S. E. 136, the police power was held to extend to forbidding a citizen to receive for his individual use more than 1 quart of intoxicating liquor within a period of fifteen days. A petition for writ of error to this case was dismissed by the Supreme Court of the United States (1917) 245 U. S. 679, 62 L. ed. 543, 38 Sup. Ct. Rep. 133.

It has been held that possession of more than a stated quantity in certain places cannot be prohibited. A statute making it unlawful "for any person to have or keep in excess of one quart of spirituous, vinous, fermented or malt liquors or any imitation thereof or substitute therefor or in any manner permit any other person to have or keep any spirituous, vinous, fermented or malt liquors, or any imitation thereof or substitute therefor; or any liquors or compounds of any kind or description whatsoever . . . upon, in, or about his place of business, or any place of amusement or recreation, or any public resort, or any club room, whether such liquors be intended for personal use of the person so having and keeping the same or not," was held unconstitutional in Ex parte Wilson (1911) 6 Okla. Crim. Rep. 451, 119 Pac. 596. Followed in Flowers v. State (1913) 8 Okla. Crim. Rep. 502, 129 Pac. 81.

The keeping of liquor in possession does not, according to these authorities, produce or threaten to produce any harm to the public. The police power under which such legislation is ordinarily sought to be sustained does not, therefore, authorize it. Com. v. Campbell (1909) 133 Ky. 50, 24 L.R.A. (N.S.) 172, 117 S. W. 383, 19 Ann. Cas. 159; Com. v. Smith (1915) 163 Ky. 227, L.R.A.1915D, 172, 173 S. W. 340; Barber v. Com. (1918) — Ky. —, 206 S. W. 290; Ex parte Wilson (Okla.) supra. The police power of the Kentucky legislature, with reference to the regulation of intoxicating liquors, is stated by the court of that state to be limited. In Com. v. Campbell (Ky.) supra, the Kentucky court points out that the Constitution of that state limits the power of the legislature with reference to intoxicating liquors, in that it may submit general laws to the people as to whether or not any given district shall prohibit the sale or giving away of intoxicating liquor, and from this provision it is argued that it cannot be "contended with any show of reason that the framers of the Constitution intended to leave the question of the retailing of liquor in a given district to a vote of the majority of the qualified voters in the district, and yet leave it in the power of the legislature, upon its own motion, to prohibit the possession of liquor by

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the citizen." The court further argues that if the legislature cannot prohibit the sale of liquor by retail in any county, town, or district of the state, without a vote of the inhabitants thereof, the taking away of the power from the legislature to regulate the retailing of liquor would have been a vain thing if the legislature possessed the greater power of prohibiting the citizen even from possessing liquor, or using it for his own benefit or comfort. In Barber v. Com. (1918) — Ky. — 206 S. W. 290, supra, the court, in referring to the earlier Kentucky cases, states: "It will be observed that these cases proceed upon the theory that the provisions of our Constitution granting to the legislature specific powers respecting intoxicating liquors are exclusive, and constitute a limitation on the police power of that body." And the court in that case, after referring to decisions in other states in which the legislature is held to have the power to prohibit the possession of intoxicating liquors, states that it does not appear "that their police power is limited by constitutional provisions similar to ours."

In some cases dealing with municipal ordinances, the court has expressed an opinion that the police power does not extend to a prohibition of the possession of intoxicating liquors, irrespective of any intention to traffic therein. Bessemer v. Eidge (1909) 162 Ala. 201, 50 So. 270; Eidge v. Bessemer (1909) 164 Ala. 599, 26 L.R.A.(N.S.) 394, 51 So. 246; Re Luera (1915) 28 Cal. App. 185, 152 Pac. 748; Cortland v. Larson (1916) 273 Ill. 602, L.R.A.1917A, 314, 113 N. E. 51, Ann. Cas. 1916E, 775; Com. v. Campbell (1909) 133 Ky. 50, 24 L.R.A.(N.S.) 172, 117 S. W. 383, 19 Ann. Cas. 159 (municipal ordinance prohibited the bringing in or distribution of intoxicating liquors). Heisembrittle v. Charleston (1842) 2 McMull. L. (S. C.) 233. For example, the Kentucky court of appeals in Com. v. Campbell (Ky.) supra, a case dealing with a municipal ordinance, states: "We are confronted, therefore, with the proposition as to whether or not, in this state, it is competent, under the police power, for any legislative body to prohibit the possession or use of liquor by one for his own necessity or comfort. Broadly stated, the question before us is, whether or not it is competent for the legislature to prohibit a citizen from having in his own possession spirituous liquors for his own use." It is assumed in this case that the municipal council was clothed with all the authority to enforce what is called the police power, which the general assembly possessed.

But in at least one of the jurisdictions represented above, — Alabama, — an opposite view was taken when the question was presented under a statute. See Southern Exp. Co. v. Whittle (1915) 194 Ala. 406, L.R.A. 1916C, 278, 69 So. 652, supra, II. a.

The power of a municipality to prohibit possession of intoxicating liquor for personal use, or irrespective of any intention to traffic therein, is dependent upon the charter power of such municipality. Unless this charter power is very broad, there is no similarity in the question as presented with reference to a municipality, and that relating to the power of the legislature. While some cases dealing with the charter power have been included herein, no attempt has been made to present an exhaustive list thereof. Thus, it has been held that a municipal ordinance making illegal the possession of intoxicating liquor within the city, without any intention of selling therein, is not warranted by authority to declare the selling, giving away, or the keeping on hand for sale of such liquor a nuisance. Sullivan v. Oneida (1871) 61 Ill. 242. It has been held that a municipal corporation has not, under its general power to improve the morals, order, and comfort of its inhabitants, authority to make unlawful the keeping in storage or deposit of intoxicating liquors, in or at any place where any drinks or beverages are kept for sale, although the sale of such liquors is prohibited by state laws. Eidge v. Bessemer (1909) 164 Ala. 599, 26 L.R.A.(N.S.) 394, 51 So. 246. In Bessemer v. Eidge (1909) 162 Ala. 201, 50 So. 270, a municipal ordinance which attempted to

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prohibit the keeping of any intoxicating liquors in any house, public or private, where people resort, for lawful or unlawful purposes, and then provided for the seizure and confiscation of such liquors, as well as for the arrest of persons suspected of violating such ordinance, with or without warrant, is held invalid. Mayfield, J., who rendered the opinion, states that such an ordinance probably exceeded the power of the legislature itself; but this statement is not concurred in by all of the judges who concur in the decision. A municipal corporation cannot, under charter power to license, regulate, and prohibit the selling of intoxicating liquors within the corporate limits, and the further power to regulate the police of the town, prohibit the receipt and possession of intoxicating liquor by club members, for their personal use at the club. Cortland v. Larson (1916) 273 Ill. 602, L.R.A. 1917A, 314, 113 N. E. 51, Ann. Cas. 1916E, 775. The power of a municipality to prohibit the keeping of intoxicating liquor in a club was denied in Wright v. Macon (1908) 5 Ga. App. 750, 64 S. E. 807, where the state had recognized the right of a club to keep such liquors. An ordinance prohibiting the storing and keeping possession within the town of any intoxicating liquors, except as was provided by a law regulating the sale of liquors by dispensaries, was sustained in Easley v. Pegg (1901) 63 S. C. 98, 41 S. E. 18, as against the objection that it was void because inconsistent with and contrary to the Dispensary Act of the state. An ordinance making it unlawful for any person who is "keeper, owner, lessee, manager, inmate, employee, hireling, or watcher of a house of prostitution or assignation (or any house where a prostitute lives), or who is an habitual visitor thereto, or who loafs around such place or places, to keep or have intoxicating liquors in such house in any quantity whatever, or for any purpose whatever, except on a physician's prescription for medicinal purposes," has been held to be beyond the power of a municipality to enact. Shreveport v. Hill (1914) 134 La. 352, 64 So. 137, Ann. Cas. 1916A, 283. It is stated that the state had not made it a crime to have intoxicating liquor in possession, or for personal use, and that, although in the parish in which the municipality was situated it appeared that it had been decided, under a local option statute, to withhold licenses from drinking saloons and to prohibit the sale of intoxicating liquors, this vote did not make and could not have made the possession of intoxicating liquors for every purpose a crime. It is further stated that the ordinance was beyond the terms of any state statute, in that it interfered with personal liberty; that although houses of prostitution may be regulated, and may be closed by the council, yet the property of the keepers may not be confiscated, and their personal liberty interfered with, so long as they and their property are not inimical to the public safety.

In Selma v. Brewer (1908) 9 Cal. App. 70, 98 Pac. 61, a municipal ordinance, which, according to its terms, made the keeping, possessing, or storing of intoxicating liquors unlawful, without reference to the disposition to be made of them by the keeper or possessor, was interpreted by the court as intended only to prevent the storing or possessing of such liquor with a view of engaging in the retail traffic therein. The decision in the case, therefore, presents no authority on the present question.

IV. Possession of interstate shipments.

It was previously held that the possession of interstate shipments of intoxicating liquors is within the protection of the interstate commerce clause of the Federal Constitution. Scott v. Donald (1896) 165 U. S. 58, 41 L. ed. 632, 17 Sup. Ct. Rep. 265; Vance v. W. A. Vandercook Co. (1897) 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674; State v. Holleyman (1898) 55 S. C. 207, 45 L.R.A. 567, 31 S. E. 362, 33 S. E. 366; State v. McGee (1898) 55 S. C. 247, 74 Am. St. Rep. 741, 33 S. E. 353. It has been held that the possession of liquor by an interstate passenger, not in excess of what was reasonably necessary for his personal use and comfort while on the journey, is

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protected as personal baggage under the commerce clause of the Constitution. Howard v. State (1916) — Ala. App. —, 73 So. 559. Since the enactment of the Webb-Kenyon Law and the Reed amendment, interstate shipments of intoxicating liquor are no longer protected by the interstate commerce clause, where intended to be possessed by the consignee in prohibition territory, in violation of law.

W. A. E.

ANDREW D. BARBOUR, Plff. in Err.,
v.
STATE OF GEORGIA.

Georgia Supreme Court — April 10, 1917.

(146 Ga. 667, 92 S. E. 70.)

Intoxicating liquor — impairing property value.

1. Intoxicating liquors being subject to the police power of a state, even when such liquors are acquired legally they are taken with their inherent infirmities, and subject to such legislation as the state may enact under its police power. The legislation, as an incident to the main purpose, may impair the property value of the liquor or destroy it altogether, when such incidental result is necessary to the main purpose and enforcement of the law. The act of the general assembly which forbids the possession of more than a specified amount of intoxicating liquor at one time applies alike to that which was acquired before and after May 1, 1916, and is not unconstitutional for any of the reasons assigned.

[*See note on this question beginning on page* 1098.]

Appeal — grounds for new trial.

2. Grounds of a motion for a new trial, not approved by the trial judge, cannot be considered. The evidence warranted the verdict.

Headnotes by GILBERT, J.

(Fish, Ch. J., and Atkinson, J., dissent in part.)

ERROR to the City Court of Savannah to review a judgment overruling defendant's motions for new trial and in arrest of judgment, convicting him of having in his possession at one time more than 1 gallon of vinous liquor, in violation of the Prohibition Law. *Affirmed.*

Statement by **Gilbert, J.**:

Andrew D. Barbour was convicted in the city court of Savannah on an accusation charging him with a violation of the prohibition law. The accusation contained six counts. The defendant was found guilty on the fourth count. He filed a motion for a new trial, and a motion in arrest of judgment. Both motions were overruled, and he excepted. The fourth count charged him with having in his possession at one time more than 1 gallon of vinous liquor.

Mr. **Robert L. Colding** for plaintiff in error.

Mr. **Walter C. Hartridge** for the State.

Gilbert, J., delivered the opinion of the court:

1. Among the provisions of the prohibition law enacted at the extraordinary session of the general assembly in 1915 (Acts [Ex. Sess.] 1915, p. 90), which became effective on May 1, 1916, was that which forbids any person to have in his possession at any one time more

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than 1 gallon of vinous liquors. It was for a violation of this provision of the law that the plaintiff in error was sentenced. He insists that he possessed the wine prior to May 1st; that, having acquired the wine when it was lawful to do so, and before his property rights were affected by the law, his possession was not a violation of the act; and that to consider the law as applying to liquor in possession before the law became effective would be to give to it a construction repugnant to the Constitution of Georgia (Civ. Code, § 6358), and to the 14th Amendment of the Constitution of the United States. That this contention is unsound we entertain no shadow of a doubt. Intoxicating liquors are peculiarly, beyond all cavil, the subject of police power of the state, and their inherent evil qualities are so well recognized as to form an unquestioned basis for such exercise of power. We will therefore not consume space for the citation of authorities on this point. The exercise of this power by legislatures, as well as the adjudications of the courts, has been progressive toward the complete outlawing of intoxicating liquors. The present nearly harmonious view of the question did not always prevail. There was a time when many things now forbidden by law, because harmful to the public morals, were permitted to flourish without let or hindrance. Lotteries, bucket shops, and numerous other activities, as well as barrooms, were considered legitimate. Few will now be found to defend any of these. The dangerous character of alcoholic liquors is universally recognized by the courts. The fact that it is an article fraught with such dangerous perils to the morals, good order, health, and safety of the people places it upon a different plane from that of other kinds of business. It is well settled that, in legislating in behalf of the public morals, health, and safety, the state, by reason of its police power, may enact laws which incidentally impair property value (Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273), or destroy it altogether (Cureton v. State, 135 Ga. 660, 49 L.R.A. (N.S.) 182, 70 S. E. 332; Southern Exp. Co. v. Whittle, 194 Ala. 406, L.R.A. 1916C, 278, 69 So. 652; Glenn v. Southern Exp. Co. 170 N. C. 286, L.R.A. 1918B, 438, 87 S. E. 136; Preston v. Drew, 33 Me. 558, 54 Am. Dec. 639; Patsone v. Pennsylvania, 232 U. S. 138, 58 L. ed. 539, 34 Sup. Ct. Rep. 281; New York ex rel. Silz v. Hesterberg, 211 U. S. 31, 53 L. ed. 75, 29 Sup. Ct. Rep. 10). It is true that the Constitution declares: "Protection to person and property is the paramount duty of government;" but it should be noted that protection to person comes first, and also that in the very first article of the Bill of Rights it is written: "All government . . . is instituted solely for the good of the whole."

The police power of the states, touching the health, morals, property, peace, good order, and dignity of the people, is essential to the existence and prosperity of the states; and this power has never been delegated to the Federal government, nor restrained by the Constitution of the United States. Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Re Rahrer, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865; United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249.

The impairment of property value or destruction is not the primary object, but is permitted because it is a necessary incident to the main purpose. Intoxicating liquors being subject to the police power of the state, they are, even when lawfully acquired, taken with their inherent infirmities, and subject to such legislation as may thereafter be enacted within the police powers of the state. "The ultimate purpose and end of prohibition is to prevent the use of liquor as a beverage. This ultimate end is approached step by step, and when the preponderant and prevailing

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morality of the nation believes that the public welfare demands the final step, the way will be found to accomplish the end." State v. Phillips, 109 Miss. 22, L.R.A.1915D, 530, 67 So. 651. As a means of preventing the use of liquor as a beverage, the state has the power, it is universally admitted, to prohibit traffic in intoxicating liquors, and this power would be futile unless there was also full power to make it effective. Since the state has the power to prohibit the manufacture and sale, it also has the power, as an incident to the right, to restrain the means by which intoxicating liquors for personal use can be obtained. Clark Distilling Co. v. Western Maryland R. Co. 242 U. S. 311, 320, 61 L. ed. 326, 335, 37 Sup. Ct. Rep. 180. It follows as an irresistible conclusion that likewise the state may constitutionally prohibit the possession of intoxicating liquors, as an incident to the main purpose.

Intoxicating liquor—impairing property value.

The act in question became effective many months after its passage and approval by the governor. Notwithstanding this fact, it is insisted that its provisions do not apply to liquors in possession at the time it became effective. If this were true, the beneficent effects of the legislation would be a negligible quantity. If intoxicating liquors in possession of persons in Georgia at the time were not affected by the law, surely such liquor stored in other states, but owned by citizens of Georgia, would not be affected. To follow this reasoning would lead us to the inevitable result that no liquor in existence prior to May 1, 1916, upon the inhabited globe, would be affected by the legislation, and hence, if found in possession after May 1, 1916, such possession would not be made illegal by the act. It requires no argument to those who are familiar with the ingenuity of persons who desire to traffic in intoxicating liquors, to demonstrate that, under such a construction, the most stringent prohibitory laws conceivable would become a matter of jest. Dealers in alcoholic liquors have never been known to be overnice and delicate in adhering to the strict letter of the law. For the reasons above stated, the state may not only limit the quantity of liquor a person may possess, but it may forbid him to possess any at all, whether acquired before the law became effective, or afterward, this power being a necessary incident to the main purpose of the legislation, and to the enforcement of the law. All provisions of this law are incidental to the main purpose. Ownership and property rights are distinct from the matter of possession. But neither ownership, nor property rights, nor possession, will be permitted to hinder the operation of laws enacted for the public welfare. Man possesses no right under the laws or Constitutions, state or Federal, which is not subservient to the public welfare. The public, through its proper channels, may commandeer a proportion of his property or his income for the support of the government. At his death it may subject to the public use a portion of his estate; and, when necessary for the public defense in times of war, it may conscript such citizens as are required, and expend their very lifeblood that the state may live. Under the police power it may slaughter diseased cattle; it may destroy unwholesome food; it may compel vaccination; it may confine the insane or those afflicted with contagious disease; suppress obscene publications and houses of ill fame (Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499), and require sanitary conditions in the homes and premises of citizens, even against their will. It would be preposterous, then, to deny the power of the state to forbid the possession by its citizens of that which is destructive of the public welfare, or its right to destroy entirely such baneful products, when necessary to protect the morals, the

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health, and the safety of the public. As was said by Chief Justice Shaw in Com. v. Alger, 7 Cush. 53: "All property in this commonwealth . . . is . . . held subject to those general regulations which are necessary to the common good and general welfare."

In Reg. v. Vine, L. R. 10 Q. B. 195, 44 L. J. Mag. Cas. N. S. 60, 31 L. T. N. S. 842, 23 Week. Rep. 649, 13 Cox, C. C. 43, where the question was whether the enactment, that "every person convicted of felony shall forever be disqualified from selling spirits by retail," affected a person convicted of felony before the passage of the act, Cockburn, Ch. J., speaking for the court, said that it did affect him, and rendered his license void. Every member of society impliedly assents that his own individual welfare, his property, his liberty, and his life shall yield to the welfare of the community, and, if necessary, shall be sacrificed to the public good. "Salus populi suprema lex." We hold, therefore, that the law is not retroactive, nor is it repugnant to the Constitution of Georgia, nor to the Constitution of the United States for any of the reasons assigned. Delaney v. Plunkett, 146 Ga. 547, L.R.A. 1917D, 926, 91 S. E. 561, Ann. Cas. 1917E, 685.

2. All other assignments of error have been decided adversely to the contentions of the plaintiff in error, in Delaney v. Plunkett, supra, and in Bunger v. State, 146 Ga. 672, 92 S. E. 72. The evidence authorized the verdict. The cases of Padgett v. Sturgis, 6 Ga. App. 544, 65 S. E. 352, and Fears v. State, 102 Ga. 274, 29 S. E. 463, are not applicable to the facts of this case, since both of these cases were decided prior to any legislation in this state limiting the quantity of intoxicating liquors that one may lawfully possess. The court having declined to approve any of the grounds of the amended motion for a new trial, they cannot be considered. Dickens v. State, 137 Ga. 523, 73 S. E. 826. The evidence warranted the verdict.

Appeal—grounds for new trial.

Judgment affirmed.

All the justices concur, except

Fish, Ch. J., and **Atkinson**, J., dissenting:

For reasons stated in the dissenting opinion in the case of Delaney v. Plunkett, 146 Ga. 547, L.R.A. 1917D, 926, 91 S. E. 561, Ann. Cas. 1917E, 685, so much of § 16 of the act approved November 18, 1915 (Acts 1915 [Ex. Sess.] p. 90) as purports to inhibit the keeping on hand of liquors owned and possessed in this state, which were lawfully so owned and possessed prior to the 1st day of May, 1916, is violative of those provisions of the state and Federal Constitutions, which guarantee the right of private property and immunity from retroactive laws.

This case does not involve the constitutionality of § 20 of the act approved November 17, 1915.

This dissent does not apply to the ruling announced in the second headnote.

Affirmed by the Supreme Court of the United States, April 14, 1919 (U. S. Adv. Ops. 1918–19, p. 393) 249 U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. —.

NOTE.

The power to prohibit the possession of intoxicating liquors, irrespective of any intention to traffic therein, is discussed in the note, ante, 1085. In BARBOUR v. STATE (reported herewith), ante, 1095, a contention against this power to prohibit possession of intoxicating liquor was based upon the fact that the liquor had been acquired before the act went into effect. Notwithstanding this contention, the power of the state to prohibit possession was sustained by the supreme court of Georgia, and this decision was affirmed by the Supreme Court of the United States, upon an appeal (U. S. Adv. Ops. 1918–19, p. 393) 249 U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. —. The

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United States Supreme Court assumes that the liquor was acquired after the enactment of the statute, but before it went into effect, and limits its decision to this state of facts, expressing no opinion as to the power to prohibit the possession of liquor lawfully acquired before the enactment of the statute. The decisions upon this particular phase of the question will be found discussed in subdivision II. of the note to which reference is above made.

CITY OF COVINGTON, Appt.,
v.
SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY.

United States Supreme Court — April 15, 1918.

(246 U. S. 413, 62 L. ed. 802, 38 Sup. Ct. Rep. 376.)

Municipal corporations — grant of franchise in perpetuity.

1. A municipality may grant a perpetual street railway franchise where, by statute, the streets are vested in the city, and the city authorities are given exclusive control over the same and exclusive power to establish and regulate all sidewalks, streets, alleys, lanes, spaces, and commons of the city.

[*See note on this question beginning on page* 1105.]

Street railways — franchise — duration — grant in perpetuity.

2. A municipal ordinance by which certain persons, "their associates, successors, and assigns" (later incorporated with perpetual succession), were granted all the right and authority that the city had the capacity to grant to construct, hold, and operate a street railway upon and along certain named streets, imports a grant in perpetuity despite the provision in a prior ordinance which primarily concerned routes contemplated and afterwards built and operated by another street railway system, that "all contracts made under the provisions of this ordinance shall be for the term and period of twenty-five years."

Same — purchase of rival.

3. A street railway company having a perpetual franchise, which purchased the right of way of a rival street railway system whose franchise had but eight years to run, acquired a perpetual franchise for the purchased lines, where the purchase was made under an ordinance granting a right of way over certain streets, with the right to contract with the rival company for the right of way held by the latter, and to use the streets specified in the contract of that company with the city, subject to the conditions, limitations, and restrictions contained in the ordinances regulating the purchasing company's rights to the streets then occupied by it, on condition that it should remove and give up its perpetual right to maintain certain tracks by which it connected with a bridge.

(Mr. Justice Clarke and Mr. Justice Brandeis dissent.)

APPEAL by defendant from a judgment of the District Court of the United States for the Eastern District of Kentucky enjoining the enforcement of a municipal ordinance providing for the grant of a street railway franchise to the best bidder, upon the ground that a perpetual franchise had already been granted. *Affirmed.*

The facts are stated in the opinion of the court.

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Mr. A. E. Stricklett, for appellant:

The ordinance passed December 15, 1864, and those subsequently passed in relation to street railways, are in pari materia, and should be construed together. The council could not by contract avoid the provisions of a general ordinance previously passed.

Louisville City R. Co. v. Louisville, 8 Bush. 415.

Public grants are to be construed strictly in favor of the public and against the grantee.

Blair v. Chicago, 201 U. S. 400, 50 L. ed. 801, 26 Sup. Ct. Rep. 427; Cleveland Electric R. Co. v. Cleveland, 204 U. S. 129, 51 L. ed. 405, 27 Sup. Ct. Rep. 202.

The council of the city of Covington had no power to grant a right, privilege, or franchise to use its streets for street railway purposes under the general power of exclusive control of the streets, sidewalks, lanes, alleys, market spaces, and other public places, conferred on it by act of the legislature approved March 2, 1850.

Louisville City R. Co. v. Louisville, supra; Bateman v. Covington, 90 Ky. 390, 14 S. W. 361; Ruttle v. Covington, 10 Ky. L. Rep. 766, 10 S. W. 644; Detroit Citizens' Street R. Co. v. Detroit R. Co. 171 U. S. 48, 43 L. ed. 67, 18 Sup. Ct. Rep. 732; Roberts v. Louisville, 92 Ky. 95, 13 L.R.A. 844, 17 S. W. 216; People's Pass. R. Co. v. Memphis City R. Co. 10 Wall. 38, 19 L. ed. 844; Davis v. New York, 14 N. Y. 506, 67 Am. Dec. 186; Milhau v. Sharp, 27 N. Y. 611, 84 Am. Dec. 314; Covington Street R. Co. v. Covington, 9 Bush. 127.

The construction which the highest court of a state has given a statute of the state will be adopted and followed by the Supreme Court of the United States.

Douglass v. Pike County, 101 U. S. 677, 25 L. ed. 968; Burgess v. Seligman, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10; Bucher v. Cheshire R. Co. 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974; Old Colony Trust Co. v. Omaha, 230 U. S. 100, 57 L. ed. 1410, 33 Sup. Ct. Rep. 967; Detroit Citizens' Street R. Co. v. Detroit R. Co. 171 U. S. 48, 43 L. ed. 67, 18 Sup. Ct. Rep. 732.

The power of a municipality to grant an exclusive perpetual franchise must be in express words, or such power must be necessarily implied.

Detroit Citizens' Street R. Co. v. Detroit R. Co. 171 U. S. 48, 43 L. ed. 67, 18 Sup. Ct. Rep. 732; Owensboro v. Cumberland Teleph. & Teleg. Co. 230 U. S. 58, 57 L. ed. 1389, 33 Sup. Ct. Rep. 988.

Messrs. Alfred C. Cassatt, Richard P. Ernst, and Frank W. Cottle, for appellee:

The city had power to make a perpetual grant.

Owensboro v. Cumberland Teleph. & Teleg. Co. 230 U. S. 58, 67, 57 L. ed. 1389, 1394, 33 Sup. Ct. Rep. 988; Detroit Citizens' Street R. Co. v. Detroit, 26 L.R.A. 667, 12 C. C. A. 365, 22 U. S. App. 570, 64 Fed. 628; Atchison Street R. Co. v. Missouri P. R. Co. 31 Kan. 661, 3 Pac. 284; Brown v. Duplessis, 14 La. Ann. 842; Chicago, B. & Q. R. Co. v. Quincy, 136 Ill. 489, 27 N. E. 232; New Castle v. Lake Erie & W. R. Co. 155 Ind. 18, 57 N. E. 516; People v. O'Brien, 111 N. Y. 1, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 672; Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410; Wolfe v. Covington & L. R. Co. 15 B. Mon. 404; Bateman v. Covington, 90 Ky. 390, 14 S. W. 361; American Car & Foundry Co. v. Johnson County, 147 Ky. 69, 143 S. W. 773; Dill. Mun. Corp. § 575.

Where a municipal corporation owning and having the power to control and regulate its streets grants a right of way thereon to a public utility without limiting its duration, such grant is a permanent grant, not by implication, but because that is a recognized method of giving a permanent grant.

Owensboro v. Cumberland Teleph. & Teleg. Co. 230 U. S. 58, 67, 57 L. ed. 1389, 1394, 33 Sup. Ct. Rep. 988; Louisville v. Cumberland Teleph. & Teleg. Co. 224 U. S. 649, 56 L. ed. 934, 32 Sup. Ct. Rep. 572; Grand Trunk Western R. Co. v. South Bend, 227 U. S. 544, 558, 57 L. ed. 633, 641, 44 L.R.A. (N.S.) 405, 33 Sup. Ct. Rep. 303; Old Colony Trust Co. v. Omaha, 230 U. S. 100, 57 L. ed. 1410, 33 Sup. Ct. Rep. 967; Northern Ohio Traction & Light Co. v. Ohio, 245 U. S. 574, 62 L. ed. 481, L.R.A.1918E, 865, 38 Sup. Ct. Rep. 196; Dayton v. South Covington & C. Street R. Co. 177 Ky. 202, L.R.A. 1918B, 476, 197 S. W. 670.

The Abbott grant was not limited by the ordinance of 1864.

Strassheim v. Jerman, 56 Mo. 104.

The ordinance of 1864 is not general.

Covington v. South Covington & C. Street R. Co. 147 Ky. 331, 144 S. W. 17.

The two ordinances are not in pari materia.

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People v. Aichinson, 7 How. Pr. 241; Fulinwider v. Southern P. R. Co. 144 C. C. A. 127, 229 Fed. 717; Hamilton v. Rathbone, 175 U. S. 414, 44 L. ed. 219, 20 Sup. Ct. Rep. 155.

The South Covington Company obtained, under the ordinance of 1882, its own independent grant to the streets named in the contract of August 15, 1865.

Louisville v. Cumberland Teleph. & Teleg. Co. 224 U. S. 664, 56 L. ed. 940, 32 Sup. Ct. Rep. 572; Blair v. Chicago, 201 U. S. 400, 482, 50 L. ed. 801, 835, 26 Sup. Ct. Rep. 427.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill in equity brought by the appellee to restrain the city of Covington from carrying out an ordinance of July 14, 1913, that provides for the grant of a twenty-year franchise for a street railway over certain streets to the best bidder. The plaintiff claims a right by grant and contract over the same streets, which will be interfered with, and sets up Article I. § 10, and the 14th Amendment of the Constitution. The defendant says that the plaintiff's grant has expired, and that if it purports to be perpetual it was beyond the power of the city. These are the two propositions argued. The district court granted the injunction as prayed, and the city appealed.

We will consider first the scope of the ordinances and contract under which the plaintiff makes its claim. On January 21, 1870, Edward F. Abbott, S. J. Redgate, and their associates were incorporated, with perpetual succession, as the Covington & Cincinnati Street Railway Company, with power to construct railways in the city of Covington along such streets as the council might grant the right of way to, and along such roads out of the city as the companies owning the roads might cede the right to use. The company was authorized to purchase and hold such routes and railway tracks as might be deemed necessary for its use, and to connect with and use the tracks of other railways in the vicinity upon equitable terms. Just before their incorporation, on December 13, 1869, an ordinance was passed by the city granting, according to the terms of a contract executed on December 23, 1869, to Abbott and Redgate, "their associates, successors, and assigns," "all the right and authority that [the city had] the capacity to grant, to construct, hold, and operate a street railroad upon and along" the streets named. The only provision for a termination of the rights conveyed was in case of a failure of the grantees to keep their covenants. On December 28, 1874, an ordinance was passed extending the time for completing the work under the Abbott contract, renewing the terms of the same, but somewhat changing the route, and on January 28, 1875, another authorized an extension to a suspension bridge across the Ohio. On May 1, 1875, Abbott and his associates conveyed all their rights under the foregoing ordinances and contract to the corporation that they had formed, and the title of the corporation was recognized by an ordinance of June 24, 1875. On January 25, 1876, Abbott and others were incorporated with perpetual succession as the South Covington & Cincinnati Street Railway Company, the appellee, with substantially the same powers that were granted to the Covington & Cincinnati Company, and on December 20, 1876, the last-named corporation conveyed its right to the appellee. The latter has whatever rights were acquired by Abbott, as was recognized by an ordinance of October 13, 1881.

As there is no hint at any limitation of time in the grant to Abbott, and on the other hand the city grants all the right and authority that it has the capacity to grant, there can be no question that the words, taken by themselves, purport a grant in perpetuity more strongly than those held to have that effect in Owensboro v. Cumberland

Street railways—franchise—duration—grant in perpetuity.

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Teleph. & Teleg. Co. 230 U. S. 58, 57 L. ed. 1389, 33 Sup. Ct. Rep. 988. The fact chiefly relied upon to narrow their operation is found in the terms of "an ordinance prescribing the terms and conditions of street passenger railroads within the city of Covington," passed on December 15, 1864, before the dealings with Abbott. By § 13, "all contracts made under the provisions of this ordinance shall be for the term and period of twenty-five years." It is contended that this, by implication, governs later transactions. But there is little ground for even an argument upon the point. The ordinance is providing for proposals and a contract with the best bidder, concerning routes contemplated by a rival of the Covington & Cincinnati, the Covington Street Railway Company, incorporated on February 9, 1864 (afterwards bought up by the appellee). The contracts referred to in § 13 are primarily, at least, contracts of those who should acquire the franchises offered, such as in fact were made. In no sense is the Abbott contract a contract under that ordinance. It was a contract under the ordinance of 1869, which established its substance and even its form. The ordinance of 1864 did not address itself to the construction or scope of future ordinances, but only of certain contracts, of which Abbott's was not one. We regard the matter as too plain to be pursued into greater detail. This part of our decision covers all the grants to Abbott, including the right to lay tracks to the suspension bridge.

There were extensions of the plaintiff's rights by acts of the legislature of March 13, and April 5, 1878, in general terms that there seems to be no reason for supposing more limited in time than the original grant. See § 3. The only part of this branch of the case needing further discussion concerns the rights acquired by the plaintiff through the purpose of its rival's, the Covington Street Railway's, lines. This company, under the ordinance of 1864 that we have mentioned, got a franchise limited to twenty-five years, but with provisions that there should be a new bid after that time, and that the successful bidder, if other than the Covington Street Railway Company, should purchase its property upon a valuation. It did not lose the value of that property by the ending of its right of use. On June 8, 1882, the plaintiff, already having a general authority by its charter, was authorized by "an ordinance granting the right of way over certain streets . . . to" the plaintiff, to contract with the Covington Street Railway Company for the right of way held by the latter, and to occupy and use the streets specified in the contract of that road with the city, "subject to the conditions, limitations, and restrictions contained in the ordinances regulating its (the plaintiff's) right to the streets now occupied by the said South Covington & Cincinnati Street Railway Company." This grant was on condition that the plaintiff should remove the tracks by which it connected with the suspension bridge under the ordinance of January 28, 1875, and give up its rights to the same, which, as we have said, were rights in fee. It got other access to the bridge over the Covington Street Railway line, but we agree with the district judge that it is not to be supposed that it would give up its perpetual right for a franchise having eight years to run over a less convenient route, so far as this part of its purchase was concerned. We agree also that the language of the ordinance conveys more than a license to purchase what the vendor had. The title and the operative words import a grant, and the reference to the ordinances regulating the plaintiff's right in the streets adopts as the measure these, not the contract with the selling road. The ordinance was followed by the contemplated contract

Same—purchase of rival.

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in July, 1882. Some further grants need no special mention. We are of opinion that the plaintiff's right in this part of its system also is a right in fee.

The question of the power of the city to grant a perpetual franchise needs but few words. By statute, the streets were "vested in the city" and the authorities of the city were given "exclusive control over the same," and in another section the council was given "exclusive power to establish and regulate . . . all sidewalks, streets, alleys, lanes, spaces and commons of the city." Acts 1849–1850, chap. 237, §§ 2, 19, p. 239. No decision of the state court is brought to our attention that calls for any hesitation in following the authority of Owensboro v. Cumberland Teleph. & Teleg. Co. supra, and pronouncing the authority complete. Wolfe v. Covington & L. R. Co. 15 B. Mon. 404. A street railroad is one of the ordinary incidents of a city street, and stands on a different footing from the steam roads habitually run over separate rights of way. See also Act of March 13, 1878, chap. 423, and Act of April 5, 1878, chap. 813, §§ 1, 3.

Municipal corporations—grant of franchise in perpetuity.

Decree affirmed.

Mr. Justice Clarke, dissenting:

I have so recently stated my reasons for not concurring in opinions which seemed to me, by inference and construction, to raise limited into perpetual grants of rights in city streets, that I shall not repeat them here (Owensboro v. Owensboro Waterworks Co. 243 U. S. 166, 174, 61 L. ed. 650, 661, 37 Sup. Ct. Rep. 322; Northern Ohio Traction & Light Co. v. Ohio, 245 U. S. 574, 62 L. ed. 481, L.R.A.1918E, 865, 38 Sup. Ct. Rep. 196), but shall confine myself to a brief statement of the facts and conclusions of law which lead me to dissent from the court's opinion in this case.

The opinion of the court begins with the grant to Abbott et al., in December, 1869; but in my judgment that grant cannot be correctly interpreted without beginning five years earlier, in 1864, with an ordinance passed by the city, which is general in its terms, and is described in the record of council as "an ordinance defining the obligations of any company or individual to whom privilege may be granted to use the streets of the city for street passenger railroad purposes." It is entitled, "An Ordinance Prescribing the Terms and Conditions of Street Passenger Railroads within the City of Covington." This ordinance contained these provisions: "This ordinance shall continue and be in force from and after its passage. All contracts under the provisions of this ordinance shall be for the term and period of twenty-five years." And, so far as the record shows, it has never been repealed.

Pursuant to the terms of this general ordinance, a contract was entered into as of March 9, 1865, with the Covington Street Railway Company, giving it the right to operate a street railway on designated streets, again "for a period of twenty-five years from its date."

More than four years later, on May 13, 1869, Abbott and others made an application to the council for a franchise, and the company holding the prior grant, which was then operating a railway, protested against the making of a grant to Abbott, and warned the city that it claimed the right to operate on all its streets, and that another grant could not lawfully be made.

But at the meeting at which this protest was filed, without any special authority from the legislature, this grant was made to Abbott. It is from the language of this grant that the court derives a perpetual franchise, and it reads:

"Be it ordained by the city council of Covington that all the authority and right that the city of Covington has the capacity to, be and the same is hereby granted to E. F. Abbott [et al.] . . . to construct,

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hold, and operate a street railroad," upon designated streets.

I cannot bring myself to think that this is the language men would use who were intending to grant perpetual rights in city streets, but rather it seems to be the cautious describing of what the councilmen thought a doubtful right under a doubtful remnant of authority, remaining after the grant to the other company, which was threatening litigation if this further grant were made, and that they thought it subject to the limitation of twenty-five years in the general ordinance of 1864. And be it noted that this grant, made without special authority from the legislature, is dated December 13, 1869; that the Covington & Cincinnati Street Railway Company, the predecessor of the appellee, was not chartered for more than a year after the date of this grant to Abbott, from which all the rights of the appellee are claimed to flow; and that it did not acquire the grant until 1875, in which year the first construction work was done under it.

Some twenty years after the grant to Abbott the city of Covington granted, this time to the Cincinnati, Covington, & Rosedale Company, a franchise which was expressly limited to fifty years, and which, recognizing that the general ordinance of December 15, 1864, was still effective, required that the grantee should conform to all the requirements of that ordinance, "except in so far as the same has been repealed."

In the street railroad case of Louisville City R. Co. v. Louisville, 8 Bush, 415, the court of appeals of Kentucky, construing the charter of the city of Louisville, granting jurisdiction over streets, in scope, not less than that granted by the Covington charter, declared: "Under the general legislative power of the municipal government to control and regulate the use of the streets of the city, it could not grant to any person or corporation the right to lay down a railway in a street. . . . The right of the general council to contract with the railway company *grows out of the special acts of the legislature* heretofore quoted."

Whether this statement was necessary to the decision of the case then under consideration or not, in the following year it was paraphrased and adopted in a Covington Street R. Co. Case, 9 Bush, 127, and almost twenty years after that it was again approved in a Covington Case, 90 Ky. 390, 14 S. W. 361.

Thus, during the entire period covered by the grants here involved, it was the law of the state, as its highest court understood and announced it, that the city of Covington did not have, under its charter, power to make a street railway grant, *without special authority so to do from the legislature.*

That this was also the opinion of the legislature of the state and of that part of the bar of the state concerned with the grants here involved is conclusively shown by the fact that in the charter of every one of the three street railway companies concerned herein there is *a special grant of power to the city of Covington* to make the contemplated contract for the use of its streets for street railway purposes.

This obscurely worded grant, thus made to Abbott without special legislative authority, is not helped out by subsequent recognition by the city, for we find the parties, almost from the beginning of its term, dealing with each other constantly at arm's length, the city claiming that the grant was, at most, limited to twenty-five years, and the railway company claiming it to be perpetual.

For instance, as early as 1887, when the right to use electric power was granted, a typical provision was inserted in the ordinance, accepted in writing by the company, "that nothing in this ordinance shall be construed to, nor shall it give to, said railway any further or longer time that it now has to operate its lines."

Again, in 1892, for a reduction of

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fare and other considerations the city agrees "for the period of twenty years after the date of the acceptance of this ordinance" not to offer for sale any of the rights or franchises of the appellee in the said streets; and it was not until after the expiration of this period that the proposition to grant a new franchise was made, which the decision of the court permanently enjoins.

This is sufficient of detail to indicate why I am of opinion that the meager and equivocal grant of 1869 should not be regarded as helped out by the subsequent dealings of the assignees of it with the city.

Under the circumstances thus presented, with limited franchises granted before and after this grant to individuals, but never one unlimited in terms, with the city contending always that this franchise was for twenty-five years only, and with the courts, legislature and bar of the state united in thinking that there was no power in the municipality to make even a limited street railroad grant without special legislative warrant, I cannot bring myself to consent to construe, as the court does, an obscurely worded clause of a single sentence, found in a grant to individuals, of the right to construct an insignificant horse railroad, which the son of the grantee in an affidavit alleges required an expenditure of only $48,000, so as to impose upon the municipality "the unspeakable burden" of a perpetual franchise to operate street railroads in its streets.

Fully realizing the futility, for the present, of dissenting from what seems to me to be an unfortunate extension of the doctrine of the Owensboro Case, 230 U. S. 58, 57 L. ed. 1389, 33 Sup. Ct. Rep. 988, I deem it my duty to record my dissent, with the hope for a return to the sound, but now seemingly neglected, doctrine of Blair v. Chicago, 201 U. S. 400, 463, 50 L. ed. 801, 827, 26 Sup. Ct. Rep. 427, declaring that a corporation which would successfully assert a private right in a public street must come prepared to show that it has been conferred *"in plain terms," "in express terms,"* and that any ambiguity in the terms of the grant must be resolved in favor of the public and against the corporation, *"which can claim nothing which is not clearly given."* The reason given by the court for this rule is, that "grants of this character are usually prepared by those interested in them," and that "it serves to defeat any purpose concealed by the skilful use of terms, to accomplish something not apparent on the face of the act." This is declared to be "sound doctrine which should be vigilantly observed and enforced."

Believing that the application of this wise rule to the decree before us must result in its reversal, I dissent from the opinion of the court.

Mr. Justice **Brandeis** concurs in this dissent.

ANNOTATION.

Grant of perpetual franchise to public service corporation.

I. Introductory, 1105.
II. Grant by state, 1106.
III. Grant by municipality:
a. View that franchise is not perpetual:
1. In general, 1100.
2. Rule in New York, 1119.
b. View that franchise is perpetual:
1. In general, 1121.
2. Rule in Federal courts, 1122.

I. Introductory.

This note discusses the right to grant to a proper public service corporation a perpetual franchise, and the question, which is closely related to that of power because governed largely by considerations of public policy, whether a particular grant will be construed as being in perpetuity.

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The conflicting concepts of public policy with respect to the grant of perpetual franchises, which have been acted on in the various jurisdictions, and the general history of legislation on that subject, are discussed at length in State ex rel. Fullerton v. Des Moines City R. Co. (1913) 159 Iowa, 259, 140 N. W. 437.

II. Grant by state.

The legislature may, either in the act creating a corporation or by a special grant, confer on any person or corporation a franchise to use and occupy the streets, highways, and public places of a city; and, save as restrained by the fundamental law, its powers in this respect are plenary and without limit, and it may, therefore, grant a permanent and perpetual franchise. State ex rel. Fullerton v. Des Moines City R. Co. (1913) 159 Iowa, 259, 140 N. W. 437.

But, since special privileges are to be strictly construed, no franchise which is granted by the state is ever construed to be perpetual, whether it is in the nature of a contract, or otherwise, unless it is so declared in clear terms, or by necessary implication. Birmingham & P. M. Street R. Co. v. Birmingham Street R. Co. (1885) 79 Ala. 465, 58 Am. Rep. 615.

In Mobile v. Louisville & N. R. Co. (1887) 84 Ala. 115, 5 Am. St. Rep. 342, 4 So. 106, there was involved the charter of a railroad company, enacted by the legislature, which expressly authorized the construction of its road across or through any street or highway, the only limitation on the right being that the usefulness and convenience of the street or highway to the public should not be unnecessarily or materially impaired. An amendment to this charter contained the following provision: "That the said company is hereby authorized and empowered to obtain, by grant or otherwise, from any incorporated city or village within the state, that may be situated upon or at the intersection or termini of any of its railroads, any rights, privileges, or franchises that any of said incorporated cities or villages may choose to grant in reference to the construction, maintenance, and management of the railroad of said company, its depots, cars, locomotives, and its business within the limits of such incorporated city or village, as hereinbefore named, is hereby authorized and empowered to grant to said company any such rights, privileges, and franchises as it may deem proper and advisable; and such privileges and franchises, when granted to and accepted by said company from any such incorporated city or village, shall be deemed and taken as rights, privileges, and franchises vested and confirmed in said company, and not liable thereafter to be revoked, changed, injured, or impaired, except with the consent of said company." Under the authority thus conferred in the charter of the company, the city passed an ordinance by which it "granted" to the railroad the right of way through certain streets, including "also the right to lay a single track, with the necessary sidings and turnouts, from the northern boundary of its depot . . . through Commerce street . . . in such manner as said company may deem expedient and necessary for its business and interests." It was held that the privilege thus granted was an irrevocable franchise, and a contract between the state and the corporators which would be protected from impairment by legislative action, by virtue of both the Federal and state constitutional provisions, prohibiting the passage of any law by which the obligation of existing contracts should be impaired or lessened.

A California statute (Stat. 1901, p. 5, amending Civ. Code 1872, § 516) requires the owner of a toll road, in addition to affixing and keeping up, "at or over each gate, or in some conspicuous place, so as to be conveniently read, a printed list of the rates of toll levied and demanded," as said section formerly read, to show in and by such printed list, "the date when the franchise or privilege under which the right to collect tolls is claimed was granted, and the term of duration of said franchise," and "the date upon which rates of toll were last fixed by the board of supervisors." In People ex rel. Spiers v. Lawley (1911) 17 Cal. App. 331, 119 Pac. 1089, holding

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that the requirements of this amendment were not intended to apply to perpetual franchises, or those as to which no limitation was prescribed as to their term of duration, the court said: "The court found, as we have seen, that the defendants 'did affix and at all times kept up, at or near the said tollgate on said toll road, a list showing the rates of toll last theretofore duly affixed and determined by the said board of supervisors,' etc.; but that they failed to show in said printed list the date when the franchise was granted, or the term of duration of said franchise, and concluded, as a matter of law, that the defendants did not comply with the provisions of the section named. The obvious object of the requirements of § 516 of the Civil Code is to prevent the public from being fraudulently imposed upon or deceived by persons claiming the right, without authority, to collect tolls, or, having such authority, claiming the right to collect tolls in excess of the rates established by the board of supervisors. The importance in all cases of the provision as to the posting of the rates of toll fixed by the authorities is plainly apparent; but, with respect to the posting of a notice showing the date when the franchise was granted and the term of its duration, is important only in those cases where the term of duration of the franchise is limited to a specified number of years. In a case like the present, where the franchise is granted to exist perpetually, the public could not be imposed upon or deceived by the mere failure to publish, as required by the statute, the date the franchise was granted, or the time during which it is to run. I am, therefore, of the opinion that the legislature did not intend that those provisions which have been added since the granting of the franchise in question should apply to such franchises as were granted by the state itself, to exist for an indefinite period, prior to the enactment of the amendment; but were inspired solely by the policy, since adopted, of limiting the life of all franchises to a definite number of years. In any event, the vital requirements of the section, so far as this franchise is concerned, having been observed by the defendants, it would certainly be a gross injustice to declare the franchise forfeited for the reason suggested, and particularly would this be true, in view of the fact that no possible injury can result to the public from the omission to comply with the requirements referred to."

In People ex rel. Deneen v. Economy Light & P. Co. (1909) 241 Ill. 290, 89 N. E. 760, it appeared that the state board of canal commissioners was authorized by statute (Act March 27, 1874; Hurd's Rev. Stat. 1908, chap. 19, pp. 220 et seq.) to lease the canal lands owned by the state for a period not exceeding twenty years. By a flowage contract, the commissioners granted certain riparian rights to the grantee, including the right to overflow certain canal land, and it was made the duty of the latter to raise the towpath of the canal, between two points, to any height necessary to prevent overflow, "and to perpetually thereafter maintain the same in good condition." The absence of any specified limit to the duration of the contract, and the agreement perpetually to maintain the path or bank of the canal in repair, formed the basis of a contention that the contract was, in effect, a sale of the interest in the lands to be flooded. However, the court said: "Appellant contends that this flowage contract was a perpetual license to flow certain lands belonging to the state, and is void because a perpetual license is, in effect, a sale of an interest in the land, and, regarding the contract as a sale, it cannot be upheld, for the reason that the statute in respect to sales was not complied with. There is no language in the contract showing that the parties to it intended it as a sale of any interest in the lands described therein. To give it the effect of a sale would be obviously against the intention of the parties to the contract. Appellant contends that the contract is a sale because of the use of the word 'perpetually,' in connection with the duty of Griswold to keep the towpath bank in repair. If this contract had, by its terms, granted the rights

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and privileges therein mentioned for a term of twenty years, it would clearly be within the powers of the commissioners, which are enumerated under division 'c' of class 1, which are granted by the 5th clause of § 8 of the statute, unless the flowage contract should be held to be a lease of 'water power and lands and lots connected therewith.' If it is possible to do so, such a construction of the contract should be given as makes the contract valid, rather than one which destroys it. No time having been stated in the contract, it must be inferred that it was made with reference to the statute, and the contract should be read in the light of the statute under which the commissioners were acting. It is a well-established rule that, where one attempts to grant a greater estate than he has, the conveyance will be effective to pass what he has, although the grant may be inoperative as to the larger estate. Disregarding the word 'perpetually,' it could not reasonably be contended that the lease extended longer than the term authorized by the statute. It will be noted that the word 'perpetually' is not used to define the duration of the rights granted to Griswold, but it occurs in a clause defining the obligations assumed by Griswold. But in our opinion the word 'perpetually,' as used in this contract, should not be construed as meaning 'forever.' . . . Reading the statute, which authorized the canal commissioners to enter into this contract for a term of twenty years, in connection with the language of the instrument, and construing the word 'perpetually' in view of the statute and the context of the contract, we think it means that the rights granted to Griswold are for twenty years, and that his obligation to maintain the towpath bank in repair is coterminous with the rights granted to him. That this flowage contract was not understood by the parties thereto as conveying a perpetual right to Griswold to flow the property of the state therein described is shown by the fact that on January 6, 1905, the canal commissioners sold and conveyed to Griswold the parcel of land known as the 16-acre tract. This 16-acre tract is embraced in the flowage contract. If by such flowage contract Griswold obtained the right to flow said 16-acre tract in perpetuity, then there would have been no reason for his paying $500 additional for a deed to said tract. This transaction shows that the parties themselves did not regard the flowage contract as a sale of an interest in the land itself."

But while the general rule is that a franchise for a toll road should be strictly construed, it is only in a very clear case that a court is justified in declaring, as the result of a mere process of construction, that such a franchise has ceased to exist. People ex rel. Spiers v. Lawley (Cal.) supra. In that case, it appeared that no limit was fixed by the legislature in its grant of a franchise to a named person, "and such persons as he may associate with him," on the time during which the franchise should run. It was held that the franchise was perpetual, and that the conclusion of the lower court, that it ceased to exist synchronously with the death of the grantee named, was erroneous.

In Virginia Canon Toll Road Co. v. People (1896) 22 Colo. 429, 37 L.R.A. 711, 45 Pac. 398, it appeared that a toll-road company was granted a franchise to construct a toll road and collect the tolls, the term of the existence of the company to be for twenty years from the date of its incorporation. In holding that the franchise remained the property of the company only until the expiration of its charter, and, after that, was the property neither of the corporation nor of its stockholders, but reverted to the state, the court said: "It is no answer to this proposition to say that the corporation is deprived of that which is valuable, for the corporation is deprived only of that which, by implication, it agreed to relinquish upon the termination of its corporate existence. If the rule were otherwise, the result would be that a toll-road company which, under our statute, is limited to twenty years, might indefinitely prolong its existence and perpetuate its franchises, contrary to the express provision of § 11, art. 2, of our Bill of Rights, which prohibits the irrevoca-

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ble grant of franchises by the general assembly; for, just before the termination of its corporate existence, its stockholders could (as was attempted to be done here) form a new corporation, to which the property and franchise of the old one would be transferred, and the business continued; and, when this second corporation was about to expire, a third one could, in like manner, be formed, and so on for all time; and thus, indirectly, the legislative will could be thwarted, and the Constitution with impunity evaded, and the perpetuation of franchises be accomplished, and a monopoly established, contrary to the letter and spirit of our law."

In Snell v. Chicago (1890) 133 Ill. 413, 8 L.R.A. 858, 24 N. E. 532, writ of error dismissed in (1894) 152 U. S. 191, 38 L. ed. 408, 14 Sup. Ct. Rep. 489, it appeared that a toll-road company's charter provided that it should have perpetual succession. By the same act it received the right to construct and maintain a toll road, and to collect tolls. A later act authorized the president of the company, by the direction of a majority of the stockholders, to sell the franchise, and thus dissolve the company. A sale having been made, it was held that the dissolution of the corporation did away with the right of perpetual succession which attached to the corporate body, and that, by neglecting to organize a corporation with the privilege of perpetual succession, the purchaser failed to preserve the element of perpetuity. It was further held that since the right to collect tolls and maintain tollhouses did not pass to the heirs of the purchaser, inasmuch as the legislature had not so specified, there was no continuation of the perpetuity to be implied from the existence of that right.

In North Michigan Water Co. v. Escanaba (1917) — Mich. —, 165 N. W. 847, it appeared that, at the time of the granting of the franchise to and the incorporation of the plaintiff water company's predecessor in title, the state Constitution provided that no corporation, except for municipal purposes, or for the construction of railroads, plank roads, and canals, should be created for a longer time than thirty years (Const. 1850, art. 15, § 10). A subsequent statute permitted a renewal of the charter of a water company for an additional period of thirty years, but provided that nothing contained therein should be "construed as extending any franchise granted by any municipality for a period of years longer than the original grant." It was held that the rights of the original company to conduct waterworks were not perpetual, but expired with its charter, which fixed the duration of the franchise at thirty years; and that the rights of the plaintiff company were no greater than those of the original company.

In Davis v. Police Jury (1846) 1 La. Ann. 288, it appeared that a Spanish governor of the province of Louisiana granted a privilege of maintaining a ferry, without specifying its duration. It was held that, whatever might be the power of the state to limit the duration of such grants, as there had been no legislative enactment fixing the time beyond which they would cease to have effect, the grant must endure so long as the state abstained from interfering.

It has been said that under a New York statute (Transportation Corporations Law, § 61; McKinney's Consol. Laws, bk. 62, p. 30), providing in substance that, if a corporation is incorporated for the purpose of supplying gas for light in the city, town, or village where it is located, it must first obtain the consent of the municipal authorities thereof, this consent operates to create a franchise, by which is vested in the corporation receiving it a "perpetual and indefeasible interest in the land constituting the streets of a municipality." People ex rel. Woodhaven Gaslight Co. v. Deehan (1897) 153 N. Y. 528, 47 N. E. 787, reversing (1896) 11 App. Div. 175, 42 N. Y. Supp. 1071. See, to the same effect, Ghee v. Northern Union Gas Co. (1899) 158 N. Y. 510, 53 N. E. 692, reversing (1898) 34 App. Div. 551, 56 N. Y. Supp. 450. It is true that the franchise comes from the state; but the act of the local authorities, who represent the state by its permission and for that purpose, constitutes the act on which the law operates to create

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the franchise. The legal effect of the consent is the same as if the local authorities, in form, granted the franchise and the interest in the land. Ghee v. Northern Union Gas Co. (N. Y.) supra. In People ex rel. Woodhaven Gaslight Co. v. Deehan (N. Y.) supra, in holding that this consent extended to new streets opened and old ones extended from time to time, the court said: "The rule that public grants are to be construed strictly against the grantee means simply that nothing shall pass by implication, except it be necessary to carry into effect the obvious intent of the grant. But the obvious intention of the parties, when expressed in plain language, cannot be ignored in a public any more than in a private grant. A construction that would lead to false consequences or unjust or inconvenient results, not contemplated or intended, should be avoided in a grant as well as in a statute. It is well known that business enterprises, such as the relator is engaged in, are based upon calculations of future growth and expansion. A franchise for supplying gas not only confers a privilege, but imposes an obligation upon the corporation to serve the public in a reasonable way. The relator is bound to supply gas to the people of the town upon certain conditions and under certain circumstances, and it would be most unjust to give such a construction to the consent as to disable it from performing its obligations. It cannot reasonably be contended that the relator is obliged to apply for a new grant whenever a new street is opened or an old one extended, as would be the case if the consent applied only to the situation existing when made. When the right to use the streets has been once granted, in general terms, to a corporation engaged in supplying gas for public and private use, such grant necessarily contemplates that new streets are to be opened and old ones extended from time to time, and so the privilege may be exercised in the new streets as well as in the old. Such a grant is generally in perpetuity or during the existence of the corporation, or at least for a long period of time, and should be given effect according to its nature, purpose, and duration."

In New York v. New York Mut. Gaslight Co. (1909) 135 App. Div. 260, 120 N. Y. Supp. 776, it was held that a statute (Laws 1866, chap. 651, p. 1406), incorporating the defendant gas corporation by a special charter, gave it a perpetual, full, and complete franchise to use the streets, and no secondary franchise from the city by the consent of the legislative body was required to make it effective. To the same effect, see New York v. New York Mut. Gaslight Co. (1912) 207 N. Y. 647, 100 N. E. 427, affirming (1910) 140 App. Div. 911, 125 N. Y. Supp. 1115.

In Wisconsin, the Public Utilities Law (Laws 1907, chap. 499) provides for indeterminate franchises, and allows public service corporations operating under previous franchises to surrender the same, and receive in lieu thereof an indeterminate permit as provided by the act. In Calumet Service Co. v. Chilton (1912) 148 Wis. 334, 135 N. W. 131, it was held that a corporation holding a franchise limited to a term of years might surrender it, and obtain a permit unlimited in time, and subject only to the conditions prescribed by the Public Utilities Law.

III. Grant by municipality.

a. View that franchise is not perpetual.

1. In general.

A legislature may also give to a city or other municipality the right to grant franchises, and may limit the terms of the grant; and the city, in granting a franchise thereunder for the use of its streets and highways, has such powers, and such only, as are expressly given, or arise by necessary implication from those granted. If the act granting this power is unlimited as to time or conditions, it is generally held on grounds of public policy that, while a municipality may fix the duration of the franchise at any reasonable length of time, and the courts will not too narrowly scrutinize the franchise in this respect, it cannot grant a perpetual and permanent franchise. Birmingham & P. Street R. Co.

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v. Birmingham Street R. Co. (1885) 79 Ala. 465, 58 Am. Rep. 615; State ex rel. Fullerton v. Des Moines City R. Co. (1913) 159 Iowa, 259, 140 N. W. 437; Joseph v. Joseph Waterworks Co. (1910) 57 Or. 586, 111 Pac. 864, rehearing denied in (1910) 57 Or. 592, 112 Pac. 1083.

"Grants or franchises in perpetuity, or for unreasonably long periods of time, are generally regarded as against public policy, and, if ever valid, the authority therefor must be found in the Constitution or statutes of the state." Cedar Rapids Water Co. v. Cedar Rapids (1902) 118 Iowa, 234, 91 N. W. 1081.

So, while the decisions are not in accord, it is held by a majority of the cases on the subject that a franchise or grant, granted by a municipality without limit as to its duration, will not be construed to be one in perpetuity. Birmingham & P. Street R. Co. v. Birmingham Street R. Co. (1885) 79 Ala. 465, 58 Am. Rep. 615; Chicago Terminal Transfer R. Co. v. Chicago (1903) 203 Ill. 576, 68 N. E. 99; People ex rel. Chicago v. Chicago Teleph. Co. (1906) 220 Ill. 238, 77 N. E. 245; People ex rel. Shallberg v. Central U. Teleph. Co. (1908) 232 Ill. 260, 83 N. E. 829; Venner v. Chicago City R. Co. (1908) 236 Ill. 349, 86 N. E. 266; People ex rel. Deneen v. Economy Light & P. Co. (1909) 241 Ill. 290, 89 N. E. 760; People ex rel. Pearce v. Commercial Teleph. & Teleg. Co. (1917) 277 Ill. 265, L.R.A.1917D, 704, 115 N. E. 379; Rock Island v. Central U. Teleph. Co. (1907) 132 Ill. App. 248; State ex rel. Fullerton v. Des Moines City R. Co. (1885) 159 Iowa, 259, 140 N. W. 437; Westminster Water Co. v. Westminster (1904) 98 Md. 551, 64 L.R.A. 630, 103 Am. St. Rep. 424, 56 Atl. 990; Wyandotte Electric Light Co. v. Wyandotte (1900) 124 Mich. 43, 82 N. W. 821; State v. Atlantic & N. C. R. Co. (1906) 141 N. C. 736, 53 S. E. 290; Little Miami R. Co. v. Greene County (1877) 31 Ohio St. 338; Lake Shore & M. S. R. Co. v. Elyria (1904) 69 Ohio St. 414, 69 N. E. 738; East Ohio Gas Co. v. Akron (1909) 81 Ohio St. 33, 26 L.R.A.(N.S.) 92, 90 N. E. 40, 18 Ann. Cas. 332; Joseph v. Joseph Waterworks Co. (1910) 57 Or. 586, 111 Pac. 864, rehearing denied in (1910) 57 Or. 592, 112 Pac. 1083; Houston v. Houston City Street R. Co. (1892) 83 Tex. 548, 29 Am. St. Rep. 679, 19 S. W. 17; Dubuc v. Chicoutimi (1909) Rap. Jud. Quebec 37 C. S. 281.

Assuming that the power to regulate and control the running of street cars exists as an incidental police power, it is unquestionably true that such a power confers no right on the city authorities to grant to any person or corporation a privilege exclusive in its character, and without limit as to duration. Birmingham & P. Street R. Co. v. Birmingham Street R. Co. (1885) 79 Ala. 465, 58 Am. Rep. 615, wherein it was held that an ordinance in the nature of a contract, granting the exclusive privilege in perpetuity to construct and operate a street railway over and through certain streets and avenues of a city, is void, where the city was given no distinct power in its charter, express or implied, to grant such a franchise. Compare, however, Mobile v. Louisville & N. R. Co. (1887) 84 Ala. 115, 5 Am. St. Rep. 342, 4 So. 106, wherein it appeared that the charter of a railroad company, enacted by the legislature, expressly authorized the construction of its road across or through any street or highway, the only limitation on the right being that the usefulness and convenience of such street or highway to the public should not be unnecessarily or materially impaired. An amendment to this charter, contained the following provision: "That the said company is hereby authorized and empowered to obtain, by grant or otherwise, from any incorporated city or village within the state, that may be situated upon or at the intersection or termini of any of its railroads, any rights, privileges, or franchises that any of said incorporated cities or villages may choose to grant in reference to the construction, maintenance, and management of the railroad of said company, its depots, cars, locomotives, and its business within the limits of such incorporated city or village, as hereinbefore named, is hereby authorized and empowered to grant to said company any such rights, privileges, and franchises as it may deem

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proper and advisable, and such privileges and franchises, when granted to and accepted by said company from any such incorporated city or village, shall be deemed and taken as rights, privileges, and franchises vested and confirmed in said company, and not liable thereafter to be revoked, changed, injured, or impaired, except with the consent of said company." Under the authority thus conferred in the charter of the company, giving it a naked right of transit, the city passed an ordinance, by which it "granted" to the railroad the right of way through certain streets, including "also the right to lay a single track, with the necessary sidings and turnouts, from the northern boundary of its depot . . . through Commerce street . . . in such manner as said company may deem expedient and necessary for its business and interests." The court held that the railroad company was possessed of an irrevocable franchise, conferred by the ordinance, giving it the right to load and unload freight at its sidings, constructed on the street named, subject to the limitation only that the use of the street by the public should not be unnecessarily or materially impaired, this right having been granted before the constitutional prohibition of irrevocable grants of special privileges went into effect.

In Chicago Terminal Transfer R. Co. v. Chicago (1903) 203 Ill. 576, 68 N. E. 99, there was involved an ordinance which expressly granted to a railroad company rights additional to those granted by a prior ordinance, but failed to provide anything in regard to the time limited in the old ordinance, which contained an express provision that the rights granted should extend to a specified date, "at which time they shall cease, unless the same are further extended." The court denied the contention of the railroad company that, having general railroad powers, by laying tracks in a street under authority from the municipality to operate a suburban passenger railway, it acquired a perpetual easement in the street.

It has been held that an Iowa statute (Code 1873, § 464), giving a city council the "power to authorize or forbid the location and laying down of tracks for railways and street railways," conferred no power to grant a street railway company a perpetual franchise, or a franchise in perpetuity, and that as the municipality could not do indirectly what it was forbidden to do directly, the railway company's evidence as to practical construction or estoppel would not aid in its claim to a perpetual franchise. State ex rel. Fullerton v. Des Moines City R. Co. (1885) 159 Iowa, 259, 140 N. W. 437.

In Houston v. Houston City Street R. Co. (1892) 83 Tex. 548, 29 Am. St. Rep. 679, 19 S. W. 17, there was involved the following provision of a city charter: "The city council shall have the exclusive control and regulation of all streets, alleys, public grounds, and highways within the corporate limits of the city, and to direct and control the laying and construction of railway tracks, turnouts, and switches, and to require that they be constructed and laid so as to interfere as little as possible with the ordinary travel and use of the streets; to control and regulate everything concerning street railways," etc. It was held that, under this provision, it was not within the power of the city council to create a perpetuity by granting a street railway a franchise, unlimited in duration, to use the city streets. Compare Texarkana Gas & E. Co. v. Texarkana (1909) 58 Tex. Civ. App. 109, 123 S. W. 213, wherein it was held that the state, as trustee for its citizens, is the ultimate holder of a paramount authority to govern and regulate the use and occupancy of the public highways, and that municipal authorities succeed to this authority by virtue of the grants contained in their charters, so that, when thus empowered, cities have the authority to grant to private persons the privilege of permanently occupying and using portions of their highways for the purpose of carrying on a business or enterprise, furnishing some public service.

The first section of the ordinance involved in Joseph v. Joseph Waterworks Co. (1910) 57 Or. 586, 111 Pac.

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864, rehearing denied in (1910) 57 Or. 592, 112 Pac. 1083, granted to a waterworks company an exclusive right to lay its mains and service pipes in the streets and alleys of the town. The fourth section provided that the common council granted the exclusive right to the company for a term of fifteen years. The court held that, as the town could not grant a perpetual franchise, whatever right or franchise was granted in the first section of the ordinance was limited as to its duration, by the fourth section, to fifteen years, the same as if the latter section had been inserted in the former. Compare Cason v. Stone (1853) 1 Or. 39, wherein a statute, giving the board of county commissioners power to establish a ferry when they deemed one necessary, was held to contemplate that the ferry was to be permanent, and the order granting the right to keep it was held to vest a franchise as durable, at least, as the life of the license, unless sooner revoked.

In State v. Atlantic & N. C. R. Co. (1906) 141 N. C. 736, 53 S. E. 290, the court held that, in the absence of an express power in the charter to make a perpetual grant, a license granted by the street commissioner of a town to a railroad company, to lay a track on and to that extent use the streets, would not be construed into a grant of a permanent easement.

In Westminster Water Co. v. Westminster (1904) 98 Md. 551, 64 L.R.A. 630, 103 Am. St. Rep. 424, 56 Atl. 990, it appeared that under a contract between a city and a water company, which, on its face, purported to run forever, the municipality was obligated to levy each year, in perpetuity, 5 cents on each hundred dollars of the assessed value of the property within the limits of the city, and to pay the proceeds of the levy to the water company, in consideration for the latter's supplying from its works water for public uses. It was held that, there having been no previous legislative sanction, the contract was ultra vires, and, having been made with an idea of perpetual duration, it could not be limited to the term of the life of the corporation. It was also held that, the contract thus being ultra vires, and hence no contract at all, the clause of the Federal Constitution respecting impairment of the obligation of contracts could not be invoked.

In East Ohio Gas Co. v. Akron (1909) 81 Ohio St. 33, 26 L.R.A.(N.S.) 92, 90 N. E. 40, 18 Ann. Cas. 832, wherein it appeared that an ordinance granted to a gas company the right to enter and occupy the streets of the city, but was silent with respect to the time when it should terminate its occupancy and withdraw, the court held that it could not infer from this silence that the gas company had acquired a perpetual franchise in the streets. Compare, however, State v. Columbus R. Co. (1903) 24 Ohio C. C. 609, wherein it appeared that the franchises in question were granted after the passage of the Street Railway Act of 1861, and before the passage of the Act of 1878, limiting to twenty-five years the grant of permission to use a street, and that the ordinances were silent as to time, or provided that they should continue in force "during the term of the charter of said (grantee) company." Referring to the Act of 1861 and a supplementary Act of 1866, the court said: "The contention of counsel for the defendant is that these statutes expressly confer upon municipalities power to grant the right to use the streets and that, the power being unlimited as to the duration of the grant, it is in the discretion of the municipality to grant without limitation, and, if it does, the grant is irrevocable and perpetual. The relator concedes that power to grant is expressly conferred, but contends that, inasmuch as the statute is silent as to time, power to make a perpetual grant is not expressly given, and that the exercise of the power is subject to the limitation that it must be reasonable, and that therefore the municipality may not grant for longer than a reasonable time, and that a grant silent as to time is only for a reasonable time. . . . It is settled by the weight of authority that the construction and operation of a street railway in a street is not a new use of the street, and that therefore municipalities, under their power of general

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control of streets, may permit such use by persons or corporations, having a franchise, to construct and operate such railways, and that such permit is merely a license revocable at the pleasure to council; but that the power to grant an irrevocable right to so use the street in perpetuity, or for a definite term, is a different and distinct kind of power, and does not exist in the municipality unless expressly conferred. . . . It is also settled that a municipality is without power to grant an exclusive right to use the streets unless the power is expressly granted, or necessary to the execution of the powers expressly granted. . . . It is contended that the same reasoning leads to the conclusion that the city of Columbus was without authority to grant a perpetual right to use its streets. The ordinance is silent as to time, and so is the statute. The cases are not in accord. . . . It will be observed that the legislature, by the acts already cited, provided that a street railway company, formed as therein authorized, shall be a body corporate with succession, and that it might mortgage its real and personal property and franchises, including the franchise of being a corporation. In view of these provisions, and of the large expenditures necessary to such use of the streets, and of the fact that such use was comparatively new and the financial success of the venture uncertain, it would be unreasonable to conclude that it was the intention, either of the legislature, or of the city or other agent of the state, to grant merely a license revocable at the pleasure of the city, and the conclusion is irresistible that it was the intention of the grantor to consent to such use of the street, either in perpetuity, or for a reasonable time, or without limit of time; and in either event the result must be the same in this action, for the state has not determined or limited the term, and no attempt has been made to show what would be a reasonable time, and it is not apparent from the agreed facts; and if the grant is not from the state, but from the city, then we are of the opinion that the whole matter was committed to the city, and that it might, in its discretion, grant in perpetuity, and that its grant, being silent as to time, is in perpetuity, it being unreasonable to conclude that it was merely at pleasure."

In Augusta & S. R. Co. v. Augusta (1897) 100 Ga. 701, 28 S. E. 126, it appeared that the plaintiff railroad company was incorporated by an act of the legislature "for the full term of thirty years," no reference to any renewal or extension beyond the thirty years being made. The charter declared that the company was incorporated for the purpose of building and using, with the consent of the city, a horse railroad from a designated point within the limits of the city to a point, or points, outside of it. The city council, both by ordinances and by a special contract in writing, granted to the company, "their successors and assigns, for and during the term of their charter," a right of way through and over the streets of the city. A section of one of the ordinances provided that "the cars and carriages of this company, running on said railways, turnouts, and switches and sidings [viz., those the company had been authorized to construct], shall be entitled to the right of way over their said tracks," and prohibited teams and vehicles from obstructing the free passage of the company's cars. In the special contract between the city and the company, it was stipulated that the city would "forever" keep this section in force. The ordinances and contract referred to were subsequently ratified and confirmed by another act of the legislature, which, among other things, declared that they were "not liable to be repealed by the city council." The court held that the company's charter being for thirty years, and the grants "for and during the term of the charter," the declaration that they were "not liable to be repealed by the city council "meant simply that the latter could not cancel or annul its contracts as made; and the declaration was not intended to prolong their existence. Further, it was said, the use of the word "forever," in that portion of the special contract wherein the city undertook to keep in force an ordinance,

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securing to the company the use of its tracks and prohibiting obstructions to the free passage of its cars, did not necessarily operate to confer on the company a grant in perpetuam of exclusive and valuable privileges, when all the evidence showed that nothing of the sort was ever contemplated or intended.

Under the legislation of Iowa, as construed by the supreme court of that state, railroad companies, at least with the assent of the municipal authorities, have the right to lay down their tracks in the streets of a city, whether they were dedicated under the statute or at common law; that is, whether the fee be in the city or in the adjoining proprietor. The Federal court, while adopting, as a rule of decision on such a question, the exposition of the state statutes by the supreme court of the state, has held that this does not give the railway company, even with the assent of the municipality, the right to erect a permanent and substantial depot building on the street, where the fee is in the abutting lot owners. Barney v. Keokuk (1876) 4 Dill. 593, Fed. Cas. No. 1032, affirmed in (1877) 94 U. S. 324, 24 L. ed. 224.

In Union Inst. for Sav. v. Boston (1916) 224 Mass. 286, 112 N. E. 637, it was held that while a statute (Stat. 1913, chap. 680) authorized the board of street commissioners, as agents of the commonwealth, to grant permits to occupy the public way for the purposes enumerated, and to adopt rules and regulations governing the use of the same, it did not purport to empower the board to surrender its control and supervision of the public highways for an indefinite period of time; the absence therefrom of express authority being equivalent to the denial of the right. Hence, it was held that a permit to erect a post with a clock thereon, which was granted without limit as to time and without reservation to the board of a power to revoke, was not an irrevocable franchise to occupy a portion of the public highway, but merely a license which legalized that form of obstruction on a public highway, which would otherwise have constituted a nuisance.

In Chicago R. I. & P. R. Co. v. People (1906) 222 Ill. 427, 78 N. E. 790, it was held that an ordinance granting to two railroad companies the right to construct and maintain on a public landing place, and use for the purpose of a passenger depot, "a permanent stone and brick building, with necessary and convenient sheds, platforms, and tracks in connection therewith," as the companies, their successors and assigns, should deem necessary, was void, as depriving the public of the use of the landing.

In Lake Shore & M. S. R. Co. v. Elyria (1904) 69 Ohio St. 414, 69 N. E. 738, the court construed a statute (Rev. Stat. § 3283) providing, in part, that "if it be necessary, in the location of any part of a railroad, to occupy any public road, street, alley, way, or ground of any kind, or any part thereof, the municipal or other corporation, or public officers or authorities, owning or having charge thereof, and the company, may agree upon the manner, terms, and conditions upon which the same may be used or occupied; and if the parties be unable to agree thereon, and it be necessary, in the judgment of the directors of such company, to use or occupy such road, street, alley, way, or ground, such company may appropriate so much of the same as may be necessary for the purposes of its road, in the manner and upon the same terms as is provided for the appropriation of the property of individuals. . . ." It was held that the statute did not authorize a city council to grant to a railroad company the exclusive and permanent right to occupy a public street, or part of it, at a crossing or elsewhere. To the same effect, see Cleveland & P. R. Co. v. Cleveland (1910) 33 Ohio C. C. 482.

In Little Miami R. Co. v. Greene County (1877) 31 Ohio St. 338, it was held that power given by a charter of a railroad to construct its road across a public highway, on condition that the same should be restored to its former state, "or in a sufficient manner not to impair its usefulness," did not authorize the company permanently to appropriate any portion of the public highway by obstructions which

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might materially interfere with the public travel.

A contract granting a water or gas company the right to lay pipes and mains in the streets of a borough, with a stipulation that certain specified rates should be charged the borough and the inhabitants thereof, the contract as to the water or gas rates being unlimited by its terms, and hence indeterminate as to time and coextensive with the grant, cannot be enforced indefinitely, but its rates are subject to the supervisory powers of the Public Service Commission. McCullough-Dalzell Crucible Co. v. Philadelphia Co. (1909) 223 Pa. 336, 72 Atl. 633; Turtle Creek v. Pennsylvania Water Co. (1914) 243 Pa. 415, 90 Atl. 199; Bellevue v. Ohio Valley Water Co. (1914) 245 Pa. 114, 91 Atl. 236; Mt. Union v. Mt. Union Water Co. (1917) 256 Pa. 516, P.U.R.1917E, 933, 100 Atl. 968, affirming (1916) 63 Pa. Super. Ct. 337.

In Wellston v. Morgan (1898) 59 Ohio St. 147, 52 N. E. 127, it appeared that a city council had power, under a statute (Bates Rev. Stat. § 2491–1), to contract for the lighting of its streets and other public grounds, for a term not exceeding ten years. It was held that an ordinance whereby the city undertook to give to the company exclusive permission and authority, within the municipal limits, to erect and maintain its poles and wires on the public streets and alleys for the period of ninety-nine years, at a specified rate per month, was ultra vires and invalid.

In Louisiana Western R. Co. v. Crowley (1917) 142 La. 640, 77 So. 486, there was involved a statute (Act No. 79 of 1896, p. 113) providing as follows: "The cities and towns of this state (having a population of less than 25,000 persons) shall have authority to grant to railroads and other corporations the right to use and occupy the streets and alleys therein, and to obstruct same, or part thereof, with buildings necessary to and used by said corporations: Provided that, prior to said grant, a majority of the property taxpayers in said city or town, voting at an election to be called for such purpose, shall approve said proposed grant: Provided further that, in making said grant, the said cities and towns through their councils shall impose such conditions and make such charges as they may deem fit." It was held that, under this statute, a grant by an ordinance of a city council of a perpetual or irrevocable easement, or servitude, for a railroad track on the streets of the city, was ultra vires and void, unless it received the approval of a majority of the property taxpayers voting at an election called and held for that purpose.

In Knight v. Thomas (1909) 35 Utah, 470, 101 Pac. 383, it appeared that a statute (Comp. Laws 1907, § 313X) provides, in part, as follows: "The city council of any city, or board of trustees of any incorporated town, of this state, is authorized to aid and encourage the building of railroads by granting to any railroad company, for depot or other railroad purposes, real property of such city or incorporated town, not necessary for municipal or public purposes, upon such limitations and conditions as said council or board of trustees may prescribe; provided, however, that no such grant shall be made to any railroad company, unless the question of making said grant has been submitted to the qualified electors of the city or town at the next municipal or special election to be called for the purpose by the city council or town board." By other statutes which defined the general powers of a city council, it was provided that such a council should have power "to lay out, establish, open, alter, widen, extend, grade, pave, or otherwise improve streets, alleys, avenues, sidewalks, parks, and public grounds; and to vacate the same" (subd. 8, § 206); and "to permit, regulate, or prohibit the locating, constructing, or laying of tracks of any railroad or tramway in any street, alley, or public place; and to grant franchises to railroad companies, and to union railroad depot companies, to lay, maintain, and operate in any street or part or parts of streets of said cities, or other public places therein, railroad tracks, and union railroad depot connecting and terminal tracks, but such

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permission shall not be for a longer time than one hundred years." Subdivision 32, § 206. It was held thereunder that the granting to a railway company of the exclusive right to occupy and use a street for depot and railroad purposes, for a period of one hundred years, was the granting of an interest in and to the land itself, constituting real property, within the meaning of the section first cited; and hence could not lawfully be made without the submission of the question of the making of the grant to the qualified voters.

It has been said that some of the cases proceed on the theory that, when the grant does not fix the term and is not to "successors or assigns," the presumption obtains that it is for the corporate life of the grantee only; and others on the theory that, no time being fixed, even if the grant is to the grantee and successors, it will be taken as the intent of the parties that it was for the corporate life of the original grantee, subject, however, to the right of the parties to show that some other term, within the power of the municipality to grant, was in the minds of the parties. State ex rel. Fullerton v. Des Moines City R. Co. (1913) 159 Iowa, 259, 140 N. W. 437. One case holds that when a franchise is unlimited as to time it exists either for a reasonable time, or is indeterminate in character. Barre v. Perry (1909) 82 Vt. 301, 73 Atl. 574.

If, however, the grant is to successors or assigns, it does not terminate with the life of the corporation to which it is granted, but may be for a term beyond the corporate life of the original grantee. State ex rel. Fullerton v. Des Moines City R. Co. (Iowa) supra. In that case it appeared that a franchise granted a street railroad company by ordinance provided that the right was given the company, its successors and assigns, to lay its tracks on and along the streets, and "to keep, maintain, use and operate thereon railway cars, in the manner, *and for the time*, and upon the conditions hereinafter mentioned and prescribed." A later section provided that "the right herein granted to said company, to operate said railway, shall be exclusive for the term of thirty (30) years from the time the first mile of said track is laid and cars running thereon, and the said city of Des Moines shall not, until after the expiration of said term, grant to or confer upon any person or corporation any privileges which will impair or destroy the rights and privileges granted to said company." The court said: "Plaintiff contends that by the use of the italicized words in § 1, 'and for the time,' the city manifested an intention that the franchise should be limited as to the time of its duration, and that, as the only other words with reference to duration are fixed in § 10 as thirty years, the proper and only construction of the grant is that it was for thirty years, and that it was an exclusive grant for that period. On the other side, it is argued with just as much confidence that the grant was unlimited as to time, save that for thirty years it was to be exclusive to the company, and that, after the expiration of that period, it should be open to franchises for like purposes to other persons or corporations. It bases this argument, first, on the grammatical construction of the language used, upon certain testimony as to what the parties receiving the grant understood it to be, the practical construction placed upon it by the parties in interest, and upon certain other matters to be hereinafter mentioned. Manifestly, we must strike out the words 'and for the time,' appearing in the first section, or say that, in virtue of the subsequent language of the franchise, the framers made the period thirty years, or either forgot to fix the time of the grant, or intentionally left it unlimited, with the idea in mind that it would be unlimited and perpetual. Either this, or adopt another rule, contended for by the counsel for the railway company, to the effect that the ordinance is ambiguous and subject to several constructions, in which event we should, from oral testimony as to what was intended and as to the practical construction put upon it by the parties thereto, find that the ordinance was intended to be unlimited and perpetual, or indeterminate, or

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that it should be construed to extend for the thirty-year period, and be so interpreted as to last either for the lifetime of the corporation to which granted, or of its successors in interest, or so indefinite as to be indeterminate. This last contention is not relied upon by counsel in their briefs, and it is merely suggested in passing. As already stated, counsel for the street railway are relying upon an estoppel due to the conduct of the city; but this has such close relation to the doctrine of practical construction that we pass it now for further consideration hereafter. At the outset of this part of the discussion, we may say that some of the members of the court are of opinion that there is no ambiguity in the words of this franchise. That, by § 1 of the ordinance, the grant is expressly limited as to time, and that, as the only other mention of time is found in § 10, the grant is, of necessity, limited to the period of thirty years, and that the franchise expired January 1, 1898. . . .

The defendant street railway company claims that the grant was expressly in perpetuity, or at least unlimited as to time, and that, if the latter, it was in perpetuity, and it assumes the middle ground, that it was for the corporate life of the original grantee, only as a matter of safety. It does not contend, however, that as the grant was to the original company, its successors or assigns, it is not limited to the life of the original grantee, but passed in perpetuity to its successors in interest. We are united in the conclusion that the grant was not in perpetuity, and are also of opinion that it was not for the life of the original grantee. It was either exclusive for the limited period of thirty years, or else ambiguous and subject to explanation by parol testimony. If the latter, it could not, as we have seen, be made perpetual, either by court decision, acts of the parties, or by estoppel. As already indicated, some of the members of the court believe it was limited to the period of thirty years, and that it expired January 1, 1898."

So, a grant to a corporation of a franchise to use and occupy the city streets, without any limitation as to duration, will not be held as a grant in perpetuity, but will be limited to the life of the corporation to which it was granted. People ex rel. Chicago v. Chicago Teleph. Co. (1906) 220 Ill. 238, 77 N. E. 245; People ex rel. Shallberg v. Central U. Teleph. Co. (1908) 232 Ill. 260, 83 N. E. 829; Venner v. Chicago City R. Co. (1908) 236 Ill. 349, 86 N. E. 266; People ex rel. Deneen v. Economy Light & P. Co. (1909) 241 Ill. 290, 89 N. E. 760; People ex rel. Pearce v. Commercial Teleph. & Teleg. Co. (1917) 277 Ill. 265, L.R.A.1917D, 704, 115 N. E. 379; Rock Island v. Central U. Teleph. Co. (1907) 132 Ill. App. 248; Wyandotte Electric Light Co. v. Wyandotte (1900) 124 Mich. 43, 82 N. W. 821.

A grant to a corporation aggregate, limited as to the duration of its existence, without words of perpetuity being annexed to the grant, creates an estate for the life of the corporation only. Rock Island v. Central U. Teleph. Co. (1907) 132 Ill. App. 248.

So, it has been held that town or village ordinances granting public service corporations the right to occupy the streets for their business, without any limit as to time, and without words of succession, cannot be construed to be perpetual grants, and, at the most, cannot extend beyond the lives of the corporations granting them, and hence ceased to exist on the annexation of the town or village to a city. People ex rel. Chicago v. Chicago Teleph. Co. (1906) 220 Ill. 238, 77 N. E. 245; Venner v. Chicago City R. Co. (1908) 236 Ill. 349, 86 N. E. 266; State ex rel. Fullerton v. Des Moines City R. Co. (1885) 159 Iowa, 259, 140 N. W. 437.

In People v. Central U. Teleph. Co. (1908) 232 Ill. 260, 83 N. E. 829, it was held that an ordinance granting to a telephone company the right to use the streets for its poles and wires, which was not for any definite time, and which reserved the right to grant to any other company, or person, like permission for the use of the streets, was for the life of the corporation, and limited to that time. It was not an irrevocable grant of special privileges and immunities, in conflict with

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the constitutional provision relating thereto.

2. Rule in New York.

Under the Greater New York Charter (Laws 1897, chap. 378, § 73), providing that "after the approval of this act no franchise or right to use the streets, avenues, parkways or highways of the city shall be granted by the municipal assembly to any person or corporation for a longer period than twenty-five years," no perpetual franchise to use the city streets could be granted after May 4, 1897, the date of its approval, though the main provisions of the act did not go into effect until January 1, 1898. Blaschko v. Wurster (1898) 156 N. Y. 437, 51 N. E. 303, affirming (1897) 23 App. Div. 625, 48 N. Y. Supp. 1101. And since the latter date, of course, no such franchise could be granted. Holmes Electric Protective Co. v. Williams (1918) 181 App. Div. 687, 168 N. Y. Supp. 746. See also People ex rel. Flatbush Gas Co. v. Coler (1907) 54 Misc. 21, 103 N. Y. Supp. 59, affirmed in (1907) 121 App. Div. 898, 105 N. Y. Supp. 1137, which was reversed on other grounds in (1907) 190 N. Y. 268, 83 N. E. 18.

Prior to the enactment of this charter, however, under the rule that the title to the streets in New York city was vested in the city, in trust for the people of the state, the city had authority to convey such title as was necessary for the purpose, to corporations desiring to acquire the same for use as a street railroad. It had authority to limit the estate granted, either as to the extent of its use or the time of its enjoyment, and had the power to grant an interest in its streets for a public use in perpetuity, which should be irrevocable. People v. O'Brien (1888) 111 N. Y. 1, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692. And it was uniformly held that grants containing no limitation, in point of time, to the continuance of the franchise, and no restriction or reservation of the power of revocation on the right conveyed, vested the grantee with an interest in the street in perpetuity, for the purposes of a street railroad. Ibid. See also Davis v. New York (1856) 14 N. Y. 506, 67 Am. Dec. 186, reversing (1854) 3 Duer, 119; Milhau v. Sharp (1863) 27 N. Y. 611, 84 Am. Dec. 314, affirming (1858) 28 Barb. 228, which affirms (1854) 17 Barb. 435; New York v. Second Ave. R. Co. (1865) 32 N. Y. 261; Sixth Ave. R. Co. v. Kerr (1878) 72 N. Y. 330; People ex rel. New York Electric Lines Co. v. Ellison (1906) 51 Misc. 413, 101 N. Y. Supp. 444, affirmed in (1906) 115 App. Div. 254, 101 N. Y. Supp. 55; Rhinehart v. Redfield (1904) 93 App. Div. 410, 87 N. Y. Supp. 789, affirmed in (1904) 179 N. Y. 569, 72 N. E. 1150; Long Island R. Co. v. Sherwood (1912) 136 N. Y. Supp. 752.

In New York C. & H. R. R. Co. v. New York (1911) 202 N. Y. 212, 95 N. E. 638, affirming (1911) 142 App. Div. 578, 127 N. Y. Supp. 513, it appeared that the New York Central & Hudson River Railroad Company came into existence in 1869, by virtue of a consolidation between two pre-existing railroad corporations, the New York Central Railroad Company and the Hudson River Railroad Company, pursuant to the provisions of chapter 917 of the Laws of 1869, entitled, "An Act to Authorize the Consolidation of Certain Railroad Companies." The agreement of consolidation provided that the new corporation should continue for the term of 500 years. This provision appeared to have been authorized by the statute cited, which empowered the directors of the companies proposing to consolidate to enter into a joint agreement for the purpose, "prescribing the terms and conditions thereof." The Act of 1869 also provided that all the provisions of the General Railroad Act of 1850 "shall be applicable to the new corporation so to be formed as aforesaid, so far as the same are now applicable to the railroad companies of this state, which may be consolidated with any other company or companies by virtue of this act." (§ 8.) The General Railroad Act provided that articles of association thereunder should state the number of years during which a railroad company should continue (Laws 1850, chap. 140 § 11), and, this provision having thus been made applicable to a consolidated corporation formed under chapter 917 of the

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Laws of 1869, it authorized the directors of the companies proposing to unite to fix the period of existence of the corporation born of the consolidation. The pre-existing New York Central Railroad Company was itself the offspring of a consolidation pursuant to chapter 76 of the Laws of 1853, under an agreement which fixed its corporate life at 500 years, while the existence of the Hudson River Railroad Company was originally limited to fifty years from May 12, 1846 (Laws 1846, chap. 216), capable, of course, of being extended by the authority of the legislature. The right or franchise to occupy the streets in controversy was conferred on the Hudson River Railroad Company by the act cited, under which it was organized, and it was the contention of the city that the duration of the franchise was limited to the term in which that statute authorized it to carry passengers and property, to wit, fifty years. The court said: "If this fifty years' limitation did apply to the franchise, under a correct construction of chapter 216 of the Laws of 1846, the franchise could not be extended by any action taken by the grantee, either alone or in the process of consolidating with the New York Central Railroad Company; and, so far as any of the opinions below intimate a contrary view, we are unable to agree with them. We are satisfied, however, that the duration of the franchise was not thus limited, but that the limitation applied to the corporate existence of the Hudson River Railroad Company only (which might be extended), and not at all to the location of its tracks in the streets of New York. . . . The assent of the corporation of the city of New York to the location of the tracks of the Hudson River Railroad Company on the streets in controversy was duly given by ordinance approved by the mayor on May 6, 1847, and subsequent ordinances. The assent of the city did not assume to prescribe any limit of time during which such occupation of the streets should continue. As has already been intimated, we think no such limitation of the franchise is to be found in the charter of the Hudson River Railroad Company. A strong reason for regarding the fifty years' limitation as applicable only to the life of the corporation is furnished by the forms of legislation in reference to the organization of railroad companies which prevailed before and at the period when this statute was enacted. Railroad companies were then incorporated by special and not under general laws; and the common practice was, at the beginning of the statute, to prescribe the duration of the life of the corporation, which was usually fifty years. . . . The street franchise is granted in a different section of the statute, quite dissociated from the time limit. The language leaves the duration of the franchise wholly indefinite and undetermined. It was unquestionably in existence, however, and in the lawful enjoyment of the Hudson River Railroad Company when that corporation was merged with the New York Central in 1869. The Consolidation Act of that year provided that upon the consummation of the acts necessary to consolidate the constituent companies 'all and singular the rights, privileges, exemptions and franchises of each of said corporations, parties to the same, and all the property, real, personal and mixed, and all the debts due on whatever account to either of said corporations, . . . shall be taken and deemed to be transferred to and vested in such new corporation, without further act of deed; and all claims, demands, property, rights of way and every other interest shall be as effectually the property of the new corporation as they were of the former corporations, parties to the said agreement and act; and the title to all real estate, taken by deed or otherwise, under the laws of this state, vested in either of such corporations, parties to said agreement and act, shall not be deemed to revert or be in any way impaired by reason of this act, or anything done by virtue thereof, but shall be vested in the new corporation by virtue of such Act of Consolidation.' Laws 1869, chap. 917, § 4. We see no escape from the conclusion that, by means of this enactment and the proceedings thereunder, the legislature transferred to the plaintiff the franchise in the New York city

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streets which it had originally bestowed upon the Hudson River Railroad Company in 1846. That franchise, it must be borne in mind, proceeded from the state and not from the city. At that time, the authority of the legislature over the streets of a municipality was not subject to the constitutional restrictions which now exist. The legislature chose to make the location of the tracks in the streets of New York dependent upon the assent of the municipal corporation, but it was not under any legal obligation to do so; and the fact that it did so gave the city no authority to withdraw or cancel the franchise after it had once been made effective by the city's consent. Assuming the existence of that power in anyone, it belonged and still belongs to the legislature, and not to the corporation of the city of New York. . . . In granting a franchise of this character, indefinite as to its duration, the legislature evidently contemplated that it should be enjoyed by the successor or successors of the immediate grantee, if that grantee should cease to operate the railroad between Albany and New York, either in consequence of ceasing to be a corporation or for any other reason. But, as Judge Earl said in Miner v. New York C. & H. R. R. Co. (1890) 123 N. Y. 242, 249, 25 N. E. 339: 'While the life of the corporation was limited to fifty years, it could not have been expected that it should really cease to exist at the end of that period. While the legislature reserved the right to cut its life short, it also had the power to extend it. It is the experience of mankind that such quasi public corporations never come to an end by mere effluxion of time. A railroad corporation which had, during fifty years, rendered a valuable public service and properly discharged its corporate functions, would, with the passage of years, become more and more useful and more and more a necessity.' In the case at bar the legislature did not, in express terms, extend the life of the corporation upon which the franchise in question was bestowed, but it provided for the continuance of that life by means of its merger into a corporation which should live 500 years."

b. View that franchise is perpetual.

1. In general.

In a few jurisdictions it has been held that a grant or franchise to a public service corporation, in which no time for the expiration of the grant was stated, is a grant in perpetuity. Northern P. R. Co. v. Hirzel (1916) 29 Idaho, 438, 161 Pac. 854; Nebraska Teleph. Co. v. Fremont (1904) 72 Neb. 25, 99 N. W. 811; Seattle v. Columbia & P. S. R. Co. (1893) 6 Wash. 379, 33 Pac. 1048. And see the later Federal cases, cited infra, III. b, 2.

In Seattle v. Columbia & P. S. R. Co. (Wash.) supra, the court held that property rights acquired by a railroad company, under and by virtue of a franchise to use the city streets for its tracks, were perpetual, and that the franchise was not void in consequence thereof. The court said: "There is no sound reason why a municipal corporation may not bind itself in this particular, as well as an individual may. On the contrary, well-recognized principles of justice require that it should be so bound, to the end that property rights may be made stable and certain; and the municipality is sufficiently protected under such circumstances; for should it become necessary to thereafter undo the work, and terminate the rights granted, and to take the property of the corporation acquired in pursuance and by virtue thereof, it may do so under the exercise of the power of eminent domain, upon making compensation; and this is a sufficient protection for the rights of the city, and one which, at the same time, affords protection to the rights of the respondents."

In Northern P. R. Co. v. Hirzel (1916) 29 Idaho, 438, 161 Pac. 854, it was held that under the provisions of an ordinance vacating a street for the use of a railway company, its successors and assigns, the railway company was granted an easement which was irrevocable so long as it, or its assigns, occupied the street for railroad purposes.

In Maine, there is no constitutional provision which forbids a contract between a city and a water company for a supply of water for an unlimited

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period, and it has been held that, the legislature having placed no limit on the length of time for which they might contract, the courts cannot. Belfast v. Belfast Water Co. (1916) 115 Me. 234, L.R.A.1917B, 908, P.U.R. 1917A, 313, 98 Atl. 738.

2. Rule in Federal courts.

Under the later decisions of the Federal courts, a grant by ordinance to a public service corporation, its successors and assigns, of the right to occupy and use the streets and alleys of a city with its poles and wires, or water mains, or tracks, etc., for the necessary conduct of a public business, is a grant of a property right in perpetuity, unless limited in duration by the grant itself, or as a consequence of some limitation imposed by the general law of the state, or by the corporate powers of the city making the grant, or by some prior adjudication by the state courts to the contrary. Louisville v. Cumberland Teleph. & Teleg. Co. (1912) 224 U. S. 649, 56 L. ed. 934, 32 Sup. Ct. Rep. 572; Owensboro v. Cumberland Teleph. & Teleg. Co. (1913) 230 U. S. 58, 57 L. ed. 1389, 33 Sup. Ct. Rep. 988; Old Colony Trust Co. v. Omaha (1913) 230 U. S. 100, 57 L. ed. 1410, 33 Sup. Ct. Rep. 967; Northern Ohio Traction & Light Co. v. Ohio (1918) 245 U. S. 574, 62 L. ed. 481, L.R.A.1918E, 865, 38 Sup. Ct. Rep. 196, reversing (1916) 93 Ohio St. 466, 114 N. E. 53; Ashland Electric Power & Light Co. v. Ashland (1914) 217 Fed. 158; Postal Teleg.-Cable Co. v. Ingraham (1915) 228 Fed. 392. And see the reported case (COVINGTON v. SOUTH COVINGTON & C. STREET R. Co. ante, 1099). See also Boisé Artesian Hot and Cold Water Co. v. Boisé City (1913) 230 U. S. 84, 57 L. ed. 1400, 33 Sup. Ct. Rep. 997.

"If there be authority to make the grant, and it contains no limitation or qualification as to duration, the plainest principles of justice and right demand that it shall not be cut down in the absence of some controlling principle of public policy. This conclusion finds support from a consideration of the public and permanent character of the business such companies conduct, and the large investment which is generally contemplated. If the grant be accepted and the contemplated expenditure made, the right cannot be destroyed by legislative enactment or city ordinance based on legislative power, without violating the prohibitions placed in the Constitution for the protection of property rights." Owensboro v. Cumberland Teleph. & Teleg. Co. (1913) 230 U. S. 58, 57 L. ed. 1389, 33 Sup. Ct. Rep. 988.

It has been said that while the supreme court of Oregon has held that, to enable a municipality in that state to confer a grant in perpetuity on a public service corporation, its authority must be deduced from the Constitution or statutes of the state and specially conferred, the essential difference between that doctrine and the doctrine of the Federal supreme court is, that, by the former, it is deemed that explicit legislative authority is essential to the conferring of a perpetual license, while, by the latter, a general authorization to grant a right or privilege of the kind is considered to carry with it the power to confer a perpetual license, such license partaking of the nature of a contract with the city; and a grant by the city without limitation as to time must be deemed perpetual in its operation. Ashland Electric Power & Light Co. v. Ashland (1914) 217 Fed. 158. In that case, the chief controversy was as to whether it was competent for a city council to confer a perpetual right or authority on the plaintiff to construct and maintain an electric lighting system within the city. Since it appeared that the grant was one to exercise the right generally, without any limitation as to the time of its running, and there was no limitation set on such a grant by the general law, nor was there to be found in the corporate powers of the city existing at the time of the grant any such restriction, the court said that it would seem that, in view of the authorities, the grant was one in perpetuity.

In the reported case (COVINGTON v. SOUTH COVINGTON & C. STREET R. Co.) it is held that an ordinance granting "all the right and authority that [the city had] the capacity to grant, to construct, hold, and operate a street rail-

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road upon and along" the streets named, the only provision for a termination of the rights conveyed being in case of a failure of the grantees to keep their covenants, purported a grant in perpetuity. The court holds that a prior "ordinance, prescribing the terms and conditions of street railroads within" the city, and declaring that all contracts made under its provisions "shall be for the term and period of twenty-five years," did not address itself to the construction or scope of future ordinances, but only of certain contracts, of which the contract in suit was not one.

In Northern Ohio Traction & Light Co. v. Ohio (1918) 245 U. S. 574, 62 L. ed. 481, L.R.A.1918E, 865, 38 Sup. Ct. Rep. 196, reversing (1916) 93 Ohio St. 466, 114 N. E. 53, it was held that a resolution by a board of county commissioners, granting to a named person, or such railroad corporation as he might cause to be incorporated for that purpose, the right to locate, construct, maintain, and operate an electric railroad along a state highway, without specifying any limit of time, granted a perpetual franchise not subject to annulment by a resolution of the board of county commissioners; since it was a valid contract within the constitutional section (art. 1, § 10, 8 Fed. Stat. Anno. 748) prohibiting the impairment of contracts.

In Old Colony Trust Co. v. Omaha (1913) 230 U. S. 100, 57 L. ed. 1410, 33 Sup. Ct. Rep. 967, it appeared that an ordinance, granting to an electric company the right to use and occupy the city in distributing its current, contained a reservation that, whenever the council should declare the necessity of removing the poles and wires from the public streets or alleys, the company should, within sixty days, remove them. It was held that this reservation or qualification did not militate against the theory that the grant was in perpetuity, nor indicate, notwithstanding the state decisions to the contrary, that it was intended to endure only during the corporate existence of the grantee.

In the reported case (COVINGTON v. SOUTH COVINGTON & C. STREET R. Co.) it appeared that the plaintiff street railroad company, having a perpetual franchise, was authorized by "an ordinance granting the right of way over certain streets . . . to" it, to contract with another street railway company for the right of way held by the latter, and to occupy and use the streets specified in the contract of that road with the city, "subject to the conditions, limitations, and restrictions contained in the ordinances regulating its [the plaintiff's] right to the streets now occupied by" it. The latter street railway company's franchise was limited to twenty-five years, and had then eight years to run. It is held that the plaintiff street railway company also acquired a perpetual right to the streets occupied by the other company's lines, since the language of the ordinance conveyed more than a license to purchase what the vendor had.

In Owensboro v. Owensboro Waterworks Co. (1917) 243 U. S. 166, 61 L. ed. 650, 37 Sup. Ct. Rep. 322, it appeared that, by an ordinance, a municipality granted to a waterworks company purchasing the plant of another water company "the franchise and license" to maintain, complete, and operate waterworks in the city, and to use its public highways for that purpose "for and during the existence of the said corporation." The company's articles of association stated that its existence was to terminate at the end of twenty-five years, "subject to such extensions of its term of existence as by law provided." In accordance with the state law, the articles were amended by a provision extending its corporate existence for a period of twenty-five years. In answer to the suggestion that the franchise might be made perpetual by repeated extensions of the company's corporate life, the court held that it was enough to say that it was there concerned with but a single extension, already effected.

In Seaboard Air Line R. Co. v. Raleigh (1914) 219 Fed. 573, it appeared that an ordinance granted the plaintiff's predecessor in title permission to occupy the sidewalk on a named street for the purpose of running a track. In passing on the perpetuity of the right thus granted, the court said:

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"Did the ordinance of 1881, construed in the light of then existing conditions, and the reasons inducing its passage, grant to plaintiff's predecessor in title a right, to be enjoyed in perpetuity, to appropriate to its use, by locating and maintaining a track thereon, to the exclusion of all others, the sidewalk, for any and all purposes connected with the operation of its freight traffic, and, if so, was such grant within the power of the board of commissioners to make? . . . In construing the language of the ordinance of 1881, for the purpose of ascertaining the intention of the parties, the purpose for which the permission to occupy the sidewalk was given should be kept in view. A cotton compress had recently been erected on the Raleigh & Gaston Railroad Company. It is proper to take notice of the fact that, in moving bales of cotton either to or from the compress, the distance and physical conditions are of essential importance in regard to cost and convenience in operating the compress. Again, as is well known, the compress would ordinarily be operated only a portion, not exceeding one third, of the year. The cost of laying a spur or sidetrack for the distance required on the sidewalk was, as compared with its value, small. It is doubtful whether the considerations which induced the commissioners to give to the Raleigh & Gaston Railroad Company permission to occupy by laying its track over the sidewalk, for the purpose of enabling it to successfully operate the compress, would have been sufficient to move them to make a grant of a franchise to do so, for all purposes, in perpetuity. Certainly, the terms used, so appropriate to confer a temporary, revocable license, and so inappropriate to vest, by grant, a perpetual and exclusive use of the sidewalk, are sufficient to raise in the mind a reasonable doubt as to the intention of the parties, which, upon the principle uniformly applied in such cases, should be solved in favor of the public, for whose use the property in the soil was held. . . . If it be conceded that by the ordinance of August 5, 1881, the commissioners undertook to grant to the Raleigh & Gaston Railroad Company, and its successors, the exclusive right, in perpetuity, to occupy and maintain a track for all such purposes as it or they deemed proper in the prosecution of their business as common carriers, over the sidewalk on the eastern side of Salisbury street, the question is presented whether they were vested by the charter of the city, which constituted the grant of legislative authority in that respect, with the power to do so. Conceding that the power granted the commissioners, in regard to the use of the streets, includes the power to 'regulate' such use, . . . the question is yet open whether the power claimed by plaintiff is conferred. . . . While the supreme court of this state [North Carolina] has, in a number of cases, sustained the power of the commissioners, or other governing body of municipalities, to grant to public service corporations the right to place their tracks, poles, wires, pipes, etc., in, under, and along the public streets, no case has been found in which the power has been claimed to grant an exclusive and perpetual use of a street or sidewalk to such corporations. . . . That the occupation of the sidewalk by plaintiff's track excludes all other persons from passing over the sidewalk otherwise than by walking over the track, when not appropriated by plaintiff's freight cars, is conceded. The extent of the claim asserted by plaintiff for all practical purposes vests in it the absolute and exclusive use of the sidewalk. This claim is based upon an ordinance adopted by the commissioners, giving 'permission' to its predecessor in title to occupy the sidewalk, without any limitation in respect to time, and without any valuable consideration to support a contract, or the use of any contractual language. The permission was given to meet a condition and promote a purpose, temporary in character, which has ceased to exist. If plaintiff's contention is sustained, the entire sidewalk, for 420 feet on one of the principal streets of the capital city of the state, in a short distance of the state

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house and other public buildings, extending from Jones to Lane streets, is appropriated to the exclusive use of the plaintiff. The claim is based upon the language of an ordinance adopted thirty years ago, to meet a temporary condition, during which time the city has increased very greatly in population. The claim invites careful consideration, and its successful maintenance demands strong reasons, or controlling authority. Giving to the numerous decided cases and the language used by the courts due weight, in the light of the facts upon which they are based, I am constrained to reach the conclusion that by a fair construction the ordinance of August 5, 1881, interpreted in the light of the condition under which it was used, and the purpose which the parties had in view, does not vest in the plaintiff the property right in the use of the sidewalk for which it contends, and that, if such construction is permissible, the commissioners were not vested by the legislature with power to make such exclusive, perpetual grant of the sidewalks to the Raleigh & Gaston Railroad Company, which prevents the present governing board, in which the power is vested, and upon which the duty is imposed to control and regulate the use of the sidewalk for the benefit of the public, from making and enforcing the ordinance, requiring the plaintiff to remove its track. . . . I am further of the opinion that, in the absence of an express legislative grant, the terms of which are free from doubt or ambiguity, the municipal authorities are not authorized to grant to a public utility corporation a franchise to occupy and appropriate the exclusive use of a street or sidewalk, to be enjoyed in perpetuity. Such power was not granted to the board of commissioners of the city of Raleigh by the charter existing at the time the resolution, or ordinance, giving permission to the Raleigh & Gaston Railroad Company to occupy the sidewalk on Salisbury street, was adopted."

Under the Constitution and statutes of Ohio, as they existed in 1892, county commissioners had power to grant franchises over public roads, to railroads, valid for twenty-five years, if not perpetually. Northern Ohio Traction & Light Co. v. Ohio (1918) 245 U. S. 574, 62 L. ed. 481, L.R.A.1918E, 865, 38 Sup. Ct. Rep. 196, reversing (1916) 93 Ohio St. 466, 114 N. E. 53.

In Louisville v. Cumberland Teleph. & Teleg. Co. (1912) 224 U. S. 649, 56 L. ed. 934, 32 Sup. Ct. Rep. 572, in holding that a charter franchise granted by the legislature to a telephone company, which fixed no limit to its corporate existence, was perpetual, and not revoked by the making of the city whose streets it was using a city of the first class, with greater municipal powers, the court said: "In considering the duration of such a franchise it is necessary to consider that a telephone system cannot be operated without the use of poles, conduits, wires, and fixtures. These structures are permanent in their nature, and require a large investment for their erection and construction. To say that the right to maintain these appliances was only a license, which could be revoked at will, would operate to nullify the charter itself, and thus defeat the state's purpose to secure a telephone system for public use. For, manifestly, no one would have been willing to incur the heavy expense of installing these necessary and costly fixtures, if they were removable at will of the city, and the utility and value of the entire plant be thereby destroyed. Such a construction of the charter cannot be supported, either from a practical or technical standpoint. This grant was not at will, nor for years, nor for the life of the city. Neither was it made terminable upon the happening of a future event, but it was a necessary and integral part of the other franchises conferred upon the company, all of which were perpetual, and none of which could be exercised without this essential right to use the streets. The duration of the public business in which these permanent structures were to be used, the express provision that franchises could be mortgaged and sold, the nature of the grant, and the terms of the charter as a whole,

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compel a holding that the state of Kentucky conferred upon the Ohio Valley Telephone Company the right to use the streets to the extent and for the period necessary to enable the company to perform the perpetual obligation to maintain and conduct a telephone system in the city of Louisville."

In Old Colony Trust Co. v. Omaha (1913) 230 U. S. 100, 57 L. ed. 1410, 33 Sup. Ct. Rep. 967, it was contended that a grant of a franchise by a municipality, to an electric company, of a right of way for the erection and maintenance of its poles and wires through, upon, and over the streets, alleys, and public grounds of the city in distributing its current, could not be held to be in perpetuity, under the section of the Nebraska Constitution (art. 1, § 16) which declares that "no law making any irrevocable grant of special privileges or immunities shall be passed." But the court said: "The contention is answered and shown to be untenable by the decision of the supreme court of the state in Plattsmouth v. Nebraska Teleph. Co. (1908) 80 Neb. 466, 14 L.R.A.(N.S.) 654, 127 Am. St. Rep. 779, 114 N. W. 588, from which we excerpt the following (p. 464): 'The argument upon which it attempts to maintain the invalidity of the statute [ordinance] is as follows: Section 15, art. 3, of our Constitution, prohibits the legislature from passing local or special laws granting to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise whatever; and it is said that the legislature cannot delegate to a municipality a power which it cannot itself exercise. It is claimed that the ordinance in question is an attempt to grant to the defendant a special privilege or franchise, and that this is beyond the power of the municipal authorities. If we should concede (which we do not) that a general law, granting to cities and towns the powers which are usually found in their charters, did not confer upon such municipalities the power to pass and enforce special ordinances suited to their local conditions, still the ordinance in question is not subject to the criticism made upon it. A special privilege in constitutional law is a right, power, franchise, immunity, or privilege granted to or vested in a person, or class of persons, to the exclusion of others, and in derogation of common right. . . . Ordinance No. 91 does not attempt to confer upon the defendant any exclusive right or franchise, and leaves it open for the city, at any time, to extend to other companies or corporations the same privileges awarded to the defendant. The contention, therefore, that ordinance No. '91 is void, and confers no right upon the defendant, cannot be sustained.' "

In the reported case (COVINGTON v. SOUTH COVINGTON & C. STREET R. Co. ante, 1099) the court holds that, since by statute (Ky. Acts 1849–50, chap. 237, art. 1, § 2, p. 239, and art. 2, § 19, p. 247), the streets were "vested in the city," and the authorities of the city were given "exclusive control over the same," and in another section the council was given "exclusive power to establish and regulate . . . all side walks, streets, alleys, lanes, spaces, and commons of the city," the city had power to grant a street railroad corporation a perpetual franchise over certain streets.

In Iowa Teleph. Co. v. Keokuk (1915) P.U.R.1916B, 141, 226 Fed. 82, a distinction was drawn between a franchise which merely grants a right, and one which fixes the conditions on which it shall be exercised. After saying that a perpetual franchise of the latter class would be contrary to public policy, the court continued: "But complainant acquired no such franchise or right. It is helpful all through this case, and especially so in construing the various statutes involved, to bear in mind just what right the complainant did acquire, and what right the estate reserved. The only right acquired was the 'bare right' to the use of the streets and highways. The conditions of such use not being specified, the power to prescribe such conditions was reserved. The legislature in its wisdom, having in mind a perpetual grant, knew that conditions of the state and the communities

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would demand constant change in the manner in which the telegraph and telephone lines should be constructed and maintained, and therefore it retained absolute power to fix the conditions from time to time. Those who constructed telegraph and telephone lines knew that the state reserved this power, and accepted the grant subject thereto. Companies building telegraph and telephone lines having only the right to the bare use of the highways for the construction of their lines, I fail to see where any principle of public policy obtains. Telegraph lines and telephone lines are a necessity. They do not interfere with the legitimate use of highways for all other purposes. They cannot well exist without using the highways, and the only purpose a city might have in excluding a company from a highway or street would be to permit another to have the use of such highway or street; but, to permit the use of a street by another, it is not necessary to exclude the first. The rights are not exclusive; the state or city is not interested in driving out one occupant to permit another to take its place. The only interest the state or city has is to have good service and fair rates, and the service and the rates are under the absolute control of the state. If a city should be empowered to build telephone systems, the 'bare right' of complainant and other companies to use the streets could not interfere with the exercise of such power. The use of a street by one company can be so regulated or controlled that it will not interfere with any other legitimate use, including use for other like purposes. Thus construed, the appeal based upon public policy fails."

The earlier Federal cases adhered firmly and strictly to the rules that no municipal corporation could make a grant of a perpetual franchise or right to use the streets, whether by ordinance in the nature of a contract or otherwise, unless the power to do so had been expressly granted by the legislature, or unless it was so far necessary to the execution of the other powers expressly granted as to make its existence free from doubt; and that any reasonable doubt or ambiguity as to the existence of such a power claimed to have been conferred would be resolved against the public service corporation, and in favor of the public. And under these rules, it was held that statutes or ordinances which were absolute in form, and contained no limitation of the duration of the grant to a public service corporation, its successors or assigns, of the right to the use and occupancy of the streets, did not constitute nor confer a right in perpetuity to such use and occupation. St. Clair County Turnp. Co. v. Illinois (1878) 96 U. S. 63, 24 L. ed. 651; Wabash R. Co. v. Defiance (1897) 167 U. S. 88, 42 L. ed. 87, 17 Sup. Ct. Rep. 748, affirming (1894) 52 Ohio St. 262, 40 N. E. 89; Blair v. Chicago (1906) 201 U. S. 400, 50 L. ed. 801, 26 Sup. Ct. Rep. 427, reversing (1904) 132 Fed. 848; Louisville Trust Co. v. Cincinnati (1896) 22 C. C. A. 334, 47 U. S. App. 36, 76 Fed. 296, reversing (1896) 73 Fed. 716, certiorari denied in (1896) 164 U. S. 707, 41 L. ed. 1183, 17 Sup. Ct. Rep. 995; Cincinnati Inclined Plane R. Co. v. Cincinnati (1894) 52 Ohio St. 609, 44 N. E. 327, affirming (1893) 30 Ohio L. J. 321; Logansport R. Co. v. Logansport (1902) 114 Fed. 688, appeal dismissed in (1904) 192 U. S. 604, 47 L. ed. 584, 24 Sup. Ct. Rep. 851; Boisé City Artesian Hot & Cold Water Co. v. Boisé City (1903) 59 C. C. A. 236, 123 Fed. 232; Omaha Electric Light & P. Co. v. Omaha (1914) 133 C. C. A. 52, 216 Fed. 848, reversing on rehearing (1910) 102 C. C. A. 601, 179 Fed. 455, which affirms (1909) 172 Fed. 494, appeal dismissed in (1913) 230 U. S. 123, 57 L. ed. 1419, 33 Sup. Ct. Rep. 974; Boisé City v. Boisé Artesian Hot & Cold Water Co. (1911) 108 C. C. A. 523, 186 Fed. 705, appeal dismissed in (1913) 230 U. S. 98, 57 L. ed. 1409, 33 Sup. Ct. Rep. 1003; Belt Line R. Co. v. Montgomery (1912) 201 Fed. 411. See also Detroit Citizens' Street R. Co. v. Detroit (1894) 26 L.R.A. 667, 12 C. C. A. 365, 22 U. S. App. 570, 64 Fed. 628, reversing (1893) 56 Fed. 867 (1894) 60 Fed. 161; Mercantile Trust Co. v. Denver (1908) 161 Fed. 769, affirmed in (1912) 120 C. C. A. 100, 201 Fed. 790. Compare

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National Waterworks Co. v. Kansas City (1895) 65 Fed. 691.

"Easements in the public streets . . . given in perpetuity . . . must have for their authority explicit permission, or, if inferred from other powers, it is not enough that the authority is convenient to them, but it must be indispensable to them." Detroit Citizens' Street R. Co. v. Detroit R. Co. (1897) 171 U. S. 48, 43 L. ed. 67, 18 Sup. Ct. Rep. 732, affirming (1896) 110 Mich. 384, 35 L.R.A. 859, 64 Am. St. Rep. 350, 68 N. W. 384.

In St. Anthony Falls Water Power Co. v. St. Paul Water Comrs. (1897) 168 U. S. 349, 42 L. ed. 497, 18 Sup. Ct. Rep. 157, it was held that Minnesota territorial charters (Act of February 26, 1856, chap. 137, p. 215, and Act of February 27, 1856, chap. 145, p. 236), which were grants of power to the respective companies under which they were licensed to build dams into a river for the purpose of utilizing the power and of using the water that flowed down the river, did not constitute contracts, by virtue of which the companies should always, and for all time, be entitled to all the natural flow of the water in the river, so as to prevent the state from providing for the diversion and use of any portion of the waters for public purposes without first compensating them for that use and diversion.

In Des Moines City R. Co. v. Des Moines (1907) 151 Fed. 854, it appeared that a city council passed an ordinance granting a street railway company and its successors and assigns the right to lay tracks in, on, and along certain streets, and "to keep, maintain, use, and operate thereon railway cars in the manner, and for the time, and upon the conditions hereinafter mentioned and prescribed." A later section was as follows: "The right herein granted to said company to operate said railway shall be exclusive for the term of thirty (30) years from the time the first mile of said track is laid and cars running thereon, and the said city of Des Moines shall not, until after the expiration of said term, grant to or confer upon any person or corporation any privileges which will impair or destroy the rights and privileges herein granted to said company." The question involved was whether, on the expiration of the thirty-year period referred to in the ordinance, the rights and franchises of the company expired, or the exclusive and monopoly period only. The city contended that all rights then ended, and passed an ordinance ordering the successor in title to the original grantee to remove its tracks and appurtenances, while the street-car company contended, and the court held, that the exclusive period, only, ended, leaving it with its rights as perpetual, in common with such other companies as might desire, with the consent of the city, to go into business,—a contract the obligation of which the ordinance requiring the removal of the tracks impaired. This decision, however, was impliedly reversed by the holding of the United States Supreme Court, which, in reversing the decree on another ground in (1909) 214 U. S. 179, 53 L. ed. 958, 29 Sup. Ct. Rep. 553, stated that the ordinance requiring the company to remove its tracks was not a law impairing its rights as alleged by it, viz., a right, unlimited as to time, to construct, maintain, and operate an electric street railway in and over the streets, alleys, and bridges of the city.

In National Waterworks Co. v. Kansas City (1895) 65 Fed. 691, it appeared that a waterworks company was granted by ordinance "the right to lay and maintain water mains under or over any stream, and along, upon, and across the streets, alleys, and other public grounds of the city of Kansas City, for the purpose of conveying water to any city in this state or any other state." The court held that the language imported permanence of right, for it was "to lay and maintain," and secured to the company and its assigns a permanent right. It was claimed that the next section of the act of the legislature under which the ordinance was passed imposed a limitation. The section commenced in this way: "No grant or contract provided for in the preceding section shall continue for a longer period

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than twenty years; and any such grant or contract may be terminated at any time after the expiration of ten years from the making of the same, or such less time as may be fixed at the time of making such grant or contract; and the city may acquire title to the waterworks property, and all the rights, privileges, and franchises thereto pertaining in the manner following." Then followed provisions for petition, notice, hearing, appraisement, and other proceedings. The court held that while the first clause in this section, which read, "no grant or contract provided for in the preceding section shall continue for a longer period than twenty years," was broad enough to include not merely grants and contracts for the construction of waterworks and the supplying of the city with water, but also contracts for laying and maintaining water mains for the purpose of conveying water to a city in another state, yet, as connected and construed with the succeeding provisions, the grants and contracts whose duration was limited were those for the construction of waterworks and the laying of pipes to supply the city with water, only.

In Levis v. Newton (1896) 75 Fed. 884, affirmed in (1897) 25 C. C. A. 161, 49 U. S. App. 266, 79 Fed. 715, the court held that, assuming but not deciding that a city council had no authority to grant by ordinance a "permanent and perpetual" franchise for the use of the city streets and alleys by an electric light and power plant, the ordinance was not invalid even if the section purporting to grant a "permanent and perpetual" right to the use of the streets of the city were held to be void. H. D. B.

KENDRICK STATE BANK
v.
GEORGE P. BARNUM et al., Appts.

Idaho Supreme Court—July 3, 1918.

(31 Idaho, 562, 173 Pac. 1144.)

Mortgage — waiver — claim against estate as unsecured.

1. The fact that a mortgagee files his claim against a decedent's estate in probate as an unsecured claim does not, ipso facto, operate as a waiver of his mortgage lien.

[*See note on this question beginning on page* 1132.]

Same — waiver of deficiency judgment.

2. Where a mortgagee presents his claim as an unsecured claim and the administrator inadvertently includes such mortgagee in a pro rata distribution of assets among creditors, and the trial court directs that the amount so paid to the mortgagee be refunded to the administrator, which was done, the mortgagee cannot be deemed to have participated in the general assets of the estate, and his measure of relief in action for foreclosure is limited to the security; all right to a deficiency judgment having been waived.

Headnotes by BUDGE, Ch. J.

APPEAL by defendants from a judgment of the District Court for Latah County in favor of plaintiff in an action brought to foreclose a mortgage. *Corrected and affirmed.*

The facts are stated in the opinion of the court.

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Messrs. **Frank L. Moore** and **A. H. Oversmith**, for appellants:

The filing of the petition of the administrator for an order of sale of the property was the commencement of an action for the purpose of liquidating the notes sued upon.

Gwinn v. Melvin, 9 Idaho, 202, 108 Am. St. Rep. 119, 72 Pac. 961, 2 Ann. Cas. 770.

Plaintiff is precluded from subjecting the property to the payment of its debt through foreclosure.

Visalia Sav. Bank v. Curtis, 135 Cal. 350, 67 Pac. 329.

One who presents a claim against an estate is bound to take notice of the proceedings in such estate.

Chandler v. Probate Ct. 26 Idaho, 173, 141 Pac. 635.

After a sale of mortgaged property through the probate court the security is exhausted, and it cannot be pursued any further.

First Nat. Bank v. Glenn, 10 Idaho, 224, 109 Am. St. Rep. 204, 77 Pac. 623.

Where the mortgagee allows the property to be sold by the administrator, and has presented a secured claim as an unsecured claim, the security is waived.

Re Turner, 128 Cal. 388, 60 Pac. 967.

Messrs. **Eugene A. Cox** and **T. B. West** for respondent.

Budge, Ch. J., delivered the opinion of the court:

On March 1 and 5, 1910, Joseph M. Wild made, executed, and delivered to the Kendrick State Bank, respondent herein, his two promissory notes, aggregating $1,000, secured by a real estate mortgage on lots 2 and 3 of block 4 of the original town site of Kendrick, Latah county, which mortgage was duly filed of record. On May 18, 1911, Wild made, executed, and delivered to George P. Barnum, an appellant herein, his promissory note in the sum of $1,534.40, secured by a mortgage on the same property, which was also duly filed of record. On the 5th day of August, 1911, Wild died intestate, and thereafter Ruth W. Broman, county treasurer and ex officio public administrator, was duly appointed as administratrix with the will annexed of Wild's estate. On the 10th day of September, 1912, the Kendrick State Bank filed with the administratrix its claims against the estate, which were duly allowed. However, it failed, in presenting and filing its claims, to refer to the fact that its notes were secured by the mortgage. On the 27th day of May, 1912, the Farmers' Bank & Trust Company, which then held the Barnum note and mortgage as collateral, filed its claim as a secured claim. In 1914 a foreclosure proceeding was commenced by both mortgagees. At that time, as appears from the record, it was conceded that both mortgages were valid liens, and that the mortgage of the Kendrick State Bank was a prior lien. After the action was commenced, $700 rent was collected by the administratrix. Thereafter a conference was held between the representatives of the holders of the two mortgages herein referred to, at which meeting it was agreed that the $700 be distributed, pro rata, to the creditors, both secured and unsecured; that the foreclosure suit be dismissed; and that a sale be had of the property covered by the mortgages in the probate court, in order that costs and expenses might be avoided and the creditors of the estate be paid their respective claims in full. The $700 was distributed, and the suit was dismissed. On the 2d day of September, 1914, in keeping with the understanding, the administratrix petitioned the probate court for an order of sale. On the 7th day of November, 1914, the sale was held. Barnum, prior to the dismissal of the foreclosure proceedings, had again become the owner of his note and mortgage, and, with the representative of the Farmers' Bank & Trust Company, agreed with the representative of the Kendrick State Bank, that if the $700 were distributed and the foreclosure proceeding dismissed, they would pay off the Kendrick State Bank's mortgage, and, in the event there were no better or higher bids, bid in the property for an amount sufficient to pay off the Barnum mortgage. At the administratrix's sale Barnum

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bid in the property. The sale was subsequently confirmed by the district court on an appeal from the probate court. Thereafter Barnum tendered to the administratrix a receipt and release of his mortgage, and demanded a deed. The administratrix refused to deliver the deed without payment being made by Barnum of the amount bid for the property, and insisted that the deed should contain a proviso that Barnum assume the mortgage of the Kendrick State Bank, which he refused to do. On the 25th day of February, 1915, the respondent commenced this action to foreclose its mortgage. Barnum and the Farmers' Bank & Trust Company filed their separate answers; the administratrix filed her separate answer; Mary Zimmerman and Katherine Laudon, heirs of Joseph M. Wild, entered their general appearance, but failed to either demur or answer, and default was taken against them. The action was dismissed as to W. W. Baker. The cause was tried by the court, and judgment was rendered, and a decree of foreclosure entered in favor of the Kendrick State Bank. This appeal is from the judgment.

While there are several assignments of error, the real contentions of appellant are: First, that, by failing to file its claim as a secured claim, respondent waived its mortgage lien and became an unsecured creditor; second, that there is but one form of action for the enforcement of a private right; that a petition for the sale of property in probate is an action; that therefore, after a sale in probate, no other proceedings can be had in the district court.

Discussing the propositions in the order above stated: Does the fact that respondent filed its claim as an unsecured claim operate as a waiver of its mortgage lien? In the instant case, respondent presented its claim as an unsecured claim, and it was allowed as such. However, it was always treated as a secured claim by the parties interested in the estate, including appellants, who had actual knowledge of the fact that it was a secured claim. The general rule is that a debtor whose claim is secured by a mortgage need not present his claim for allowance in order to preserve his right to subject the property covered by his lien to the satisfaction of his claim; but when he seeks to foreclose his mortgage he must waive all recourse against any other property belonging to the estate. In Bank of Sonoma County v. Charles, 86 Cal. 322, 24 Pac. 1019, a case involving the identical question urged by counsel for appellants, it was contended "that plaintiff, by presenting the note and having it allowed, waived his mortgage and all his rights under it."

The court said: "We do not think that the consequences of plaintiff's carelessness are so ruinous as to utterly preclude it from the benefit of the mortgage lien. Its property therein should not be held to be lost, unless such holding be an inevitable legal conclusion. Plaintiff certainly did not intend to waive or abandon its mortgage. It evidently supposed that the presentation of the note was a presentation of the mortgage also, and it has proceeded on that theory ever since, and it would be unjust and inequitable not to allow plaintiff to correct the error into which it fell while it is not too late to do so, and when no injury will be done to other parties. . . . The fact that the note was presented and allowed, as above stated, presents no great difficulty."

To the same effect are Schuelenburg v. Martin (C. C.) 1 McCrary, 348, 2 Fed. 747; Howard v. J. P. Paulson Co. 41 Utah, 490, 127 Pac. 284.

The same principle has been applied with respect to a vendor's lien (Selna v. Selna, 125 Cal. 357, 73 Am. St. Rep. 47, 58 Pac. 16); and to a judgment lien (Morton v. Adams, 124 Cal. 229, 71 Am. St. Rep. 53, 56 Pac. 1038).

We are satisfied that the fore-

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going cases announce the correct rule, and we therefore hold that the fact that a mortgagee files his claim against a decedent's estate in probate as an unsecured claim does not operate, ipso facto, as a waiver of his mortgage lien.

Mortgage—waiver—claim against estate as unsecured.

Counsel relies on Rev. Codes, § 4020, to support his contention that in this state there is but one form of action for the enforcement of a private right. This section of the statute has no application to the point contended for, but is intended solely to abolish the distinction between actions at law and suits in equity, and to substitute therefor one action, known as a civil action. Rev. Codes, § 4520, prescribes the only method for the recovery of a debt or the enforcement of any right secured by a mortgage upon real estate or personal property, and this was the only action that could be maintained by the respondent in order to satisfy its debt secured by its mortgage. The filing of a claim, secured or unsecured, with the administrator, is not an action within the meaning of the rule contended for, and gives to the claimant no right of action, but leaves the selling of the property and the payment of the debt in the discretion of the administrator, in the manner prescribed by law. Had appellants lived up to their agreement and accepted the deed to the property after the confirmation of the sale, they would have taken the property subject to the mortgage of the Kendrick State Bank, and would have been subjected to the necessity of either paying the mortgage or submitting to foreclosure. No question as to election of remedies is here presented.

The trial court found, and the finding is supported by the evidence, that the distribution to respondent of its portion of the $700, which was distributed pro rata among the creditors, secured and unsecured, was made through inadvertence and under a misapprehension of the facts, and directed that the amount so paid to respondent be repaid to the administratrix, which was done. Respondent, therefore, has not participated in the general assets of the estate, and its relief in this action is limited to its security.

Same—waiver of deficiency judgment.

There appears to have been some discrepancy in the amount of the judgment, occurring through an error in computation. Counsel for respondent admitted upon the argument that this discrepancy amounted to $80, and that the judgment should be reduced by that amount. The trial court should correct its judgment accordingly. For the purpose of this appeal, however, there is nothing in the point available as error; no effort appears to have been made to have the trial court correct the judgment in this respect, nor is there anything to show that the discrepancy was called to the attention of the trial court. The judgment should be corrected in accordance with the foregoing suggestion, and, as thus corrected, is affirmed. Costs awarded to respondent.

Morgan and Rice, JJ., concur.

ANNOTATION.

Filing a claim against decedent's estate as an unsecured claim, as a waiver of a mortgage or other lien.

This note, as indicated in its title, is confined to the question whether the lien has been lost or extinguished, and is not concerned with questions as to the basis or amount of allowance on a claim secured by a lien.

The filing of a claim against a decedent's estate, in probate as an unsecured claim, does not operate, ipso facto, as a waiver on a mortgage lien. Bank of Sonoma County v. Charles (1890) 86 Cal. 322, 24 Pac. 1019; Visa-

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lia Sav. Bank v. Curtis (1902) 135 Cal. 350, 67 Pac. 330; Mathew v. Mathew (1903) 138 Cal. 334, 71 Pac. 344; KENDRICK STATE BANK v. BARNUM (reported herewith) ante, 1129. See also First Nat. Bank v. Glenn (1904) 10 Idaho, 224, 109 Am. St. Rep. 204, 77 Pac. 623; Day's Succession (1847) 2 La. Ann. 895; Towle v. Bannister (1834) 16 Pick. (Mass.) 255; National L. Ins. Co. v. Fitzgerald (1901) 61 Neb. 692, 85 N. W. 948; Massey v. Fralish (1916) 37 S. D. 91, 156 N. W. 791.

And the same is true of a vendor's lien. Selna v. Selna (1899) 125 Cal. 357, 73 Am. St. Rep. 47, 58 Pac. 16; Ball v. Hill (1878) 48 Tex. 634.

And of a warehouseman's lien. Howard v. J. P. Paulson Co. (1912) 41 Utah, 490, 127 Pac. 284.

In Schuelenburg v. Martin (1880) 1 McCrary, 348, 2 Fed. 747, where it does not appear whether the claim was filed as an unsecured claim or not, it was held that the fact that the plaintiffs proved their entire debt as against the estate, and received two dividends from the assets of the estate, did not extinguish their rights under the mortgage.

In determining the question of waiver, it is clearly brought out in some of the cases that whether a creditor intended to waive or abandon his lien is material.

Thus, it is stated in the reported case (KENDRICK STATE BANK v. BARNUM, ante, 1129), that the parties interested knew that the claim, as filed, was a secured claim, and always treated it as such.

So, it is stated in Bank of Sonoma County v. Charles (1890) 86 Cal. 322, 24 Pac. 1019, cited and relied upon in the KENDRICK STATE BANK CASE and subsequently set out in this note, that the mortgagee's carelessness in presenting a note without the mortgage was not necessarily fatal to the mortgage lien, the mortgagee not intending to waive or abandon its mortgage, but supposing that the presentation of the note was a presentation of the mortgage also.

And it is stated in Selna v. Selna (1899) 125 Cal. 357, 73 Am. St. Rep. 47, 58 Pac. 16, also subsequently set out, that to constitute a waiver of a vendor's lien some act or omission on the part of the vendor, indicating an intention to waive, must be shown; and that the mere presentation and allowance of the claim did not indicate such an intent.

So, in Towle v. Bannister (1834) 16 Pick. (Mass.) 255, where a partially secured claim against an insolvent estate was allowed in full by the commissioners, it was held that as the creditor did not intend to waive his mortgage, and the commissioners had notice that he claimed for the balance only, it was a proper case for the probate judge to exercise his statutory authority to open up the commission and rectify the mistake.

In Bank of Sonoma County v. Charles (1890) 86 Cal. 322, 24 Pac. 1019, it was held that the lien of a mortgage was not waived by the presentation to and allowance of a note by the administrator, without presenting the mortgage, under the erroneous impression on the part of the creditor that a presentation of the note was a presentation of the mortgage also, and with no intention to waive or abandon the mortgage; and that the failure of the complaint, in a suit to foreclose the mortgage, to waive all recourse against the property of the estate other than the mortgaged property, could be cured by amendment so as to bring the suit within the provision of the statute, to the effect that the holder of a mortgage may without presentation thereof to the administrator, maintain an action to enforce the mortgage against the particular property subject thereto, when all recourse to other property of the estate is expressly waived in the complaint.

It was held in Morton v. Adams (1899) 124 Cal. 229, 71 Am. St. Rep. 53, 56 Pac. 1038, a suit to quiet title, that the presentation of a judgment constituting a lien on a judgment debtor's property, and its allowance by the administrator, did not, under the guise of the equitable doctrine of merger, destroy the lien.

So, in Selna v. Selna (Cal.) supra, an action to recover a sum of money

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and have it declared a lien on real estate, it is held that a vendor's lien for purchase money is not waived by presentation and allowance of the claim against an estate. "The question as to what constitutes a waiver of this lien of the debtor," observes the court, "has been a source of much controversy. The authorities generally agree that to constitute a waiver of the lien there must be some acts or omission by the vendor, showing an intention on his part to waive the lien. . . . We think that the mere fact of making out and filing the claim did not show any determination or intention of plaintiff not to rely upon his lien; neither do we think such fact in any way would make it inequitable to now allow such lien. No one has been injured by any delay, act, or conduct of the plaintiff. The filing of the claim did not deceive anyone, and the right of plaintiff to a lien is such that we cannot presume from any trivial circumstances that such right was waived. The plaintiff could not have maintained any action upon the note without first presenting his claim. Code Civ. Proc. §§ 1500, 1510. The claim was not secured by any mortgage or recorded lien, and therefore it was not necessary for it to contain any statement as to the claim of lien. Code Civ. Proc. § 1497. It might have stated the claim of lien and that the claimant did not intend to waive it, and it would, perhaps, have been the better practice if it had so stated; but, as the statute does not expressly require such statement, we think it would be a harsh rule to hold that the absence thereof of itself waived the lien."

In Visalia Sav. Bank v. Curtis (1902) 135 Cal. 350, 67 Pac. 330, it was said that the proceeding under the statute referred to in the Bank of Sonoma County Case (Cal.) supra, is entirely independent of the administrator of the estate, and may be conducted in a different forum from that in which such administration is pending, and may be taken after the presentation and allowance of its claim (Moran v. Gardemeyer (1889) 82 Cal. 96, 23 Pac. 6), or even after its rejection.

In Mathew v. Mathew (1903) 138 Cal. 334, 71 Pac. 344, an action to recover damages for the conversion of personal property, it is stated, upon no cited authority, that the plaintiff did not waive any right or interest in the property mortgaged, by presenting to the executor a claim for the amount due her.

The case of Re Turner (1900) 128 Cal. 388, 60 Pac. 967, is not opposed to the above California cases cited, as the decision is merely to the effect that a mortgagee, who had presented his claim to the administrator without making a proper presentation of the mortgage, could not apply the mortgage as a payment on the purchase price of the mortgaged property, which was bid in by it (mortgagee) at a sale by the administrator for the purpose of paying debts; since, unless a mortgage is presented and allowed it is not a valid claim against the estate, within the statute providing that when an administrator sells land subject to a mortgage, or any other lien which is a "valid claim against the estate of the decedent, and has been presented and allowed," the purchase money must be first applied to the payment and satisfaction of the mortgage or lien; it being necessary to read that provision in connection with the statutory provision that the holder of a mortgage may become a purchaser at the sale, and his receipt for the amount due him from the proceeds of the sale is a payment, pro tanto.

It is held in National L. Ins. Co. v. Fitzgerald (1901) 61 Neb. 692, 85 N. W. 948, that a mortgagee may, after the death of the mortgagor, institute a suit to foreclose his mortgage, and the mere filing in the county court of the mortgage debt as a claim against decedent's estate, while the foreclosure suit is pending, will not operate as a release or discharge of the mortgage. The court said that the plaintiff did not actually intend to abandon his lien, and he has done no act which is inconsistent with the existence of the right to enforce it. His position is as logical now as it would have been had

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he brought a foreclosure suit against the mortgagor in his lifetime, and afterwards sued him to recover a personal judgment on the mortgage debt.

In Massey v. Fralish (1916) 37 S. D. 91, 156 N. W. 791, where the holder of a note against an estate, secured by a chattel mortgage, presented to the administrator the note, but not the mortgage, the court stated that the failure to present a claim secured by a mortgage or other lien on specific property only affects the deficiency arising after applying the mortgaged property to the payment of the claim or debt secured thereby, and in no manner affects the right of the lien owner to make foreclosure. In this case plaintiff would be entitled to a deficiency judgment, by reason of having filed the note secured by the mortgage.

It was held in Sutherland v. Elmendorf (1900) 24 Tex. Civ. App. 137, 57 S. W. 890, that the presentation of a claim, two of the items of which were the balance due on two judgments, to the administrator of an insolvent estate, without specifying a lien, and the allowance of the same as a fourth-class claim, did not estop the holder of the judgment from asserting his lien or claiming title to the property.

Where the holder of a note secured by a vendor's lien on certain real estate sought an order to sell to satisfy his debt, it was stated in Ball v. Hill (1878) 48 Tex. 634, that the failure to set up the lien in the affidavit authenticating the note as a claim against the estate, or when the claim was accepted and proved, did not amount to a waiver.

Where a warehouseman presented a claim for storage without mentioning its lien thereon and, after the claim was rejected, brought an action against an estate to recover the amount due, which action it dismissed, it was held in Howard v. J. P. Paulson Co. (1912) 41 Utah, 490, 127 Pac. 284, that the bringing of the action upon the rejection of the claim did not constitute an election of remedies, so as to bar the assertion of the lien by the warehouseman, by way of counterclaim in an action by the executor to recover the property. In this case the statute providing for a warehouseman's lien (Comp. Laws 1907) also, in substance, provides that all claims arising upon contracts, whether due or not, must be presented to the administrator or executor of the estate within the time limited in the notice to creditors, or be forever barred. There is also a proviso as follows: "Provided that nothing in this title contained shall be so construed as to prohibit the foreclosure of liens or mortgages as hereinafter provided." A subsequent section, after stating that no claimant shall be permitted to maintain an action unless his claim is first presented to the administrator or executor, provides that "an action may be brought without notice by any holder of a mortgage or lien, to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint; but no counsel fees shall be recovered in such action unless such claim be so presented." "Lien claimants, therefore," observes the court, "who make no claim upon the general assets of the estate, are excused from filing any claim against it, but may bring their action, as in other cases, to subject the particular property upon which the lien exists, to the satisfaction thereof.

Some cases, involving the settlement of insolvent estates, hold that a creditor who voluntarily proves his whole debt thereby necessarily waives his security.

Thus, where one who held a chattel mortgage, given by an intestate whose estate had been adjudged insolvent, presented his whole claim to the commissioners, and declared that he had no security therefor, it was held in Nickerson v. Chase (1897) 90 Me. 296, 38 Atl. 175, that the mortgagee, by such procedure, waived his security.

In Hooker v. Olmstead (1828) 6 Pick. (Mass.) 481, it was held that in as much as the creditor filed his claim generally with the commissioners of insolvency, the estate being insolvent, and a distribution was decreed upon the allowance of the entire claim, he

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waived his right under a mortgage securing the claim.

It is to be observed that cases like Amory v. Francis (1820) 16 Mass. 308; Farnum v. Boutelle (1874) 13 Met. (Mass.) 159, and Haverhill Loan & Fund Asso. v. Cronin (1862) 4 Allen (Mass.) 141, which announce and apply the principle that a secured creditor of an insolvent estate cannot prove his debt without first waiving his lien, or in some manner applying the amount thereof to the reduction of the debt, and then proving for the balance, are not within the scope of this note, since the question was not whether the creditor had lost his lien, but as to his right to prove the claim, or the amount of his allowance.

J. D. C.

SELMA SAVINGS BANK, Appt.,
v.
WEBSTER COUNTY BANK.

SAME, Appt.,
v.
FARMERS' NATIONAL BANK.

Kentucky Court of Appeals — December 20, 1918.

(182 Ky. 604, 206 S. W. 870.)

Check — acceptance — telegram.

1. A telegram satisfies the requirements of the Statute of Frauds that acceptance of a check must be in writing.

[*See note on this question beginning on page* 1146.]

Same — telephoned telegram.

2. The necessary acceptance in writing of a check may be effected by telephoning such acceptance, including the signature, to the office of a telegraph company, to be transmitted over its wires.

Principal and agent — telegraph agent — relation to patrons.

3. The telegraph operator to whom a bank telephoned its acceptance of a check for transmission over the telegraph wire is not the agent of the bank, within the meaning of a statute requiring written authority to enable an agent to affix the signature of a party to an acceptance.

Check — acceptance — variance.

4. A reply by a bank that it will pay a customer's check for $2,000, in response to an inquiry if it will pay a check up to that amount, renders it liable to pay a check for less than that amount.

APPEAL by plaintiff from judgments of the Circuit Court for Webster County sustaining demurrers to and dismissing petitions filed to enforce payment of two certain checks. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. W. Foster Hayes, E. B. Anderson, and Ernest Woodward, for appellant:

The telegram in each case constituted an acceptance or certification of the check.

20 Cyc. 255; Bill v. Allen, 149 U. S. 481, 37 L. ed. 819, 13 Sup. Ct. Rep. 950; Ryan v. United States, 136 U. S. 68, 34 L. ed. 447, 10 Sup. Ct. Rep. 913; Brewer v. Horst & L. Co. 127 Cal. 643, 50 L.R.A. 240, 60 Pac. 418; Cobb v. Glenn Boom & Lumber Co. 110 Am. St. Rep. 760, note; Howley v. Whipple, 48 N. H. 487; Western U. Teleg. Co. v. Corso, 121 Ky. 328, 89 S. W. 212, 11 Ann. Cas. 1065; Lamaster v. Wilkerson, 143 Ky. 226, 136 S. W. 217; Pierce v. Dekle, 61 Fla. 390, 54 So. 389, Ann. Cas. 1912D, 1355; Lewis v. Watson, 98

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Ala. 479, 22 L.R.A. 297, 39 Am. St. Rep. 82, 18 So. 570; Munn v. Wellsburg Bkg. & T. Co. 66 W. Va. 204, 135 Am. St. Rep. 1124, 66 S. E. 230; State v. Sarlls, 135 Ind. 195, 34 N. E. 1129; Turner v. Cross, 83 Tex. 218, 15 L.R.A. 262, 18 S. W. 578; McCroskey v. Hamilton, 108 Ga. 640, 75 Am. St. Rep. 79, 34 S. E. 111; Kingan & Co. v. Silvers, 18 Ind. App. 80, 37 N. E. 413; Ewing v. Citizens Nat. Bank, 162 Ky. 551, 172 S. W. 955; Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. 604, 648, 19 L. ed. 1008, 1019.

Whether the telegram constitutes a technical acceptance or certification or not, plaintiff was entitled to recover on the promise to honor and pay the check.

Finley v. Smith, 165 Ky. 445, L.R.A. 1915F, 777, 177 S. W. 262; Wettlaufer v. Baxter, 137 Ky. 362, 26 L.R.A.(N.S.) 804, 125 S. W. 741; First Nat. Bank v. First Nat. Bank, 210 Fed. 542; Garrettson v. North Atchison Bank, 7 L.R.A. 428, 39 Fed. 163, 47 Fed. 869, 2 C. C. A. 145, 4 U. S. App. 557, 51 Fed. 168; Scudder v. Union Nat. Bank, 91 U. S. 406, 23 L. ed. 245; Williams v. Winans, 14 N. J. L. 339; Henrietta Nat. Bank v. State Nat. Bank, 80 Tex. 648, 26 Am. St. Rep. 773, 16 S. W. 321; Boyce v. Edwards, 4 Pet. 111, 7 L. ed. 799; Elliott v. First Nat. Bank, 105 Tex. 547, 152 S. W. 808; First Nat. Bank v. Commercial Sav. Bank, 74 Kan. 606, 8 L.R.A.(N.S.) 1148, 118 Am. St. Rep. 340, 87 Pac. 746, 11 Ann. Cas. 281; Wells v. Western U. Teleg. Co. 144 Iowa, 605, 24 L.R.A.(N.S.) 1045, 138 Am. St. Rep. 317, 123 N. W. 371; Whilden v. Merchants' & P. Nat. Bank, 64 Ala. 1, 38 Am. Rep. 1; James River Nat. Bank v. Thuet, 135 Minn. 30, 159 N. W. 1093; State Bank v. Bradstreet, 89 Neb. 186, 38 L.R.A.(N.S.) 747, 130 N. W. 1038.

Defendants were estopped to deny acceptance or promise to pay.

Rudd v. Matthews, 79 Ky. 479, 42 Am. Rep. 231; Union Cent. L. Ins. Co. v. Johnson, 25 Ky. L. Rep. 682, 76 S. W. 335; Bigelow, Estoppel, 6th ed. p. 545; Ewing v. Citizens Nat. Bank, 162 Ky. 551, 172 S. W. 955.

Messrs. Hunt & Burnett, Bourland & Blackwell, and G. L. Withers for appellees.

Miller, J., delivered the opinion of the court:

As the questions presented in these two appeals are identical, they will be considered and decided together. The appellant, Selma Savings Bank, an Iowa banking corporation doing business at Selma, Iowa, was the plaintiff in each case; the two appellees, the Webster County Bank and the Farmers' National Bank, banking corporations doing business in the city of Clay, Webster county, Kentucky, were the defendants in the respective cases, and are the appellees here.

James W. Nall, of Webster county, was a customer of the appellee the Farmers' National Bank, and J. L. Townsend, Jr., of the same county, was a customer of the appellee, the Webster County Bank. J. A. Baldwin, an Iowa cattle dealer, sold certain cattle to Nall and Townsend. In payment of his cattle so purchased Nall, on February 13, 1917, drew his check on the appellee Farmers' National Bank in favor of Baldwin for $1,957.50, and on the same day Townsend drew his check for the same amount, and in favor of Baldwin, on the appellee the Webster County Bank. On the same day Baldwin indorsed these checks and offered to sell them to the appellant, the Selma Savings Bank; but before that bank would buy either of the checks, it telegraphed the two Kentucky banks, asking if the checks would be honored. The telegram to the Farmers' National Bank reads as follows:

Selma, Iowa, Feb. 13, 1917.
Farmers' National Bank, Clay, Ky.
Will you pay check of Jas. W. Nall up to $2,000 for cattle?
Selma Savings Bank.

On the same day the Farmers' National Bank answered this telegram by another, in the following language:

Clay, Ky., Feb. 13, 1917.
Selma Savings Bank, Selma, Iowa.
We will honor James W. Nall's check for $5,000, when properly signed.
Farmers' National Bank.

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The telegram to the Webster County Bank was as follows:

Selma, Iowa, Feb. 13, 1917.
Webster County Bank, Clay, Ky.
Will you pay check of J. L. Townsend, Jr., up to $2,000, for cattle?
Selma Savings Bank.

In response thereto the Webster County Bank answered:

Clay, Ky., Feb. 13, 1917.
Selma Savings Bank, Selma, Iowa.
We will honor J. L. Townsend, Jr.'s, check for $2,000.
Webster County Bank.

After receiving these assurances from the two Kentucky banks, the Selma Savings Bank cashed the checks, paying therefor their face value, and in due course it presented them to the respective appellees for payment, which was refused. The Selma Savings Bank thereupon filed these actions against the two Kentucky banks, and, demurrers having been sustained to the petitions and the petitions dismissed, the plaintiff appeals.

The petitions are in the usual form, setting forth the above facts. In response, however, to a motion by the defendant in each case to require the plaintiff to file the checks and the telegrams referred to, the plaintiff filed the original check in each case, and further stated that neither of the telegrams was in its possession, but that the facts with reference thereto, in the case against the Farmers' National Bank, were as follows:

"The telegram dated February 13, 1917, at Selma, Iowa, and addressed to the defendant, was sent by the plaintiff in regular course over the Western Union telegraph line from Selma, Iowa, to Madisonville, Kentucky; that there is no telegraph office or agent in Clay, Kentucky, and that Madisonville, in Hopkins County, is the nearest office for the Western Union Telegraph Company to Clay, Kentucky, and that said message sent by defendant as aforesaid was delivered by the Western Union Telegraph Company to the Cumberland Telephone & Telegraph Company at Madisonville on February 13, 1917, in the usual and regular course of business. The said message was delivered to the defendant on said date by the operator of the Cumberland Telegraph & Telephone Company at Madisonville, telephoning the contents thereof to the cashier of the defendant, and that said defendant and said cashier could have procured a written copy thereof by requesting the same.

"That immediately after receipt of the message quoted in the petition from plaintiff to defendant, and on the same day, the defendant, acting by and through its cashier, telephoned to the telegraph company the message quoted in the petition as addressed from the defendant to plaintiff, and caused the same to be transmitted in regular course of business to the defendant (plaintiff) on February 13, 1917, which date said message was delivered to defendant (plaintiff) in regular course by the Western Union Telegraph Company, and was and is in writing, and was and is as quoted in the original petition."

The response in the case against the Webster County Bank was the same in substance, the only difference being, it stated that the message from the defendant to the plaintiff was telephoned to the Postal Telegraph Company at Wheatcroft, Kentucky, and by it was delivered to the Western Union Telegraph Company at Louisville, and by the Western Union Telegraph Company to the plaintiff. By agreement it was ordered that the response in each case should be taken as an amended petition, and it was so treated by the demurrer. Upon the hearing the demurrers were sustained; and, the plaintiff declining to further plead, the petition in each case was dismissed. From those judgments these appeals are prosecuted.

The circuit court was of the opinion that no recovery could be had because there was a written acceptance or certification of the checks, signed by the defendants, or by an

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agent of the defendants, duly authorized in writing, as required by § 19 of the Kentucky Negotiable Instruments Law (Ky. Stat. § 3720b, subsec. 19). It was not contended that the acceptance or certification of the check could not have been made by telegram; but as the telephone had been used in the transmission of the message, the telegraphic answers thus sent by the two Kentucky banks could not be considered as writings signed by the defendants. This means either that the circuit court was of opinion that telegrams are not to be treated as writings signed by the defendants, or that the telegraphic operators at Madisonville and Wheatcroft were agents of the Kentucky banks in forwarding the messages, and that neither of them had been authorized to do so in writing.

Preliminary to a discussion of the facts, we quote here for convenience the following sections of the Kentucky Negotiable Instruments Law, which are subsections to § 3720b of the Kentucky Statutes:

"Sec. 19. The signature of any party may be made by an agent duly authorized in writing."

"Sec. 132. The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money."

"Sec. 134. Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value."

"Sec. 185. A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check."

"Sec. 187. Where a check is certified by the bank on which it is drawn, the certification is equivalent to an acceptance."

"Sec. 189. A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check."

It will be observed that the requirement that the acceptance must be in writing, signed by the drawee, is practically the same as that found in the Statute of Frauds, requiring that the contract, or some memorandum of it, must be in writing, signed by the party sought to be charged. The reason in each case is that sound policy requires some substantial and tangible evidence of the contract, and more reliable in its nature than the statements or recollection of witnesses. It is, however, well established that a telegram satisfies the requirement of the Statute of Frauds. 20 Cyc. 255; Ryan v. United States, 136 U. S. 68, 34 L. ed. 447, 10 Sup. Ct. Rep. 913; Bibb v. Allen, 149 U. S. 481, 37 L. ed. 819, 13 Sup. Ct. Rep. 950; Brewer v. Horst & L. Co. 127 Cal. 643, 50 L.R.A. 240, 60 Pac. 418; Leesley Bros. v. A. Rebori Fruit Co. 162 Mo. App. 203, 144 S. W. 138. This rule is sustained by both reason and authority.

Check—acceptance—telegram.

In Howley v. Whipple, 48 N. H. 487, the court said: "When a contract is made by telegraph, which must be in writing by the Statute of Frauds, if the parties authorize their agents, either in writing or by parol, to make a proposition on one side, and the other party accepts it through the telegraph, that constitutes a contract in writing under the Statute of Frauds, because each party authorizes his agents, the company, or the company's operator, to write for him; and it makes no difference whether that operator writes the offer or the acceptance, in the presence of his principal and by his express direction, with a steel pen an inch long, attached to an or-

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dinary penholder, or whether his pen be a copper wire a thousand miles long. In either case the thought is communicated to the paper by the use of the finger resting upon the pen; nor does it make any difference that in one case common record ink is used, while in the other case a more subtle fluid, known as electricity, performs the same office."

See also note in 110 Am. St. Rep. 760.

The substance of the amended petitions being that the defendant banks had, by telephone, delivered to the telegraph companies the messages transmitted by those companies and received by the appellant, including, of course, the signatures of the respective parties, the question arises, Did these facts constitute the signing of a written acceptance by the respective Kentucky banks? We think they did. The existence of a tangible written memorial, which is the main reason for requiring a writing, would seem to be satisfied in this way just as fully as if the officers of the defendant banks had, with their own hands, written these messages; and under the authorities above quoted they certainly had the right to adopt that means of making the written communication.

Same—telephoned telegram.

To elucidate the subject, let us suppose that the cashier of the Farmers' National Bank had written its telegram in its office by dictating it, signature and all, to a typist, and that the telegram thus written had been delivered to the telegraph company and transmitted by it to the Iowa bank. Could any doubt arise as to its being a writing signed by the bank, although the operator of the typewriter had no written authority to sign the name of the bank, but wrote at the dictation of the cashier? We do not understand the appellees to so contend.

Or, suppose the cashier of the Webster County Bank had called a public stenographer and dictated and delivered the telegram in the same way, no different or new question would be presented, since the two supposed cases are practically identical in principle. Furthermore, they are practically identical with the transaction that actually happened in the cases before us, since the proper officers of the two banks simply called the telegraph operator and dictated to him the telegram, including the signature. The mechanical means of making and signing the writing are not important, in view of subsection 190 of the Negotiable Instruments Law, providing that "written" includes printed, and "writing" includes print.

In Western U. Teleg. Co. v. Corso, 121 Ky. 328, 89 S. W. 214, 11 Ann. Cas. 1065, there was a question as to whether a certain deposition should have been suppressed. The language of the opinion states the facts and the reasons for the ruling as follows:

"Afterwards, on February 4, 1904, for the first time, an exception was filed asking a suppression of the deposition on the ground that the deposition was not written either by the witness or by the officer. An affidavit of the notary was furnished to both parties, detailing the manner in which the deposition was taken, and these affidavits were filed on April 11, 1904, which shows a literal compliance with the provisions of our Code with reference to the taking of depositions and the certificate of the officer thereto, except that the questions and answers were written in shorthand by the notary's clerk, in the presence of the witness and the notary, and then transcribed by this clerk.

"It is contended by appellant that this is an infraction of § 582 of the Civil Code of Practice, which provides that the officer's certificate shall, among other things, show that it was written and subscribed by the witness in the officer's presence, or was written by the officer in the presence of the witness, and read to and subscribed by the witness in the presence of the officer. The purpose of this provision was

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to procure an authentic statement of the witness under oath, and also that it be definitely ascertained to what the witness has made oath, and therefore either that the witness himself shall write the deposition or that the officer shall write it, and, when the officer writes it, to bring it directly to the attention of the witness after it is written, it must be read over to and subscribed by him. The object of having the officer write the deposition is to prevent the substitution of false depositions or the coloring of answers by having them written by parties who are interested in the litigation. It was not intended by the Code that the officer should do the manual labor of writing the deposition. The purpose was that the officer should be responsible for its writing, and that he in person should supervise its writing, and therefore that the writing of the deposition should be his act. An act done under the direction, in the presence of, and under the immediate supervision of, an officer, is no less an act done by him because, perchance, he employs the labor of some third person. The intervening labor does not lose the personality of the officer under whose direction and personal supervision it is done. We therefore conclude that an act is still the official act of the officer, though not personally done by him, if it is done under his direction and his immediate personal supervision. This construction is sustained by the following cases from other states: Tuthill Spring Co. v. Smith, 90 Iowa, 331, 57 N. W. 853; Crossgrove v. Himmelrich, 54 Pa. 203; Read v. Randel, 2 Harr. (Del.) 501; Stoddard v. Hill, 38 S. C. 385, 17 S. E. 138; Cushman v. Wooster, 45 N. H. 412."

Again, in Lamaster v. Wilkerson, 143 Ky. 226, 136 S. W. 217, the validity of a school election was involved. Section 4481 of the Kentucky Statutes required that notice of the election should be signed by the trustees. In holding that notices bearing the printed signatures of the trustees were sufficient, the court said:

"Complaint is made of the judgment on two grounds: First, That the posters giving notice of the election were not signed by the members of the board of trustees, and that their names appearing thereto were merely printed instead of being signed in their own handwriting; second, that the clerk and one of the judges of the election were not authorized to act as such, because they were illegally appointed by only two of the five members of the board of trustees. For the foregoing reasons it is argued by counsel for appellant that the election was void, and therefore the bonds are invalid and should not be sold.

"Neither of these contentions is sound. As to the first, it would perhaps be sufficient to say that the posters giving the voters of the district notice of the time, place, and hours of the election were doubtless printed from the original notice or manuscript prepared by the trustees, to which each of them will be presumed, in the absence of allegation and proof to the contrary, to have attached his official signature. If this view of the matter should be rejected, there is still the presumption, altogether reasonable and legal, that the trustees, considering the fact that it is admitted they caused the notice to be printed and posted, authorized the printing of their names on them and adopted them as their signature. In either case there was a substantial compliance with the statute (Ky. Stat. § 4481) which requires that the election notices be signed by the trustees.

"In legal contemplation, to sign means to attach a name, or cause it to be attached, by any of the known methods of impressing the name on paper with the intention of signing it. 7 Words & Phrases, 6512.

"In 36 Cyc. 448, we find this statement of the law on the subject: 'Signatures adopted by persons are sufficient to give validity to instruments, even though typewritten or printed.' Herrick v. Morrill, 37 Minn. 250, 5 Am. St. Rep. 841, 33 N. W. 849."

From these authorities we are of

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opinion that the telegrams in these cases were in writing, and were signed by the appellee banks, within the meaning of the requirement that an acceptance must be in writing and signed by the drawee.

But appellees insist their signatures are not binding upon them for the reason that their telegrams were not signed by their respective agents authorized in writing, as is required by § 19 of the Negotiable Instruments Law, above quoted. And we are advised by the briefs that the circuit court rested its judgments upon that ground.

The requirement that the authorization of the agency must be in writing is peculiar to the Kentucky Negotiable Instruments Law. Usually, it is provided in similar laws of other states that the agency may be shown as in other cases.

The petitions as amended do not state that the bank cashiers reduced their telegrams to writing and signed them before sending them over the telephone, which is usually done for the purposes of accuracy and retaining a copy; they merely allege that the cashiers telephoned their telegrams to the telegraph company, addressed to the plaintiff, and caused them to be transmitted and delivered to the plaintiff, in the usual and regular course of business.

The defense relied upon assumes that the telegraphic operator at Madisonville was the agent of defendant bank when he signed the bank's name to the telegram to plaintiff, and, having no written authority to do so, his act did not bind the bank.

There are some cases holding that where messages are received over a telephone, or orally, by a telegraph company for transmission, the operator receiving the message is the agent of the sender of the message. Most, if not all, of the cases of this class are suits against the company for negligence in handling the message, in which it interposed its rules, limiting the recovery.

Upon the authority of two Alabama cases and several Texas cases, Cyc. formulates the following rule: "Where the message is written on the blank by one of the company's messengers or operators, at the dictation and request of the sender, the messenger or operator is, for this purpose, the sender's agent, and the latter is bound by the stipulations as though he had written the message himself; and in such cases it is not material, in the absence of fraud or misrepresentation, that the sender did not read such stipulations, or even that he was unable to read or write, or did not know of the existence of such stipulations." 37 Cyc. 1694.

The same work further says: "If a telegraph company accepts for transmission a message offered to it over a telephone, and the operator, without the knowledge or direction of the sender, writes the message upon one of the company's blanks, the sender will not ordinarily be bound by the stipulations contained thereon, particularly where he did not know of such stipulations or intend or expect the message to be written upon such blank." Id. 1695.

But if the operator is the sender's agent in one case, he would seem to be equally so in the other.

We think, however, that the best-considered cases are to the effect that where telegrams are given by telephone, or orally, the operator, so long as he is attending to the usual business of the company, is the agent or servant of his company.

In Shawnee Mill. Co. v. Postal Teleg.-Cable Co. 101 Kan. 307, L.R.A.1917F, 844, 166 Pac. 493, it was held that where a telegraphic message is dictated over a telephone, and is thus received by a telegraph company for transmission, it will be considered as if it were written on the ordinary blank forms furnished by the company, and its liability for an error in transmission is neither greater, nor less, nor different, than if the message had been delivered in the usual and more formal modes of sending telegrams. If it is the customary way of doing business to receive telegrams over the telephone,

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what reason can there be for transferring the operator from a servant of his company into a servant or agent of a man who neither controls him nor pays him his salary?

In Carland v. Western U. Teleg. Co. 118 Mich. 369, 43 L.R.A. 280, 74 Am. St. Rep. 394, 76 N. W. 762, Carland, residing at Corunna, Michigan, called the office of the appellee at that place, by telephone, and dictated to the agent or operator a telegram to G. W. Wylie Company, at Chicago. Young, the company's operator, negligently failed to send the message, and when sued for damages, the company answered that Carland had made Young his agent to write and send the telegram, and was therefore bound by the conditions of the contract, limiting the company's liability. In overruling that contention the court said: "It is contended that the contract to send the message was subject to the conditions which the defendant usually imposes upon its patrons; that Young was, by the plaintiff, made his agent to write the telegram upon the blank containing the conditions; and that receiving a message upon any other terms than such conditions would be outside of the scope of Young's authority. Young, being the person in charge of the defendant's business, and authorized to receive telegrams, was acting within the general scope of his authority in so doing, and the plaintiff was not bound, at his peril, to ascertain the secret instructions that the defendant had given in relation thereto. . . . Should it be said that Young, in receiving by telephone, and writing such message, was the agent of the plaintiff? We are cited to several cases holding that the operator is such agent, under somewhat similar circumstances."

Then, after reviewing the older Texas cases of Western U. Teleg. Co. v. Edsall, 63 Tex. 677; Western U. Teleg. Co. v. Foster, 64 Tex. 220, 53 Am. Rep. 754, and Gulf, C. & S. F. R. Co. v. Geer, 5 Tex. Civ. App. 349, 24 S. W. 86, seeming to sustain a contrary doctrine, the court said: "It seems to us that in the cases cited the Texas court went too far, if it took judicial notice that the scope of the agent's authority did not permit him to write messages for those desiring to send them, who, from infirmity, were incapacitated from writing the same, or were, from ignorance, unable to do so. The law does not forbid such authority, nor does it make it the duty of the sender to write the message. If the rules of the company forbade it, there is nothing in the case to show that the fact was brought home to the knowledge of the patron, and the rule would have no greater force than any other of which he was ignorant. We cannot conclude, in the absence of proof, that the telegraph companies expect their operators to turn away patrons who cannot write, or that they keep telephones in the office, but do not permit their use in their business by their patrons who send and receive messages. And we are of the opinion that such use should not be altogether at the peril of the patron, or that he should suffer for mistakes made at either end of the line, merely because such are the instructions to the operator, or made the subject of a rule of which the patron has no knowledge. It would seem more reasonable to hold such acts to be within the general scope of his authority, or, at least, hold it to be a question for a jury. There is sufficient justification for the decision in the Edsall Case without invoking such a rule, for the sender signed the message upon the blank, thus making it his own, under the current weight of authority that so holds, although the conditions be not read. 25 Am. & Eng. Enc. Law, 805, and cases cited in note 1. So, in the case of Gulf, C. & S. F. R. Co. v. Geer, supra, the message was written upon the blank by request. The Foster Case, 64 Tex. 220, 53 Am. Rep. 754, more nearly sustains defendant's contentions. We are cited to no authorities in support of the Texas cases. We are of the opinion, therefore, that the court committed no error in holding that Mr.

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Young acted as agent for the defendant, under the proofs contained in the record, and might properly have instructed the jury that he was not shown to have acted as agent for the plaintiff."

In Bowie v. Western U. Teleg. Co. 78 S. C. 424, 59 S. E. 65, where a message was sent to the company by telephone, the company relied on the stipulation in its message blank to excuse it for liability for any mistake in transmission. In discussing the liability of the company in that case, the court said: "There was no evidence that the sender assented to the stipulation, or knew it was written on the company's blank, or that he intended or expected the message to be written on the blank. In the absence of such evidence, we can see no ground whatever for the company to say a delivery and acceptance over a telephone kept in its office was not a proper delivery. Certainly the defendant has no right to complain, when the circuit judge, assuming that there might be some evidence bringing the stipulation home to the sender, in response to the defendant's request, charged, if the regulation on the message blank was reasonable and brought to the knowledge of the sender, he would be bound by it, and the company would incur no liability in reference to the telegram until it had been presented and accepted at one of its transmitting offices, unless the company had seen fit to waive the regulations by inviting or encouraging the sender or the public to deliver to it messages in some other way."

In Mims v. Western U. Teleg. Co. 82 S. C. 247, 64 S. E. 236, it was held, under evidence that the sender of a message dictated it to a girl, who wrote it down and read it to the company's agent, there being no evidence that the sender had any notice or knowledge of the regulations on the back of the blank messages, and there being uncontradicted evidence that the girl had no notice or knowledge thereof, that the agent of the company who took the message from the girl was, in that act, the agent of the company, and not of the sender as stipulated on the message blanks.

Again, in Western U. Teleg. Co. v. Todd, — Ind. App. —, 53 N. E. 194, Chapman wrote out a telegram and dictated it to the telegraph company over the telephone, and in its transmission it was so materially altered in the address that it could not be delivered. By way of defense the company answered that in writing the message the operator was the agent of Chapman, and that any mistake made by the operator was the mistake of Chapman, for which the company was not liable.

In deciding that point against the company, the court said: "It may, perhaps, be true that the servant of the telegraph company, as to a matter not within the authority conferred on him, expressly or impliedly, by the company, can be for the time, in a particular act, the agent of a sender of a message. The ordinary duty of a clerk or employee who is held out to the public as a receiver of messages at the transmitting office, and who has not express authority to do more, cannot bind the company as its servant outside of such apparent duty, and beyond the scope of his employment. But where the company, in receiving a message orally by telephone, is pursuing a custom of so accepting patronage from the sender and others, we cannot agree that the company, so carrying on its business for its own convenience and profit, may thereby relieve itself from the obligation to exercise the skill and diligence which such a method demands. If such be a customary method of receiving messages, it cannot be claimed that a message so received and transmitted over the wires for the usual hire was not received by the company, or that, in the act of receiving and writing down the message, the company's employee was acting as the servant of the sender."

In Markley v. Western U. Teleg. Co. 159 Iowa, 557, 141 N. W. 443, a case involving the liability of a tel-

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egraph company for the negligence of its operator in receiving a message over a telephone, the court, in holding the operator to be the agent of the company, said: "The defendant is not bound to keep a telephone in its office, over which messages may be sent to it to be forwarded. If it does so, it must be held to the exercise of reasonable care in thus receiving messages. It had the right to require all tendered messages to be in writing, and to make such reasonable rules as might be necessary for its own protection and for the accurate care of its business; but, in the absence of any showing that there were such rules, which were known to the sender of the message, it must be presumed that the use of the telephone was a means permitted by it to be employed in receiving messages for forwarding. So permitting it, if there was negligence on the part of its agent in receiving the message, such would be the negligence of the defendant."

To the same effect, see Western U. Teleg. Co. v. Powell, 94 Va. 268, 26 S. E. 828; Will v. Postal Teleg.-Cable Co. 3 App. Div. 22, 37 N. Y. Supp. 933. See also Western U. Teleg. Co. v. Stevenson, 128 Pa. 442, 5 L.R.A. 515, 15 Am. St. Rep. 687, 18 Atl. 441.

So far as we have been able to learn, the courts of Alabama, Maryland, and Texas are the only tribunals announcing a contrary rule, and some of those cases can be distinguished and shown not to be in real opposition, particularly the later cases from Texas. See Western U. Teleg. Co. v. Uvalde Nat. Bank, — Tex. Civ. App. —, 72 S. W. 232; Gore v. Western U. Teleg. Co. — Tex. Civ. App. —, 124 S. W. 977; Western U. Teleg. Co. v. Douglas, 104 Tex. 66, 133 S. W. 877; Western U. Teleg. Co. v. Parham, — Tex. Civ. App. —, 152 S. W. 819; Texas Teleg. & Teleph. Co. v. Seiders, 9 Tex. Civ. App. 431, 29 S. W. 258.

The result, according to the weight of the authorities, is that, where a telegraph company is accustomed to receive messages by telephone for transmission by telegraph, the agent receiving the message will not be regarded as the agent of the sender. 56 L.R.A. 745, note.

Principal and agent—telegraph agent—relation to patrons.

This conclusion is in harmony with the acts and intentions of the parties. Appellant did not understand it was dealing with appellees through an agent. If an agency existed, it was hidden from the Selma Bank. No one claimed to be so acting at the time. Neither the operator, the telegraph company, nor the defendants are claiming, by any pleading in these cases, that the operator was the agent of the Kentucky banks; it is so urged only in argument, and we are asked to so hold as a matter of law, regardless of the manner in which business of this character is usually conducted. But, as was said in the Shawnee Mill. Co. Case, 101 Kan. 307, L.R.A.1917F, 844, 166 Pac. 493, a message dictated to the operator over the telephone must necessarily, in this busy and practical age, be treated as if it were written on the ordinary blank and received and transmitted in the ordinary way—neither more nor less.

So we get back to the original proposition that this is the usual case of sending a telegram, without any supervening question of agency; and, as heretofore seen, telegrams constitute a writing sufficient to satisfy the statute. Our conclusion is that the operators at Madisonville and Wheatcroft were not the agents of the defendants; and the question of agency being eliminated, we do not understand that the Kentucky banks deny their liability.

We have been referred to § 482 of the Kentucky Statutes, requiring the authority of an agent to bind another as surety to be in writing and signed by the principal, and the decisions thereunder, as sustaining, in principle at least, the judgment of the circuit court. But, as we have

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seen, there being no agency here, those decisions are not applicable.

Neither are we impressed by the substance of the argument that, since the appellant inquired if the Webster County Bank would pay Townsend's checks "up to $2,000," and having agreed to pay Townsend's check "for $2,000," the check presented for $1,957.50 was either a different check from the one accepted, or, if the same, there was a material alteration of the sum payable, so as to avoid the acceptance. The effect of the telegraphic correspondence was that the Selma Savings Bank would present a check, possibly for as much as $2,000, but not for more than that amount, and that the Webster County Bank would pay the check for whatever sum it might be drawn, provided it did not exceed $2,000.

Check—acceptance—variance.

In First Nat. Bank v. First Nat. Bank (D. C.) 210 Fed. 542, the inquiry was: "Will you pay Werner Company checks fifty-nine hundred odd dollars? Answer: First National Bank." The answer reads as follows: "Answering yours. Forward your checks. They will undoubtedly be taken care of by the company when presented." The check was drawn for $5,921.

In answer to the contention that the answer did not constitute an acceptance for $5,921, the court said: "The question formulated in plaintiff's telegram called for a plain, simple answer. All the defendant had to do was to make such an answer. It had it in its power, and it was the duty in fair dealing, to put the question beyond all possibility of doubt. Being presumed to know this, the defendant wired, 'Forward your checks.' Whatever the telegram said in reference to the solvency of the company was not in direct answer to the telegram, as the telegram inquired whether or not the checks would be paid, not whether or not the Werner Company was solvent."

See also Garrettson v. North Atchison Bank (C. C.) 47 Fed. 869; North Atchison Bank v. Garrettson, 2 C. C. A. 145, 4 U. S. App. 557, 51 Fed. 168; Scudder v. Union Nat. Bank, 91 U. S. 406, 23 L. ed. 245; Henrietta Nat. Bank v. State Nat. Bank, 80 Tex. 648, 26 Am. St. Rep. 773, 16 S. W. 321; Elliott v. First Nat. Bank, 105 Tex. 547, 152 S. W. 808.

The judgment in each case is reversed, with instructions to overrule the demurrer to the petition, and for further proceedings not inconsistent with this opinion.

ANNOTATION.

Acceptance of checks by telegraph or telephone.

I. Acceptance by telephone, 1146.
II. Acceptance by telegraph:
1. In general, 1147.
2. As dependent upon language, 1147.

I. Acceptance by telephone.

In the absence of a statute requiring a written acceptance of a check an oral acceptance is good. 5 R. C. L. p. 517, § 639. But if, at the time of such acceptance, the bank has no funds of the drawer on deposit, the acceptance is within the Statute of Frauds as an agreement to pay the debt of another, and is not valid. 5 R. C. L. p. 518, § 39.

In accordance with this general rule, an acceptance in a telephone conversation has been sustained. Leach v. Hill (1898) 106 Iowa, 171, 76 N. W. 667. In First Nat. Bank v. San Juan State Bank (1916) — Tex. Civ. App. —, 189 S. W. 745, a bank upon which a check was drawn was held liable thereon, upon its oral statement over the telephone, in answer to an inquiry in regard to the check, that the check was good, and that the bank would pay it. The court does not speak of this as an acceptance, but states that it was an unconditional promise on the

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part of the drawee bank to pay the check.

In Leach v. Hill (Iowa) supra, in a telephone conversation, in which inquiry was made of the drawee bank as to whether any and all checks thereafter drawn by a certain person would be paid, the bank replied: "It will be all O. K. to cash checks from C. E. Sisson to the amount of stock he gets." This was held to be an acceptance of a check subsequently drawn, although the drawer had no funds in the bank, but had an arrangement with another depositor of the bank, who had funds, that the check was to be paid out of such funds. The court recognizes the rule that a verbal acceptance of an order is valid and enforceable, only where the drawee has funds of the drawer in his hands, so that by payment of the order he satisfies his own debt, but it is held in this case that the check was, in effect, an order by the depositor who had funds.

The Negotiable Instruments Law requires an acceptance to be in writing. Under this law, a telephone conversation is insufficient as an acceptance. Van Buskirk v. State Bank (1905) 35 Colo. 142, 117 Am. St. Rep. 182, 83 Pac. 778; Rambo v. First State Bank (1912) 88 Kan. 257, 128 Pac. 182; Superior Nat. Bank v. National Bank (1916) 99 Neb. 833, 157 N. W. 1023.

A parol acceptance of a check in a telephone conversation has been held not good, although the statute requiring written acceptance related simply to bills of exchange, the court stating that, whether a bank check is within the letter of the statute or not, it is certainly within its policy. Bank of Springfield v. First Nat. Bank (1888) 30 Mo. App. 271. The representation by the drawee bank was merely that the check was good, and the decision is based in part upon the theory that this did not amount to a certification or acceptance of the check.

II. Acceptance by telegraph.

1. In general.

A valid acceptance may be made by telegram. Re Armstrong (1890) 41 Fed. 381; Garrettson v. North Atchison Bank (1891) 47 Fed. 867.

That a valid acceptance may be made by a telegram is true under statutes requiring an acceptance to be in writing, signed by the drawee. Iowa State Sav. Bank v. City Nat. Bank (1918) — Iowa, —, L.R.A.1918F, 169, 168 N. W. 148; Garrettson v. North Atchison Bank (1889) 7 L.R.A. 428, 39 Fed. 163. And this held true in the reported case (SELMA SAV. BANK v. WEBSTER COUNTY BANK, ante, 1136), although the telegram was telephoned by the drawee bank to the telegraph company.

That an acceptance may be made by telegram was recognized without dispute in First Nat. Bank v. Commercial Sav. Bank (1906) 74 Kan. 606, 8 L.R.A. (N.S.) 1148, 118 Am. St. Rep. 340, 87 Pac. 746, 11 Ann. Cas. 281; and this, of course, is assumed in the cases subsequently cited, which consider whether a contract of acceptance was made out by the telegram in question, especially those that hold that such a contract was made out.

In Iowa State Sav. Bank v. City Nat. Bank (Iowa) supra, a telegram to the effect that "we will pay check for ten hundred thirty-five dollars, signed Lon Fraseur," sent in reply to a telegram asking: "Will you pay check for ten hundred thirty-five dollars signed Lon Fraseur for cattle?" was held to be an acceptance of the check.

2. As dependent upon language.

The question, in most cases in which a telegram is urged as an acceptance is not whether a valid acceptance may be made by a telegram, but whether the language used evidences a contract of acceptance. Whether or not there is an acceptance depends upon the facts of the particular case. Some general observations have been made by the courts upon this question. It has been stated that one relying on a telegram as an acceptance should see to it that the language used will at least fairly bear the meaning. Myers v. Union Nat. Bank (1888) 27 Ill. App. 254, affirmed in (1889) 128 Ill. 478, 21 N. E. 580. And the supreme court of Kansas, in speaking of a claimed contract of acceptance arising from telegrams, states that "anyone claiming

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to be the beneficiary of a contract of this kind, independent of and collateral to the check, must clearly show that the bank intended to make it. Neither law nor custom binds parties to the use of any set formula in arranging an acceptance. They may choose their own words. Brevity is not simply allowable, it is commendable; but in all cases there must be no doubt that an absolute promise to pay was made. If the transaction involved two writings, a proposition and a response, they should be construed together." First Nat. Bank v. Commercial Sav. Bank (1906) 74 Kan. 606, 8 L.R.A. (N.S.) 1148, 118 Am. St. Rep. 340, 87 Pac. 746, 11 Ann. Cas. 281.

In Henrietta Nat. Bank v. State Nat. Bank (1891) 80 Tex. 648, 26 Am. St. Rep. 773, 16 S. W. 321, an action was brought not upon an alleged acceptance, but for the breach of promise to pay the check, and such an action was held sustainable against the bank, which, in answer to a telegraphic inquiry as to whether it would pay the certain check on presentation, replied by telegram: "Yes; will pay the Ikard check," where, upon the receipt of this telegram, the bank making the inquiry discounted the paper and the holder transferred it to such bank.

In the following cases there was held to be an acceptance:

A telegram sent by a bank which held a special deposit for the purpose of paying a certain check, in answer to an inquiry by another bank, which was about to discount such check, as to whether the bank would pay it, stating that "D. T. Elliott has deposited with us $1,790 to pay check drawn by D. S. Elliott, in favor of O. H. Kilpatrick," amounts to an acceptance of the check, where the bank to which it was sent, in reliance thereon, discounted the check. Elliott v. First Nat. Bank (1913) 105 Tex. 547, 152 S. W. 808. The court further states that, if the telegram be not regarded as a technical acceptance, at all events it amounts practically to a letter of credit against the check of such a description, and one, who, for value, takes the check upon the faith of it, is entitled to enforce the liability that it imports, as a promise to pay the check.

In Farmers' & M. Nat. Bank v. Elizabethtown Nat. Bank (1906) 30 Pa. Super. Ct. 271, a drawee bank which, in answer to a telegraphic inquiry as to whether it would pay a certain check, telegraphed in reply, "Will pay . . . checks, $900," was held liable to the inquiring bank, which cashed the check.

A telegram sent by the drawee bank to the effect that it "will pay Fidelity Nat. Bank draft for $15,000 at sight," sent in answer to an inquiry by another bank, to which the draft is offered for deposit in cash, whether the drawee bank will pay the draft in question, is a valid acceptance of the draft. Re Armstrong (1890) 41 Fed. 381.

A telegram stating that "Tate is good. Send on your papers," sent by a bank in reply to an inquiry as to whether or not it would pay such person's check for a certain amount, constitutes a written acceptance of such check which will render the bank liable for its amount to a holder thereof, who was shown the telegram, and took the check for value in reliance thereon. Garrettson v. North Atchison Bank (1889) 7 L.R.A. 428, 39 Fed. 163, followed on second appeal in (1891) 47 Fed. 867, which is affirmed in (1892) 2 C. C. A. 145, 4 U. S. App. 557, 51 Fed. 168.

A telegram sent by the drawee bank, in answer to an inquiry as to whether it would pay certain checks, stating: "Forward your checks. They will undoubtedly be taken care of by the company when presented," is held in First Nat. Bank v. First Nat. Bank (1913) 210 Fed. 542, to render the drawee bank liable to the inquiring bank, which advanced money upon the strength of the drawee bank's reply. Apparently this is on the theory that the telegram constituted an acceptance.

In Wells v. Western U. Teleg. Co. (1909) 144 Iowa, 605, 24 L.R.A. (N.S.) 1045, 138 Am. St. Rep. 317, 123 N. W. 371, a case involving a forged telegram, it is stated that a telegram dated and directed to the agent of

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the payee of a check, saying, "We will honor Barnes draft for $8,972," amounted, in law, to an acceptance of the check, from which the bank could not recede if the message had been authentic.

The circuit court of appeals in North Atchison Bank v. Garrettson (1892) 2 C. C. A. 145, 4 U. S. App. 557, 51 Fed. 168, supra, in answer to the argument that the telegram sent by the drawee bank did not amount to an acceptance, says: "It cannot be questioned, and it is practically admitted by counsel for the bank, that if the answer had been: 'The bank will pay Tate's check for $22,000, on presentation,' there would be no doubt that thereby the bank would have been bound absolutely for the payment of the check. Can any other meaning be fairly given to the words actually used by the bank, in answering the question put to it? These are: 'James Tate is good; send on your paper.' Counsel for plaintiff in error claim that the answer should only be construed to be a statement that Tate was good for the amount named, and cannot be construed to be a promise to pay the check. The question put to the bank, and to which an answer was requested, was not whether Tate was good, but whether the bank would pay his check for a given sum. It cannot be supposed that the bank intended to return an ambiguous answer, for the purpose of misleading the party asking the question, and therefore, if the answer had been limited to the words, 'Tate is good,' there would be ground for holding that the bank thereby intended an affirmative answer to the categorical question put to it; but all doubt is put at rest by the remaining words of the answer, to wit, 'Send on your paper.' These words invited action on part of the person to whom they were addressed. They are not merely an expression of an opinion. Read in connection with the message sent by Streeter, and which they were intended to answer, the meaning thereof is: 'Send on your check on Tate, and we will pay it.' When the answer reached Streeter, he was clearly justified in assuming that the meaning of the bank was that, if he sent on the check, the bank would pay it on presentation."

See Iowa State Sav. Bank v. City Nat. Bank (1918) — Iowa, —, L.R.A. 1918F, 169, 168 N. W. 148, supra.

A telegram merely stating that the check about which inquiry is made is "good," or is "good now," is not ordinarily regarded as an acceptance. Myers v. Union Nat. Bank (1888) 27 Ill. App. 254, affirmed in (1889) 128 Ill. 478, 21 N. E. 580; First Nat. Bank v. Commercial Sav. Bank (1906) 74 Kan. 606, 8 L.R.A.(N.S.) 1148, 118 Am. St. Rep. 340, 87 Pac. 746, 11 Ann. Cas. 281; Colcord v. Banco De-Tamaulipas (1918) 181 App. Div. 295, 168 N. Y. Supp. 710. This is especially true if a statement that the check is "good now" is coupled with an express refusal to certify by wire. Carmichael v. Tishomingo Bkg. Co. (1917) — Mo. App. —, 191 S. W. 1043.

But see Garrettson v. North Atchison Bank (1889) 7 L.R.A. 428, 39 Fed. 163, supra.

In the following cases there was held to be no acceptance:

In Myers v. Union Nat. Bank (1888) 27 Ill. App. 254, affirmed in (1889) 128 Ill. 478, 21 N. E. 580, the holder of three bank drafts telegraphed the bank on which they were drawn as follows: "Will draft for $3,800, made by J. R. Snyder on you, be paid if presented Monday;" to which the drawee bank replied: "Drafts named are good now." To this the holder of the draft replied: "We have sent a man with draft. Will be there before 3 o'clock." This correspondence was held not to amount to an acceptance.

In First Nat. Bank v. Commercial Sav. Bank (1906) 74 Kan. 606, 8 L.R.A. (N.S.) 1148, 118 Am. St. Rep. 340, 87 Pac. 746, 11 Ann. Cas. 281, the drawee bank, in response to an inquiry whether "J. F. Donald's check on you, $350," is good, replied: "J. F. Donald's check is good for sum named." This is held to be no acceptance, and the court states that "the inquiry indicates no clear intention to extract from the bank a new contract to pay, independent of its duty to Donald. It is entirely consistent with the expression of a

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simple desire for information relating to Donald's standing at the bank. It fairly means: 'Is J. F. Donald's account with you sufficient to make his check for $350 good?' The answer is strictly responsive to the inquiry. It indicates no clear intention to make Donald's check good, whenever presented and whatever the condition of his account. It is entirely consistent with the simple purpose to state Donald's standing at the bank on the day of the telegram. It fairly means: 'Donald's account is now sufficient to meet a check for the sum named.' The writings are not equal to the unambiguous and unequivocal, 'Will you pay?' and, 'We will pay.'"

A reply telegram as follows: "Answering telegram; cannot certify by wire; account amply good now," sent in reply to a telegraphic inquiry as follows: "Will you protect checks amounting to $3,700, drawn on you by the Tishomingo Banking Company, signed by James H. Faircloth, President," was held not to be an acceptance of the check, in Carmichael v. Tishomingo Bkg. Co. (Mo.) supra.

In Colcord v. Banco De Tamaulipas (1918) 181 App. Div. 295, 168 N. Y. Supp. 710, there was held to be no acceptance, where the drawee bank, in answer to an inquiry as follows: "Please telegraph us immediately if you will pay a draft, signed, . . . for . . . dollars," replied: "Draft . . . for . . . dollars is good." The court states that the very form of the reply, not answering directly the question as to whether the drawee would pay the draft, was sufficient to put the inquirer on his guard, and cause him either to require an explicit answer from the drawee as to whether it would accept and pay the draft, or to proceed further at his own risk.

W. A. E.

RE ESTATE OF PHEBE EDMUNDSON, Deceased.

E. R. EDMUNDSON et al., Appts.

Pennsylvania Supreme Court — January 7, 1918.

(259 Pa. 429, 103 Atl. 277.)

Contract — to convey property at death — right of beneficiary to enforce.

1. The beneficiary, though not a party to the contract, may enforce a parol promise by a stranger, to convey a definite portion of the proceeds of property deeded to the promisor without consideration, to the beneficiary, when it is sold, or at the death of the promisor.

[*See note on this question beginning on page* 1193.]

Same — right to enforce.

2. A promise by one to whom property is conveyed without consideration, to pay a certain amount to a third person when the property is sold, or at death of the promisor, cannot, if not in consideration of payment of an existing indebtedness to the grantor, be released or enforced by the grantor.

Evidence — parol — consideration for real estate.

3. That no consideration passed for the conveyance of a parcel of real estate may be shown by parol, although a substantial consideration is named in the deed.

Same — transaction with person since deceased.

4. One deeding property to a stranger upon the latter's promise to convey it to the grantor's child at the death of the grantee is competent to testify to the transaction, in a proceeding by the beneficiary to enforce the promise after the death of the promisor, notwithstanding the statute forbidding a survivor with adverse interest to give evidence of transactions with persons since deceased.

Witness — survivor to contract — adverse interest.

5. The surviving party to a con-

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tract is not incompetent to testify when it comes into litigation, if he has no interest adverse to the party against whom he is called to testify.

Evidence — weight — positive and negative.

6. Positive testimony that a promise was made is not overcome by testimony of witnesses who said that they did not hear it made.

Appeal — finding of fact — error.

7. A finding of fact by the orphans' court, affirmed by the court in banc, will not be reversed on appeal unless clear and manifest error is shown.

APPEAL by legatees from a decree of the Orphans' Court for Allegheny County dismissing exceptions to the allowance of a claim against and distribution of the estate of Phebe Edmundson, deceased. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **E. R. Edmundson** and **Owen S. Cecil** for appellants.

Messrs. **John D. Brown** and **John E. Winner**, for appellee:

Where money or property is placed by one in the hands or possession of another, to be paid or delivered to a third person, an equitable title to the money or thing which is the consideration of the promise passes to the beneficiary, and he may release or compel performance in his own name.

Adams v. Kuehn, 119 Pa. 76, 13 Atl. 184; Hoffa v. Hoffa, 38 Pa. Super. Ct. 356; Delp v. Bartholomay Brewing Co. 123 Pa. 51, 15 Atl. 871; First M. E. Church v. Isenberg, 246 Pa. 221, 92 Atl. 141; Sweeney v. Houston, 243 Pa. 542, L.R.A.1915A, 779, 90 Atl. 347; Howes v. Scott, 224 Pa. 7, 73 Atl. 186; Hostetter v. Hollinger, 117 Pa. 606, 12 Atl. 741; Sargeant v. National L. Ins. Co. 189 Pa. 341, 41 Atl. 351.

The mother of claimant and her present husband were competent to testify as to the contract made by the decedent.

Sargeant v. National L. Ins. Co. supra; Norristown Trust Co. v. Lentz, 30 Pa. Super. Ct. 408; Lancaster County Nat. Bank v. Henning, 171 Pa. 399, 33 Atl. 335; First Nat. Bank v. Gerli, 225 Pa. 256, 74 Atl. 52; Joseph Horne & Co. v. Petty, 192 Pa. 32, 43 Atl. 404; Dickson v. McGraw Bros. 151 Pa. 98, 24 Atl. 1043; Allen's Estate, 207 Pa. 325, 56 Atl. 928.

Mestrezat, J., delivered the opinion of the court:

This is an appeal from the decree of distribution made by the orphans' court of Allegheny county, allowing a claim against the estate of Mrs. Phebe Edmundson, deceased. In 1892, J. A. Herron purchased a house and lot in the city of Pittsburgh for the consideration of $5,500, and, at his suggestion, the title to the property was taken in the name of his wife, Carrie E. Herron, who was a daughter of Mrs. Edmundson, the decedent. Three thousand six hundred dollars of the purchase money was borrowed on a building and loan association mortgage for that amount, on which payments of principal and interest were made at various times by Mr. Herron until July, 1894. In that year Mr. and Mrs. Herron were divorced, and in the autumn of 1895 Mrs. Herron was married to Joseph Stadtfeld. By a deed, dated November 16, 1895, Mr. and Mrs. Stadtfeld conveyed the house and lot in question to Mrs. Edmundson, the consideration stated being $5,500, subject to liens and encumbrances.

At the audit of the account filed by the executor of Mrs. Edmundson, Carrie Herron, now Mrs. Carrie Cotton, daughter of Mrs. Carrie E. Herron, presented for allowance a claim for $3,333.01, alleged to be due her on an oral contract made by the decedent, in 1895, with Mrs. Carrie E. Herron, the mother of the claimant. It is alleged that in the autumn of 1895 Mrs. Edmundson agreed to take title to the property in question under an express agreement made with Mrs. Herron that Carrie Herron, then her infant daughter, should receive all that the latter's father, J. A. Herron, had put into the property, in case of a sale by Mrs. Edmundson during her lifetime, or, if the property was not sold by Mrs. Edmundson, she would

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leave to Carrie Herron the full amount invested therein by Mr. Herron, at her death. With this understanding and agreement, it is claimed that Mrs. Stadtfeld and her husband executed and delivered the deed for the property, subject to the unpaid balance of the mortgage, to Mrs. Edmundson. While this deed recites a consideration of $5,500, it is contended, and the evidence shows, that Mrs. Edmundson paid nothing to the grantors or to Mr. Herron for the property. Mrs. Edmundson did not sell the real estate, and at her death bequeathed $1,000 to Mrs. Cotton.

The children of Mrs. Edmundson deny that she ever entered into a contract to pay or give Mrs. Cotton any sum whatever during her life or at her death, or that she ever made any arrangement or agreement with the Stadtfelds as to the disposition of the property or its proceeds. On the contrary, they claim that, at the time of the execution and delivery of the deed, there was a default in payment of the money due on the mortgage, and the property was conveyed to Mrs. Edmundson by the grantors to prevent foreclosure proceedings.

The claim was allowed by the auditing judge, less the amount of the legacy of $1,000 to Mrs. Cotton. Exceptions filed by parties interested under Mrs. Edmundson's will were dismissed, and exceptants have appealed, assigning as error the overruling of the exceptions, the decree of distribution and the allowance of the claim, and the admission of the testimony of Mrs. Stadtfeld.

The questions raised by the assignments of error are: (a) The right of the claimant to recover on the contract, she not being a party thereto or to the consideration, and having no beneficial interest in the property transferred; (b) the competency of the mother of the claimant as a witness to prove the oral contract; and (c) the sufficiency of the evidence to sustain the claim.

We think Carrie Herron, now Mrs. Cotton, can enforce, by an action or proceeding instituted in her own name, the contract made by her mother with the decedent for the benefit of the claimant. In Howes v. Scott, 224 Pa. 7, 10, 73 Atl. 187, it is said: "At common law no one could maintain an action upon a contract to which he was not a party. This rule is well established in this country, and is recognized by both the state and Federal courts. There are, however, exceptions to the rule which, in this state, are as well settled as the rule itself. For nearly three quarters of a century, since the decision in Blymire v. Boistle, 6 Watts, 182, 31 Am. Dec. 458, the decisions of this court have uniformly recognized and enforced the exceptions, whenever the facts of a case required it."

In Adams v. Kuehn, 119 Pa. 76, 85, 13 Atl. 186, Mr. Justice Williams, delivering the opinion, says: "Where one person enters into a contract with another to pay money to a third, or to deliver some valuable thing, and such third party is the only party interested in the payment or the delivery, he can release the promisor from performance or compel performance by suit."

He then notes some of the exceptions to the general rule at common law, that a person could not maintain an action upon a contract to which he was not a party, as follows: "Among the exceptions are cases where the promise to pay the debt of a third person rests upon the fact that money or property is placed in the hands of the promisor for that particular purpose. Also where one buys out the stock of a tradesman, and undertakes to take the place, fill the contracts, and pay the debts of his vendor. These cases, as well as the case of one who receives money or property on the promise to pay or deliver to a third person, are cases in which the third person, although not a party to the contract, may be fairly said to be a party to the consideration on which it rests. In good conscience

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the title to the money or thing which is the consideration of the promise passes to the beneficiary, and the promisor is turned in effect into a trustee. But when the promise is made to and in relief of one to whom the promise is made, upon a consideration moving from him, no particular fund or means of payment being placed in the hands of the promisor out of which the payment is to be made, there is no trust arising in the promisor and no title passing to the third person. The beneficiary is not the original creditor who is a stranger to the contract and the consideration, but the original debtor who is a party to both, and the right of action is in him alone."

Mrs. Edmundson took title to the land, as the court found, under an oral agreement to give Mrs. Cotton, the claimant, the amount of money invested in the land by the claimant's father, when the premises might be sold or at the grantee's death. The premises were not sold by the grantee, nor did she make provision by her will for payment of this claim. It is clear, therefore, that she failed to comply with the contract on her part. The claimant was not a party to the contract, and had no beneficial interest in the property conveyed by her mother to the decedent, but she is the only party beneficially interested in enforcing the claim secured by it. Mrs. Herron, the grantor, has no interest in the claim. The deed is absolute, and conveys the property to the decedent without any conditions imposed for the payment of any sum whatever to her. The promise contained in the agreement was not in consideration of the payment of an existing indebtedness due Mrs. Herron, the promisee, and therefore could not be released or enforced by her. This proceeding is on the oral contract to compel payment to the party beneficially interested by its terms, and not to enforce any covenant or condition in the deed in favor of the grantors or promisees therein. Being the only person beneficially interested in the payment of the money secured thereby, the claimant can release the promisor's estate from performance, or compel performance of the terms of the contract by suit. While the deed showed the payment of a consideration of $5,500, there was, in fact, nothing whatever paid, or agreed to be paid, by the decedent to the grantors for the transfer of the property. This was shown by parol evidence which was competent for the purpose. Sargeant v. National L. Ins. Co. 189 Pa. 341, 346, 41 Atl. 351. We think the facts of this case bring it within the doctrine of our decisions, and that the claimant can recover in an action or proceeding instituted by her against the estate of the decedent.

Contract—right to enforce.

Same—to convey property at death—right of beneficiary to enforce.

Evidence—parol—consideration for real estate.

In Hoffa v. Hoffa, 38 Pa. Super. Ct. 356, the learned superior court applied the same doctrine, and held that the person beneficially interested could maintain an action on the contract. There one brother conveyed a farm to another for the consideration of $1 named in the deed, and the grantee agreed to pay another brother and sister $1,000 each. The farm was in fact worth $3,000. It was held that the brother and sister could maintain a suit against the grantee's administrator for the money which the grantee had promised his brother to pay them, and that the declarations of the grantee were admissible in evidence and constituted sufficient proof of the contract. The learned counsel for the appellants concede that the present case seems to be on all fours with the Hoffa Case, but claim that the latter case is distinguished by the fact that the deed showed a nominal consideration. As already pointed out, it was shown, and in fact was not denied, that while a substantial con-

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sideration was named in the deed conveying the property to the decedent, no consideration passed to Mr. Herron or to the grantors from the grantee.

The claimant called as witnesses, in support of her claim, her father, J. A. Herron, her mother, and her mother's second husband, Mr. Stadtfeld. The appellants objected to the competency of Mr. and Mrs. Stadtfeld, but error is assigned to the admission of the testimony of Mrs. Stadtfeld only. They contend that the witness was incompetent on the ground that she is the surviving and remaining party to the contract, and therefore directly within the words of clause "e," § 5 of the Act of May 23, 1887 (P. L. 158).

Same—transaction with person since deceased.

This fact in itself is not sufficient to disqualify a witness. He must be not only a "remaining party" to the contract, but must also have an interest adverse to the party against whom he is called to testify. This clause provides that where any party to a thing or contract in action is dead, and his right thereto or therein has passed, either by his own act or by the act of the law, to a party on the record who represents his interest in the subject in controversy, no surviving or remaining party to such thing or contract, or any other person whose interest shall be adverse to the said right of such deceased, shall be a competent witness to anything occurring before the death of said party. It will be observed that to disqualify a witness under this clause he must not only be a surviving and remaining party to the thing or contract in action, but he must have an interest adverse to the right of the deceased party. This is clearly the correct interpretation of the clause, and we have so held. Dickson v. McGraw Bros. 151 Pa. 98, 24 Atl. 1043; First Nat. Bank v. Gerli, 225 Pa. 256, 74 Atl. 52. The disqualification is made to depend, not only on the fact of being a remaining party, but also of having an adverse interest (Dickson v. McGraw, supra), and it is the adverse interest, and not the adverse testimony, that disqualifies a witness (Joseph Horne v. Petty, 192 Pa. 32, 43 Atl. 404). This claim is based on the parol contract, and is made by Mrs. Cotton against the decedent's estate, and Mrs. Stadtfeld can have no interest in having it sustained. She is not a party to the litigation, nor interested in sustaining the claim. Her interest is, therefore, not adverse to the estate. On the contrary, however, her interest is adverse to the claim if she be a residuary legatee; and, if it be allowed and paid, it cannot increase, but will reduce, her share in her mother's estate. It being apparent, therefore, that Mrs. Stadtfeld had no interest in the claim, and hence no interest adverse to the estate of the decedent, we think she was a competent witness for the claimant.

Witness—survivor to contract—adverse interest.

The evidence is amply sufficient, if believed, to establish the oral contract and sustain the claim. Mrs. Stadtfeld's testimony is clear and explicit as to the terms of the agreement by which the decedent agreed to give Mrs. Cotton the sum paid by Mr. Herron on the purchase price of the property. She says that the conveyance was made without any consideration passing to the grantors, and because Mr. Stadtfeld objected to her retaining any property acquired from her former husband. The purpose, therefore, of devesting herself of the title to the premises was to secure to her daughter the amount of money which Mr. Herron paid on the purchase price. She further testified that her mother had frequently assured her that she would stand by the promise she made when the property was conveyed to her. Mr. Stadtfeld corroborated his wife's testimony as to the purpose of disposing of the property, and as to the repeated assurance of the decedent to abide by her promise. Mr.

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Herron testified that in the summer or fall of 1895 the decedent discussed with him the taking over of this property by her, and she repeatedly assured him that, if she did take it over, her granddaughter, Mrs. Cotton, should have everything that Mr. Herron put into it, and that in case of her death she would leave the house to the child, or leave her the equivalent of the amount he had put into it.

Three sons and a daughter of the decedent were called to testify against the claim, but their testimony is simply to the effect that they did not hear their mother make the promise or reaffirm it, and did not hear of the claim until shortly before their mother's death. There was no substantial contradiction of the testimony introduced by the claimant, and hence the learned auditing judge very properly found that "the evidence by which the claim is established is uncontradicted."

Evidence—weight—positive and negative.

It is claimed by the appellant that the decree is excessive in amount. The auditing judge, however, found that the amount invested in the property in cash by the claimant's father was $3,333.01, and, on an exception filed, this finding was sustained by the court in banc. Such clear and manifest error in the court's conclusion has not been pointed out as would justify us in reversing the decree on this ground.

Appeal—finding of fact—error.

The other questions argued by the appellant are not in the case, and do not require consideration.

The decree is affirmed.

NOTE.

The right of a beneficiary to enforce a contract between third persons to provide for him by will is discussed in the note following SEAVER v. RANSOM, post, 1187. In this case the court, in holding such an agreement enforceable by the beneficiary, applies a test somewhat different from that applied by the courts of some other jurisdictions. It apparently makes the right of the beneficiary to maintain the action dependent on the two facts that money or property has been placed in the hands of the promisor from which to make such payment, and that the beneficiary is the only person beneficially interested in enforcing the promise.

GEORGIA FRANCES STEVENS, Appt.,
v.
GEORGE TOBIAS MYERS, Respt.

Oregon Supreme Court (In Banc) — December 31, 1918.

(— Or. —, 177 Pac. 37.)

Specific performance — contract to make will — right of beneficiary.

1. The beneficiary in mutual wills, executed in consideration of the revocation of existing wills by husband and wife, who acquired the property by mutual effort after marriage, under laws giving them equal rights in the property, may, after the death of the maker, specifically enforce an agreement evidenced by a clause in both wills, and supported by satisfactory testimony, that such beneficiary shall have a share of the property upon the death of the surviving maker of the wills, where such survivor received property under the will of the one first dying.

[*See note on this question beginning on page* 1193.]

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Appeal — equity — hearing de novo.

2. An equity suit is tried de novo in the appellate court.

Same — granting rehearing — discretion.

3. The question of granting a reargument in an appellate court is a matter addressed to the sound discretion of the court.

Appeal — divided court — motion to affirm.

4. Motions to affirm, because of the equal division of the court, a decree in equity which is heard de novo on appeal, will be denied where the statute requires a concurrence of four judges to pronounce a judgment and the court orders successive rearguments for the purpose of securing the necessary concurrence.

Will — mutual — consideration.

5. The mutual revocation of existing wills is a consideration for the execution by husband and wife of mutual wills in favor of each other, with substituted provisions in favor of their children.

Same — right to abandon.

6. One maker of mutual wills, executed in accordance with agreements based on a good consideration, cannot, after probating and receiving property under the will of the other person to the contract, who dies while both wills are in force and effect, abandon his agreement and dispose of his property in violation of its terms.

APPEAL by plaintiff from a decree of the Circuit Court for Multnomah County dismissing a complaint filed to enforce specific performance of an alleged contract between her parents to make mutual wills. *Reversed.*

Statement by Johns, J.:

It is alleged that the plaintiff and the defendant are brother and sister and the only children of George Tobias Myers and Sally S. Myers, his wife; that by their mutual effort and joint labor the father and mother accumulated a large amount of property; that, at the time of the making of the alleged agreement and the execution of their respective wills, the parents were the owners, in their respective rights, of valuable real estate and personal property in the city of Portland; that, while they were such owners, George T. Myers, the father, promised and agreed to and with Sally S. Myers, the mother, for and in consideration of her making and executing her will, in and by which she would convey and bequeath to George T. Myers all of her property, both real and personal, which she might own at the time of her death, and therein further providing that, in the event that she should die first, all of the property of every kind which she might own at the time of her death should be divided equally between their son and daughter, the plaintiff and the defendant, that he, George T. Myers, would make and execute his will, in and by which he would devise and bequeath to his wife, Sally S. Myers, the mother of the plaintiff and the defendant, all of the property which he might own or in which he might have an interest at the time of his death; and he would further provide in his will that, if his wife should die first, then, and in that event, all of the property which he might own or in which he might have an interest at the time of his death should be equally divided between the plaintiff and the defendant; that the mother and father joined in said agreement to make and execute said wills, and promised and agreed with each other to make such wills; that pursuant thereto, and in compliance with such agreement, George T. Myers and Sally S. Myers, husband and wife and the father and mother of the plaintiff and the defendant, did on February 11, 1896, duly and regularly make and execute their respective wills as follows:

Mr. Myers's Will.	Mrs. Myers's Will.
I, George T. Myers, of Portland, Oregon, being of sound and disposing mind and	I, Sallie S. Myers, of Portland, Oregon, being of sound and disposing mind and

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memory, do make, ordain, publish, and declare this my last will and testament as follows, hereby revoking all former wills made by me.

I.

I give, devise and bequeath all of my property, and estate, real and personal, of every name, nature or description, and wheresoever situate or being, to my beloved wife, Sallie S. Myers, to have, possess and hold the same in her own right.

II.

I intentionally omit giving anything to my children, Georgia Frances Stevens and George Tobias Myers, Jr., knowing that my wife will care and provide for them.

III.

In case of the death of my said wife, Sallie S. Myers, before my death, then, and in that event, I give, devise and bequeath all of my property and estate, real and personal, of every name, nature or description, and wheresoever situate and being, to my said children, Georgia Frances Stevens and George Tobias Myers, Jr.

IV.

I do hereby nominate and appoint my said wife, Sallie S. Myers, executrix of this, my last will and testament, and direct that no bond or undertaking shall be required of her as such executrix.

V.

In case of the death of my said wife, Sallie S. Myers, before my death, so that the third provision of this, my said will, shall then be operative, I do then, and in that event, nominate and appoint my said children, Georgia Frances Stevens, executrix, and George Tobias Myers, Jr., executor, of this, my last will and testament, and direct that no bond or undertaking shall be required of them, or either of them, as such executrix and executor.

memory, do make, ordain, publish, and declare this my last will and testament as follows, hereby revoking all former wills made by me.

I.

I give, devise and bequeath all of my property, and estate, real and personal, of every name, nature or description, and wheresoever situate or being, to my beloved husband, George T. Myers, to have, possess and hold the same in his own right.

II.

I intentionally omit giving anything to my children, Georgia Frances Stevens and George Tobias Myers, Jr., knowing that my husband will care and provide for them.

III.

In case of the death of my said husband, George T. Myers, before my death, then, and in that event, I give, devise and bequeath all of my property and estate, real and personal, of every name, nature or description, and wheresoever situate and being, to my said children, Georgia Frances Stevens and George Tobias Myers, Jr.

IV.

I do hereby nominate and appoint my said husband, George T. Myers, executor of this, my last will and testament, and direct that no bond or undertaking shall be required of him as such executor.

V.

In case of the death of my said husband, George T. Myers, before my death, so that the third provision of this, my said will, shall then be operative, I do then, and in that event, nominate and appoint my said children, Georgia Frances Stevens, executrix, and George Tobias Myers, Jr., executor, of this, my last will and testament, and direct that no bond or undertaking shall be required of them, or either of them, as such executrix and executor.

On January 18, 1902, Sally S. Myers died, and at the time of her death she was the owner in fee simple, in her own right, of all of the real estate which she owned at the time their respective wills were executed, and both of said wills were then in full force and effect, as they were when executed on February 11, 1896. It is further alleged that, upon the death of Sally S. Myers, George T. Myers, as her surviving husband, caused her will to be duly and regularly proved and admitted to probate in the county court of Multnomah county, Oregon; that pursuant to its provisions he was duly appointed and qualified as executor of such will, and discharged the duties thereof; and that upon the settlement of her estate he took and accepted, under the will, all of the real estate and personal property which the said Sally S. Myers owned at the time of her death, the said real estate being specifically described.

It is averred in the complaint that after he had obtained and acquired such real property pursuant to such will, and while he was the owner thereof, the said George T. Myers, on May 31, 1902, in violation of said promise and agreement made with his wife on February 11, 1896, annulled and destroyed his will, executed pursuant to the terms and conditions of said agreement, and executed another and a different will, by which he bequeathed

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to his daughter, the plaintiff Georgia Frances Stevens, the sum of $20,000, to be paid to her when she should arrive at the age of forty-five years, and, in case of her death before his own death or before she should reach the age mentioned, then the $20,000 should go to his son, George Tobias Myers, Jr., to whom he also devised the residue of his property, both real and personal, and whom he named as sole executor of such will. On December 3, 1902, he executed a codicil thereto, in which it was provided that if his son, George T. Myers, Jr., should die before himself, then $20,000 should be given to the Children's Home of Portland, $20,000 to the Taylor Street Methodist Episcopal Church of Portland, $20,000 to a nephew, and the remainder of his property to certain of his nephews and nieces. Henry L. Pittock was named therein as executor.

On July 12, 1907, George T. Myers died, and upon petition therefor his last will and testament above described, with the codicil attached thereto, was duly admitted to probate in Multnomah county, Oregon, and pursuant to its terms the defendant was duly appointed as executor of that will, and qualified as such. It is alleged that all of the debts and expenses of the estate have been paid in full, and that at the time of his death George T. Myers was the owner of certain real property described; that, in addition to said real estate, he was also the owner of valuable salmon fisheries and fishing rights in the territory of Alaska, from which large profits have been made; that he also owned a large amount of personal property, the nature and amount of which are to the plaintiff unknown, of which the defendant has taken the sole and exclusive possession, and now claims to be the exclusive owner thereof; that the latter refuses to carry out or comply with the agreement alleged to have been made between the father and the mother at the time of the execution of their respective wills on February 11, 1896, or to convey to the plaintiff one half, or any, of the property, which rightfully belongs to her, and to which she is entitled under the terms and provisions of such respective wills, and refuses to account to her for the rents, issues, and profits, or any part thereof.

The plaintiff and the defendant were the only children of George T. Myers and Sallie S. Myers, and the plaintiff contends that, but for the violation of the alleged agreement by the father, all of the property owned by him at the time of his death would have been devised and bequeathed to the plaintiff and the defendant in equal parts. Based upon such allegations, she prays for the court to declare and decree a specific performance of the alleged agreement made between the father and the mother at the time of the execution of their respective wills; that the plaintiff be declared to be the owner of one half of all the property which her father owned at the time of his death; that the defendant hold the same as trustee for her; and that he be required to account to the plaintiff for one half of all such property, including the rents, issues, and profits thereof.

The defendant filed an answer in which he admits that he is the brother of the plaintiff, and that they are the only children of George T. Myers and Sally S. Myers, both of whom are now deceased; that the latter had accumulated a large amount of property during their lifetime; and that Sally S. Myers was the owner of her real property described.

The record does not show what was done with the will of George T. Myers, executed on February 11, 1896; but Mr. Boise testifies that, soon after the death of Mrs. Myers, Mr. Myers made another will, in which he left a nominal sum only to his daughter. However, there is no other evidence of that will in the record, although it is admitted that George T. Myers did execute an-

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other and different will on May 31, 1902. The defendant denies the execution of any will by George T. Myers on February 11, 1896, but admits the execution of the will of Sally S. Myers on that date, although denying that it was made or executed pursuant to any agreement, as alleged, or otherwise "than in the execution of an intent, purpose, and design on the part of said Sally S. Myers to dispose of whatever property she might have at the time of her death, in accordance with the provisions made and set out in her said will;" and in legal effect denies every material allegation of the complaint. As a further and separate answer, the defendant alleges the probating of the will of George T. Myers on July 22, 1907, and the initiation and filing of a contest by the plaintiff against the probate of said will on December 19, 1907, based upon the allegation that the said George T. Myers, at the time of the execution of the said will, was acting under an insane delusion, and that such will was invalid; that the validity of such will, however, was sustained by decree of this court (Stevens v. Myers, 62 Or. 372, 121 Pac. 434, 126 Pac. 29); and that by the initiation of such contest the plaintiff made her election, and is now estopped to maintain or prove the allegations made in her complaint. A reply was filed, and, after testimony was taken, the trial court on January 22, 1914, made its findings of fact and conclusions of law and rendered a decree against the plaintiff, dismissing her complaint and assessing costs against her, from which decree plaintiff appealed.

The case was first argued and submitted in banc on June 3, 1915, reargued on September 4, 1917, and again reargued on November 26, 1918; Mr. Justice Harris not sitting at any of the hearings for the reason that he considered himself disqualified. On June 17, 1917, the defendant filed a motion here to affirm the decree of the lower court, on the ground that the members of this court were then equally divided upon the issues between the plaintiff and the defendant. On May 2, 1918, the defendant filed another motion to affirm the decree of the lower court, for the reason that the members of this court were then evenly divided upon the merits of the case, and that about eight months had elapsed since the case was reargued and submitted. No decision was ever rendered on either of said motions, and they were again renewed at the time of the last argument.

It is alleged that the promises, agreements, and contract between the father and the mother were not in writing; that the plaintiff does not know, and therefore cannot specify, the exact date when they were made, but on information and belief charges that they were made on, or a short time prior to, February 11, 1896. The wills of that date were prepared by Whitney L. Boise, an attorney of this court, at his office in Portland, and were executed at the same time and on the same day, in the presence of the same witnesses. After execution, both wills were returned to Mr. Boise and deposited in the safe in his office, where they remained until after the death of Sally S. Myers, when her will was taken out and probated by her husband. The record does not show what was done with the will of George T. Myers executed on February 11, 1896, but it is admitted that he executed another and different will on May 31, 1902, about four months after the death of his wife, and that the codicil to his last will was executed on December 3, 1902. Exclusive of the contents of the respective wills and the fact that both were executed at the same time and on the same day, in the presence of the same witnesses, there is no other evidence of any writing tending to show any contract or mutual compact between George T. Myers and Sally S. Myers, or that one will was made in consideration of the other; and the oral evidence of such a contract is

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confined to the testimony of Mr. Boise, who drew the wills, and that of the plaintiff and her husband.

The question is thus presented as to whether the wills of George T. Myers and Sally S. Myers of February 11, 1896, were executed pursuant to an agreement, and, if so, what is the legal force and effect of such agreement; and whether the plaintiff, as the surviving daughter of the deceased father and mother, can now enforce that agreement against her brother, the surviving son, as to property which he received under the terms and provisions of the will of George T. Myers executed May 31, 1902.

Messrs. **Roscoe C. Nelson** and **W. Lair Thompson**, for appellant:

To establish a compact in the case of joint or mutual wills, the wills themselves are evidence, and are to be considered in connection with the surrounding facts and circumstances affecting the relations of the parties and the subject-matter, as tending to show their mutual or contractual nature.

Worden v. Worden, 96 Wash. 592, 165 Pac. 501; Alexander v. Lewes, — Wash. —, 175 Pac. 572; Anderson v. Anderson, 181 Iowa, 578, 164 N. W. 1042; Corcoran v. Kennedy, 177 App. Div. 63, 163 N. Y. Supp. 703; Phillip v. Phillip, 96 Misc. 471, 160 N. Y. Supp. 624; Shroyer v. Smith, 204 Pa. 310, 54 Atl. 24; McGinley's Estate, 257 Pa. 478, 101 Atl. 807; Skinner v. Rasche, 165 Ky. 108, 176 S. W. 942; Williams v. Williams, — Va. —, 96 S. E. 749.

Where one claiming under a contract to execute a will has fully performed, and similarly where one claims under one of two mutual or reciprocal wills, the maker of the other having died and the survivor having accepted the benefits, the Statute of Frauds will not be applied, the contract being executed, and the property involved will be treated as being impressed with a trust.

Steinberger v. Young, 175 Cal. 81, 165 Pac. 432; Bromeling v. Bromeling, — Mich. —, 168 N. W. 431; Green v. Whaley, 271 Mo. 636, 197 S. W. 355; Gordon v. Spellman, 145 Ga. 682, 89 S. E. 749, Ann. Cas. 1918A, 852; Velikanje v. Dickman, 98 Wash. 584, 168 Pac. 465; James v. Lane, 103 Kan. 540, 175 Pac. 387; Larrabee v. Porter, — Tex. Civ. App. —, 166 S. W. 395.

Messrs. **Arthur C. Emmons** and **Emmons & Webster** also for appellant.

Messrs. **Dolph, Mallory, Simon, & Gearin**, and **Martin L. Pipes**, for respondent:

Where the contract relates to both real and personal property, being void in part, it is void as a whole.

Ellis v. Cary, 74 Wis. 176, 4 L.R.A. 55, 17 Am. St. Rep. 125, 42 N. W. 252; Pond v. Sheean, 132 Ill. 312, 8 L.R.A. 414, 23 N. E. 1018; Gould v. Mansfield, 103 Mass. 408, 4 Am. Rep. 573.

The part performance, to take the case out of the statute, must be exclusively referable to the contract alleged; and, if it is explicable on any other ground, it is not sufficient.

Pom. Contr. 1st ed. § 108; Shahan v. Swan, 48 Ohio St. 25, 29 Am. St. Rep. 517, 26 N. E. 222; Christy v. Barnhart, 14 Pa. 260, 53 Am. Dec. 543; Johnson v. Clancy, 4 Blackf. 94, 28 Am. Dec. 45; Swash v. Sharpstein, 14 Wash. 426, 32 L.R.A. 796, 44 Pac. 862; Poland v. O'Connor, 1 Neb. 50, 93 Am. Dec. 327; Hawkins v. Doe, 60 Or. 437, 119 Pac. 754, Ann. Cas. 1914A, 765; Semmes v. Worthington, 38 Md. 298; Wallace v. Rappleye, 103 Ill. 231; Horton v. Stegmyer, 99 C. C. A. 332, 175 Fed. 756, 20 Ann. Cas. 1134.

In order to specifically perform a parol contract to convey land, possession must have been transferred.

Purcell v. Miner (Purcell v. Coleman) 4 Wall. 513, 18 L. ed. 435; Pond v. Sheean, 132 Ill. 312, 8 L.R.A. 414, 23 N. E. 1018; Swash v. Sharpstein, 14 Wash. 426, 32 L.R.A. 796, 44 Pac. 862; Grindling v. Reyhl, 15 L.R.A.(N.S.) 466, and note, 149 Mich. 641, 113 N. W. 290.

The wills themselves do not imply a contract to make them, even though simultaneously made.

Re Edwall, 75 Wash. 391, 134 Pac. 1041; Edson v. Parsons, 155 N. Y. 555, 50 N. E. 265; Cawley's Appeal, 136 Pa. 628, 10 L.R.A. 93, 20 Atl. 567; Wilson v. Gordon, 73 S. C. 155, 53 S. E. 79; Buchanan v. Anderson, 70 S. C. 454, 50 S. E. 12; Frazier v. Patterson, 243 Ill. 80, 27 L.R.A.(N.S.) 508, 90 N. E. 216, 17 Ann. Cas. 1003; Schumaker v. Schmidt, 44 Ala. 454, 4 Am. Rep. 135.

Courts do not look with favor upon declarations of deceased party to prove an oral contract.

Rosenwald v. Middlebrook, 188 Mo. 58, 86 S. W. 200; Rose v. Oliver, 32 Or. 447, 52 Pac. 176; Richardson v. Orth, 40 Or. 252, 66 Pac. 925, 69 Pac. 455; Sappingfield v. King, 49 Or. 102, 8

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L.R.A. (N.S.) 1066, 89 Pac. 142, 90 Pac. 150.

Every bill for the specific performance of a contract is an application to the sound discretion of the court.

Cox v. Cox, 26 Gratt. 305; Sprinkle v. Hayworth, 26 Gratt. 384; Snider v. Lehnherr, 5 Or. 386.

All precedent, as well as all contemporaneous, negotiations in relation to a contract afterwards reduced to writing, is, in the absence of accident, etc., conclusively presumed to have been swallowed up by, and entirely merged and expressed in, the written instrument, which henceforth becomes the sole expression of the will and agreement of the contracting parties.

State ex rel. Yeoman v. Hoshaw, 98 Mo. 358, 11 S. W. 759; Tracy v. Union Iron Works Co. 104 Mo. 193, 16 S. W. 203; Jones v. Shepley, 90 Mo. 307, 2 S. W. 400; Boyd v. Paul, 125 Mo. 9, 28 S. W. 171; Smith v. Caro, 9 Or. 278; Halsell v. Renfrow, 14 Okla. 674, 78 Pac. 118, 2 Ann. Cas. 286; Naumberg v. Young, 44 N. J. L. 331, 43 Am. Rep. 380; Ferguson v. Rafferty, 128 Pa. 337, 6 L.R.A. 33, 18 Atl. 484.

Even when the contract limits a man's rights to dispose of his property by will, it is regarded with suspicion, and enforced only when it is apparent that the hand of equity is required to prevent a fraud upon the promisee.

Richardson v. Orth, 40 Or. 263, 66 Pac. 925, 69 Pac. 455; Rose v. Oliver, 32 Or. 456, 52 Pac. 176.

The law gives to every man the unqualified right to dispose of his property by will as he sees fit.

Potter v. Jones, 20 Or. 239, 12 L.R.A. 161, 25 Pac. 769; Chrisman v. Chrisman, 16 Or. 128, 18 Pac. 6; Holman's Will, 42 Or. 345, 70 Pac. 908; Re Turner, 51 Or. 1, 93 Pac. 461; Carpenter v. Calvert, 83 Ill. 70.

The court erred in holding that Mrs. Myers made and executed a will as a consideration for the contract relied on, and in holding that such will was mutual.

Taggart v. Hunter, 78 Or. 151, 150 Pac. 738, 152 Pac. 871, Ann. Cas. 1918A, 128; Taylor v. Peterson, 76 Or. 77, 147 Pac. 520; Great Western Land Co. v. Waite, 87 Or. 488, 168 Pac. 927, 171 Pac. 193; Oregon Home Builders v. Crowley, 87 Or. 517, 170 Pac. 718, 171 Pac. 214; Lueddemann v. Rudolf, 79 Or. 249, 154 Pac. 116, 155 Pac. 172.

In an appellate court, when there is an equal division of the judges on the merits, the judgment of the lower court will be affirmed.

Putman v. Southern P. Co. 21 Or. 230, 27 Pac. 1033; United States v. Reeside, 19 L. ed. 391; Albany Bridge Case (Coleman v. Hudson River Co.) 2 Wall. 403, 17 L. ed. 876; Washington Bridge Co. v. Stewart, 3 How. 413, 11 L. ed. 658; 3 Cyc. 415; Baltimore v. Lefferman, 4 Gill, 425, 45 Am. Dec. 145; Hammond v. Ridgely, 5 Harr. & J. 245, 9 Am. Dec. 522; Rayne v. American Sugar-Ref. Co. — Mass. —, 44 N. E. 444; Comer v. Knowles, 17 Kan. 436; Dutch Reformed Church Cases, 52 Mich. 329, 17 N. W. 933; Gran v. Spangenberg, 53 Minn. 42, 54 N. W. 933; Durant v. Essex Co. 8 Allen, 103, 85 Am. Dec. 685; Luco v. De Toro, 88 Cal. 26, 11 L.R.A. 543, 25 Pac. 983; Santa Rosa City R. Co. v. Central Street R. Co. 112 Cal. 436, 44 Pac. 733; Frankel v. Deidesheimer, 93 Cal. 73, 28 Pac. 794.

Johns, J., delivered the opinion of the court:

In his motions to affirm the decree of the circuit court, the defendant relies upon the decisions of the Supreme Court of the United States, and some other jurisdictions, and the cases of Guthrie v. Imbrie, 12 Or. 182, 53 Am. Rep. 331, 6 Pac. 664, and Putman v. Southern P. Co. 21 Or. 230, 27 Pac. 1033; and under such authorities contends that the disagreement of this court would necessarily result in an affirmance of the decree of the lower court. All of the arguments in this case were heard in banc, and chapter 167 of the Laws of 1913, p. 295, § 4, provides: "When sitting in banc, the concurrence of four justices shall be necessary to pronounce a judgment."

Section 5 of this act is as follows: "The supreme court shall have power to make and enforce all rules necessary to the prompt and orderly despatch of the business of the court, and the remanding of causes to the court below."

It is not claimed that this court ever rendered any decision in this case, and the rehearings were ordered on the application of one of the litigants.

This is a suit in equity and is

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here tried de novo. The cases of Guthrie v. Imbrie and Putman v. Southern P. Co. supra, were both actions at law, and both were decided under an older statute, different from the one enacted in 1913, above quoted, and for such reason those cases are not in point. The motions to affirm were filed on June 7, 1917, and May 2, 1918, renewed on October 21, 1918, and insisted upon at the last argument of this cause. The petitions for reargument were addressed to the sound discretion of this court, and were granted in the exercise of that discretion. The following entry appears in the official records of this court under date of June 19, 1917: "Now at this time, the court being fully advised, it is ordered that the motion to affirm the decree of the court below be and the same is denied."

Appeal—equity—hearing de novo.

Same—granting rehearing—discretion.

By order of the court the case was reargued on September 4, 1917, and again reargued on November 26, 1918. This is an important case, and it is very apparent that the reargruments were ordered and made for the purpose of procuring the concurrence of four justices, "necessary to pronounce a judgment" on the merits. The motions to affirm the decree are denied.

Appeal—divided court—motion to affirm.

At the time of their marriage, youth and energy were about the only assets of George T. Myers and Sally S. Myers. They had their trials and struggles, but through economy and close attention to business affairs they eventually accumulated a substantial fortune, and at the time of her death on January 18, 1902, Sally S. Myers left an estate in her own right of the appraised value of $26,350; and at the time of his death of July 12, 1907, George T. Myers left an estate of the appraised value of $232,138.65, including the property which he received by the will of his deceased wife. It appears that Mrs. Myers had received $5,000 from an estate; that this money was invested and used for family purposes; that in a large measure it was the beginning of their later financial success; and that, at the time of George T. Myers's death, one parcel of his wife's property was worth at least $100,000. There has since been a very marked increase in the value of all of the property.

George T. Myers and Sally S. Myers had two children, a daughter and a son, the plaintiff and the defendant in this suit. Their domestic relations were exceptionally happy and pleasant. Mr. Myers had great confidence in and respect for the ability and judgment of his wife, and freely consulted her about all of his business affairs, never making an investment without her approval. There was also a strong attachment between the son and daughter, and the only trouble they ever had originated in the execution of their father's subsequent wills and the settlement of his estate. The father and mother were boon companions, and after they had acquired their fortune they took numerous trips, always together, and looked forward to them with pleasure. In short, up to the time when this trouble arose it was an unusually happy family, strongly bound by the ties of love, mutual respect, and confidence.

In February, 1896, just prior to taking one of their accustomed trips, George T. Myers called at the office of Whitney L. Boise, an attorney of this court, and, according to Mr. Boise's testimony, advised the latter that "Mrs. Myers and himself had decided to make a will; each one wanted to make a will; that he was going to will to Mrs. Myers all of his property, and, in case of her death before his, that he wanted it to go to his children equally, but at the present time he did not desire to give anything to the children; that Mrs. Myers had helped him to make his money, and he thought that he wanted to give

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everything he had to her; and that she felt the same way."

Mr. Boise further testifies that both Mr. and Mrs. Myers came into his office the next morning; that "they both stated to me what they wanted;" and that "I asked Mrs. Myers if she wanted the same kind of a will made, and she said she did." They then commenced to talk about trips they had made, and of the one which they were contemplating, and when Mr. Boise was ready to draw the wills his stenographer had gone. He explained to them how the wills should be executed, and that Mr. Myers could come in later, take them home, and have them executed. He further testifies: "I drew the wills that afternoon, and Mr. Myers came in and got them and took them home and had them executed, and brought them back to my office, and I looked them over and saw they were properly executed, and put them in envelops and sealed them up, and put them in the safe in my office. They remained there a great many years, I think until Mrs. Myers's death."

In response to a question as to any understanding or agreement, Mr. Boise answered:

I think I have substantially stated it. He said they had talked it over and they had come to the agreement to make these wills. He wanted to give all of his property to his wife, and, in case she died before he did, he wanted it to go to his children equally, and she wanted to do the same. That is all I can recollect.

Q. They did not ask you, as I understand it, anything about the making of these wills, but told you what they wanted done; that is, they merely told you what they wanted in the wills?

A. I have stated the case as it was, yes. And I drew it as they told me to, or tried to.

We quote from his cross-examination:

Q. You are sure, now, you did draw the wills according to the directions of both of them?

A. I drew the wills as I understood to be their directions.

Q. And the wills as they now are written express the agreement that was made at the time between Mr. and Mrs. Myers?

A. That is what I tried to do. If I failed, it is my fault.

Q. You do not wish to be understood to say that the wills are not according to the agreement made between them, that you have testified about?

A. Certainly not.

In the former case, that of contesting the will, Mr. Boise had testified as follows: "She left all her property to him, and he left all his to her. That is, in case either one should die, that was the condition, and he was appointed executor of her will, and I think she was appointed executrix of his will, and they were identical. I don't remember now as to whether, in case both of them died, the property was to be divided equally between the children; but her will will show. Whatever her will is, his will was a counterpart of it."

There is no question about the execution of the will of Mrs. Myers on February 11, 1896, and, while the defendant denies the execution of the will of George T. Myers of that date, and such will was not offered in evidence and is not accounted for, we think it clearly appears from the record that both the husband and wife did execute their respective wills at the same time and in the same manner, as indicated by the testimony of Mr. Boise and the subscribing witnesses, and that such wills were in form and substance as outlined in the statement of this case.

From an analysis of those wills it clearly appears that Sally S. Myers devised and bequeathed all of her property, both real and personal, to her husband, George T. Myers; that he devised and bequeathed all of his property to his wife, Sally S. Myers; and that each appointed the other as executor or executrix of the respective wills. The second clause of

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the wills provides: "I intentionally omit giving anything to my children, Georgia Frances Stevens and George Tobias Myers, Jr., knowing that my husband (or my wife) will care and provide for them."

The third clause specifically provides that in case of the death of George T. Myers before Sally S. Myers, or of Sally S. Myers before George T. Myers "then and in that event, I give, devise and bequeath all of my property and estate, real and personal, of every name, nature and description, and wheresoever situate and being, to my said children, Georgia Frances Stevens and George Tobias Myers, Jr." And in such an event the fifth clause provides for the appointment of the plaintiff and the defendant as executrix and executor of the wills. Clause 1 must be construed as an absolute devise and bequest of all of the property from the testator to the survivor, and clause 3 must be understood as showing the purpose and intent, at that time, of both George T. Myers and Sally S. Myers that, when both of them should die, the son and daughter should have all of the property of their father and mother.

It is contended by the plaintiff that the wills are mutual or reciprocal, and that, upon the death of Sally S. Myers and the probate of her will, and the taking of her property by her surviving husband under clause 1 thereof, by virtue of the agreement the will of George T. Myers then and thereby became irrevocable, and that the rights of the plaintiff and the defendant then became vested under clause 3 of his will. The plaintiff further contends that the mere execution of the respective wills at the same time and in the same manner, coupled with the fact that Sally S. Myers died first and her husband probated her will and received her property thereunder, is sufficient evidence of a contract, compact, or agreement to make the will of George T. Myers of February 11, 1896, irrevocable; that, if such acts and facts are not legally effective for that purpose, the oral testimony in the record, considered with the execution of such wills, is sufficient evidence to establish the existence of the alleged compact or agreement; and that it can be enforced by this plaintiff as the daughter and one of the beneficiaries under the third clause of the wills.

This is not a case where both parties before marriage had their own property, and made an antenuptial contract. Neither is it a case where, by inheritance or otherwise, both of them acquired property after marriage, and then made mutual wills. Nor is it an instance where one of the parties, by his individual efforts only, had acquired property, and the other had obtained none. But it is a case where, at the time of their marriage, neither the husband nor the wife had any property, and, as the result of their mutual and joint endeavor after their marriage, they accumulated a substantial fortune under a law which gives the wife equal property rights with her husband; and where a husband and wife, at the same time, in the same manner, in the presence of the same witnesses, with the same terms and provisions, and for the same reasons, executed their respective wills. It must be conceded that the wills in question clearly expressed the natural feeling and instincts which then existed between a loving husband and a devoted wife, and those strong parental ties which bind father and mother to son and daughter; that such wills were the very natural expression of the true relation which then existed between the members of the family; that the father then fully intended that the son and daughter should eventually receive, share and share alike, all of the property of both the father and the mother; that such relations continued to exist until some time after the death of the mother on January 13, 1902. And it must be fair to assume that the mother died, fully trusting and believing that such relations would continue to exist; that the terms and provisions of the wills

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of herself and her husband, which were executed on February 11, 1896, would be fully carried out, and that, upon the death of her husband, the son and daughter would then receive in equal parts all of the property which had been accumulated by the mutual efforts of herself and her husband. The surviving husband probated her will, took and accepted the use and benefit of her property, and claimed it as his own, with full knowledge of the terms and provisions of her will, and the terms and provisions of his own will, concurrently executed on February 11, 1896.

Standing alone, are such circumstances sufficient evidence of a valid contract between husband and wife, and can such contract now be enforced by the daughter as against the defendant, who claims title to all of the property under the terms and provisions of the father's will executed on May 31, 1902, after the death of the latter's wife and the receipt by him of her property under her will of February 11, 1896? This presents a novel and interesting legal question, upon which there is an apparent conflict of the authorities. The leading original case on this subject is Dufour v. Pereira, 1 Dick. 419, 21 Eng. Reprint, 332, decided by Lord Camden, Chancellor, on July 18, 1769, wherein "Camilla Rancer, the wife of —— Rancer, being entitled to a legacy under the will of her aunt, she and her husband agree to make a mutual will, which they do, and both execute it. The husband died; the wife proved his will, and afterwards made another will. And the question was, whether it was in the power of the wife to revoke the mutual will."

The will was jointly executed by them. The chancellor said:

"Consider how far the mutual will is binding, and whether the accepting of the legacies under it by the survivor is not a confirmation of it.

"I am of opinion it is.

"It might have been revoked by both jointly; it might have been revoked separately, provided the party intending it had given notice to the other of such revocation.

"But I cannot be of opinion that either of them could, during their joint lives, do it secretly; or that, after the death of either, it could be done by the survivor by another will.

"It is a contract between the parties, which cannot be rescinded but by the consent of both. The first that dies carries his part of the contract into execution. Will the court afterwards permit the other to break the contract? Certainly not.

"The defendant, Camilla Rancer, hath taken the benefit of the bequest in her favor by the mutual will, and hath proved it as such; she hath thereby certainly confirmed it; and therefore I am of opinion the last will of the wife, so far as it breaks in upon the mutual will, is void."

For such reasons it was held that, by her acts, the defendant "bound her assets to make good all her bequests in the said mutual will," and it was ordered that an accounting be had. This case is criticized and somewhat weakened by the later decision of Lord Loughborough in the case of Walpole v. Orford, 3 Ves. Jr. 402, 30 Eng. Reprint, 1076, 4 Revised Rep. 38; but is again approved in Stone v. Hoskins, L. R. [1898] P. 7, 93 L. T. N. S. 441, 74 L. J. Prob. N. S. 10, 54 Week. Rep. 64, 21 Times L. R. 528, decided in November, 1905.

Underhill on the Law of Wills, vol. 1, p. 19, § 13, lays down this rule:

"Mutual wills, whether joint or several, are revocable by either testator during the lifetime of the others so far as his disposition of property is concerned, without notice to or consent of the others, unless the making of the will is the result of a contract by which each has agreed to devise his property to the others.

"If two testators who have united in the execution of a mutual will have devised their property to each other so that the devises form a mutual consideration, neither, after

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the death of the other and the probate of the will as to his property, is at liberty, after accepting the benefit conferred, to repudiate the contract to the injury of the heirs or next of kin of the testator who predeceased him. The mutual will was made upon condition that the whole shall be but one transaction. If the will is not revoked during the joint lives of the testators, he who dies first has a right to rely upon the promise of the survivor. He has fulfilled his part of the agreement, and it is not just to his representatives to permit a revocation, when he has been prevented from revoking his will by a reliance upon the other's promise. It is too late for the survivor, after receiving the benefit, to change his mind, because the first will is then irrevocable. It would have been differently framed, or perhaps not made at all, if it had not been for his inducement,"—citing, among other authorities, the case of Dufour v. Pereira, supra.

Schouler on Wills, 5th ed. vol. 1, p. 577, § 458a, says: "It would appear that, at all events, either party to a joint or mutual will, and a survivor especially, has the right, during life, to revoke that will as concerns his own disposition, so that it cannot be set up in probate as his last testament; but that in equity, at all events, a subsequent revocation which was not mutual cannot destroy the trust or compact created thereby."

A full discussion of this question is found in the late work of Alexander on Wills, where, in vol. 1, §§ 85, 87, 88, and 91, pp. 96–105, the author says:

"The general rule seems to be, although not undisputed, that if two persons execute wills at the same time, either in one or two instruments, making reciprocal dispositions in favor of each other, the mere execution of such wills does not impose such a legal obligation as will prevent revocation, without notice, by either during their joint lives. The case is different, however, where the mutual or reciprocal wills are the result of a contract based upon a valid consideration, where there has been a joining of property interests for the purpose of making a testamentary disposition of the same, or where, after the death of one, the survivor has accepted benefits under the will of the other, which was executed pursuant to an agreement. In such cases, where all the facts are fully established, equity will interpose to prevent fraud. This, however, can be accomplished only through a court of equity, the probate court having no jurisdiction. . . .

"There are cases, however, where it would be a fraud for the survivor of two, who had, pursuant to an agreement, made wills in favor of each other and certain third persons, to alter or revoke on his part the testamentary dispositions so mutually made, after the will of the other had become irrevocable through death. In such a case equity will step in to prevent fraud, and will compel performance, viewing the matter as a contract rather than as a will. . . .

"Where two parties have made mutual wills in favor of each other, whether pursuant to a valid agreement or not, if the survivor receives benefits under the will of the other who has died without having revoked the same, and under the belief that the will of the survivor would not be altered, the revocation by the survivor of his will would be such a fraud as equity would prevent. Such wills are in effect the separate will of each maker, and the right of revocation is undisputed, except in those cases where it would be a fraud against the estate of the decedent to allow the survivor to receive a benefit or advantage under the will of the one first dying, and thereafter to make a different disposition of his property. Where mutual or reciprocal wills have been made pursuant to an agreement which has been executed by one of the testators dying without having made any different testamentary disposition of this property, and the

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other has accepted the benefits accruing to him under the will of the deceased, the agreement becomes obligatory upon the survivor and may be enforced in equity against his estate. . . .

"The distinguishing feature of a will is that the testator may revoke it at any time, yet this right may be renounced. He may contract to make a will containing certain dispositions which shall not be altered or canceled, and such agreement, if based upon a sufficient consideration, is valid, and will be enforced in equity."

The case of Anderson v. Anderson, 181 Iowa, 578, 164 N. W. 1042, holds:

"While extrinsic evidence is inadmissible to vary or change the terms of a will or make another or different will for the testator, there is no rule excluding proof of facts tending to show that a husband and wife, who executed wills in favor of each other within a few weeks of each other, acted with the knowledge of the other, that the wills were drawn by the same person at the same time, and in identical terms, and at the joint request or direction of both husband and wife, and that they were, in fact, executed in pursuance of a common understanding and purpose. . . .

"Evidence held to show that wills executed by a husband and his wife in favor of each other, though executed on different dates, were executed in pursuance of a common understanding and purpose, even excluding the testimony of the scrivener as to the statements of the parties to him concerning the contents of the wills and their intention therein expressed."

From an examination of that case it will be found that there is a marked similarity between the testimony of J. E. Anderson, who prepared the wills in question there, and that of Mr Boise in the instant case. In its opinion the court goes on to say: "But we think there is no rule of evidence which excludes proof of facts tending to show that the husband and wife did act each with the knowledge of the other; that the two wills were drawn by the same person at the same time, and in identical terms, and at the joint request or direction of both husband and wife; and that, although the dates of their execution differ by a few days, they were in fact executed in pursuance of a common understanding and purpose."

In the case of Frazier v. Patterson, 243 Ill. 80, 90 N. E. 216, 17 Ann. Cas. 1003, 27 L.R.A.(N.S.) 508, the syllabus in the last-named report says:

"A will executed jointly by husband and wife, in which each devises his or her property to the other for life, with remainder over, cannot be revoked by one after the death of the other.

"Extraneous proof of mutual understanding is not necessary to make irrevocable, after the death of one party, a joint will by husband and wife, by which each gives his or her property to the other for life, with remainder over to their child."

And at the close of the opinion the court says: "If evidence of a mutual compact is necessary in such case, that evidence is afforded by what the parties did. We cannot see how the situation would be any different if witnesses had testified that they heard this husband and wife discuss what disposition they would make of their respective estates, and that they agreed with each other that they would make a joint will such as they did make. The fact that they made such will is satisfactory proof to our minds that it was done in accordance with their mutual compact to dispose of their property in this manner."

We find this statement in the notes appended to the above report of the case: "There is much confusion and apparent conflict among the cases upon the question of the revocability of a mutual or conjoint will by one of the makers, after the death, or without the consent, of the other. The general principle, however, seems to be that such an in-

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strument, as a testamentary instrument, may be revoked by either maker, so far as his property is concerned, without the consent of the other, and therefore an express or implied covenant against revocation will not prevent the probate of a later will executed by one of the parties; but a court of equity may, in a proper case, give effect to the instrument as a contract, in the same way that equity may give practical effect to an agreement to make, or not revoke, an individual will. This distinction serves in a large measure to reconcile apparently conflicting cases." [27 L.R.A.(N.S.) 508.]

The case of Brown v. Webster, 90 Neb. 591, 37 L.R.A.(N.S.) 1196, 134 N. W. 185, in the syllabus lays down this rule:

"Where a husband and wife, possessed of separate estates, orally agree that, upon the predecease of either, the survivor shall thereupon become the owner of all of the estate, both real and personal, of such decedent, and at the same time, and in pursuance of, and for the expressed purpose of providing, a proper method of carrying such agreement into effect, simultaneously execute reciprocal wills, in each of which the other spouse is made sole devisee and legatee, held, that the oral agreement and the execution of the wills constitute a single transaction, that each is an integral part of one contract, and that such contract cannot be said to rest entirely in parol.

"And, in such a case, the contract of each is a sufficient consideration for the contract of the other.

"And the continued reliance by plaintiff upon the contract, by permitting her will, executed as a part thereof, to remain in the family safe, unchanged and unrevoked, during the entire lifetime of the deceased, constituted full performance by her of the terms of the contract.

"And the wills executed as a part of such contract, in equity, are not ambulatory, and may not be revoked by either party to such contract so long as the other party continues to perform the contract on his or her part."

Larrabee v. Porter, — Tex. Civ. App. —, 166 S. W. 395, is an exhaustive and well-considered case, and the rule is there stated thus:

"A joint and mutual will, executed by husband and wife pursuant to a contract between them, which gives to the survivor a life estate in the entire property, with remainder to their daughters, is executed on a valid consideration, consisting of the reciprocal devise of the one to the other; and where, on the death of the wife, acquiescing in the will, the husband probates it and goes into possession, he cannot revoke the will.

"Where a joint and mutual will executed by husband and wife, which gave to the survivor their property for life, with remainder to their daughters, was executed in consummation of a parol agreement between them to make an equitable disposition of their property to their children, and the husband, on the death of the wife, probated the will and took possession of the property devised thereby, he was estopped from thereafter disregarding the will."

In Robinson v. Mandell, 3 Cliff. 169, Fed. Cas. No. 11,959, the rule is thus laid down: "Where two persons agree each with the other to make mutual wills, and both execute the agreement, it is held that neither can properly revoke his will without giving notice to the other of such revocation. The death of one of the parties, in such a case, carries his part of the contract into execution, and the better opinion, perhaps, is, that the other party, after that event, if the agreement was definite and satisfactory, cannot rescind the contract. Dufour v. Pereira, 1 Dick. 419, 21 Eng. Reprint, 332; 2 Hargrave's Jurid. Arg. 272. . . . The doctrine is, that the parties are under a restriction, each to the other, not to revoke their respective wills so as to secure any undue advantage. Bound by the agreement to maintain good faith, each to the other, the conclusion is that neither

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can revoke without giving due and seasonable notice."

2 Story, Eq. Jur. § 785, says: "A contract to make mutual wills, if one of the parties has died, having made a will according to the agreement, will be decreed in equity to be specifically executed by the surviving party, if he has enjoyed the benefit of the will of the other party."

In Prince v. Prince, 64 Wash. 552, 117 Pac. 255, it is held: "Mutual wills by two testators, looking to a just distribution of the property of both, partake of the nature of contracts, and may be specifically enforced."

This case quotes with approval the opinion in Deseumeur v. Rondel, 76 N. J. Eq. 394, 74 Atl. 703, where the rule is thus laid down: "A contract of two persons on a sufficient consideration for the benefit of a third person is enforceable against the contractor."

And: "An agreement between two persons on a legal consideration to dispose of their property at death in a specified manner, or to specified persons, is enforceable. . . .

"It may be that, during the lifetime of both Alexander and Elizabeth Bisson, either could have rescinded this agreement—call it a will, or call it a contract, or an instrument of proof tending to prove a contract. But I am clearly of opinion that, whatever name should be properly used to characterize this paper, it proves, or tends to prove, an agreement between the parties signing it to dispose of their property in a certain way, which a court will enforce if made upon legal consideration; and if it be true and proved that at the time the paper was executed, and at the time of the death of Alexander, he was possessed of personal property or real estate, which was taken over and used by Elizabeth, his wife, by virtue of the probate of this paper as his will, the agreement thus evidenced has sufficient legal consideration to support it, and the rights under it will be enforced.

"If, for instance, Alexander was a man of means, and Elizabeth had the four lots which were in her name at the time of the making of the paper on the 20th of June, 1855, and they made this paper, which, as they said, was to make a final settlement respecting their properties, and he died first, and she took under the terms of this paper, which was probated as a will, all of his personal property, and either used it (if it were held that under the terms of the probated will she was entitled to do so), or used it for life (if the narrower estate was held to be vested), I cannot believe it possible that any court would thereafter permit her, under these circumstances, to rescind or repudiate her part of the bargain."

In Campbell v. Dunkelberger, 172, Iowa, 385, 153 N. W. 56, this doctrine is announced: "Where mutual wills, reciprocal in their provisions, are executed in pursuance of a contract between the parties, if, after the death of one of the parties, the survivor takes advantage or accepts the provisions made by the other party, the survivor may not otherwise dispose of his property than according to the terms of the will."

In the case of Baker v. Syfritt, 147 Iowa, 49, 125 N. W. 998, it is held: "Where two persons unite in a joint will, whereby the survivor takes some benefit from the estate of the one first dying, and such provision is coupled with another, by which, subject to such right in the survivor, the estate of both is devised to a third person, there is an element of contract obligation between the persons, and, when the devise becomes irrevocable, there arises a vested right in the beneficiary of which he cannot be arbitrarily deprived."

In Rastetter v. Hoenninger, 151 App. Div. 853, 136 N. Y. Supp. 961, id. 157 App. Div. 553, 142 N. Y. Supp. 962, id. 214 N. Y. 66, 108 N. E. 210, this rule is announced: "Where a joint and mutual will is made by a husband and wife, and is binding upon the survivor, the latter, by proving the will and accepting benefits thereunder, contracts

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that not only the property received from the other estate, but also his individual property, shall be disposed of at his death in the manner provided by the joint will."

This case is cited and approved in the recent opinion in Phillip v. Phillip, 96 Misc. 471, 160 N. Y. Supp. 624.

In the case of Re Burke, 66 Or. 252, 134 Pac. 11, in an opinion written by Mr. Chief Justice McBride, quoting with approval from 40 Cyc. 2117, 2118, it is said: "Such an agreement is valid if performed by the making of such wills, and the acceptance by the surviving party of the fruits of the agreement; but it is valid only as a contract, the performance of which by one party and acceptance by the other has taken it out of the Statute of Frauds."

The above authorities, either directly or by implication, sustain the legal principles contended for by the plaintiff.

In 1 Alexander on Wills, § 85, it is said: "The weight of authority is that such agreements to make wills are not established merely because two persons have made reciprocal testamentary dispositions in favor of each other, the language of such wills containing nothing to the effect that the instruments were the result of a contract. Some jurisdictions, however, have held that such fact causes the presumption to arise that the wills were executed pursuant to an agreement. The reasoning in such cases, however, does not seem cogent, and general facts and circumstances are included to aid in arriving at the conclusion. . . . And where such wills are executed by relatives because of love, affection, or family ties, such facts would seem to negative any agreement between the parties, based upon a fixed condition."

In the recent case of Wanger v. Marr, 257 Mo. 482, 165 S. W. 1027, the supreme court of Missouri in legal effect overrules the former case of Bower v. Daniel, 198 Mo. 325, 95 S. W. 359, and holds that "the mere fact of the execution of joint wills is not sufficient evidence in itself to show that the wills were made pursuant to contract. . . . The reciprocal character of separate wills, if proved, is not so significant evidence that they were executed pursuant to a contract, as is the execution in a single instance of the joint will of husband and wife," and that the evidence in the case was "insufficient to establish the fact that contemporaneous wills, executed by the husband and wife, were executed pursuant to a contract."

In Allen v. Bromberg, 163 Ala. 620, 50 So. 884, it is held that "where there was an agreement between husband and wife to make mutual wills disposing of real estate, the same was void . . . unless in writing, . . . and the wife had the right to revoke a will made pursuant thereof, after the death of the husband, and to make another."

In Edwall v. Jesseph, 75 Wash. 391, 134 Pac. 1041, it is announced: "The making of mutual wills by a husband and wife is not such a part performance of an oral contract to make irrevocable wills, devising the real estate of the parties to the survivor, as to take the same out of the operation of the Statute of Frauds."

In Buchanan v. Anderson, 70 S. C. 454, 50 S. E. 12, this statement is made: "Where a husband and wife adopt an instrument as their will, which disposes of the separate but not of the joint property, either may revoke it, in the absence of a valuable consideration to support a contract to dispose of the property in the manner set forth in the will."

Wilson v. Gordon, 73 S. C. 160, 53 S. E. 79, decided that "an attorney was employed by two maiden sisters, on joint request, to prepare two wills, giving the property of each to the other, with a provision that, if the devisee should die in the lifetime of the testator, the property should go to a niece and her children. Held, not mutual wills; and that the surviving sister, after having accepted the benefit of the deceased sister's will, might destroy her own will."

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In Cawley's Appeal, 136 Pa. 628, 10 L.R.A. 93, 20 Atl. 567, it was decided that "the instrument was not a contract, in form or effect; nor, there having been no joint property or joint devise, was it a joint will. It was properly a double will, and must be construed and treated as the separate will of each maker, as fully as though a separate copy had been executed by each. Wherefore, after the death of one, it was revocable by the other as to his own property."

In Edson v. Parsons, 155 N. Y. 555, 50 N. E. 265, it is held that, "after the death of one of the sisters, the survivor made a different will, and upon her death the brother attempted to establish the provisions of the first will, as a contract between the sisters to give their property ultimately to the brother. Held, that the making of the wills, and the other circumstances shown, did not establish such a contract, as a matter of law."

The opinion goes on to say: "I think it needs no further argument to show that to attribute to a will the quality of irrevocability demands the most indisputable evidence of the agreement which is relied upon to change its ambulatory nature, and that presumptions will not, and should not, take the place of proof."

This case was cited with approval by Mr. Justice Eakin in Sappingfield v. King, 49 Or. 109, 8 L.R.A. (N.S.) 1066, 89 Pac. 142, 90 Pac. 150.

Such is the conflict of authorities as shown by the decisions of some of the different courts. Applying the law to the facts in the case at bar, we find that in the preamble of their respective wills each testator says: ". . . Hereby revoking all former wills made by me." This language would clearly imply that each of them had made a former will, and from it we might infer that their former wills were mutually revoked; that in consideration thereof the instant wills were executed; and that circumstances might be a consideration for such wills. Concerning the conversation prior to the execution of the wills, Mr. Boise testifies that George T. Myers told him: "At the present time he did not desire to give anything to the children," and in clause 2 of their respective wills the testators announce their intentional omission of any bequest to their children, "knowing that my wife (or my husband) will care and provide for them." We consider this to mean that it was not the purpose or intent of either of the testators specifically to bequeath any property to either of the children while both of the parents were living, and that each of them relied upon the other, after the death of one and during the lifetime of the survivor, properly to care and provide for them, and what should be proper care and provision was a matter in the discretion of the surviving parent. That is the construction which should be placed on clause 2 of the will. Any specific provision for the children must then be found in the third clause. If both wills remained in force and effect as they were originally executed, upon the death of their parents the children would become the owners of their joint estate, share and share alike.

Will—mutual—consideration.

The testimony is undisputed that the mother, Sally S. Myers, was a shrewd, practical business woman, of far more than ordinary ability. This appears from the uncontradicted testimony of Dr. Darr, H. L. Pittock, Mrs. H. L. Pittock, and Captain John Marshall. Her husband considered her, as he told one witness, "the main spoke in the wheel, in the business way and every other way," and said that, "if it had not been for Mrs. Myers, he would not be where he was." Another witness says: "He consulted with her about their business affairs. . . . He always told me she was the best partner he ever had."

To the witness, C. C. Smith, Mr. Myers said: "The balance of my

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property I want to keep for my children."

The record shows that Mrs. Myers had all of the loving instincts of a good wife and mother; that she was very much concerned in the success and happiness of her children; and that the plaintiff, in particular, was a constant companion of, and devoted to, her mother, to the very last. We cannot believe that it was ever the purpose or intent of the mother to put it in the power of the father, after he should acquire her property under her will, to disinherit her daughter, and yet that is the legal force and effect of the contention of the defendant.

The testimony is undisputed that their fortune was acquired as the result of the joint and mutual efforts of the father and mother; that each of them recognized that fact; that the mother was freely consulted by her husband on all matters; and that her advice was followed in all their business dealings. It must be conceded that at the time of the execution of their respective wills on February 11, 1896, it was then the expressed intention of both of them that, when the father and mother should die, the children should then have all of their joint accumulations; that when the mother died both of their wills were in force; and that she died "knowing" that, during the lifetime of her husband, he would properly provide for the children, and upon his death they would receive, and become the owners of, the joint property of herself and her husband under clause 3 of their respective wills.

The record shows that the plaintiff has been the victim of unfortunate circumstances, as the result of which her father, immediately upon the death of his wife, her mother, sought to disinherit her, and made a new will in which he left her a nominal sum only; that after about four months, upon his return from California, he made another will, in which he bequeathed to his daughter $20,000 when she should arrive at the age of forty-five years, and devised all of his other property to the defendant; and that, for the purpose of further cutting off his daughter, he afterwards executed a codicil which provided that, in the event of the death of his son before his own death, he bequeathed $20,000 to the Portland Children's Home, $20,000 to the Taylor Street Methodist Episcopal Church of Portland, $20,000 to his nephew, Charles A. M. Myers, and the residue of his estate to other named nephews and nieces. At the time the later will was prepared, he told Mr. Boise that "he had been thinking it over himself, and he thought he ought to give Mrs. Stevens half the value of the property he got from his wife," and it was apparently for that purpose that he devised to her the $20,000, to be paid when she should reach the age of forty-five years. Yet it appears from the testimony of the defendant himself that, at the time of his father's death, one parcel of the property which the latter had received from his wife was worth at least $100,000, and the plaintiff's husband testifies that it was worth $150,000.

After again reading the testimony, carefully studying and examining the respective wills and rereading all of the authorities, and upon a further consideration of all of the surrounding facts and circumstances which obtained at the time the wills were executed, we are of the opinion that the wills in question were executed pursuant to an agreement and understanding between the deceased George T. Myers and Sally S. Myers; that there was a valid and mutual consideration for such agreement; and that in equity and good conscience the agreement should be enforced. This does not conflict with the right of any individual to dispose of his own property, by will or otherwise, in his own discretion; but we do hold that where, for a good consideration, two persons enter into an agreement to execute mutual wills, and do execute such wills pursuant

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to such agreement, and one of them dies while both of such wills are in force and effect, the survivor probating the will of the deceased and accepting property under it, and where the agreement is valid and reasonable, and such facts are established by competent evidence, a court of equity will then enforce the specific performance of such agreement on behalf of a third person, who is a beneficiary under such mutual wills. In this case, we hold that there is sufficient evidence of such an agreement, and of a valid consideration between George T. Myers and Sally S. Myers at the time of the execution of their respective wills; that, after George T. Myers acquired his wife's property by a mutual will under a contract, equity will not permit him to keep the property and revoke the contract; that the plaintiff, as a beneficiary under clause 3 of their mutual wills, is entitled to a specific performance of that agreement; that she is the owner of and should have an undivided one-half interest in all of the property, both real and personal, of which her father died seised, and which he owned at the time of his death; and that she should have from the defendant an an accounting therefor.

Same—right to abandon.

Specific performance—contract to make will—right of beneficiary.

The decree of the Circuit Court is reversed, and it is hereby ordered, adjudged, and decreed that the plaintiff is the owner of, and is entitled to have and receive, an undivided one-half interest in all of the property, both real and personal, owned and held by George T. Myers, her father, at the time of his death on July 12, 1907; that she is entitled to an accounting for any and all of the rents, issues, and profits of such property from that date; that the defendant is entitled to credit for any just and reasonable charges or expenses incurred in the administration of the estate, including the contest of the will of George T. Myers, but that he is not entitled to credit for any expenses or attorney's fees incurred in the defense of this suit; that such decree shall be and is hereby entered; that for the purpose of such an accounting the cause shall be remanded to the Circuit Court; and that neither party shall have or recover costs on this appeal or in the court below.

Mr. Justice **Harris** took no part in the consideration of this cause.

Mr. Justice **Bean** concurs in the result of this opinion.

Burnett, J., dissenting:

The plaintiff sues to enforce the specific performance of an alleged contract said to have been made between her parents, which she thus states in her complaint: "That while each of her parents was so the owner of such property, her father promised and agreed with her mother that for and upon the consideration that her mother would make and execute a will, whereby she would devise and bequeath to him all the property of every kind which she might own at the time of her death, and would further provide in and by said will that, in the event that he should die before her mother, then all of the property of every kind which her mother might own at the time of her death should be equally divided between the plaintiff and the defendant herein, her father would make and execute a will whereby he would devise and bequeath to her mother all the property of every kind which he might own or in which he might have an interest at the time of his death, and that in and by said will he would further provide that, if her mother should die before he did, then and in that event all the property which he might own or in which he might have an interest at the time of his death should be equally divided between the plaintiff and the defendant herein. That her mother joined in said agreement so to make and execute said wills, and promised and agreed with

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her father to make and execute a will as aforesaid."

She avers, in substance, that on February 11, 1896, each of her parents, in pursuance of that agreement, made a will, which she sets out at large in her complaint. These testamentary documents are averred to be alike, except that the testator and the principal beneficiary are transposed. Quoting from the will of the mother, the following three clauses appear:

"I. I give, devise and bequeath all of my property and estate, real and personal, of every name, nature, and description, and wheresoever situate or being, to my beloved husband, George T. Myers, to have, possess and hold the same in his own right.

"II. I intentionally omit giving anything to my children, Georgia Frances Stevens and George Tobias Myers, Jr., knowing that my husband will care and provide for them.

"III. In case of the death of my said husband, George T. Myers, before my death, then and in that event, I give, devise and bequeath all of my property and estate, real and personal, of every name, nature or description, and wheresoever situate and being, to my said children, Georgia Frances Stevens and George Tobias Myers, Jr."

The complaint also states in substance that, without either of the wills being changed, the mother died on January 18, 1902, and the father took all her property under her will, and afterwards made a different will, bequeathing to the plaintiff only $20,000 out of his possessions, said to have been of much greater value, and giving the rest to the defendant, plaintiff's brother. It is charged that under the last-mentioned will the defendant took possession of the estate of the father, after the latter's death, including what came from the mother, and has managed the same with great profit, the exact amount of which is unknown to plaintiff; but she calls for an accounting, and demands a specific performance of the alleged agreement, so that half of the estate and its increment shall be decreed to her. It is affirmatively stated in the complaint "that the promises, agreements, and contracts between the father and mother of the plaintiff, as hereinbefore alleged and set out, were not in writing, and that the plaintiff does not know, and therefore cannot allege, the exact date upon which the same were made, but according to her best knowledge and belief they were so made on, or a short time before, the 11th day of February, 1896."

A general demurrer to the complaint was overruled. The agreement and the making of the wills in pursuance thereof, as stated by the plaintiff, are denied by the answer.

As an estoppel against the maintenance of this suit, the defendant avers the probate of the will under which he claims, and its final establishment over the plaintiff's contest thereof, as decided in Stevens v. Myers, 62 Or. 372, 121 Pac. 434, 126 Pac. 29. The reply traverses the answer in material particulars. From a decree dismissing her suit, the plaintiff appeals.

It is conceded, as a matter of law, that it is competent for living persons validly to contract with each other to make a certain testamentary disposition of the property of either or both. The authorities, however, differ somewhat as to the effect of such a contract, some of them distinguishing between devises solely to the other contracting party, and those to him and others. For instance, in Anderson v. Anderson, 181 Iowa, 578, 164 N. W. 1042, cited by the plaintiff, and in the opinion of Mr. Justice Johns, the husband and wife each made a will naming the other as sole beneficiary thereof. As claimed in the present case, the two testaments were identical in form in all respects except in date; but they were made about the same time. The testimony of the scrivener is much like that of the one who drew the alleged wills in the present case.

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The precedent under consideration, however, proves too much for the contention of the present plaintiff. The court there said: "Much of the confusion and doubt which is liable to arise over cases of this kind is readily removed if we keep in mind the essential truth that the two instruments constitute a single will, and that it is in all essential respects the will of the first to die; and when such death occurs, and the will is thereby made effective, and is established in probate, such joint or mutual instrument has served its full purpose, and it has no further existence as the will of the survivor. The generality of this statement is subject to this exception, that if, as sometimes happens, the mutual character of the will is limited to a fractional part of the survivor's estate, and in the same instrument such survivor includes a bequest or devise to some third person, or class of persons, then to that extent the instrument is an individual will, and to that extent may be established and carried out."

In that instance both Anderson and his wife were dead when the litigation arose, the husband dying first. The plaintiffs, as heirs at law of the husband, claimed under a section of the Iowa Code, providing that "if a devisee die before the testator, his heirs shall inherit the property devised to him, unless from the terms of the will a contrary intent is manifest." Code 1897, § 3281.

This is substantially like our own statute, L. O. L. § 7327. The court, speaking through Mr. Justice Weaver, used this language: "Does the statute which appellants invoke . . . have any application to this case? In our judgment it does not. By this provision, which preserves to the heirs of a devisee who predeceases the testator making the devise, the right to succeed thereto, a lapse is prevented. That is, if the devise is one which would have vested in the deceased devisee at some time, had he lived, his heirs take his place in the same right. They take through the devisee, or (perhaps in more accurate terms) they take in his stead by way of representation or statutory substitution. But their right is not of any better or higher quality than was his. If, then, as we have already indicated, the wills are to be treated as mutual and reciprocal, constituting in legal effect the will of the first to die, it follows that the reciprocal devise which would have vested in the husband had the wife died first could never become effective or payable, either to the husband or his heirs. In other words, the husband's rights in the estate of his wife were, by the will, made to depend solely upon his surviving her. He did not survive her, and the will she had made in his favor, conditioned upon his outliving her, can never be made effective for any purpose, at the demand of his heirs. This is the logical and necessary result of the most recent holdings on this branch of the law of wills. [Citing a large number of authorities.] While these cases are not all closely in point with the one at bar they do together, though with some variances, afford a fair guide to correct conclusions upon a question which is not frequently before the courts, and the law upon which has not yet progressed entirely beyond its formative period. But the present case brings it up in its simplest and least complicated form. The will, as we construe it, is wholly reciprocal. Each party thereto makes the other the sole beneficiary. It creates no remainders and no executory devises. The survivor is to take all that either or both has to give, benefits which are subject to no condition or contingency save that of survivorship. As the husband died first, the instrument is to be treated and given effect as his will alone; and when this is done, nothing is left to operate or to be given effect as the will of the survivor."

Applying the doctrine of the Anderson Case to the present contention, and conceding that the husband and wife made identical wills,

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they constitute but one instrument, which is the will of the first to die, and only that. Having served its purpose as the testament of the first decedent, and the estate not having been limited, under the conditions of the instrument, to any other, the bipartite convention, even if made as alleged, served its purpose as the will of the first decedent, and afterwards became inert. According to the theory of the Anderson Case, therefore, on the wills as stated in the complaint, Myers took as of right all of the property of his wife on her decease, because she bequeathed it entirely to him, expressly omitting any bequest to the children, and there the transaction between the husband and wife ended, leaving the survivor, as in the Anderson Case, to do as he chose with his estate, augmented by that of his wife.

In the opinion of Mr. Justice Johns there is a quotation from 1 Alexander's Commentaries on Wills, to the effect that "where two parties have made mutual wills in favor of each other, whether pursuant to a valid agreement or not, if the survivor receives benefits under the will of the other who has died without having revoked the same, and under the belief that the will of the survivor would not be altered, the revocation by the survivor of his will would be such a fraud as equity would prevent."

In good reason this cannot be the law, for it would, under all circumstances, utterly destroy testamentary capacity and authority, where one party had made a will in favor of another who had reciprocated. The authorities cited in support of the text do not uphold it, but are decided on the basis that there was a precedent contract for making such wills. For instance, in Schumaker v. Schmidt, 44 Ala. 454, 4 Am. Rep. 135, there was a joint instrument containing testamentary language, as well as express words of contract upon the consideration of mutual promises, which was executed by both parties and attested as a will, giving to the survivor the whole property of the first to die. Afterwards one of them made a separate will, otherwise disposing of his property, and died. The survivor sought to impress upon the decedent's property a trust in accordance with the original joint agreement, but his bill was dismissed. In Bolman v. Overall, 80 Ala. 451, 60 Am. Rep. 107, 2 So. 624, the court said, among other things, respecting the instrument signed by the decedent and involved in the suit: "It is clearly a will in form, being testamentary in frame and verbiage. But it is also a contract, in essence and fact, being executed, as stated on the face of the paper, 'in consideration of past and future treatment,' and, as shown by the bill, in furtherance of a previous parol agreement that it should be executed upon an admitted and specified valuable consideration."

Baker v. Syfritt, 147 Iowa, 49, 125 N. W. 998, was a case concerning a joint will which the court construed as a contract, and which the survivor adopted. Campbell v. Dunkelberger, 172 Iowa, 385, 153 N. W. 56, was another joint will case, and the court said: "In order that either party denied the right to revoke such wills, it must appear by clear and satisfactory evidence, or on the face of the wills, that these were executed in pursuance of a contract or compact between the parties."

Bower v. Daniel, 198 Mo. 289, 95 S. W. 347, indeed, holds that there must be a contract, but also decides that a joint will gave internal evidence of a supporting agreement. However, this case was expressly overruled in the later case of Wanger v. Marr, 257 Mo. 482, 165 S. W. 1027. Without exception, the precedents cited under the section of Alexander on Wills, above noted, are based upon contract, so that the case must turn in every instance upon the existence of an agreement, and whether it is sufficiently proved to take the case out of the Statute of Frauds. The ambulatory element of wills is not to be destroyed

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unless there is a contract to that effect.

Passing this, however, we come to the main question to be determined, namely, whether Myers and his wife made the agreement stated in the complaint. The principal testimony about the execution of the wills is that of Whitney L. Boise.

Referring to those wills, which the plaintiff says were executed in pursuance of the alleged oral agreement, he stated: "Shortly before these wills were drawn, perhaps three or four days, Mr. Myers called at my office. He used to come there very often, drop in every day or so, and he said they were going off on a trip, and that Mrs. Myers and himself had decided to make a will; each one wanted to make a will; . . . that he was going to will to Mrs. Myers all his property, and, in case of her death before his, that he wanted it to go to his children equally; but at the present time he did not desire to give anything to the children; that Mrs. Myers had helped him make his money, and he thought he wanted to give everything he had to her; and that she felt the same way. I told him if they would both come in it would not take but a short time to draw the wills, and they could execute them most any time. I think it was the next morning, about half past eleven they came in, and then they both stated to me the understanding again; what they wanted. Mr. Myers, I think, was the spokesman. I asked Mrs. Myers if she wanted the same kind of a will made, and she said she did; and then we commenced to talk over some of their trips. I knew them very well, socially. They told me about some of the trips they had taken in the East, and what they contemplated doing; and we talked for some time, and when I got ready to draw the wills, I looked at my watch, and it was about half past twelve o'clock, and the stenographer had gone. I told them I would dictate the wills that afternoon, and prepare them, and Mr. Myers could come in and take them home and execute them. That they wanted to have two witnesses—I explained how they were to be executed—that were not interested in the property. That was all there was to it. I drew the wills that afternoon, and Mr. Myers came in and got them and took them home and had them executed and brought them back to my office, and I looked them over and saw they were properly executed, and put them in envelops and sealed them up, and put them in the safe in my office. They remained there for a great many years; I think until Mrs. Myers's death."

Q. Now in the talk that they had, or he had, with you, I would like to have all that you can remember that they said as to any understanding, agreement, or arrangement that they had, or they would make in that will, or wanted to make, or talked over to themselves, anything of that sort. All the conversation as you recollect it.

A. I think I have substantially stated it. He said they had talked it over, and they had come to the agreement to make these wills. He wanted to give all his property to his wife, and, in case she died before he did, he wanted it to go to his children equally, and she wanted to do the same. That is all I can recollect.

Q. Did they talk the same thing over, in that way, both of them, when that matter came up again?

A. They had come in for that purpose. He stated again the proposition, and I asked Mrs. Myers if she wanted to make the same kind of a will, and she said she did; and we started to talk about something else; and I drew it in accordance with those directions.

On cross-examination, counsel for the defendant alluded to the testimony given by the witness in the former contest of Myers's will, on the ground of his insanity, and proposed to question him about his declarations on oath in that proceeding. During the discussion of counsel and the court about the reg-

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ularity of the cross-examination, the witness on his own motion interrupted more than once, and finally broke in with this statement: "Just a minute! I want to make an explanation myself, as this question has arisen there. The issue I was called on in the contest of the Myers will was proving his sanity. This question about these other wills never occurred to me; it never occurred to me it had anything to do with it. I did not try to refresh my memory with reference to the other wills. When this contest came up, I did give thought to it, because I was asked to by Judge Webster and Mr. Simon. I looked over the wills and refreshed my memory. That is the difference between testifying once when a thing was in issue, and once when it was not. I was called on to testify as to his sanity. I had not looked at the wills since, except that I probated Mrs. Myers's will, and I didn't try to refresh my memory. Then I was called into this case, and I went and looked at the wills again."

The foundation of the plaintiff's claim is that the parents made identical wills in pursuance of a contract. This is denied, making it necessary for the plaintiff to prove that averment. Otherwise stated, she must show by competent proof that the will of her father, made on February 11, 1896, was not only executed in pursuance of the agreement as alleged, but was indeed identical with that of her mother. The following sections of our Code affect this question:

"Sec. 712. There shall be no evidence of the contents of a writing, other than the writing itself, except in the following cases:

"(1) When the original is in the possession of the party against whom the evidence is offered, and he withholds it under the circumstances mentioned in § 782."

(This latter section requires the original writing to be produced and proved, except as provided in § 712, and that, if it be in the custody of the adverse party and he fails to produce it on reasonable notice, the contents thereof may be proved as in case of its loss.)

The further provision of § 712, so far as applicable to this case, is: "(2) When the original cannot be produced by the party by whom the evidence is offered, in a reasonable time, with proper diligence, and its absence is not owing to his neglect or default."

Section 802 refers particularly to wills, and reads thus: "A last will and testament, except when made by a soldier in actual military service, or by a mariner at sea, is invalid, unless it be in writing, and executed with such formalities as are required by law. Evidence, therefore, of such will shall not be received other than the written instrument itself, or secondary evidence of its contents, in the cases prescribed by law."

We have the statement of the witness that the alleged wills were in his custody for a great many years, and further that "then I was called into this case, and I went and looked at the wills again." If Myers's will was made and was the same, as stated, as that of his wife, the indispensable proof thereof, to wit, the will itself, was plainly within the reach of a subpœna duces tecum, and should have been produced. Notwithstanding all this, however, the witness, over objection, volubly explained the contents of the will orally. Why should he be permitted, when "called into the case," to go and examine the wills and then come into court and give his oral version of one of them, without its being produced? Under the plain provisions of our Code, enforced by many decisions of our own, there was no competent proof of the allegation that Myers made a will identical with that of his wife, or made one at all. For aught that appears in the evidence, even if he made a will at that time, he may have expressly reserved to himself the right to dictate the disposition of his own property and that which he should receive from his wife,

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without any restriction. It is mentioned in the testimony of some of the witnesses for the plaintiff that the parents often took pleasure trips away from home, and that on such occasions the father habitually made the statement that all their affairs were settled, and that in case anything happened to them the property would go to the two children; but no witness imputes to him any utterance indicating that the settlement was in fulfilment of any binding contract between him and his wife, or that the adjustment was irrevocable. All this is consistent with the idea that each of the parents retained testamentary control over his or her property then in hand, or to be derived from the will of the other. There is nothing in such language in the least indicating any contract of any kind. Indeed, it is passing strange that in all the years elapsing between the date of the wills of February 11, 1896, and the making of the last will of Mr. Myers in 1902, no word escaped him, so far as the record discloses, indicating a contract between himself and his wife on the subject. Much stress was laid in argument on what Myers said about his wife being the best partner he ever had, and of his counseling with her in important matters. The cross-examination of witnesses narrating such statements reveals that she never took active part in any of his business ventures, but confined herself to the role of a good, helpful wife, an ideal of the character. They appear to have kept their property interests separate, and there is quite as much reason to say that he helped her to accumulate her holdings as to exploit the opposite theory.

The only post facto suggestion of any arrangement between the parents whatever, coming from the lips of either of the participants, is narrated in the testimony of Mrs. Van Duers. She was a witness for the defendant and a niece of Mrs. Myers, who lived about ten years in the family of the father and mother, and testified that during the life of the latter, at some time subsequent to 1898, she had a conversation with her aunt, which she thus relates: "It was a general conversation I had with my aunt on one occasion in regard to an estate left by a friend in a rather tangled condition; and I remember distinctly asking my aunt if she did not think property should be divided before the death of the parents, and she said, 'No.' I said, 'Why don't you do it?' and she said, 'No, your uncle accumulated it himself, and he has a right to say what shall be done with it; or, if he is not here, I have a right to say what shall be done with it.' "

Pertinent to this testimony are the following Code provisions:

"Where, however, one derives title to real property from another, the declaration, act, or omission of the latter, while holding the title, in relation to the property, is evidence against the former." L. O. L. § 706.

"The declaration, act, or omission of a deceased person, having sufficient knowledge of the subject, against his pecuniary interest, is also admissible as evidence to that extent against his successor in interest." L. O. L. § 710.

The statement of Mrs. Myers to her niece is binding upon the plaintiff, who claims in the right of her mother as a contracting party. This is a most natural declaration for Mrs. Myers to make to her niece who had lived in her family for ten years prior to her marriage, and was still on intimate terms with her aunt. The voice of the father is hushed in the tomb and cannot speak to us in the defense of his property or of his character, against the present attack of his daughter. Such an effort as hers ought not to succeed, except upon the most cogent testimony. No member of the family or other person testifies that either of the testators ever stated that there was a contract between them respecting the disposition of their property, or that either of them intended to restrict the other in subsequent disposition of

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property, unless we except the testimony of Mr. Boise. Again, the course of the plaintiff in contesting her father's subsequent will on the ground of his alleged insanity is inconsistent with the idea of the contract to make a will, and, in good morals at least, ought to bar her from changing front as she does. If there was a contract, naturally she would have sought its enforcement in the first instance, instead of contesting his will. She is not in the equitable position of one who has performed valuable services for a decedent, with the expectation of being suitably rewarded by a devise or bequest of property. She claims only as a descendant of the testator. She is merely not satisfied with $20,000, and wants more.

The power of disposing of lands or goods owned by an individual is an essential element of property. As against this prerogative of testamentary disposition, children have no vested rights in the estates of their parents. Much of the litigation in contesting wills has grown out of the fallacy that the Statute of Descents confers upon children benefits of which they cannot be deprived by their parents, whether they die testate or intestate. The true legal principle, however, remains, that the prerogative of saying who shall enjoy his earnings after his death abides in the parent. It is a wise and just provision of the law for the protection and security of old age. It is often potent to compel the performance of filial obligations, and to inspire loyalty in otherwise undutiful children. Except upon cogent reasons, plainly established, we ought not to ignore the right of the owner to dispose of his property according to his own ideas, or to unmake his will because he did not do as we personally might have done in the same situation.

Although our Code requires a will to be executed in the presence of two attesting witnesses, who shall sign the same at the request of the testator, in his presence and in the presence of each other, we are called upon by this suit in effect to ignore the statute, and substitute for the will established under a contest upon the sanity of the testator, the one made by him February 11, 1896, all upon the statements of the one attorney who drew the wills, and who speaks from memory almost eighteen years after the occurrence which he relates. In this connection, the case of Moore v. Campbell, 102 Ala. 445, 14 So. 780, may be read with profit, to the effect that under a statute similar to our § 7398, L. O. L., this cannot be done because it is an evasion of the Law of Wills, and an effort to impress a parol trust upon lands, in violation of the Code section cited.

As to the making of the contract averred, we cannot rely upon the wills themselves, because they make no reference whatever to each other. As said in Frazier v. Patterson, 243 Ill. 80, 27 L.R.A.(N.S.) 508, 90 N. E. 216, 17 Ann. Cas. 1003: "If two persons make wills, each devising his property to the other, there is no necessary inference that the wills were the result of any mutual or reciprocal agreement or understanding."

In that case, cited in the opinion of Mr. Justice Johns, the court was considering a joint will, containing terms of contract, and limited to such an instance the doctrine that the agreement might be established by the terms of the instrument itself. In Prince v. Prince, 64 Wash. 552, 117 Pac. 255, while holding, under the ample extraneous proofs in the case, that there was a contract relating to the testamentary disposition of the property of the parents, the court, speaking through Mr. Justice Chadwick, quotes with approval the language of § 6 of Remsen on Preparation and Contest of Wills, as follows: "But, to invoke the intervention of equity, it is not sufficient that there are wills simultaneously made, and similar in their cross provisions; but the existence of a clear and definite contract must be shown, either by

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proof of an express agreement, or by unequivocal circumstances."

See also McClanahan v. McClanahan, 77 Wash. 138, 137 Pac. 479, Ann. Cas. 1915A, 461.

Again, the mother said in her testamentary document: "I intentionally omit giving anything to my children, Georgia Frances Stevens and George Tobias Myers, Jr., knowing that my husband will care and provide for them."

It would seem that, if these wills were made in pursuance of a contract, the one would have referred to the other or to the contract, and the testator would have said something like this: ". . . Knowing that my husband has provided for them by will of even date herewith," or, "that he has agreed with me to provide for them." It is worthy of note, also, that nothing is said by either testator about the kind of care or amount of provision that was to be made for the children by the other. All is left to future disposition. The central idea of the situation, as expressed by the language of Mr. Boise, is found in his statement ". . . that Mrs. Myers had helped him make his money, and he thought he wanted to give everything he had to her, and that she felt the same way."

Like that of any other witness, the analysis of his testimony should be conducted in the light which all the circumstances of the case throw upon it. His acquaintance with the plaintiff runs back to a date before her marriage, and ever since he has been her friend. It is natural that an early friendship for one of the opposite sex would, insensibly at least, influence one in later years. Mr. Boise testifies that he endeavored to disabuse the mind of Mr. Myers of his prejudice against the plaintiff's husband, and it is fair to presume that the witness regretted the action of the father in bequeathing only $20,000 to the plaintiff. The record justifies the inference that his mind was predisposed to finding a way by which the plaintiff could share more substantially in her father's accumulation of property. Although he was one of the principal witnesses in the contest instituted by the plaintiff to overthrow her father's will, because of alleged insane delusions said to control him, and detailed the transaction of making the two wills by the parents with all its preliminaries, we find in his narrative there not a word indicating that there was any contract to make irrevocable wills. He tells of the elder Myers often talking to him by the hour about his wife after her death, and of drawing his later will and its codicil, but the existence of a covenant between the father and mother never occurred to him until, as he puts it, he "was called into this case." It is, at least, unlikely that in all those hours of communing with his friend and client that agreement was not discussed, if it ever was made. Assuredly something would have been said about it when his duty as a lawyer called upon him to restrain that client, about to act in violation of his compact irrevocably sealed by the death of the other party, as he would do in making the later will.

Coming to what the witness says in the present litigation, we find him declaring first that Myers told him the pair had "decided" to make wills. Prominent in that connection is the announced purpose of the testator to give all his property to his wife, and his statement that he did not want "to provide anything for the children now." Finally, however, after eighteen years of silence about this chimerical contract, with every opportunity to describe it in the closely contested will case, when pressed by plaintiff's counsel at the hearing of this suit, the witness, like an exhausted runner, stumbles over the line at the finish with the statement that Myers said: "They had come to an agreement." No language of stipulation is imputed to Mrs. Myers. According to the single witness, all she said was that she wanted the same kind of a will, clearly indicating only identical action of the husband and wife, with

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no thought of creating an obligation. The idea of restricting the testamentary power of the survivor by the execution of identical wills never occurred to anyone until after the death of the parents. The phrase, "they had come to an agreement," being an oral admission of a party, must be viewed with caution. L. O. L. § 868, subd. 4. Even if an accurate rehearsal of what Myers said eighteen years before, it savors too much of afterthought, under all the circumstances, to measure up to that clear, precise, and convincing proof which all the authorities require to make out a case for specific performance of a contract, changing the title to real property, otherwise within the Statute of Frauds. "Agreement" does not necessarily mean contract. Jurors "agree" upon a verdict. The parents "agreed" to make a trip to Mexico, as stated in the testimony. Yet no obligation arises from either situation. In short, the testimony discloses no more than that they were animated by a common purpose, and each followed the example of the other.

In speaking of part performance, Pomeroy, in his work on Contracts (§ 108), states the rule thus: "With this explanation of their probative effect, the acts of part performance must be done in pursuance of the agreement; must unequivocally refer to and result from the agreement; or, in other words, clearly showing that there exists some contract between the parties they must be exclusively referable thereto; it must appear that they would not have been done except on account thereof, and they must be consistent with the contract alleged. When parol evidence has been admitted to prove the agreement in suit, the acts of part performance must be clearly and exclusively referable to and in pursuance of its terms."

In a note to the preceding section is quoted an utterance of Wigram, V. C., in Dale v. Hamilton, 5 Hare, 369, 67 Eng. Reprint, 955: "It is in general of the essence of such an act [of part performance] that the court shall by reason of the act itself, without knowing whether there was an agreement or not, find the parties unequivocally in a position different from that which, according to their legal rights, they would be in if there were no contract. . . . But an act which, though in truth done in pursuance of a contract, admits of explanation without supposing a contract, is not, in general, admitted to constitute a part performance taking the case out of the Statute of Frauds; as, for example, the payment of a sum of money alleged to be purchase money."

In Wagonblast v. Whitney, 12 Or. 83, 6 Pac. 399, a suit to compel the specific performance of a verbal contract to convey lands, Mr. Justice Lord discussed the authorities at length, and said, respecting the measure of proof: "Nor will the specific performance of a parol contract be granted, unless it be proved in the clearest manner and substantially the same contract as set out in the bill. Brown v. Brown, 47 Mich. 384. These are salutary but stringent rules, in the observance of which the interests of society and the public welfare are involved. A party is presumed to know the requirements of the law, and that a contract for the sale of land must be in writing. When he asks a court of equity to interfere, and save him from the consequences of his disregard of the law, the burden of proof is rightfully thrown upon him to show a case outside of the operation of the statute. The court will not interfere to protect his rights, and lend its aid to the enforcement of a contract, depending upon parol evidence and part performance, unless he proves the existence of the contract, its terms, and the acts of part performance by clear, satisfactory, and indubitable proof,"—citing authorities.

In Kinney v. Murray, 170 Mo. 700, 71 S. W. 202, the court said: "But the proof of such a contract must be so cogent, clear, and forcible as to

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leave no reasonable doubt in the mind of the chancellor as to its terms and character; and, where the consideration consists of acts to be performed, there must be like proof that the acts performed refer to and result from that contract, and are such as would not have been done unless on account of that very agreement and with a direct view to its performance. 'There must be no equivocation or uncertainty in the case.' "

In Berg v. Moreau, 199 Mo. 416, 9 L.R.A.(N.S.) 157, 97 S. W. 901, the court lays down the standard that "it must appear, not only that some contract was performed by the beneficiary, but that the identical contract sued on was performed, and that the acts relied on to show performance should point unvaryingly as the needle to the pole to the contract in suit and to no other;" and that the principles are "well settled as requiring a high and stringent character of proof, to wit, proof so impelling, so definite and clear, that there can be no reasonable doubt of the existence of a contract, of its terms, and of its performance."

Respecting the rule that the evidence must clearly and exclusively refer to the contract pleaded, and to no other, without equivocation, an analogy may be drawn from the rule laid down by Mr. Justice McBride in Spain v. Oregon-Washington R. & Nav. Co. 78 Or. 355, 153 Pac. 470, Ann. Cas. 1917E, 1104, where he says: "When the evidence leaves the case in such a situation that the jury will be required to speculate and guess which of several possible causes occasioned the injury, that part of the case should be withdrawn from their consideration."

The rule is thus laid down in Johnson v. Devine, 166 Ill. App. 341: "When such a contract is made the basis of an action, the evidence in support thereof should be looked upon with great jealousy, and weighed in the most scrupulous manner, and the character, conduct, and testimony of the witnesses should be such as to inspire confidence that they are telling the truth. Such a contract can only be enforced when it is clearly proved by direct and positive testimony, and when the terms of the contract are definite and certain. The most stringent doctrines of the court should be applied in such cases."

In Wilson v. Gordon, 73 S. C. 155, 53 S. E. 79, two maiden sisters, after a conference on joint request in writing, had two wills prepared by the same attorney, giving all the property of each to the other without limitation, with the provision that, if the devisee should die in the lifetime of the testator, the property should go to a niece and her children; and it was held that they were not mutual wills, and that the surviving sister, after having accepted the benefits of the deceased sister's will, might destroy her own will. The court says in that opinion: "But where a contract to make or not to revoke a will is set up, there are strong reasons for requiring an agreement definite and certain, established by evidence clear and convincing. The evidence comes from the living against the dead, who cannot speak in his own behalf in disproof of a charge of the violation of a solemn obligation. . . . The discussion by two persons bound to each other by the closest ties of affection as to disposition of their property, resulting in separate wills by which the property of each was left to the other, affords no ground for the inference that either undertook or exacted a legal obligation."

Speaking further, the court said: "But there are some facts which go very far towards disproving any contract. Not only was there no intimation from either of the sisters that they so understood it in the lifetime of Miss Mary, but the terms of the wills are very significant. They were prepared with great care and after much consideration. The fact that there was an absolute devise from each sister to the other, wthout limitation, was

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strong evidence that there was no intention to limit the power of alienation. When an intention is reduced to writing, either in the form of a will or a contract, there is always the strong implication of fact that the whole intention has been expressed, and an implication still stronger that there is no agreement or intention contrary to that expressed."

Hale v. Hale, 90 Va. 728, 19 S. E. 739, was a case where two sisters made identical wills. One of them married, before which, however, she consulted an attorney, who advised her that her marriage would have no effect on her will. She died under that belief, and never republished her testamentary document. After stating the principles relating to part performance, the court said: "Now the alleged acts of part performance in the present case, taken singly or collectively, do not bring the case within these principles. The making and preserving the wills, under the circumstances stated in the bill, while they are acts consistent with, are yet not demonstrative of, the existence of any contract between the parties, or, in other words, they do not unequivocally show that there was a contract. Non constat, the wills were not made from motives of love and affection, and independently of any contract or agreement; and, this being so, parol evidence to establish the alleged contract would not be admissible."

Wanger v. Marr, 257 Mo. 482, 165 S. W. 1027, was a case in which the husband and wife each executed a will. By these, each was given a life estate in the property of the other, and the remainder was devised to plaintiffs and defendant. The wife died, and the husband took possession of her land. Afterwards he executed another will, inconsistent with the former, and died. The court held that the evidence was insufficient, either to prove a contract or to require specific performance thereof. In Sappingfield v. King, 49 Or. 102, 8 L.R.A.(N.S.) 1066, 89 Pac. 142, 90 Pac. 150, it appears that a husband and wife, after consideration of the same for some weeks, went to the office of an attorney, where the wife executed a deed conveying to her husband all her land, to take effect after her death, and he made a will bequeathing his property to her while she lived, with remainder to other parties. He died first, and, in a suit by the widow to quiet the title to her lands as against a claim of the residuary legatees of her husband, it was contended that the testimony showed a binding contract between the husband and wife to make mutual wills, which became irrevocable upon the death of one of the contracting parties. It is enough to say of the record in that case that it went much farther than anything revealed here to establish such a contract. Mr. Justice Eakin, however, dismissed the contention, holding that the testimony was insufficient to fulfil the standard, requiring clear and convincing evidence of a contract, specific performance of which is desired.

The principle to be deduced from all the authorities on part performance is that it must point unequivocally and undisputably to the contract alleged, and to nothing else. If it can be referred to any other contract or arrangement, it is insufficient. Applying the rule to this case, in the light of the only written memorial of the transaction between husband and wife, namely, the two wills of February 11, 1896, we will suppose that, instead of the one alleged, there was in fact a contract between the husband and wife that each should leave the entire estate to the other, with discretion to provide for the children as the survivor should think best. The two wills as drawn would be the only practical expression of such intention. More than two years after they were executed, we find Mrs. Myers saying to her niece, Mrs. Van Duers: "No; your uncle accumulated it himself, and he has a right to say what shall be done with it; or, if he is not here,

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I have a right to say what shall be done with it."

She doubtless had in mind at the time the two wills in question. If the complaint is true, she knew that they were identical in their terms. Her statement to her niece clearly shows her attitude towards that arrangement, and is utterly inconsistent with a covenant to devise the property of the survivor, absolutely and at all events, to the children in equal shares. If, as Mrs. Myers said, her husband had the right to say what should be done with the estate, he certainly was not fettered by any contract to dispose of it only in a certain manner and to two particular persons. The parents evidently intended to leave the whole property to the one remaining after the first decedent, to dispose of without any restraint or condition whatever. The acts of the parties and the declaration of Mrs. Myers coincide and harmonize with that estimate of their transaction. The only memorial of the matter which either spouse required of the other was a will, to which the law attaches the quality of revocability at the pleasure of the testator. They were not making a fixed and definite contract. They were publishing ambulatory wills, each subject to renunciation at any time. Referable as it is to an agreement leaving the whole disposition of the estate to the discretion of the survivor, the testimony about a mere casual expression of the testator is not sufficient to support specific performance of an irrevocable contract to make a will.

Neither of the parties ever contemplated giving up control of their several properties, either then or afterwards. That the survivor was left untrammeled in that respect is made as clear as possible by the language of Mrs. Myers, in her conversation with her niece, Mrs. Van Duers. This statement of the plaintiff's mother, one of the couple who of all others knew what the transaction really was, properly characterizes the subject of the present contention. It is consistent with the only written memorial they left, the wills themselves. It is not at variance with the testimony of Mr. Boise.

It must be presumed that the private transaction of Myers in making the last will and its codicil was fair and regular, favored as he was by the ministrations of able counsel. In this long-drawn-out scramble for filthy lucre, there were those who had the opinion that he was mentally erratic; but, although he had a long and successful business career, bringing him into contact with many people, none rose to impeach his loyalty to his contracts until his daughter attacked it by this suit. We cannot presume that he broke faith with his departed wife. The presumption is the other way, and the truth is manifestly as she herself stated it to Mrs. Van Duers.

Let us concede for the moment that the parents had some kind of an agreement, understanding, or arrangement. Let us even, as we might under the testimony, suppose that the compact was that the survivor should take all the property of the other, with full discretion about leaving any of it to the children, and without restriction upon testamentary disposition of it by the one living longer. In such a case, how differently would they have framed their wills from the way the plaintiff alleges they did? In all the divagations of discussion no one has answered this question. If we are to be bound by the rule laid down by substantially all the authorities, to the effect that the evidence to support a decree for specific performance must clearly prove the contract alleged, the question cannot be answered consistently with a reversal of the decree of the circuit court.

Under such circumstances, we would do violence to the almost unbroken current of authority on part performance, and assume to make for the survivor a will according to our own notions, if we reversed this case. A contrary view of the record would make it impossible for one

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spouse to bequeath anything to the other, without raising the presumption of a contract requiring the same, and would unreasonably fetter the right to dispose of estates by will. The following cases are instructive on the subject under consideration: Christy v. Barnhart, 53 Am. Dec. 543, and note, 14 Pa. 260; Swash v. Sharpstein, 14 Wash. 426, 32 L.R.A. 796, 44 Pac. 862; Semmes v. Worthington, 38 Md. 298; Wallace v. Rappleye, 103 Ill. 231; Grindling v. Rehyl, 149 Mich. 641, 15 L.R.A.(N.S.) 466, 113 N. W. 290; Horton v. Stegmyer, 99 C. C. A. 332, 175 Fed. 756, 20 Ann. Cas. 1134; Russell v. Jones, 68 C. C. A. 487, 135 Fed. 929; Taylor v. Higgs, 202 N. Y. 65, 95 N. E. 30; McClanahan v. McClanahan, 77 Wash. 138, 137 Pac. 479, Ann. Cas. 1915A, 461; Buchanan v. Anderson, 70 S. C. 454, 50 S. E. 12; Gould v. Mansfield, 103 Mass. 408, 4 Am. Rep. 573; Cawley's Appeal, 136 Pa. 628, 10 L.R.A. 93, 20 Atl. 567; Cross v. Cleary, 29 Ont. Rep. 542; Tousey v. Hastings, 127 App. Div. 94, 111 N. Y. Supp. 344; id. 194 N. Y. 79, 86 N. E. 831; Messier v. Rainville, 30 R. I. 161, 73 Atl. 378; Kinney v. Murray, 170 Mo. 674, 71 S. W. 197; Edson v. Parsons, 155 N. Y. 555, 50 N. E. 265; Dicks v. Cassels, 100 S. C. 341, 84 S. E. 878; Dyess v. Rowe, — Tex. Civ. App. —, 177 S. W. 1001; Brewer v. Hieronymous, 19 Ky. L. Rep. 645, 41 S. W. 310; Wallace v. Wallace, 158 App. Div. 273, 143 N. Y. Supp. 1148; Davidson v. Davidson, 72 W. Va. 747, 79 S. E. 998.

As taught by subdivision 1 of § 868, L. O. L., summing up, let us judge of the effect of the evidence, not arbitrarily, but with legal discretion, and in subordination to the rules of evidence, and, so doing, ascertain where the preponderance lies. On one side we find the statement of a single witness, undertaking to recall, after a lapse of eighteen years, the language of Myers, that "they had come to an agreement" to make identical wills. As to whether they were to be so alike or were in fact the same, we are asked to accept the oral interpretation of the witness, who says he had custody of them many years and went and looked at them after he "was called into this case." No excuse whatever is offered for not producing the will itself. This is all that fairly can be set down on the plaintiff's side of the account. On the other side is the version given to the arrangement by Mrs. Myers as related in the testimony of her niece. This is supported by the presumptions that Myers was innocent of the wrong of violating a contract made with his deceased wife; that the transaction of making his last will was fair and regular; and that the higher evidence of the will made when his wife made hers, if he made one, viz., the will itself, would be adverse from the production of the inferior or oral evidence of its contents. L. O. L. § 799, subds. 1, 19, and 6. Negatively, the defendant's case is aided by the fact that although Myers lived from February 11, 1896, to July 12, 1907, yet no witness, not even his attorney to whom he talked so freely, imputes to him during all that time any word indicating a contract. There is also the improbability that, if he and his wife were negotiating an agreement, he would consent to relinquish all future testamentary control of his $200,000 worth of property, in consideration of her doing the like with her $40,000 worth.

On the record, Mrs. Van Duers is quite as worthy of belief as Mr. Boise. Laying aside for the moment all the statutory presumptions noted, the best that can be said for the plaintiff about the weight of the testimony is, that the statements of these two witnesses balance each other. Yet they are the only ones who pretend to state anything about an agreement.

But it is incumbent upon the plaintiff to prove her case by a preponderance of the evidence; otherwise, she must fail. On the other hand, the presumptions turn the scale in favor of the defendant and he is entitled to prevail.

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The remaining insuperable objection to the plaintiff's case is, that it is an attempt to create a trust concerning real property upon the doubtful oral testimony of a single witness, without the support of a single act of either party but what is easily and naturally referable to an unrestricted noncontractual devise. In this respect the case is plainly governed by § 804, L. O. L.: "No estate or interest in real property, other than a lease for a term not exceeding one year, nor any trust or power concerning such property, can be created, transferred, or declared otherwise than by operation of law, or by a conveyance or other instrument in writing, subscribed by the party creating, transferring, or declaring the same, or by his lawful agent, under written authority, and executed with such formalities as are required by law."

And § 7398, L. O. L.: "Every grant or assignment of any existing trust in lands, goods, or things in action, unless the same shall be in writing, subscribed by the party making the same, or by his agent, lawfully authorized, shall not be void."

To sustain this suit under such circumstances is to make the title to real property subject to the slightest vagary of memory. It is to invite plunder of estates on the most flimsy pretexts. Besides all this, it is well settled that equity will not, as a matter of right, decree specific performance of any contract. It rests solely in the sound discretion of the court, and we cannot say upon the record that the circuit judge, who heard the testimony, saw the witnesses, and considered all the circumstances and relations of the parties, abused his discretion in denying the suit of the plaintiff. Neither is the case made by the plaintiff sufficient to impute fraud to the dead father, or to authorize us to record him as a faithless covenant breaker at the suit of his daughter. The decree of the circuit court should be affirmed.

Petition for rehearing denied.

NOTE.

It will be noted that in this case the court holds that an agreement between husband and wife (evidenced by their mutual wills) that a daughter should have a share of their property on the death of the survivor, was enforceable by the daughter. The right of a third person to enforce an agreement in his favor between persons making mutual wills is discussed in subdivision III. of the note following SEAVER v. RANSOM, 1193, on "Right of beneficiary to enforce contract between third persons to provide for him by will."

MARION E. SEAVER, Respt.,
v.
MATT C. RANSOM et al., Exrs., etc., of Samuel A. Beman, Deceased, Appts.

New York Court of Appeals — October 1, 1918.

(224 N. Y. 233, 120 N. E. 639.)

Contract — to provide for third person by will — enforcement.

1. A beloved and favorite niece of a childless woman may enforce a contract by the woman's husband to provide for such niece in his will for a consideration furnished by the aunt.

[*See note on this question beginning on page* 1193.]

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Trust — promise by legatee.

2. Where a legatee promises the testator that he will use property given him by the will for a particular purpose, a trust arises.

— promise to prevent will — what bound.

3. No trust in favor of one who failed of mention in a will because of the promise of another to care for him can arise beyond the property received by the promisor.

Contract — enforcement by third person.

4. In New York, the right of a beneficiary to take by contract made for his benefit is confined to cases where there is a pecuniary obligation running from the promisee to the beneficiary; to cases where the contract is made for the benefit of the wife, affianced wife, or child of a party to the contract; to cases where a municipal corporation seeks to protect its inhabitants by covenants for their benefit, and to cases where, at the request of a party to the contract, a promise runs directly to the beneficiary.

(Hiscock, Ch. J., and Collin and Andrews, JJ., dissent.)

APPEAL by defendants from a judgment of the Appellate Division of the Supreme Court, Third Department, affirming a judgment of a Trial Term for Franklin County in favor of plaintiff, in an action brought to recover for services performed by her and to enforce a contract by deceased with his wife to provide for plaintiff in his will. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **Bryant & Lawrence**, for appellants:

There was no obligation or duty owing from Mrs. Beman, the promisee, to plaintiff, the third party, which would give a legal or equitable claim to the benefit of the promise, or an equivalent from the promisee personally.

Lawrence v. Fox, 20 N. Y. 268; Burr v. Beers, 24 N. Y. 178, 80 Am. Dec. 327; Garnsey v. Rogers, 47 N. Y. 233, 7 Am. Rep. 440; Vrooman v. Turner, 69 N. Y. 280, 25 Am. Rep. 195; Lorillard v. Clyde, 122 N. Y. 498, 10 L.R.A. 113, 25 N. E. 917; Durnherr v. Rau, 135 N. Y. 219, 32 N. E. 49; Townsend v. Rackham, 143 N. Y. 516, 38 N. E. 731; French v. Vix, 143 N. Y. 90, 37 N. E. 612; Embler v. Hartford Steam Boiler Inspection & Ins. Co. 158 N. Y. 431, 44 L.R.A. 512, 53 N. E. 212; Borland v. Welch, 162 N. Y. 104, 56 N. E. 556; Rigney v. New York C. & H. R. R. Co. 217 N. Y. 31, 111 N. E. 226; Wait v. Wilson, 86 App. Div. 485, 83 N. Y. Supp. 834; Lockwood v. Smith, 81 Misc. 334, 143 N. Y. Supp. 480; Coleman v. Hiler, 85 Hun, 547, 33 N. Y. Supp. 357.

Plaintiff cannot recover in equity.

Phalen v. United States Trust Co. 186 N. Y. 178, 7 L.R.A.(N.S.) 734, 78 N. E. 943, 9 Ann. Cas. 595; Re O'Hara, 95 N. Y. 403, 47 Am. Rep. 53; Amherst College v. Ritch, 151 N. Y. 282, 37 L.R.A. 305, 45 N. E. 876; Hamlin v. Stevens, 177 N. Y. 39, 69 N. E. 118; Mahaney v. Carr, 175 N. Y. 454, 67 N. E. 903; Ide v. Brown, 178 N. Y. 26, 70 N. E. 101; Bull v. Bull, 31 Hun, 69; Crippen v. Crippen, 53 Hun, 233, 6 N. Y. Supp. 378; Ahrens v. Jones, 169 N. Y. 555, 88 Am. St. Rep. 620, 62 N. E. 666.

The evidence is too uncertain and indefinite to sustain a recovery.

Mahaney v. Carr, 175 N. Y. 454, 67 N. E. 903; Hamlin v. Stevens, 177 N. Y. 39, 69 N. E. 118; Ide v. Brown, 178 N. Y. 26, 70 N. E. 101; Dobie v. Armstrong, 160 N. Y. 584, 55 N. E. 302.

Messrs. **Kellas & Kellas**, for respondent:

The agreement between Mrs. Beman and her husband, Samuel A., at the time of the execution of her will, was valid and can be enforced in this action.

Amherst College v. Ritch, 151 N. Y. 282, 37 L.R.A. 305, 45 N. E. 876; Re O'Hara, 95 N. Y. 403, 47 Am. Rep. 53; Crippen v. Crippen, 53 Hun, 232, 6 N. Y. Supp. 378; Bull v. Bull, 31 Hun, 69; Burr v. Beers, 24 N. Y. 178, 80 Am. Dec. 327; Clark v. Howard, 150 N. Y. 232, 44 N. E. 695; Buchanan v. Tilden, 158 N. Y. 109, 44 L.R.A. 170, 70 Am. St. Rep. 454, 52 N. E. 724; Ahrens v. Jones, 169 N. Y. 555, 88 Am. St. Rep. 620, 62 N. E. 666; McClellan v. Grant, 83 App. Div. 599, 82 N. Y. Supp. 208; Goldsmith v. Goldsmith, 145 N. Y. 313, 39 N. E. 1067; Gallagher v. Gallagher,

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135 App. Div. 457, 120 N. Y. Supp. 18; Rigney v. New York C. & H. R. R. Co. 217 N. Y. 37, 111 N. E. 226; Union Bank v. Coster, 3 N. Y. 204, 53 Am. Dec. 280; Rochester Dry Goods Co. v. Fahy, 111 App. Div. 748, 97 N. Y. Supp. 1013.

The evidence sustains the findings of the trial court.

Chainless Cycle Mfg. Co. v. Security Ins. Co. 169 N. Y. 311, 62 N. E. 392; Ostrom v. Greene, 161 N. Y. 353, 55 N. E. 919; Winne v. Winne, 166 N. Y. 267, 82 Am. St. Rep. 647, 59 N. E. 832.

Pound, J., delivered the opinion of the court:

Judge Beman and his wife were advanced in years. Mrs. Beman was about to die. She had a small estate, consisting of a house and lot in Malone and little else. Judge Beman drew his wife's will according to her instructions. It gave $1,000 to plaintiff, $500 to one sister, plaintiff's mother, and $100 each to another sister and her son, the use of the house to her husband for life, and remainder to the American Society for the Prevention of Cruelty to Animals. She named her husband as residuary legatee and executor. Plaintiff was her niece, thirty-four years old, in ill health, sometimes a member of the Beman household. When the will was read to Mrs. Beman, she said that it was not as she wanted it. She wanted to leave the house to plaintiff. She had no other objection to the will, but her strength was waning, and, although the judge offered to write another will for her, she said she was afraid she would not hold out long enough to enable her to sign it. So the judge said, if she would sign the will, he would leave plaintiff enough in his will to make up the difference. He avouched the promise by his uplifted hand with all solemnity and his wife then executed the will. When he came to die, it was found that his will made no provision for the plaintiff.

This action was brought, and plaintiff recovered judgment in the trial court, on the theory that Beman had obtained property from his wife and induced her to execute the will in the form prepared by him, by his promise to give plaintiff $6,000, the value of the house, and that thereby equity impressed his property with a trust in favor of plaintiff. Where a legatee promises the testator that he will use property given him by the will for a particular purpose, a trust arises. O'Hara v. Dudley, 95 N. Y. 403, 47 Am. Rep. 53; Amherst College v. Ritch, 151 N. Y. 282, 37 L.R.A. 305, 45 N. E. 876; Ahrens v. Jones, 169 N. Y. 555, 88 Am. St. Rep. 620, 62 N. E. 666. Beman received nothing under his wife's will but the use of the house in Malone for life. Equity compels the application of property thus obtained to the purpose of the testator, but equity cannot so impress a trust, except on property obtained by the promise. Beman was bound by his promise, but no property was bound by it; no trust in plaintiff's favor can be spelled out.

Trust—promise by legatee.

—promise to prevent will—what bound.

An action on the contract for damages, or to make the executors trustees for performance, stands on different ground. Farmers' Loan & T. Co. v. Mortimer, 219 N. Y. 290, 294, 295, 114 N. E. 389, Ann. Cas. 1918E, 1159. The appellate division properly passed to the consideration of the question whether the judgment could stand upon the promise made to the wife, upon a valid consideration; for the sole benefit of plaintiff. The judgment of the trial court was affirmed by a return to the general doctrine laid down in the great case of Lawrence v. Fox, 20 N. Y. 268, which has since been limited as herein indicated.

Contracts for the benefit of third persons have been the prolific source of judicial and academic discussion. Williston, Contracts for Benefit of Third Person, 15 Harvard L. Rev. 767; Corbin, Contracts for Benefit of Third Persons, 27 Yale L. Rev. 1008. The general rule, both in law and equity (Phalen v. United States Trust Co. 186 N. Y. 178, 186, 7 L.R.A.(N.S.) 734, 78 N. E. 943, 9

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Ann. Cas. 595), was, that privity between a plaintiff and a defendant is necessary to the maintenance of an action on the contract. The consideration must be furnished by the party to whom the promise was made. The contract cannot be enforced against the third party, and therefore it cannot be enforced by him. On the other hand, the right of the beneficiary to sue on a contract made expressly for his benefit has been fully recognized in many American jurisdictions, either by judicial decision or by legislation, and is said to be "the prevailing rule in this country." Hendrick v. Lindsay, 93 U. S. 143, 23 L. ed. 855; Lehow v. Simonton, 3 Colo. 346. It has been said that "the establishment of this doctrine has been gradual, and is a victory of practical utility over theory, of equity over technical subtlety." Brantly, Contr. 2d ed. p. 253. The reasons for this view are that it is just and practical to permit the person for whose benefit the contract is made to enforce it against one whose duty it is to pay. Other jurisdictions still adhere to the present English rule (7 Laws of England, Halsbury, 342, 343; Jenks's Digest of English Civil Law, § 229) that a contract cannot be enforced by or against a person who is not a party (Exchange Bank v. Rice, 107 Mass. 37, 9 Am. Rep. 1). But see also Forbes v. Thorpe, 209 Mass. 570, 95 N. E. 955; Gardner v. Denison, 217 Mass. 492, 51 L.R.A. (N.S.) 1108, 105 N. E. 359.

In New York, the right of the beneficiary to sue on contracts made for his benefit is not clearly or simply defined. It is at present confined: First. To cases where there is a pecuniary obligation running from the promisee to the beneficiary, "a legal right founded upon some obligation of the promisee in the third party to adopt and claim the promise as made for his benefit." Farley v. Cleveland, 4 Cow. 432, 15 Am. Dec. 387; Lawrence v. Fox, supra; Garnsey v. Rogers, 47 N. Y. 233, 7 Am. Rep. 440; Vrooman v. Turner, 69 N. Y. 280, 25 Am. Rep. 195; Lorillard v. Clyde, 122 N. Y. 498, 10 L.R.A. 113, 25 N. E. 917; Durnherr v. Rau, 135 N. Y. 219, 32 N. E. 49; Townsend v. Rackham, 143 N. Y. 516, 38 N. E. 731; Sullivan v. Sullivan, 161 N. Y. 554, 56 N. E. 116. Secondly. To cases where the contract is made for the benefit of the wife (Buchanan v. Tilden, 158 N. Y. 109, 44 L.R.A. 170, 70 Am. St. Rep. 454, 52 N. E. 724; Bouton v. Welch, 170 N. Y. 554, 63 N. E. 539), affianced wife (De Cicco v. Schweizer, 221 N. Y. 431, L.R.A.1918E, 1004, 117 N. E. 807, Ann. Cas. 1918C, 816), or child (Todd v. Weber, 95 N. Y. 181, 193, 47 Am. Rep. 20; Re Kidd, 188 N. Y. 274, 80 N. E. 924) of a party to the contract. The close relationship cases go back to the early King's bench case (1677), long since repudiated in England, of Dutton v. Poole, 2 Lev. 211, 83 Eng. Reprint, 523 (s. c. 1 Vent. 318, 332, 86 Eng. Reprint, 205). See Schemerhorn v. Vanderheyden, 1 Johns. 139, 3 Am. Dec. 304. The natural and moral duty of the husband or parent to provide for the future of wife or child sustains the action on the contract made for their benefit. "This is the farthest the cases in this state have gone," says Cullen, J., in the marriage settlement case of Borland v. Welch, 162 N. Y. 104, 110, 56 N. E. 556.

Contract—enforcement by third person.

The right of the third party is also upheld in, thirdly, the public contract cases (Little v. Banks, 85 N. Y. 258; Pond v. New Rochelle Water Co. 183 N. Y. 330, 1 L.R.A. (N.S.) 958, 76 N. E. 211, 5 Ann. Cas. 504; Smyth v. New York, 203 N. Y. 106, 96 N. E. 409; Farnsworth v. Boro Oil & Gas Co. 216 N. Y. 40, 48, 109 N. E. 860; Rigney v. New York C. & H. R. R. Co. 217 N. Y. 31, 111 N. E. 226; International R. Co. v. Rann, 224 N. Y. 83, 120 N. E. 153. Cf. German Alliance Ins. Co. v. Home Water Supply Co. 226 U. S. 220, 57 L. ed. 195, 42 L.R.A.(N.S.) 1000, 33 Sup. Ct. Rep. 32, where the municipality seeks to protect its inhabitants by covenants for their

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benefit; and, fourthly, the cases where, at the request of a party to the contract, the promise runs directly to the beneficiary, although he does not furnish the consideration (St. Mark's Church v. Teed, 120 N. Y. 583, 24 N. E. 1014; First Nat. Bank v. Chalmers, 144 N. Y. 432, 439, 39 N. E. 331; Hamilton v. Hamilton, 127 App. Div. 871, 875, 112 N. Y. Supp. 10). It may be safely said that a general rule sustaining recovery at the suit of the third party would include but few classes of cases not included in these groups, either categorically or in principle.

The desire of the childless aunt to make provision for a beloved and favorite niece differs imperceptibly, in law or in equity, from the moral duty of the parent to make testamentary provision for a child. The contract was made for the plaintiff's benefit. She alone is substantially damaged by its breach. The representatives of the wife's estate have no interest in enforcing it specifically. It is said in Buchanan v. Tilden that the common law imposes moral and legal obligations upon the husband and the parent, not measured by the necessaries of life. It was, however, the love and affection, or the moral sense, of the husband and the parent, that imposed such obligations in the cases cited, rather than any common-law duty of husband and parent to wife and child. If plaintiff had been a child of Mrs. Beman, legal obligation would have required no testamentary provision for her, yet the child could have enforced a covenant in her favor identical with the covenant of Judge Beman in this case. De Cicco v. Schweizer, 221 N. Y. 431, L.R.A. 1918E, 1004, 117 N. E. 807, Ann. Cas. 1918C, 816. The constraining power of conscience is not regulated by the degree of relationship alone. The dependent or faithful niece may have a stronger claim than the affluent or unworthy son. No sensible theory of moral obligation denies arbitrarily to the former what would be conceded to the latter. We might consistently either refuse or allow the claim of both, but I cannot reconcile a decision in favor of the wife in Buchanan v. Tilden, based on the moral obligations arising out of near relationship, with a decision against the niece here, on the ground that the relationship is too remote for equity's ken. No controlling authority depends upon so absolute a rule. In Sullivan v. Sullivan, 161 N. Y. 554, 56 N. E. 116, the grandniece lost in a litigation with the aunt's estate, founded on a certificate of deposit payable to the aunt, "or, in case of her death, to her niece;" but what was said in that case of the relations of plaintiff's intestate and defendant does not control here, any more than what was said in Durnherr v. Rau, 135 N. Y. 219, 32 N. E. 49, on the relation of husband and wife, and the inadequacy of mere moral duty, as distinguished from legal or equitable obligation, controlled the decision in Buchanan v. Tilden. Borland v. Welch, 162 N. Y. 104, 110, 56 N. E. 556, deals only with the rights of volunteers under a marriage settlement not made for the benefit of collaterals. Kellogg, P. J., writing for the court below, well said: "The doctrine of Lawrence v. Fox is progressive, not retrograde. The course of the late decisions is to enlarge, not to limit, the effect of that case." [180 App. Div. 740, 168 N. Y. Supp. 454].

—to provide for third person by will—enforcement.

The court in that leading case attempted to adopt the general doctrine that any third person, for whose direct benefit a contract was intended, could sue on it. The headnote thus states the rule. Finch, J., in Gifford v. Corrigan, 117 N. Y. 257, 262, 6 L.R.A. 610, 15 Am. St. Rep. 508, 22 N. E. 756, says that the case rests upon that broad proposition; Edward T. Bartlett, J., in Pond v. New Rochelle Water Co. 183 N. Y. 330, 337, 1 L.R.A.(N.S.) 958, 76 N. E. 213, 5 Ann. Cas. 504, calls it "the general principle;" but Vrooman v.

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Turner, supra, confined its application to the facts on which it was decided. "In every case in which an action has been sustained," says Allen, J., "there has been a debt or duty owing by the promisee to the party claiming to sue upon the promise." 69 N. Y. 285, 25 Am. Rep. 195. As late as Townsend v. Rackham, 143 N. Y. 516, 523, 38 N. E. 731, 733, we find Peckham, J., saying that, "to maintain the action by the third person, there must be this liability to him on the part of the promisee." Buchanan v. Tilden went further than any case since Lawrence v. Fox, in a desire to do justice, rather than to apply with technical accuracy strict rules calling for a legal or equitable obligation. In Embler v. Hartford Steam Boiler Inspection & Ins. Co. 158 N. Y. 431, 44 L.R.A. 512, 53 N. E. 212, it may at least be said that a majority of the court did not avail themselves of the opportunity to concur with the views expressed by Gray, J., who wrote the dissenting opinion in Buchanan v. Tilden, to the effect that an employee could not maintain an action on an insurance policy issued to the employer, which covered injuries to employees.

In Wright v. Glen Teleph. Co. 48 Misc. 192, 195, 95 N. Y. Supp. 101, the learned presiding justice who wrote the opinion in this case said at trial term:

"The right of a third person to recover upon a contract made by other parties for his benefit must rest upon the peculiar circumstances of each case rather than upon the law of some other case."

"The case at bar is decided upon its peculiar facts." Edward T. Bartlett, J., in Buchanan v. Tilden.

But, on principle, a sound conclusion may be reached. If Mrs. Beman had left her husband the house on condition that he pay the plaintiff $6,000, and he had accepted the devise, he would have become personally liable to pay the legacy, and plaintiff could have recovered in an action at law against him, whatever the value of the house. Gridley v. Gridley, 24 N. Y. 130; Brown v. Knapp, 79 N. Y. 136, 143; Dinan v. Coneys, 143 N. Y. 544, 547, 38 N. E. 715; Blackmore v. White [1899] 1 Q. B. 293, 304, 68 L. J. Q. B. N. S. 180, 47 Week. Rep. 448, 80 L. T. N. S. 79. That would be because the testatrix had, in substance, bequeathed the promise to plaintiff, and not because close relationship or moral obligation sustained the contract. The distinction between an implied promise to a testator, for the benefit of a third party, to pay a legacy, and an unqualified promise, on a valuable consideration, to make provision for the third party by will, is discernible, but not obvious. The tendency of American authority is to sustain the gift in all such cases and to permit the donee beneficiary to recover on the contract. Re Edmundson (1918) 259 Pa. 429, ante, 1150, 103 Atl. 277. The equities are with the plaintiff, and they may be enforced in this action, whether it be regarded as an action for damages or an action for specific performance to convert the defendants into trustees for plaintiff's benefit under the agreement.

The judgment should be affirmed, with costs.

Hogan, Cardozo, and Crane, JJ., concur. **Hiscock**, Ch. J., and **Collin and Andrews, JJ.**, dissent.

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ANNOTATION.

Right of beneficiary to enforce contract between third persons to provide for him by will.

I. Generally, 1193.
II. Adoption contracts and other contracts in consideration of child's society, companionship, and services, 1197.
III. Agreements for joint, mutual, or reciprocal wills, 1200.

I. Generally.

Aside from the contracts considered in the next two subdivisions of this note, the courts do not, apparently, make any distinction between a contract to leave property by will and any other contract, so far as the right of a third person for whose benefit the contract was made to sue thereon is concerned. There are many shades of opinion on this question, and a number of them are represented in the cases dealing with the question under annotation.

A few of the cases are apparently based on the broad rule that the fact that the contract is made for the third person's benefit is, in itself, sufficient to entitle him to sue thereon. Smith v. Smith (1869) 5 Bush (Ky.) 625; Winn v. Schenck (1908) 33 Ky. L. Rep. 615, 110 S. W. 827; Murphy v. Whitney (1894) 140 N. Y. 541, 24 L.R.A. 123, 35 N. E. 930. But see other New York cases cited below.

Smith v. Smith (1869) 5 Bush (Ky.) 625, supra, involved a contract between a man and his daughter-in-law, whereby she released him from liability on claims against a partnership theretofore existing between him and his son, and he agreed on the final distribution of his estate to make the children of the son and daughter-in-law equal in all things with another son; the action was by the grandchildren, after the grandfather's death, to enforce their rights. It was contended that, the contract having been made by their mother, they could not maintain the action in their name, but the court said: "Before the adoption of the Civil Code, the party for whose benefit a contract was made could maintain an action in equity on it; and § 30, Civil Code, expressly provides: 'Every action must be prosecuted in the name of the real party in interest.' The 33d section permits the person with whom, or in whose name, a contract is made for the benefit of another, to bring an action on the contract without joining the beneficiary; but that does not take the right from the real party in interest to bring the suit in his own name. There can be nothing in that objection, therefore."

In Winn v. Schenck (1908) 33 Ky. L. Rep. 615, 110 S. W. 827, supra, a man devised his whole estate to his mother on her agreement to devise one half thereof, on her death, to his godson; the mother carried out the contract, and a question arose as to the liability of the devise by her to an inheritance tax imposed subsequent to the contract. The court said: "That one may enforce a contract made for his benefit, though not made with him or to him, has been too often decided by this court to need further consideration here. . . . So that, had Mrs. Mary E. Greathouse violated her contract, which she made with her son for the benefit of appellee, the latter would have had a perfect right, after she had accepted the estate of her son under the terms of his will, to have enforced the contract which she had violated."

Many of the cases, particularly in New York, are apparently based on the view that the right of the third person to enforce the contract depends on the existence of some obligation in favor of the third party on the part of the promisee. Owings's Case (1827) 1 Bland, Ch. (Md.) 370, 17 Am. Dec. 311; Babcock v. Chase (1895) 92 Hun, 264, 36 N. Y. Supp. 879, 3 N. Y. Anno. Cas. 25; Whitcomb v. Whitcomb (1895) 92 Hun, 443, 36 N. Y. Supp. 607; Wait v. Wilson (1903) 86 App. Div. 485, 83 N. Y. Supp. 834; Seager v. Tholens (1918) 182 App.

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Div. 317, 170 N. Y. Supp. 482; SEAVER v. RANSOM (reported herewith) ante, 1187, affirming (1917) 180 App. Div. 734, 168 N. Y. Supp. 454.

Thus, in Babcock v. Chase (1895) 92 Hun, 264, 36 N. Y. Supp. 879, 3 N. Y. Anno. Cas. 25, supra, the court quotes from Vrooman v. Turner (1877) 69 N. Y. 283, 25 Am. Rep. 195 (the facts in which are outside the scope of this note), as follows: "To give a third party who may derive a benefit from the performance of the promise an action, there must be, first, an intent by the promisee to secure some benefit to the third party; and, second, some privity between the two, —the promisee and the party to be benefited,—and some obligation or duty owing from the former to the latter, which would give him a legal or equitable claim to the benefit of the promise or an equivalent from him personally."

In Seager v. Tholens (1918) 182 App. Div. 317, 170 N. Y. Supp. 482, supra, the court, in holding that children could not enforce a contract made with their mother to devise land to her, or in case of her death to the children, because they were not parties to the contract, and did not furnish the consideration, and it did not appear that the contract was made for their benefit or in discharge of any duty owing to them by their mother, said: "That performance of the contract would benefit plaintiffs is not alone sufficient to give them a standing to enforce it; nor is their kinship to the parties sufficient, unless their mother was under some duty or obligation to them which, by the contract, she undertook to discharge. A mother's contract with a third party to provide support for her infant children can no doubt be enforced by the children; but the fact of this infancy, from which alone the mother's obligation or duty springs, must be alleged. So far as appears from this complaint, no such obligation or duty exists. The mother owed no legal duty to plaintiffs to provide them with an inheritance, and this seems to have been the object of her contract. On the face of this complaint, plaintiffs are volunteers, seeking to enforce a contract between other parties, in which they have no legal interest."

A moral obligation will, however, in some cases, support the action. SEAVER v. RANSOM (reported herewith) ante, 1187.

Where an agreement is made by a husband for the benefit of his wife with a third person, whereby the third person agrees to give property to the wife by will, and the husband has performed his part of the agreement, it can be enforced by the wife. Bouton v. Welch (1900) 48 App. Div. 378, 63 N. Y. Supp. 80 (where, on an exchange of land, the husband gave a mortgage for much more than the difference in value, in consideration of the other party's agreement that the mortgage would be assigned or bequeathed to the wife, who was the other party's niece or adopted daughter); De Cicco v. Schweizer (1917) 221 N. Y. 431, L.R.A.1918E, 1004, 117 N. E. 807, Ann. Cas. 1918C, 816 (where a man agreed with his daughter's intended husband, in consideration of the marriage, to pay his daughter a specified annuity, and not to change the provisions of his will for the benefit of the daughter and her issue).

And a parent owes an obligation to his infant child, sufficient to entitle the child to enforce a contract made with the parent for the child's benefit. Babcock v. Chase (1895) 92 Hun, 264, 36 N. Y. Supp. 879, 3 N. Y. Anno. Cas. 25 (agreement with plaintiff's parents to leave her $500 by will, in consideration of the parents' naming her as desired by the promisor); Whitcomb v. Whitcomb (1895) 92 Hun, 443, 36 N. Y. Supp. 607 (agreement between a man and his wife, who was suing him for divorce, and the man's father, whereby the wife was given the custody of certain children, and the grandfather agreed to pay or cause to be paid, at his death, a specified amount to such children); Rhoades v. Schwartz (1903) 41 Misc. 648, 85 N. Y. Supp. 229 (agreement by plaintiff's grandmother, on a consideration moving from plaintiff's mother and made to the mother, that she would devise property to the mother to hold in trust

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for plaintiff and her sister until they reached a certain age, when the property was to be divided between them). And see Wait v. Wilson (1908) 86 App. Div. 485, 83 N. Y. Supp. 834, and Seager v. Tholens (N. Y.) supra, where, in refusing to enforce the contract, the court lays stress on the fact that the children seeking to enforce it were not infants.

In Whitcomb v. Whitcomb (N. Y.) supra, the court said: "The support of a promise made by one person to another, for the benefit of a third person, requires no privity between the promisor and him for whose benefit it is made, but between the latter and the promisee privity is essential in so far that some duty is owing by the promisee to the person to be benefited by the promise, or some reciprocal duties are undertaken or assumed by them, in respect to which the promise may have some beneficial relation. Such, as before suggested, was the relation between the mother and the plaintiffs, and, in taking the agreement of the defendant's testator, she may be deemed to have acted in their behalf. As the promise was made with a view to aid in the support and maintenance of those children, it was within reasonable contemplation that the mother might be entitled to reimbursement from the fund, for supplying the means necessary for such purpose."

That a promise made to a parent to leave property by will to his adult child cannot be enforced by the child, in the absence of any duty or obligation owing to him by the parent, has been twice held by the New York appellate division. Wait v. Wilson (N. Y.) supra (agreement between plaintiff's father and stepmother, whereby the stepmother, in consideration of her being made residuary devisee of her husband, agreed that all the property which she had at the time of her death should go to plaintiff); Seager v. Tholens (1918) 182 App. Div. 317, 170 N. Y. Supp. 482 (agreement by plaintiff's grandmother to convey or devise land to plaintiff's mother, or, in case of her death, to plaintiff). In the last cited case the court, however, placed its decision, in part, on the ground that the contract was not made for plaintiff's benefit.

With the possible exception of Rhoades v. Schwartz (N. Y.) supra (where the age of the children when the promise was made does not very clearly appear), no case within the scope of this note in direct conflict with those just cited has been found; but it may be doubted whether they would be approved by the court of appeals, in view of the light thrown upon the attitude of that court by SEAVER v. RANSOM (reported herewith) ante, 1187, and especially in view of the statement therein with reference to an earlier case not within the scope of this note, that "it was, however, the love and affection or the moral sense of the husband and the parent that imposed such obligations in the cases cited, rather than any common-law duty of husband and parent to wife and child."

In an early Maryland case, where a man refrained from giving any share of his property to a particular daughter, in reliance on his wife's promise to give all of her property after her death to such daughter, it was held that a father's natural obligation to provide for his children entitled them to enforce a promise made to him for their benefit. Whether the daughter was an infant or an adult when the promise was made does not appear. Owings's Case (1827) 1 Bland, Ch. (Md.) 370, 17 Am. Dec. 311.

That a woman's moral obligation to a dependent or faithful niece will entitle the niece to sue on a promise made to the woman by her husband, to leave property to the niece by will, is held in SEAVER v. RANSOM (reported herewith) ante, 1187, affirming (1917) 180 App. Div. 734, 168 N. Y. Supp. 454.

In Pennsylvania, it seems that a third person may sue on a contract to pay money to him, if he is the only person beneficially interested in the promise, and money or property has been placed in the hands of the promisor, from which to make such payment. It was therefore held in RE EDMUNDSON (reported herewith) ante, 1150, that plaintiff could sue on an

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agreement by her grandmother, in consideration of a conveyance by plaintiff's mother, that plaintiff should have the amount put into the property by her father, if the land was sold in the grandmother's lifetime; and that, if not sold, the grandmother would leave plaintiff that amount by will.

The so-called English rule that a third person cannot sue on a contract made for his benefit, unless the contract has the effect of creating a trust, is followed in Signs v. Bush (1917) — Mich. —, 165 N. W. 820.

In Signs v. Bush (Mich.) supra, a mother conveyed land in part payment for land conveyed to the decedent, under his agreement to bequeath the agreed value of her land, with interest thereon, to her children. The court held that the contract could not be enforced by the surviving child, saying: "No serious claim is made that a promise made by one person to another for the benefit of a third—a stranger to the consideration—will support an action by the latter according to the law of this state. . . . But the contention is made that a trust relationship was created by this transaction." The court disposed of this contention by saying that no parol trust could be created in land; that, under the express provisions of the statute, there could be no resulting trust because of the payment of part of the consideration by claimant's mother, and that there could be no trust in the proceeds of a sale of the land, because there was no declaration of trust after such sale. The court also refers to a recent statute, providing that every action shall be prosecuted in the name of the real party in interest, but holds that it did not apply because the claim was pending when the law went into force. Whether this statute would permit a third person to sue in a case to which the statute applies is not directly decided.

Wright v. Tinsley (1860) 30 Mo. 389, involved an agreement by plaintiff's father-in-law that plaintiff should be a legatee and devisee, and share equally with the father-in-law's other children in his estate after his death. Although on its face this promise does not seem to have been made for the benefit of any third person, plaintiff, in suing to enforce the promise, alleged that his agreement, constituting the consideration for such promise, was made to secure to his daughter and her children her equal share of the estate, and he sued as trustee for the use and benefit of the daughter's administrator. It was contended that plaintiff could not sue as a trustee of an express trust, under a statute defining a trustee of an express trust as including a person with whom or in whose name a contract was made for the benefit of another; and the courts, in holding that plaintiff was the proper party to sue, said that, if living, the daughter would not be the proper party, for, although she might be beneficially interested, she could not sue if plaintiff made the contract for her benefit, which fact constituted him the trustee of an express trust. And see Kirk v. Middlebrook (1907) 201 Mo. 245, 100 S. W. 450, where the right of the person to whom a promise to leave property by will to a third person was made, to sue thereon, was conceded arguendo, the court citing Wright v. Tinsley (Mo.) supra.

In the following cases, alleged contracts to leave property by will to third persons were enforced in suits by the beneficiaries, or held not proved or unenforceable on other grounds, with no intimation that the beneficiary could not enforce the contract because it was not made with her:

United States. — Russell v. Jones (1905) 68 C. C. A. 487, 135 Fed. 929 (promise by husband to wife to give property received under her will to her sister held not proved).

Alabama.—Noble v. Metcalf (1908) 157 Ala. 295, 47 So. 1007 (beneficiary held not entitled to restrain waste in promisor's lifetime).

Illinois. — Wallace v. Rappleye (1882) 103 Ill. 229 (promise to beneficiary's mother by divorced husband, in consideration of surrender of dower rights); Barrett v. Geisinger (1899) 179 Ill. 240, 53 N. E. 576 (enforcement of promise made to plaintiff's father denied because promise was in alternative).

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Iowa.—Mueller v. Batcheler (1906) 131 Iowa, 650, 109 N. W. 186 (where the court said that the question as to plaintiff's right to sue was not raised or passed upon).

Kansas.—Overly v. Angel (1911) 84 Kan. 259, 113 Pac. 1041 (agreement held not proved).

Maine.—Androscoggin County Sav. Bank v. Tracy (1916) 115 Me. 433, 99 Atl. 257 (agreement with father of beneficiaries).

Maryland. — Gaither v. Gaither (1851) 3 Md. Ch. 158 (agreement held not proved).

Minnesota.—Laird v. Vila (1904) 93 Minn. 45, 106 Am. St. Rep. 420, 100 N. W. 656 (agreement between husband and wife for benefit of children they had agreed to adopt).

New Jersey.—Belknap v. Tillotson (1913) 82 N. J. Eq. 271, 88 Atl. 841 (promise by legatee as to disposition of legacy).

New York. — Stanton v. Miller (1874) 58 N. Y. 192 (agreement with father of beneficiaries not enforced, because of uncertainty as to who the beneficiaries were); Miller v. Hill (1910) 137 App. Div. 378, 121 N. Y. Supp. 741, affirmed in (1911) 203 N. Y. 646, 97 N. E. 1109 (agreement by wife, in consideration of husband's will in her favor, held not proved); Krell v. Stein (1911) 127 N. Y. Supp. 150 (agreement between plaintiff's parents held not proved); Cross v. Hoy (1917) 101 Misc. 75, 166 N. Y. Supp. 516 (agreement by devisee to devise property to plaintiff, to which agreement plaintiff may possibly have been a party, held not proved); Hausner v. Wickham (1918) — App. Div. —, 172 N. Y. Supp. 680 (promise by plaintiff's father to plaintiff's grandfather in consideration of devise).

Wisconsin. — Freeman v. Morris (1906) 131 Wis. 216, 120 Am. St. Rep. 1038, 109 N. W. 983, 11 Ann. Cas. 481 (agreement with plaintiff's parents, in consideration of being permitted to name plaintiff, held too indefinite to be enforced).

But see the following cases in which the action was brought by the promisee, or someone claiming under him: McAllister v. Bronaugh (1908) — Ky. —, 113 S. W. 821 (action for services rendered under agreement that land would be devised to plaintiff's wife); Sherman v. Scott (1882) 27 Hun (N. Y.) 331 (where, however, the promisee was himself the beneficiary in a contingency which apparently happened, and the person suing under an assignment from him was one of the contingent beneficiaries, and was joined by another of such beneficiaries); Taylor v. Brinkley (1902) 131 N. C. 8, 42 S. E. 336 (suit to recover value of improvements placed on land, under agreement that it would be devised to plaintiff's wife); Davis v. Porter (1895) 10 **Ohio** C. C. 243, 6 Ohio S. & C. P. Dec. 607 (suit for damages for breach of contract to devise property to plaintiff's wife, in reliance on which he had placed improvements on the property); Davidson v. Davidson (1913) 72 **W. Va.** 747, 79 S. E. 998 (agreement to provide for promisee and her illegitimate child, which she sought to enforce in her own name and as next friend of the child); Re Broadwood (1912) 56 Sol. Jo. (**Eng.**) 703, cited in Butterworth's Yearly Dig. 1912, col. 669 (holding that a man's promise to his daughter's intended husband, not to change the provisions of his will in her favor, was an enforceable contract, which the husband could prove against the estate of the father).

And see also Bird v. Jacobus (1901) 113 **Iowa**, 194, 84 N. W. 1062, where, in passing on the competency of a witness, the court said that the witness had no interest under a will in her favor, made pursuant to a contract with a third person, as the will might be at any time changed, she not being a party to the contract, though benefited by it.

II. Adoption contracts and other contracts in consideration of child's society, companionship, and services.

In connection with the matter embraced in this subdivision, it has been found impracticable to exclude agreements to give property to the beneficiary on the death of the promisor, though the word "will" was not used, and though, as in cases contemplating a formal adoption, the contract could

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have been performed without the execution of a will.

Where a contract to adopt a child provides that, on the death of the adopting parent, the child shall have all or a share of the parent's property; or where contracts to adopt, or valid or invalid adoptions, are construed as amounting to an implied agreement to leave property to the child; or where an agreement is made to leave property to a child, in consideration of the surrender to the promisor of the child's custody and control, though no legal adoption is contemplated,—it is the rule, supported by the substantially unanimous current of authority, that the agreement, though made with a third person for the benefit of the child, is enforceable by the child.

United States.—Jaffee v. Jacobson (1891) 14 L.R.A. 352, 1 C. C. A. 11, 4 U. S. App. 4, 48 Fed. 21; Hood v. McGehee (1911) 189 Fed. 205, affirmed in (1912) 117 C. C. A. 664, 199 Fed. 989, which was affirmed in (1915) 237 U. S. 611, 59 L. ed. 1144, 35 Sup. Ct. Rep. 718.

Alabama.—Prince v. Prince (1915) 194 Ala. 455, 69 So. 906.

Colorado.—Oles v. Wilson (1914) 57 Colo. 246, 141 Pac. 489.

Georgia. — Crawford v. Wilson (1913) 139 Ga. 654, 44 L.R.A.(N.S.) 773, 78 S. E. 30; Lansdell v. Lansdell (1916) 144 Ga. 571, 87 S. E. 782.

Iowa.—Chehak v. Battles (1907) 133 Iowa, 107, 8 L.R.A.(N.S.) 1130, 110 N. W. 330, 12 Ann. Cas. 140; Horner v. Maxwell (1915) 171 Iowa, 660, 153 N. W. 331 (dissenting opinion, which, in this respect, is not in conflict with anything in the majority opinion).

Minnesota.—Odenbreit v. Utheim (1915) 131 Minn. 56, L.R.A.1916D, 421, 154 N. W. 741.

Montana.—Burns v. Smith (1898) 21 Mont. 251, 69 Am. St. Rep. 653, 53 Pac. 742.

Nebraska.—Kofka v. Rosicky (1894) 41 Neb. 328, 25 L.R.A. 207, 43 Am. St. Rep. 685, 59 N. W. 788.

New Jersey.—Van Dyne v. Vreeland (1857) 11 N. J. Eq. 370, s. c. on final hearing (1858) 12 N. J. Eq. 142.

New York.—Godine v. Kidd (1892) 64 Hun, 585, 29 Abb. N. C. 36, 19 N. Y. Supp. 335 (where the court said that the beneficiary's mother, with whom the contract was made, could not have sued to enforce the contract for her own benefit).

Canada.—Roberts v. Hall (1882) 1 Ont. Rep. 388, 18 Can. L. J. N. S. 328.

While the child's right to sue appears to be well settled, the reason for permitting him to sue does not appear so clearly from the cases. In some jurisdictions the broad view taken with regard to the right of a third person to sue on a contract made for his benefit probably renders any other reason for the rule unnecessary. In other states, the right to sue is probably recognized because of the child's connection with the consideration; while in other states the controlling consideration may be the fact that suits to enforce such agreements are usually brought in equity.

In Crawford v. Wilson (1913) 139 Ga. 654, 44 L.R.A.(N.S.) 773, 78 S. E. 30, supra, which involved a contract made with the child's mother, the court said: "Under the agreement between her mother and Mrs. Puckett, petitioner was to receive something beyond the literal terms of the contract. The contractual obligation was to adopt petitioner as a child. If formal adoption had been consummated, then the law would have vested her with a right of inheritance . . . and it is this right of inheritance which petitioner is seeking to enforce in this action. Therefore, when we consider that this action is not to recover for services under her mother's contract, but is grounded on what was done under it, the changed domestic relation which was contemplated to be accomplished by the contract, and the personal rights which would accrue to petitioner from the act of adoption by operation of law, we see no reason why it cannot be maintained by petitioner in her own name." The court further said that the suit was in equity, and that the changed domestic relations between the foster parent and the foster child, together with the right of inheritance under the law, as a result of the changed parental relations, if formal adoption had been consum-

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mated, brought the case within the recognized exception to the rule that a third person could not sue on a contract.

In Van Dyne v. Vreeland (1857) 11 N. J. Eq. 370, s. c. on final hearing (1858) 12 N. J. Eq. 142, supra, the contract was made with complainant's father, and the chancellor said: "It is objected that this agreement cannot be enforced by the complainant, because he was not a party to it. But he was the party for whose benefit the agreement was made. All the advantages of the agreement were to accrue to him. The consideration was but partially paid by his father; the most valuable portion of it, and that most beneficial to the defendant Vreeland, has been rendered by the complainant himself. The party for whose benefit the agreement is to be performed, and especially if any valuable portion of the consideration has been rendered by him, has the legal right to enforce it. It is of no consequence that the promise to fulfil it was not made directly to the person who is entitled to the remuneration. It is enough if it was made by someone who had authority to make it on his behalf."

In Roberts v. Hall (1882) 1 Ont. Rep. 388, 18 Can. L. J. N. S. 328, supra, the court said that plaintiff could sue on a contract of this kind made with her parents, because, if the parents had brought the suit and recovered, they would have been trustees of the proceeds for her. The court intimated that she could not sue on the theory of agency, or because of the relationship of parent and child between her and the party making the contract.

Where decedent agreed with plaintiff's father that, if the father would give plaintiff to him and allow plaintiff to live with and work for him until he became of age, he would, by will, give plaintiff a specified share of his estate, it was held in Cooper v. Claxton (1905) 122 Ga. 596, 50 S. E. 399, that plaintiff could not recover for breach of the contract, because it was not made with him, and he was not a party nor a privy to the contract, but a mere stranger thereto. This case is distinguished in Crawford v. Wilson (Ga.) supra, on the ground that it was a suit at law by the child to recover, as for breach of contract made by the parent with a stranger, the stipulated compensation for the child's services; while in the Crawford Case the subject-matter of the contract was that the petitioner was to be adopted as a child of the promisor, which contract, if consummated, would have given petitioner a beneficial right of inheritance by operation of law, and beyond the express terms of the contract.

See also the following cases, having some indirect bearing on the right of a child to sue on a contract of this kind:

—Steinberger v. Young (1917) 175 Cal. 81, 165 Pac. 432, where the court, in disposing of the contention that a contract made with plaintiff's stepfather was invalid because he had no legal control over her, said that she was the real party in interest, if not a formal party to the contract;

—Hankins v. Young (1916) 174 Iowa, 383, 156 N. W. 380, where the petition or claim alleged that the contract was made with plaintiff, but was subsequently amended to allege that it was made with her father, for her benefit, and accepted and performed by her. The court said: "Under the original claim it would be competent for the plaintiff to show that the contract relied upon was made by her father for her use and benefit, that she accepted the contract so made, and thereunder discharged the duties required by the terms of the contract. The amendment added nothing to this right. Though the father in the strict sense was not an agent acting for the daughter, yet he did, in fact, act for her in this transaction. He received the proposition made by the deceased; communicated it to the plaintiff; she accepted and acted upon it. It, therefore, became the contract of the plaintiff with the deceased. . . . It does not make much difference, so far as the legal phase of this case is concerned, how you term this agreement, whether you call it a proposition to Bunker for plaintiff's services, and ac-

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cepted by her, or a contract with the claimant;"

—Sutton v. Hayden (1876) 62 Mo. 101, where, in response to the contention that plaintiff never assented to the agreement with her father, the court said that, while a minor, her father assented to the agreement in her behalf, and that she acquiesced in and discharged all the duties which the agreement and the relations sustained by her towards the promisor implied, and that a more formal assent was unnecessary;

—Pemberton v. Pemberton (1906) 76 Neb. 669, 107 N. W. 996, where, though an invalid deed of adoption had been delivered to plaintiff, the court said that his right of action did not depend on such delivery, but that the deed was admissible to show a written contract between his natural mother and the promisor for his benefit;

—Bridgewater v. Hooks (1913) — Tex. Civ. App. —, 159 S. W. 1004, where it was held that the fact that plaintiff did not know of the contract between his father and the promisor, or know the terms of the contract, did not prevent its enforcement;

—Hill v. Gomme (1840) 5 Myl. & C. 250, 41 Eng. Reprint, 366, 9 L. J. Ch. N. S. 54, 4 Jur. 165, affirming (1839) 1 Beav. 540, 48 Eng. Reprint, 1050, 8 L. J. Ch. N. S. 350, 3 Jur. 744, where decedent covenanted with plaintiff's father to maintain, educate, and apprentice him and to leave him, at his death, what he died possessed of. The court seemed to doubt plaintiff's right to sue on the contract, but merely held that decedent and the father could, by agreement, abandon the contract.

In many other cases, contracts of this kind have been enforced by the beneficiary without any discussion of the question under annotation, and, in many more, enforcement has been denied on some other ground, without questioning the beneficiary's right to maintain the suit.

III. Agreements for joint, mutual or reciprocal wills.

It is to be observed that the scope of the note excludes any consideration of questions in relation to agreements of this character, except the single question whether such an agreement, if otherwise valid, will sustain an action by a beneficiary who was not a party to it.

While agreements of this character need not necessarily contain any provisions in favor of third persons, such of them as result in litigation usually do contain such provisions. The right of a third person to enforce such provisions against a party who has received the benefit of the agreement is declared in STEVENS v. MYERS (reported herewith) ante, 1155, and Morgan v. Sanborn (1919) 225 N. Y. 454, 122 N. E. 696, and is supported to some extent by Baker v. Syfritt (1910) 147 Iowa, 49, 125 N. W. 998; Meador v. Manlove (1916) 97 Kan. 706, 156 Pac. 731; Deseumeur v. Rondel (1909) 76 N. J. Eq. 394, 74 Atl. 703; Wanger v. Marr (1914) 257 Mo. 482, 165 S. W. 1027; Edson v. Parsons (1898) 155 N. Y. 555, 50 N. E. 265; Rastetter v. Hoenninger (1913) 157 App. Div. 553, 142 N. Y. Supp. 962, reversed on another ground in (1915) 214 N. Y. 66, 108 N. E. 210; Phillip v. Phillip (1916) 96 Misc. 471, 116 N. Y. Supp. 624.

Baker v. Syfritt (Iowa) supra, involved a joint will of husband and wife, giving property to the survivor with remainder to third persons. After the surviving husband's death, his second wife brought an action in which the remaindermen were made parties, and judgment was rendered in their favor, the court saying that when two persons entered into a compact or agreement, by which they united in devising their joint or several estates to a designated third person, subject to a life estate in the survivor, and, upon the death of the one, the survivor availed himself of the benefits of the devise in his favor, he would, in equity, be treated as holding the title in trust for the purposes indicated in the contract; which became irrevocable upon the death of the other.

In Meador v. Manlove (1916) 97 Kan. 706, 156 Pac. 731, supra, a husband and wife made wills in each other's favor, under an agreement that the survivor would bequeath the prop-

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erty received from the other to the heirs of the one dying first. The parents of the wife brought an action, after her death, to establish a trust in the property, and this relief was granted.

In Deseumeur v. Rondel (1909) 76 N. J. Eq. 394, 74 Atl. 703, supra, a husband and wife executed an instrument purporting to be a will, giving the property of each to the survivor, and the property of both, after the death of the survivor, to their heirs. After the husband's death the wife disposed of the property, contrary to the disposition made by her in the instrument mentioned; and, in holding that a person claiming under her conveyance could not give a title which a purchaser would be compelled to accept, the court said that if the instrument was founded upon sufficient consideration a court of equity would sustain the same, and decree its enforcement. "Thus it will be perceived that it is immaterial (if the above statements of law are correct) whether the paper in question is a will, or is an instrument of proof concerning a contract or agreement. In either event, the persons to be benefited would have a cause of action respecting this property, and if they could prove that the parties (husband and wife), upon legal consideration, had agreed that their respective properties should go in a certain way, they could obtain an enforcement of that agreement."

In Edson v. Parsons (1898) 155 N. Y. 555, 50 N. E. 265, supra, an alleged agreement between two sisters, executing wills in each other's favor, that the survivor would make a brother the residuary legatee, was held not proved; but Gray, J., said: "I think that there is no force in the objection of the respondents that if the agreement was proved the plaintiff's testator was incapable of enforcing it, by reason of his not being a party to it. If it existed, it was for his benefit and advantage, and he had a standing in equity to enforce it against the legatees and legal representatives of the testatrix." Though this question was apparently raised by counsel, and intentionally decided, the court's remarks on this point are criticized in Everdell v. Hill (1901) 58 App. Div. 151, 68 N. Y. Supp. 719, on the ground that they were not necessary to the decision.

In Rastetter v. Hoenninger (1918) 157 App. Div. 553, 142 N. Y. Supp. 962, reversed on another ground in (1915) 214 N. Y. 66, 108 N. E. 210, supra, an agreement (evidenced by a joint and mutual will) between husband and wife to give property, after the death of the survivor, to the son and daughter or their children, was enforced in an action in equity by the children of the son against the daughter and the executrix of the husband, who made a different will after the wife's death.

In Phillip v. Phillip (1916) 96 Misc. 471, 160 N. Y. Supp. 624, agreements between husband and wife (evidenced by mutual wills) to give property, after the death of the survivor, to plaintiff, a son, was enforced in an action by the son against the father and his grantee to set aside the father's conveyances and establish mutual wills by agreement. The court, however, said that the agreement was made in consideration of the son's services, and that he knew of the agreement and performed it, and the court may have meant that he was a party to the agreement.

Wanger v. Marr (1914) 257 Mo. 482, 165 S. W. 1027, supra, involved an alleged agreement between husband and wife that they should make wills in each other's favor, and that the survivor should make a will, giving the entire property equally to a child and the children of the wife by a former marriage. The wife's children by the former marriage brought a suit for specific performance, and their right to maintain the suit was not questioned; but it was held that the agreement was not proved.

In Everdell v. Hill (1901) 58 App. Div. 151, 68 N. Y. Supp. 719, reversing (1899) 27 Misc. 285, 58 N. Y. Supp. 447, appeal dismissed in (1902) 170 N. Y. 581, 63 N. E. 1116, it was, however, held that a parol agreement between three sisters that each should leave her property to the survivor or survivors, and that the last survivor should

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leave it to their nieces, could not be enforced by the nieces,—at least, where the agreement was wholly executory,—the sisters first dying having made wills in favor of the survivors, and none of them having mentioned the nieces in their will. The court, after pointing out that the contract was within the Statute of Frauds, and that there had been no part performance by the nieces, said: "It may be that the executors of Matilda and Catherine Everdell, or those who are now their legal representatives, might enforce this contract; but how it can be enforced by other persons, who never paid anything, and never acquired any right, and have no legal interest in any of the estates under this contract, I cannot see. . . . So far as the nieces were concerned, neither of these three ladies had a legal obligation towards them, either to support them, or to pay them any money, or to give them any part of their estates. Whatever they might see fit to give them was simply a matter of favor; and was not done, and cannot be said to have been done, in performance of any legal obligation which either of these ladies ever owed to any niece. . . . So we have here an effort by persons who are not parties to a contract to enforce it. Under certain circumstances that undoubtedly can be done. [Citing a case, the facts of which are not within the scope of this note.] But, while this case has established a principle which is undoubtedly well settled in the jurisprudence of this state, yet that principle has never been so far extended as to permit a person to enforce such a contract unless some obligation existed towards him on the part of the one who procured the contract to be made for his benefit." In discussing Edson v. Parsons (N. Y.) supra, the court points out that, in that case, wills containing provisions in favor of the third person had been executed, and said: "If the contract had been established, it would have been an executed and not an executory contract; and it is quite possible that in such a case a beneficiary under the will might have a standing in court to enforce the contract." Two of the five judges dissented, basing their dissent very largely on Edson v. Parsons (N. Y.) supra.

See also Houck v. Anderson (1913) 14 Ariz. 502, 131 Pac. 975, and Re Anderson (1914) 16 Ariz. 185, 141 Pac. 723, where a joint and mutual will executed by husband and wife, with provisions in favor of their heirs, was held revoked by the husband's remarriage, even though constituting a "testamentary contract, based upon a sufficient consideration." A. McT.

FEDERAL CONSTRUCTION COMPANY
v.
J. E. CURD, Superintendent of Streets, et al.

California Supreme Court (In Banc) — December 31, 1918.

(— Cal. —, 177 Pac. 469.)

Constitutional law — due process — prejudiced tribunal — protest against street assessments.

A contractor for street improvements is not denied due process of law by the fact that the tribunal hearing protests of property owners against an assessment for the improvement, on the ground that the work had not been completed according to contract, was composed of property owners in the district whose property was subject to assessment for the improvement.

[*See note on this question beginning on page* 1207.]

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APPLICATION for a writ of mandate to compel the respondent superintendent to certify to the respondent treasurer a list of unpaid assessments upon certain street improvement work, alleged to have been done by petitioner, and to direct the issuance of street improvement bonds thereon, representing the amount of said unpaid assessments. *Writ denied.*

The facts are stated in the opinion of the court.

Messrs. Morrison, Dunne, & Brobeck, Maurice E. Powell and Raymond Benjamin for petitioner.

Messrs. Guy Knupp, C. L. Russell, Jr., George G. Murry, and Thomas, Beedy, & Lanagan for respondents.

Richards, Judge pro tem, delivered the opinion of the court:

This is an application for a writ of mandate by which the petitioner seeks to compel J. E. Curd, as superintendent of streets of the city of Porterville, California, to certify to W. L. Graham, as the treasurer of said city, a list of unpaid assessments upon certain street improvement work, alleged to have been done therein by the petitioner, and to direct the said treasurer to issue street improvement bonds thereon, representing the amount of said unpaid assessments. The facts giving rise to this proceeding are practically undisputed, and may be stated as follows:

In the month of July, 1915, the city of Porterville, through its regularly constituted officials, initiated proceedings under the Street Improvement Act of 1911 for the improvement of certain of its streets, and in the course thereof duly entered into fourteen certain contracts, in writing, with the petitioner or its assignors herein, whereby the latter agreed to perform certain street work, therein described, in accordance with certain plans and specifications adopted by the board of trustees of said city. The petitioner alleges, and for the purpose of considering the questions of law raised herein it may be taken to be true, that all of the work required to be done by the petitioner or its assignors under the terms of said contracts was performed and completed by it on December 15, 1915, and was then accepted by the superintendent of streets, and his certificate of acceptance and approval duly issued. Thereafter, and during the month of October, 1916, the said superintendent of streets prepared and made assessments, as required by said act, covering the cost of the work performed under each of said contracts, and also prepared, in connection with such assessments, a diagram of the streets on which said work had been done, and thereupon attached to each of such assessments a warrant authorizing the petitioner, as such contractor, to demand and receive from the owners of the property, subject to such assessments, the amounts shown to be due thereon. Each of said warrants was dated on the 28th day of October, 1916. In the preparation of said assessments and warrants the said superintendent of streets made use of loose leaves, especially prepared and intended for insertion in a lock book, also prepared to receive and hold the same; and, as each of said assessments and warrants was completed by said superintendent of streets, it was fastened in said lock book, which was marked and entitled, "Street Assessments of the City of Porterville." The diagrams of the streets included in said work were also similarly placed in said book, and the said warrants, assessments, and diagrams, as so placed, were signed by the superintendent of streets and countersigned by the president of the board of trustees of the said city of Porterville, on October 28, 1916. That thereupon, and on said 28th day of October, 1916, the said superintendent of streets recorded said assessments and warrants in his office, as required by law. Subsequent to the performance of the foregoing acts, and within thirty days thereafter, the said superintendent of streets delivered said assessments and warrants to the said petitioner, pursuant to the requirements of said Street Im-

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provement Act, and between the date of the said receipt thereof, and the 21st day of November, 1916, the said petitioner made the demand required by said act upon each of the persons assessed, for the amount of their respective assessments, and, having done so, the said petitioner redelivered to the said superintendent of streets each and all of such assessments and warrants, with its return as to such demand duly indorsed thereon, which said return was thereupon indorsed by said superintendent of streets upon the record thereof, as required by law. Thereafter, and on November 25, 1916, a number of the persons, whose property had been assessed according to said assessments, filed with the clerk of the board of trustees of said city their objection, in writing, thereto, setting forth as a ground of their said objections that the said contractor had not completed its said contracts in accordance with the plans and specifications thereof. Due notice was given of these objections, and the matter of the hearing thereon was fixed for the 4th day of December, 1917. Only three members of said board of trustees were present at the hearing upon said objections. It is alleged by the petitioner herein, and is not controverted, that each of the said three members of said board, so conducting and participating in said hearings, and rendering their and each of their decisions upon the same, was an owner or was interested in one or other of the parcels of land upon which such assessments had been imposed, and in respect to which said objections had been filed, and upon which objections said hearing had been had. It was also alleged, and not controverted, that the attorney for the said protestants was, at the time thereof and of the hearings thereon, a law partner of the city attorney of said city, who was then directly interested in the outcome of such hearings, and was thereby biased and prejudiced against the said contractor, and who advised and urged the said board of trustees to sustain said objections. At the time of such hearings the petitioner herein objected to the said members of said board sitting upon the hearings thereon, or deciding or determining the matter of said protests, and objected to their determination thereof, but, notwithstanding its said objection, the said board of trustees and the said members thereof proceeded to hear and to determine said objections, and to make and enter the order of said board sustaining the same. Notwithstanding said determination and order, the petitioner herein has demanded of the superintendent of streets that he make and certify to the city treasurer a list of all of said assessments which are unpaid, and has also demanded of the said city treasurer that he thereupon make out and deliver to the petitioner bonds representing such unpaid assessments. Said officials having refused to comply with these demands, this proceeding has been instituted by said contractor, the petitioner herein.

The single question requiring determination in this case relates to the right and power of the city council, acting solely through and by the aforesaid three members thereof, to sit and act as a judicial body in the hearing and determination of the aforesaid appeals and protests of the property owners, as to the proper completion of the said work of street improvement in compliance with the contract providing for the same, and as to the validity of said assessments claimed to be due and payable from them thereon. It is the contention of the petitioner herein that the three members of the city council, who assumed to sit and act upon the hearing of said appeals and protests, were disqualified to so sit and act by reason of their, and each of their, interest in property directly affected by such assessments, and directly involved in and represented upon said appeals, and that the compulsion which the act imposed upon the petitioner, to submit the issues raised upon said ap-

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peal and protests as to the sufficiency of its compliance with its said contracts, and as to its right to have said assessments levied and collected and said warrants paid, to a tribunal thus composed of persons interested in the determination of such issues adverse to said petitioner, amounted to a denial to it of due process of law. In making this contention the petitioner herein is drawn to the extreme position of claiming that the portions of the act under review, which provide for appeals by property owners to the city council for relief from the assessments sought to be imposed upon their property, upon the ground of irregularities on the part of the street superintendent in levying the same, or upon the ground that the contract has not been fully or properly performed, is unconstitutional and void, for the reason that no provision is made for the hearing upon such appeals before a judicial body whose membership is not interested in the result of such appeals, and hence that such provisions should be eliminated from the body of the act; and that, being eliminated, and the right of property owners to have and take such appeals being thus taken away, the petitioner would be entitled to the writ of mandate which it seeks by this proceeding. To adopt this view would be to deny to property owners any right of appeal to the city council under this act, no matter how irregular the proceedings of the street superintendent, or how incomplete or insufficient the performance of the contract, might be,—a consequence quite as disastrous to the property owners in the denial of their constitutional right to due process of law, as the alleged denial to the petitioner of the similar right would be. While for this reason alone we would be very reluctant to adopt a view which would lead to such a consequence, and while for the added reason that its adoption would compel the conclusion that the entire act was invalid, upon the authority of Hutson v. Woodbridge Protection Dist., 79 Cal. 90, 16 Pac. 549, 21 Pac. 435 (a result which the petitioner herein would probably not relish), we would not wish to adopt it, we think that there are other and sufficient reasons why the contention of the petitioner herein cannot be sustained.

Conceding it to be true, as a rule of ethics, that no person or body of persons should sit in judgment in cases and proceedings in which they are interested parties, and conceding, also, that it has been frequently and properly held that the attempted violation of this ethical rule by persons presiding over causes triable in the ordinary courts of justice amounts to a denial of due process of law to those who are injuriously affected by such denial, yet, to this there are certain exceptions, which are said to spring from the necessity of the situation. The statement in general terms of the principle underlying these exceptions is to be found thus stated in 23 Cyc., 581: "Where disqualification, if permitted to prevail, destroys the only tribunal in which relief may be sought, and thus effectually bars the door of justice, the disqualified judge is bound to hear and decide the cause."

The particular application of this principle has been most frequently made to the class of quasi judicial bodies of which the city council of Porterville is an example, such as boards of supervisors, city councils, boards of trustees, boards of equalization, commissioners of irrigation and drainage districts, and the like. While these various bodies are, as a rule, executive and administrative as to most of their functions, there are certain matters committed by the law of their creation to their judgment and discretion, which matters are judicial in their nature; such as the fixing of water rates, the equalizing of taxes, the determination of benefits, the correction of errors in assessments, and the like. Quite frequently the entire community to which the members of these boards or bodies belong are directly and beneficially interested in

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the result of the hearing and determination of such matters, and they themselves are therefore interested parties therein. Of necessity, therefore, in many of such matters, unless the members of the body designated by statute as the sole body to hear and determine the same are qualified, notwithstanding their interest, so to do, they never could be determined without recourse, in every instance, to actions in regularly constituted judicial tribunals. The state of California, in common with practically every other state in the Union, has committed itself to the more practical plan of relegating all such matters to the local boards, councils, or other municipal bodies, and of providing that they shall have jurisdiction to decide them, notwithstanding the fact that some or all of the persons constituting their membership may be more or less directly interested in the result of their action. In the case of Hiben v. Smith, 191 U. S. 310, 48 L. ed. 195, 24 Sup. Ct. Rep. 88, the question was directly presented to that tribunal in an action involving the validity of a street assessment, where the members of the board of town trustees levying the assessment were residents and taxpayers of the town, and where two of their number were owners of lots abutting upon the immediate improvement. The court said:

"The objection to the tribunal constituted by the legislature of Indiana, which the plaintiff in error makes in this particular instance, is that it results in making a person a judge in his own case, and that hence any judgment of a tribunal thus constituted is absolutely void, and may be attacked, as it is attacked in this case, collaterally. It is said that to impose an assessment, which is the same as a judgment under such circumstances, is to take the lot owner's property without due process of law, and violates thereby the Federal Constitution. We think the first objection, that all of the members of the board of trustees were residents of and taxpayers in the town, is wholly unimportant. We have not the slightest doubt of the power of a legislature of a state, unless hampered by some special constitutional provision, to create a tribunal in a city or town, such as the common council or board of trustees, to make an assessment, and that such assessment would be valid, notwithstanding the fact that every member of the board was a taxpayer of the city or the town. It is a matter of legislative discretion as to how such a board shall be constituted, and we hazard nothing in saying that it is quite common throughout the country for the legislatures of the states to create a tribunal for levying assessments for local improvements in a manner precisely like the case in question. It is not at all analogous, even in principle, to a judge of a court acting in a case in which he is personally interested.

"To say that no one who was a taxpayer in a city or town could act in imposing an assessment upon property therein is to say that the legislature is wholly without power, by reason of the Federal Constitution, to constitute a tribunal to make an assessment, where such tribunal is composed of taxpayers in the city or town. This we do not believe. . . . Whether a judgment obtained in a case like this, where two members of a general board created by statute for the purpose of making it, had some interest in some of the property subject to the assessment, was a void or voidable judgment, is a proper question for the state court to decide. A state court has the right to place its own construction upon its own judgments, and where, as in a case like this, it holds that the judgment is not void, and that it cannot be attacked collaterally, we ought to follow that determination. Newport Light Co. v. Newport, 151 U. S. 527, 539, 38 L. ed. 259, 263, 14 Sup. Ct. Rep. 429.

"In Lent v. Tillson, 140 U. S. 316, 35 L. ed. 419, 11 Sup. Ct. Rep. 825, which was an assessment case, it was stated by Mr. Justice Harlan, in

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delivering the opinion of the court (p. 333) as follows: 'Other objections have been urged by the plaintiffs which we do not deem it necessary to consider. For instance, it is said that the mayor of the city of San Francisco, one of the board of commissioners, was himself the owner of a lot on Dupont street, and, for that reason, was incompetent to act as one of the board of street commissioners. . . . In respect to all these and like objections, it is sufficient to say that they do not necessarily involve any question of a Federal nature, and, so far as this court is concerned, are concluded by the decision of the supreme court of California.' "

The case of Lent v. Tillson, supra, from which the last above-quoted citation was made, was decided by this court in 72 Cal. 404, 14 Pac. 71, and that decision of this court, to which the above-quoted passage refers, has thus stood as the judicial declaration of the law of this state touching the question now before us, for the past thirty years, during which time practically every existing statute governing the subject of street improvements has been enacted. In the case of People ex rel. Chapman v. Sacramento Drainage Dist. 155 Cal. 373, 103 Pac. 207, wherein the question arose as to whether the members of the board of drainage commissioners were disqualified to act as a tribunal to hear objections to the assessment by reason of the fact that they were landholders within the district, this court held that they were not disqualified by their interest, basing its decision to this effect upon the authority of Hibben v. Smith, supra. It would thus seem to be settled that the interest which one or all of the members of boards of supervisors, boards of trustees, city councils, or other municipal bodies charged with the making or rectifying of assessments for street or other improvements may have, arising from the fact of their ownership of property directly affected by the proposed improvement, does not create such a disqualification to sit or act in the premises as to render their action void as not constituting due process of law. This being so, and the city council having heard the appeals and protests of the property owners, and having sustained the same, and the record herein failing to show that any further steps have been taken by the petitioner herein to complete the said work of street improvement, or to rectify the assessments therefor in accordance with the decision and determination of the said city council, it follows necessarily that the petitioner has not presented to this court such an application as would be sufficient to require the issuance of a writ of mandate herein, and that the demurrer of the respondents thereto must be sustained.

Constitutional law—due process—prejudiced tribunal—protest against street assessments.

Writ denied.

We concur: **Angellotti**, Ch. J.; **Sloss**, J.; **Wilbur**, J.; **Lorigan**, J.

Petition for rehearing denied, January 30, 1919.

ANNOTATION.

Qualification of owner of property affected by public improvement to act in making assessment.

The majority of the courts which have had occasion to consider the question agree with the reported case (FEDERAL CONSTR. CO. v. CURD, ante, 1202) in holding that the interest which one or all of the members of a body charged with the making or rectifying of assessments for a public improvement may have, arising from the fact of their ownership of property directly affected by the proposed improvement, does not create such a disqualification to sit or act in the premises as to render their action void, as

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not constituting due process of law. See Hibben v. Smith (1903) 191 U. S. 310, 48 L. ed. 195, 24 Sup. Ct. Rep. 88, affirming (1902) 158 Ind. 206, 62 N. E. 447; Lent v. Tillson (1890) 140 U. S. 316, 35 L. ed. 419, 11 Sup. Ct. Rep. 825; Less Land Co. v. Fender (1915) 119 Ark. 20, 173 S. W. 407; Oates v. Cypress Creek Drainage Dist (1918) — Ark. —, 205 S. W. 293; People ex rel. Chapman v. Sacramento Drainage Dist. (1909) 155 Cal. 373, 103 Pac. 207; Nemaha Valley Drainage Dist. v. Marconnit (1912) 90 Neb. 514, 134 N. W. 177; Drainage Dist. v. Chicago, B. & Q. R. Co. (1914) 96 Neb. 1, 146 N. W. 1055; State ex rel. Dorgan v. Fisk (1906) 15 N. D. 219, 107 N. W. 191; Re Cranberry Creek Drainage Dist. (1906) 128 Wis. 98, 107 N. W. 25.

A contrary view, however, has been taken in Illinois. See Hunt v. Chicago (1871) 60 Ill. 183; Shreve v. Cicero (1889) 129 Ill. 226, 21 N. E. 815; Union Drainage Dist. v. Smith (1908) 233 Ill. 417, 16 L.R.A.(N.S.) 292, 84 N. E. 376; Vandalia Levee Drainage Dist. v. Hutchins (1908) 234 Ill. 31, 84 N. E. 715. In discussing the question, the court in Union Drainage Dist. v. Smith (1908) 233 Ill. 417, 16 L.R.A.(N.S.) 292, 84 N. E. 376, said: "While it is true that in a proceeding such as the one at bar the property owner is not entitled to 'a trial by jury;' within the meaning of that phrase as it is used in the Constitution, still it is entirely clear that, in providing for a commission to determine the amount of money that shall be collected from each property owner, the law of the land forbids the enactment of a statute that permits the selection of a commissioner who personally has a property interest in the result of the deliberations of the body of which he is a member. Self-interest would lead him to seek a low assessment for his own land, and assessments correspondingly high for the lands of others. A statute which compels the litigant to submit his controversy to a tribunal of which his adversary is a member makes his antagonist his judge, and does not afford due process of law."

But even where this view prevails it is held that failure to object to an assessment, by an interested person, of benefits from the improvement, before its confirmation by the court, waives the objection. Union Drainage Dist. v. Smith (Ill.) supra; People ex rel. Jackson v. Bunyard (1912) 147 Ill. App. 121.

The ownership of property affected by the improvement will not, ipso facto, in the absence of any statutory provision operating to the contrary, operate as a disqualification. See Less Land Co. v. Fender (1915) 119 Ark. 20, 173 S. W. 407; Oates v. Cypress Creek Drainage Dist. (1918) — Ark. —, 205 S. W. 293; People ex rel. Chapman v. Sacramento Drainage Dist. (1909) 155 Cal. 373, 105 Pac. 207; Nemaha Valley Drainage Dist. v. Marconnit (1912) 90 Neb. 514, 134 N. W. 177; Re Cranberry Creek Drainage Dist. (1906) 128 Wis. 98, 107 N. W. 25.

Ownership of land or an interest therein will, however, operate as a disqualification, where the statute requires the assessment to be made by a disinterested person. See Bradley v. Frankford (1884) 99 Ind. 417; Markley v. Rudy (1888) 115 Ind. 533, 18 N. E. 50; Carr v. Duhme (1906) 167 Ind. 76, 78 N. E. 322, 10 Ann. Cas. 967; Hopkins v. Mason (1871) 42 How. Pr. (N. Y.) 115; Longley v. Hudson (1874) 4 Thomp. & C. (N. Y.) 353; Re Main Street (1890) 137 Pa. 590, 20 Atl. 711. It is enough to disqualify one, within the meaning of such a statute, that he is a trustee and director of a charitable corporation owning property affected (Longley v. Hudson (1874) 4 Thomp. & C. (N. Y.) 353, supra), or that he is a pewholder and member of a church, the edifice and property of which is within the assessment district. (Hopkins v. Mason (1871) 42 How. Pr. (N. Y.) 115, supra).

But if a person so disqualified by interest participates in spreading the assessment, his act is not void, but voidable only. Carr v. Duhme (1906) 167 Ind. 76, 78 N. E. 322, 10 Ann. Cas. 967.

It has been held not to constitute a ground of disqualification which will invalidate an assessment, under a statute requiring such assessment to be made by disinterested freeholders, that one of the commissioners owns

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property 100 or 150 feet beyond the area of benefit, although the duty of the commissioners was to determine how far the benefit extended, and whether such property was to be included. State, Coward, Prosecutor, v. North Plainfield (1899) 63 N. J. L. 61, 42 Atl. 805.

But it was held in Re Powers (1874) 29 Mich. 504, that no proceeding for the continuation of a street could lawfully be had, under an act providing that the cost of the improvement should be assessed against the property benefited, by a certain number of disinterested freeholders, and, if there should not be sufficient property benefited to pay the full amount, the remainder should become a city charge, assessed on all property, like other taxes, where the act did not define a separate improvement district in advance,—because it would be impossible to appoint a freeholder who would not have a direct interest in so charging the benefit as to avoid any part of the expense reaching his own property, or that of his relatives. To the same effect is Re Montgomery Ave. (1880) 54 Cal. 579.

There is a difference of opinion as to whether ownership of property affected will render one incompetent, within the meaning of a statute requiring the commissioners to be appointed to establish an improvement district, to be "competent." That it does so operate is held in King's Lake Drainage & Levee Dist. v. Jamison (1903) 176 Mo. 557, 75 S. W. 679, while a contrary view is taken in People ex rel. Jackson v. Bunyard (1909) 147 Ill. App. 121, and Re Cranberry Creek Drainage Dist. (1906) 128 Wis. 98, 107 N. W. 25. E. S. O.

EDWARD HIGGINSON, Appt.,
v.
CITY OF FALL RIVER.

Massachusetts Supreme Judicial Court—April 2, 1917.

(226 Mass. 423, 115 N. E. 764.)

Municipal corporation — authority of commissioners to employ counsel.

1. A board of fire commissioners has no implied authority, by reason of its general powers, to employ counsel on behalf of the city to prepare charges against an officer of the fire department, upon refusal of the city solicitor to act.

[*See note on this question beginning on page* 1212.]

— power to employ counsel.

2. A city official has no authority to employ counsel on behalf of the city by reason of the general powers conferred upon him by law.

Appropriation — unauthorized employment.

3. An appropriation for the current expenses of the fire department does not authorize payment by the commissioners for services of counsel whom they had no authority to employ.

— authority to expend.

4. The authority of public officials to make payment from an appropriation for current expenses is limited to lawful obligations of the city.

Notice — absence of authority.

5. An attorney employed by the board of fire commissioners of a city, without authority, is chargeable with knowledge of the want of authority.

Municipal corporation — contract by official — binding effect.

6. Public officers cannot make a binding contract on behalf of a municipality without express authority,

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APPEAL by plaintiff from a judgment of the Superior Court for Bristol County in favor of defendant in an action brought to recover the value of professional services, rendered at the request of defendant's board of fire commissioners. *Affirmed.*

Chapter 37, §§ 2 and 3 of the charter, relating to the city solicitor, and the material portion of § 1 of the ordinance relating to contracts, mentioned in the opinion, were as follows:

"Section 2. He shall draw all bonds, deeds, contracts and other legal instruments, of whatever nature, which may be required of him by the city council, or by any committee of the city council, or cause the same to be done under his supervision.

"Section 3. He shall commence, prosecute, or defend all actions and suits brought by or against the city before any tribunal, and shall represent and advocate the rights and interests of the city or any of the officers thereof, in any suit or prosecution, wherein any official act or any estate, right, privilege, or act of the city may be brought in question. He shall draw all complaints for the violation of any city ordinance, and appear and prosecute the same before any court having jurisdiction thereof. He shall also represent and answer for the city before the legislature, or any committee thereof, and advocate the interests of the city, and shall in all respects do every professional act incident to the office which may be required of him by the city government or any committee thereof, and he shall, when required, furnish the mayor and aldermen, and any officer of the city government who may require it, in the official discharge of his duties, with his legal opinion upon any subject touching the duties of their respective offices."

"Section 1. Every contract or purchase where the amount involved is $50 or more, made by any officer, department, board or other agent of the city of Fall River, shall be awarded only after open competition, except when otherwise specifically authorized by law or vote of the city council. . . ."

The further facts appear in the opinion of the court.

Mr. Edward **Higginson**, in propria persona:

The defendant city had the power to employ counsel to prepare the charges in question.

Coolidge v. Brookline, 114 Mass. 592; Cushing v. Stoughton, 6 Cush. 389.

Mr. **George Grime**, for defendant:

No direct authority was ever conferred upon the fire commission.

Dill. Mun. Corp. 5th ed. § 389, p. 682; Fletcher v. Lowell, 15 Gray, 103; Butler v. Charlestown, 7 Gray, 12.

The existence of a custom or usage of employment of counsel by the fire commissioners or other departments of the city would not legally confer such authority.

Butler v. Charlestown, supra; Wormstead v. Lynn, 184 Mass. 425, 68 N. E. 841; Throop, Pub. Off. § 551.

The provisions of § 1 of an ordinance of the defendant city, relative to contracts, is likewise additional evidence that the plaintiff's alleged contract was unauthorized.

Wormstead v. Lynn, 184 Mass. 425, 68 N. E. 841.

If the plaintiff is not entitled to a verdict on an express contract made as claimed, he cannot recover on a quantum meruit, no matter how profitable or useful his services may have been to the defendant.

Butler v. Charlestown, 7 Gray, 12; Wormstead v. Lynn, supra; Douglas v. Lowell, 194 Mass. 268, 80 N. E. 510; Bartlett v. Lowell, 201 Mass. 151, 87 N. E. 195; Commercial Wharf Corp. v. Boston, 208 Mass. 482, 94 N. E. 805.

Unless authorized by statute, a city or town cannot lawfully engage counsel, or pay their fees or charges.

Frost v. Belmont, 6 Allen, 152; Coolidge v. Brookline, 114 Mass. 592; Minot v. West Roxbury, 112 Mass. 1, 17 Am. Rep. 52; Connolly v. Beverly, 151 Mass. 437, 24 N. E. 404; Flood v. Leahy, 183 Mass. 232, 66 N. E. 787; Hood v. Lynn, 1 Allen, 103; Tash v. Adams, 10 Cush. 252; Stetson v. Kempton, 13 Mass. 272, 7 Am. Dec. 145.

Crosby, J., delivered the opinion of the court:

A majority of the members of the board of fire commissioners of the

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defendant, acting under the provisions of its city charter (Stat. 1902, chap. 393, § 28), sought to remove the chief engineer of the fire department, who had previously refused to resign in compliance with the request of the board, and demanded a hearing as provided for by § 28 of the charter. Afterwards, it was voted by the board that he be given a hearing on charges, and that the city solicitor be requested to formalize such charges, and to aid the board in all matters relating to the hearing.

The city solicitor, at the request of the mayor, declined to comply with the request of the board, and thereafter, in accordance with a vote of the latter, the plaintiff, an attorney at law, was employed by the board to assist in "preparation of the charges against the chief engineer . . . and in all matters pertaining to the hearing to be given on the same." Having rendered services in accordance with the foregoing employment, the plaintiff brings this action to recover therefor.

The charter (chap. 37, §§ 2, 3) provides for the appointment of a city solicitor, whose duties are therein prescribed.

If, as the plaintiff contends, we assume, without deciding, that the city solicitor was not required to comply with the request of the board, it is plain that the plaintiff is not entitled to recover, although we do not mean to intimate that the defendant would have been liable, if the city solicitor had wrongfully refused to comply with the request of the board.

It is well settled that a city official has no authority to employ counsel on behalf of the city, by reason of the general power conferred on him by law. Butler v. Charlestown, 7 Gray, 12; Fletcher v. Lowell, 15 Gray, 103.

Municipal corporation—power to employ counsel.

It is not contended that any express authority was given by the city council to the fire commissioners to employ counsel, nor can such authority be implied as incident or necessary to the exercise of their corporate functions. Coolidge v. Brookline, 114 Mass. 592.

—authority of commissioners to employ counsel.

In view of the conclusion reached, it is unnecessary to determine whether § 1 of the ordinance relative to contracts would be a bar to recovery of this action.

The contention that the plaintiff's charges come under the head of "current expenses," for which an appropriation had been made for the maintenance of the fire department, cannot be sustained, even if there was an unexpended balance of such appropriation at the time the services were rendered by the plaintiff. Manifestly, the authority of the board of fire commissioners to make payments from the appropriation for "current expenses" is limited to lawful obligations of the city; the appropriation could not be applied, in whole or in part, to demands which the city was under no legal liability to pay.

Appropriation—unauthorized employment.

—authority to expend.

The plaintiff was chargeable with knowledge that the fire commissioners, in employing him, had no authority to bind the defendant (Bartlett v. Lowell, 201 Mass. 151, 155, 87 N. E. 195); and the city cannot be held liable for the services rendered, even if beneficial to it (Butler v. Charlestown, ubi supra; Douglas v. Lowell, 194 Mass. 268, 275, 80 N. E. 510).

Notice—absence of authority.

That a public officer cannot make a binding contract on behalf of a municipality, without express authority, would seem not only to be settled by precedent, but to be in accord with sound principles. Butler v. Charlestown, and Fletcher v. Lowell, ubi supra; Connolly v. Beverly, 151 Mass. 437, 24

Municipal corporation—contract by official—binding effect.

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N. E. 404; Flood v. Leahy, 183 Mass. 232, 66 N. E. 787; Wormstead v. Lynn, 184 Mass. 425, 68 N. E. 841.

As the plaintiff is not entitled to recover under either count of the declaration, for the reasons above stated, the entry must be, judgment affirmed.

ANNOTATION.

Power of fire, water, or health commissioners, or the like, to employ counsel.

I. In absence of express statutory authority:
 a. General rule, 1212.
 b. Power implied, 1217.
II. Under express statutory authority, 1219.

I. In absence of express statutory authority.

a. General rule.

The powers granted to fire, water, or health commissioners, or similar administrative boards, vary, of course, in the several jurisdictions, and, in each jurisdiction, vary as between the different boards. As a general rule, however, the power to employ counsel is not deemed to be incidental to such boards, and does not exist, except as it is expressly conferred, or results by necessary implication from the powers granted.

Arkansas.—Miller County Highway & Bridge Dist. v. Cook (1918) 134 Ark. 328, 204 S. W. 420.

California.—Greathouse v. Dunn (1882) 60 Cal. 311; Rafael v. Boyle (1916) 31 Cal. App. 623, 161 Pac. 126.

Georgia. — Ross v. Bibb County (1908) 130 Ga. 585, 61 S. E. 465.

Minnesota.—State ex rel. Finlayson v. Gorman (1912) 117 Minn. 323, 136 N. W. 402.

New York.—Collins v. Saratoga Springs (1893) 70 Hun, 583, 24 N. Y. Supp. 234, affirmed in (1893) 140 N. Y. 637, 35 N. E. 892; People ex rel. Bevins v. Warren County (1894) 82 Hun, 298, 31 N. Y. Supp. 248; People ex rel. French v. Town (1896) 1 App. Div. 127, 37 N. Y. Supp. 864; Reynolds v. Ossining (1905) 102 App. Div. 298, 92 N. Y. Supp. 954.

Ohio.—Lunkenheimer v. Hewitt (1890) 10 Ohio Dec. Reprint, 798 (stated in the following subdivision of this note).

Pennsylvania.—Smith v. Scranton (1884) 2 Pa. Co. Ct. 331.

And see the reported case (HIGGINSON v. FALL RIVER, ante, 1209).

Thus, in Greathouse v. Dunn (1882) 60 Cal. 311, it appeared that legal services were rendered to the board of new city hall commissioners, in certain proceedings between the board and the board of supervisors. In a proceeding for a writ of mandamus to compel the auditor to audit the claim for attorney's fees, the court held that the board had no power to employ an attorney, the statute under which they acted providing that the funds at their disposal were to be used to pay "all claims for work, labor and materials used in the construction of said building, and the salaries of the commissioners, the secretary, the architect, the superintendent of works, and others employed in and about the construction of said building, and necessary office expenses of the board of commissioners."

In Ross v. Bibb County (1908) 130 Ga. 585, 61 S. E. 465, holding that the road board, as county officers, had no authority, in the absence of express statutory authority, to make contracts binding on the county, the court said: "There is nothing in the act creating the 'road board' of Bibb county (Acts 1871–2, p. 221), or the act amendatory thereof (Acts 1873, p. 221), or in the road laws of the state, as embodied in the Political Code, §§ 516 to 519, inclusive, which authorizes such 'road board' to employ counsel, at the expense of the county, to defend the board in a proceeding by mandamus, brought by citizens of the county against the board, to compel it to open and work a road purporting to have been established as a public road, by order of the county board of commissioners for the county of Bibb. A petition against such county to recover the fee of counsel, employed by the

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'road board' in such a case, was properly dismissed upon general demurrer."

In Collins v. Saratoga Springs (1893) 70 Hun, 583, 24 N. Y. Supp. 234, affirmed in (1893) 140 N. Y. 637, 35 N. E. 892, it appeared that, in a proceeding to appoint commissioners to appraise damage done to petitioner's property while grading a street, the attorneys for the petitioner and the village stipulated as to the commissioners, and the court so ordered the appointment. Subsequently, the board of street commissioners, on whom a notice had been served, employed counsel, and moved that the order appointing the damage commissioners be vacated. The lower court thereupon granted the motion. It was held that the board of street commissioners had no authority, except that which was expressly granted it, and hence they had no authority to employ counsel. The court said: "The board of street commissioners is not the corporation of itself; it is only one of the branches or arms of the municipality of the village of Saratoga Springs; it is not the whole village government, and, except in those particulars in which the statute has clothed such board with specific powers, it is subordinate to the board of trustees of such village; it has no power or authority except that which has been specifically granted to it, and that which is necessary to enable it to discharge the duties and exercise the privileges specifically imposed upon and granted to them. They are not specifically authorized to employ counsel, and it is not necessary in the discharge of their duties that they should employ counsel; the employment of counsel is otherwise provided for. The municipality of the village of Saratoga Springs embraces its president, board of trustees, board of street commissioners, and all other boards and village officers, and they must all be considered together as forming a complete whole. These proceedings are taken against the village of Saratoga Springs, not against the board of street commissioners, and the damages to be awarded are to be paid by the village of Saratoga Springs, not by the board of street commissioners thereof." In that case, in construing a statute empowering the board of trustees to employ counsel, the court held that such authority was exclusive, saying: "Under this law, therefore, the trustees of the village of Saratoga Springs had power and authority to employ an attorney in these proceedings, there being nothing in conflict with the last-quoted statute in the special act by which the village was chartered. It seems to me that the authority vested in the board of trustees to employ attorneys is exclusive, and that no other board or official has the power to employ attorneys in behalf of the village; and that no attorney has the right to represent the village, or any board or officer thereof, except the attorney designated by the board of trustees."

In People ex rel. Bevins v. Warren County (1894) 82 Hun, 298, 31 N. Y. Supp. 248, it appeared that, in a proceeding to lay out a street, the highway commissioners employed an attorney to render legal services. It was held, in reversing an order compelling the supervisors to audit his claim for fees, that the highway commissioners had no implied authority to employ counsel. The court said: "We are unable to find any statutory provision which conferred upon the highway commissioner of the town of Chester power to employ an attorney and counsel on its credit, in a proceeding to lay out a road under the provisions of article 4, chapter 568, Laws of 1890. Certainly no such power is expressly given, and we think none can be implied. A highway commissioner cannot bind the town except under a power expressly conferred by statute." However, in Duntz v. Duntz (1865) 44 Barb. (N. Y.) 459, it appeared that legal services had been rendered to the commissioners of highway at their request. Plaintiff, one of the commissioners, paid the attorney's fee, taking an assignment of his claim. It was held, in affirming a judgment for plaintiff, that the commissioners, as incidental to their powers, had authority to employ counsel. The court said: "I think the plaintiff and his

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associates, as such commissioners of highways, were authorized to employ Andrews to render the services which were the subject of the action. And that such authority was incident to their official character."

In Miller County Highway & Bridge Dist. v. Cook (1918) 134 Ark. 328, 204 S. W. 420, in an action by a landowner to have the unauthorized payments of the highway commissioners refunded, it appeared that, among other things, one of the commissioners had been paid a certain amount to enable him to procure legal services to institute proceedings in his name against the district, to test the validity of the statute creating the district. It was held that the board of commissioners had no authority to employ counsel to institute proceedings that challenged its own existence. It was said: "In other words, the district paid for the services of an attorney to bring suit which challenged its own existence, and then defended that suit. There was no authority for such payment."

In Rafael v. Boyle (1916) 31 Cal. App. 623, 161 Pac. 126, a petition for a writ of mandamus to compel the city auditor to audit a claim for attorney's fees, it appeared that petitioner was employed by the civil service commission to render legal services in proceedings against it. It also appeared that the city attorney was ready and willing to defend these suits, notwithstanding that the commission had acted contrary to his advice. In reversing a judgment for the petitioners it was held that, since the charter expressly provided that the city attorney should have charge of all proceedings and suits of the city, the board of civil service commissioners had no authority to employ counsel. The court said: "In general, unless forbidden by law, when necessity arises therefor and the interests of the municipal corporation require it, the employment of attorneys has usually been sanctioned. 2 McQuillin, Mun. Corp. § 501. It is usual, however, to find in municipal charters or laws applicable to the government of local public corporations, provisions dealing with the conduct of the municipality's legal business. . . . The charter having provided a city attorney upon whom the board can call when a defense to any suit is necessary, it by implication makes it incumbent upon the board to avail itself of his services, and it cannot ignore this provision and employ some other attorney to render those services which it is the duty of the city attorney to perform. Denman v. Webster (1903) 139 Cal. 452, 73 Pac. 139; Merriam v. Barnum (1897) 116 Cal. 619, 48 Pac. 727."

In People ex rel. French v. Town (1896) 1 App. Div. 127, 37 N. Y. Supp. 864, wherein it appeared that the relator rendered legal services to the board of street commissioners, in proceedings over certain property under their supervision, it was held that the board had no authority to employ counsel. The board of trustees having provided a counsel for village matters, the board of street commissioners should have procured his services. The court said: "Concede all these duties and powers as claimed, and yet it does not necessarily follow that the employment of counsel at the expense of the village, to conduct such proceedings, was within the power given them. The property which it is their duty to protect is the property of the village; and the board itself is but one of the departments of the village government. It has the powers given it by statute, and those necessary to enable it effectually to perform the work and duties so imposed upon it; nothing more. The duty of employing counsel to take such legal proceedings as shall be necessary to protect the village property is given to another department of the village, to wit, the board of trustees of the village. It appears that such department had performed that duty, and employed an attorney whose advice and assistance were at the service of this board, and, therefore, there was no necessity for its employing another. Even if the right to employ counsel would ordinarily be inferred as a power incident to the duty of bringing suit to protect public funds, yet, when it appears that other

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provisions are made by the charter for the employment of such counsel, such inference vanishes. The necessity being removed, the incidental power would cease."

In Reynolds v. Ossining (1905) 102 App. Div. 298, 92 N. Y. Supp. 954, it appeared that legal services were rendered to the board of health. The court held, reversing a judgment for plaintiff, who rendered such service, that the board was not expressly authorized to employ counsel, and that such services should have been rendered by the village attorney. In that case it was said: "I cannot but think that if the legislature had intended that the board might regularly employ counsel, it would have expressly so provided, as it did provide for a health officer (§ 20, as amended by Laws 1902, chap. 339, and Laws 1903, chap. 383), and for health and registering officers of the district (§ 29), especially in view of the fact that it made provision for the institution of legal actions (§§ 21, 26, as amended supra). Conceding that there might be instances where the services of one who was an attorney were, in some special case, required to enable it to carry out its orders and regulations, I am quite clear that the scheme of the statute does not contemplate either the appointment of a counsel or the employment of an attorney in the great bulk of the business shown by the record. . . . Further, § 21 of the law (as amended supra) authorizes the board to issue warrants to the peace officers of the municipality. And the cost of maintenance of such board is directly cast upon the village, which does not raise and intrust a fund to the administration of its board of health. § 30. These provisions and the authority cited are strong indications that the legislature set up these local boards in the exercise of the police power, contemplating that they would be articulated with the local government, and not separate corporations, coincidentally existing in the same territory as does the village government, but wholly distinct and separate therefrom. If actions for penalties must be brought in the name of the village, if the recoveries must be paid to the village, if all the expenses of the board of health (and consequently all legal expenses) are a charge direct upon the village, and the village has a standing corporation attorney provided for by the municipal charter, no good reason appears, when the statute is silent, why the board of health should appoint or employ its own attorney in all legal matters, at an additional expense to the municipality, and the logic of circumstances makes against such a scheme. On the evidence, it is clear that the bulk of the services rendered were such as could and should have been rendered by the corporation attorney in his legal capacity."

In Smith v. Scranton (1884) 2 Pa. Co. Ct. 331, it appeared that the plaintiffs were employed by the board of health to abate a nuisance. In sustaining defendant's exception to the referee's report in favor of the plaintiffs, it was held that the powers of a department of a municipality are only those which are expressly conferred or necessarily implied. While the board of health had power to require a person to abate a nuisance, it was not necessarily implied thereby that they had authority to employ counsel other than the city solicitor. The court said: "It is an oft-repeated maxim that municipal corporations have only the powers which are expressly given by statute, or those necessarily to be implied therefrom. This rule is to be applied with greater strictness when measuring the authority of that which, as in this case, is only a branch of the general municipal government of very limited and special powers. The board of health has no such general authority as councils have, even within the strict sphere of its duties. It is created solely for sanitary purposes, and the means which may be employed to effectuate this end are clearly set forth in the act. To these the authority of the board alone extends. While it may require of any person maintaining a nuisance that such nuisance shall be abated, and while the violation of any such order is made a mis-

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demeanor by the statute, still this does not imply the right to retain counsel for the conduct of a prosecution for such misdemeanor in the courts. . . . If the city is so far interested in the enforcement of the orders and authority of the board of health as to warrant such board in instituting and carrying on criminal prosecutions for that purpose, then such prosecutions may well be considered law matters of the city, and so are provided for in the statute. The board of health have, therefore, the right to invoke the assistance of the city solicitor in pursuing any such duties; and, on the other hand, they have no such general authority over municipal affairs as entitles them to pass him by and employ, in the name of the city, other and independent counsel. If they can do so in one case, they can in every case, and not only in criminal prosecutions, but in every matter requiring the attention of the board. A recognition of such powers would end in establishing a distinct and regularly employed attorney for the board of health, as well as for every separate department of the city."

In State ex rel. Finlayson v. Gorman (1912) 117 **Minn.** 323, 136 N. W. 402, it appeared that appellant's assignor had rendered legal services for the water, light, power, and building commission, in a mandamus proceeding. The city counsel had refused to render these services, although called on to do so by the commission. It was held that the commission had no authority to employ counsel, the court saying: "The water, light, power, and building commission is merely a board, or department, of the city government. While it may, within its sphere, incur expense, enter into contracts, and allow and order the claims therefore paid, independently of the city council, it has been given no power to sue or be sued, so that it stands in need of no attorney to carry on its litigation. Monfort v. Wheelock (1899) 78 **Minn.** 169, 80 N. W. 955; American Electric Co. v. Waseca (1907) 102 **Minn.** 329, 113 N. W. 899. Therefore, the commission being a department of the city, it must be conceded that, by the section above quoted, the duly appointed city attorney became its legal adviser, and the statutory inhibition against any board, department, or officer of the city having or employing any other attorney in connection with their official duties applies to the commission. And it follows that, if this inhibition is in force as to the commission, no implied power for it to employ counsel may be read into chapter 412 of the General Laws of 1907." In construing a statute authorizing the commission to employ all help necessary to operate plants, the court held that it did not give them the power to employ counsel, saying: "It cannot be reasonably contended that this language was intended to confer the power to employ an attorney, in view of the fact that for every city to which chapter 412 applies the law already provided a legal adviser, whose duty it is to render legal services for the city, and every officer, board, and department thereof. The duties of a city attorney in cities of less than 10,000 inhabitants cannot be exceedingly arduous. Frequently, city officials disagree as to their several duties, and clash; but, because of this, can it for a moment be admitted that each has the power, by implication, to hire an attorney for consultation and litigation, and make the city responsible for the services so rendered? As bearing on this question, and the reluctance of courts to imply power to hire an attorney where none is given, may be cited Horn v. St. Paul (1900) 80 **Minn.** 369, 83 N. W. 388; True v. Crow Wing County (1901) 83 **Minn.** 293, 86 N. W. 102, and Jackson v. Board of Education (1910) 112 **Minn.** 167, 127 N. W. 569. It was further held that, assuming that an emergency may create a power where it would not otherwise exist, the facts did not show such an emergency, the court saying: "But counsel insists that the facts show that an emergency arose which threatened to deprive the city of the services of the commission. Granting that an emergency may create a power where none other exists,

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we do not think the facts stated in the writ show an emergency. The litigation in which the attorney was employed was not directed against the commission, as such, nor was any pecuniary interest of the public at stake in it."

In the reported case (HIGGINSON v. FALL RIVER, ante, 1209), it is held that a board of fire commissioners had no authority to employ counsel in a proceeding instituted by the board to remove the chief engineer.

b. Power implied.

A fire, water, health, or similar commission may, however, employ counsel, if the authority is incidental to or can be necessarily inferred from their other duties or powers. Simrall v. Covington (1895) 16 Ky. L. Rep. 770, 29 S. W. 880; Freeman v. Brooks (1899) 29 Misc. 719, 62 N. Y. Supp. 761; Quintard v. New York (1900) 51 App. Div. 233, 64 N. Y. Supp. 904; Duntz v. Duntz (1865) 44 Barb. (N. Y.) 459 (set out in the preceding subdivision); Yaple v. Morgan (1887) 2 Ohio C. C. 406, 1 Ohio C. D. 557, affirmed in (1891) 25 Ohio L. J. 336; Burton v. Norwich (1861) 34 Vt. 345; Hall v. Taylor (1858) El. Bl. & El. 107, 120 Eng. Reprint, 447, 27 L. J. Q. B. N. S. 311, 4 Jur. N. S. 877.

In Freeman v. Brooks (1899) 29 Misc. 719, 62 N. Y. Supp. 761, it appeared that legal services were rendered to the water board. On a bill to restrain the board from paying the balance of the attorney's fees, it was held that the power to employ counsel was inferable from the legislation creating the board, and that they did not have to rely on the city attorney. The court said: "Independent of that, however, I think the plan and intention of the legislation creating the water board was to give it general control of the acquisition and construction of a water system, and that the right to hire an attorney to conduct its important legal proceedings is to be fairly inferred and found. Upon the other hand, I think it would have been unreasonable and impracticable to rely upon a city attorney, charged with all of his other duties, to conduct all of the intricate and laborious proceedings and litigation which have arisen in connection with the water question in Syracuse."

In Simrall v. Covington (1895) 16 Ky. L. Rep. 770, 29 S. W. 880, it appeared that the petitioners rendered legal services to the board of trustees of the Covington reservoir in defending a proceeding against them. It was held that the board, having the power to contract and to sue and be sued, had the power to employ counsel. The court said: "They had the power to contract and be contracted with, to sue and be sued, to select their agents and employees, and in fact were invested with all the powers the city would have had if the board of council had been selected, instead of this board of trustees. It was an agent invested with all the powers of a principal, in so far as the improvement was concerned. Having the power to sue, and the right of others to sue them as trustees, when acting within the scope of their authority, it necessarily follows they had the right to employ counsel to bring this action, or, if sued, to employ counsel to make their defense, and to make such contracts with reference to the employments as they could have made if contracting for their own benefit."

In Yaple v. Morgan (1887) 1 Ohio C. D. 557, 2 Ohio C. C. 406, affirmed in (1891) 25 Ohio L. J. 336, it appeared that the board of commissioners, in order to test the validity of a tax, part of which was to be placed to the account of the police board fund, instituted a test case, and employed counsel therefor. A proceeding was instituted to restrain payment of attorney's fees. In reversing a judgment in favor of the petitioner, the court held that it was proper for the board to institute such proceedings, and that the employment of counsel was incidental to the performance of their duty, saying: "No special provision being made by law for counsel for these commissioners, may they employ such in a matter which, in their judgment, is necessary to carry out the duties of their office properly? The statute prescribes their

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duty. It is, 'to secure and maintain an honest and efficient system of police force, free from partisan dictation and control.' To do this, the law presumes funds are necessary, and provides how they shall be raised. Two sources of revenue are provided, one a tax on general property, the other a specific tax on a business. By the answer of defendants, the proper authority, at the proper time, estimated the amount necessary to be realized from both sources. But before the time arrives for the collection of the latter, it is well known that it will not be paid until the question has been decided by the supreme court that its collection is constitutional. It is true, as claimed, that the collection of this tax was cast by the law upon other officers. But in their judgment, to wait for such action was largely, for the time, to diminish the police force, and deprive them of the anticipated revenue to pay them. They might have sat still and let the time arrive for voluntary payment, and then wait until other officers proceeded, by restraint or otherwise, to collect it; but in the meantime they would have been unable to 'maintain and secure an effective police force.' The emergency had arisen in which, as they conceived, action at once was necessary to put the machinery of the law in process for speedy adjudication by the supreme court; and the sooner begun, the sooner (if the law were held constitutional) would the necessary funds come under their control for the payment of the police. We think this action was proper, that the test suit was one which materially hastened the decision of the question, and brought the funds speedily under their control, and that the employment of counsel was a necessity, incidental to carying out the provisions of the law defining their duties, and, as such, it necessarily follows that they may, out of the police fund, direct a payment of reasonable counsel fee."

In Lunkenheimer v. Hewitt (1890) 10 Ohio Dec. Reprint, 798, however, it appeared that the board of police commissioners employed counsel to defend the chief of police in certain proceedings and render other legal services. In a suit to restrain the payment of the attorney's fees, it was held that the proceedings against the chief of police were personal suits, and the board had no authority to employ counsel therefor. The court said: "No fundamental question was presented as to the protection of the fund intrusted to their control. The contempt proceeding grew out of an individual burden Colonel Hudson had assumed in proceeding upon the theory that the registration laws were unconstitutional. In the damage suit it was also an individual burden he had assumed. The municipality is not liable in damages for the neglect or wrongdoing of a police officer. Moreover, it would be unreasonable to imply that funds raised by taxation for police purposes should be used in the defense of an officer prosecuted individually for neglect or misconduct."

In Burton v. Norwich (1861) 34 Vt. 345, it appeared that plaintiff rendered legal services to the overseer of the poor on a certain occasion. The court, while not deciding squarely on the point, impliedly held that the overseer had authority to employ counsel. It was said: "Item 23, the auditor reports, was for services rendered at the request of the overseer of the poor, and on reference to the account it is said to be for 'advice relative to Mr. Field being a town pauper, and going to his house, at request of overseer of poor.' To this item it is objected that the overseer has no authority to bind the town by the employment of counsel. It is certainly necessary and important for the interests of the town, that the overseer should, in many instances, in his department, have legal advice to guide him; difficult questions often arise in relation to the settlement of paupers, and it often becomes necessary for the overseer to determine whether to procure an order of removal, and for that purpose to know in what town the pauper has his legal settlement, in order to know whether to make a removal, and, if so, to what town. The overseer is often called on to judge whether to appeal from an order made against his town. The

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consequence of making a wrongful removal, or of removing one to a wrong town, or of taking an appeal under a mistaken idea of the law, at once involves the town in litigation, and in no part of the business of a town is reasonable legal advice more necessary than in relation to paupers."

In Hall v. Taylor (1858) El. Bl. & El. 107, 120 Eng. Reprint, 447, it appeared that legal services were rendered to a board of commissioners, created for "lighting, watching, and otherwise improving" a town. In an action for such services, it was held that a contract with an attorney was within the scope of the statute creating the board of commissioners. The court said: "Therefore, the substantial question is, whether the contract here sued on is within the scope of the statute; and the answer is in the affirmative. The 12th section specifies the services of a clerk and other officers as requisite; and other sections, giving large and various powers for the exercise of which legal advice would often be required, by implication give the power of retaining an attorney; and although there are several sections specifying powers of contracting in certain cases, there is no prohibition of contracts in cases not specified."

II. Under express statutory authority.

Under express statutory authority a board of commissioners may, of course, employ necessary counsel. Re Ryan (1894) 6 Misc. 478, 27 N. Y. Supp. 169; State ex rel. Spiegel v. Leiman (1918) 97 Ohio St. 334, 120 N. E. 174; Cincinnati v. Rogers (1918) — Ohio St. —, 120 N. E. 839.

Thus, in Re Ryan (N. Y.) supra, it appeared that petitioner had rendered legal services to the board of excise commissioners in proceedings against them. The board of audit having refused to audit his claim, a bill was brought to compel them to do so. The court said: "Section 11 of chapter 401 aforesaid provides: 'A board of excise of a town may employ an attorney and counselor of the supreme court to act as attorney of such board from time to time, as may be reasonably necessary. His compensation shall be a town charge and shall be audited and paid in the same manner as other town charges.' The command of this statute is imperative. If the board of excise do employ an attorney, and he does act from time to time as may be reasonably necessary, his compensation shall be a town charge, and shall be audited and paid. It must be conceded that Mr. Ryan was employed as an attorney by the board of excise; that he performed services at their request. Were the services which he performed reasonably necessary for the board? A new and most comprehensive and important statute, which assumed to revise and consolidate the laws regulating the sale of intoxicating liquors, had just gone into operation. The duties of the board of excise and the consequences of a violation of those duties were prescribed by this statute. Important legal questions must be considered and acted upon by the board under it. It was plainly contemplated by the statute that the board would need an attorney to guide them in the discharge of their duties; they had entered upon the performance of those duties, and in consequence of their action or nonaction, they were assailed and charged with misconduct and wrongdoing as a board, and as commissioners, and it was sought to remove them from office, not for anything they had done as individuals, but because of their official action. It would seem that, if any case could be presented where the services of an attorney were reasonably necessary, it was this very case. It clearly was so."

In Quintard v. New York (1900) 51 App. Div. 233, 64 N. Y. Supp. 904, it appeared that the board of charities and corrections had employed petitioner as its counselor. Under the charter of the city of Brooklyn, the board of charities and corrections had the power to employ counsel. The powers of the board were continued on the consolidation of the city of Brooklyn and county of Kings. In an action for his salary as assistant corporation counsel, based on the Consolidation Acts, wherein it was pro-

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vided that the counsel of the board of charities and corrections became part of the law department of New York city, the question became material as to the authority of the board to re-employ counsel. It was held that the board had such authority. The court said: "When the city of Brooklyn and county of Kings were consolidated, and both municipal corporations were known as the city of Brooklyn, the act of consolidation expressly continued the department of charities and corrections, with the same powers, duties, and authority as it then possessed. It, therefore, retained power to continue the employment of counsel."

In State ex rel. Spiegel v. Leimann (1918) 97 Ohio St. 334, 120 N. E. 174, it appeared that relator rendered legal services to the board of rapid transit commissioners. In overruling a demurrer to the petition for a writ of mandamus to compel payment of his fees, the court held that the board was expressly authorized to employ counsel.

And in Cincinnati v. Rogers (1918) — Ohio St. —, 120 N. E. 839, arising out of the same employment of counsel, it appeared that the petitioner contended that the board of rapid transit commissioners abused its discretion, as it could have procured the services of the city solicitor. It was held, in reversing a judgment for the petitioner, that it was within the discretion of the board to employ counsel. The court said: "We see no reason, in the circumstances of the case, to hold that the board abused its discretion in the employment of counsel. The wisdom of securing the assistance of counsel appointed by itself, to assist in the manifold responsible duties imposed by the statute, is clear."

R. C. L.

PEOPLE OF THE STATE OF NEW YORK, Respt.,
v.
DOMENICO GALBO, Appt.

New York Court of Appeals — May 30, 1916.

(218 N. Y. 283, 112 N. E. 1041.)

Homicide — attempt to dispose of body — evidence of guilt.

1. A legless cripple who did not show a mark or bloodstain cannot be convicted of the murder, either as principal or accessory before the fact, of a strong man whose body shows marks of a fierce combat before death, merely because he attempted to dispose of the body, and swore falsely about his connection with such disposition.

[*See note on this question beginning on page* 1227.]

Appeal — consideration of credibility of witnesses.

2. Under the New York Constitution the credibility of witnesses cannot be considered by the court of appeals unless the judgment is of death.

Evidence — sufficiency — inference.

3. Proof that one accused of murder had possession of the body of the victim, and denied the fact, justifies the inference that in some way, and at some stage, he was connected with the crime.

Criminal law — accessories.

4. Principals in the first and second degree at common law, and accessories before the fact, are classed as principals, while accessories after the fact are simply accessories.

Trial — jury — inference from possession of fruits of crime.

5. The inference of guilt to be drawn from possession of the fruits of crime is one of fact, not of law.

Criminal law — mitigation of offense.

6. If the circumstances under which one is found in possession of the body of a murdered man make the inference that he was an accessory after the fact as reasonable as that he was a princi-

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pal, he must be given the benefit of the conclusion that would mitigate his guilt.

Evidence — sufficiency.

7. Insufficient evidence is, in the eye of the law, no evidence.

— impossibility.

8. Impossibility, in law, means merely that a thing is so nearly impossible that the jury ought not to believe it.

Homicide — assisting murderer to escape.

9. One who merely assists a murderer to escape is not a principal to the murder, but merely an accessory.

Appeal — conviction on circumstantial evidence.

10. Conviction on circumstantial evidence is not to be sustained, unless the circumstances are inconsistent with innocence.

— sufficiency of evidence — second-degree murder.

11. To sustain a verdict convicting one of murder in the second degree the reviewing court must hold that, on the same evidence, the jury might have found first-degree murder.

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of a Trial Term for Monroe County, convicting him of murder in the second degree, and from an order denying a motion for a new trial. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Louis E. Fuller, for appellant:

As a matter of law, the fact of the killing of deceased by defendant was not proved beyond a reasonable doubt, as required by § 1041 of the Penal Law.

People v. Ledwon, 153 N. Y. 10, 46 N. E. 1046; People v. Carbone, 156 N. Y. 413, 51 N. E. 23, 11 Am. Crim. Rep. 484.

As matter of law, there was no evidence in the case, either direct or circumstantial, connecting the defendant with the actual killing of the deceased.

As matter of law, the evidence produced by the people was not incompatible with the innocence of the defendant of the crime charged, and was not incapable of explanation on any other reasonable hypothesis than his guilt.

People v. McGonegal, 136 N. Y. 62, 32 N. E. 616; People v. Johnson, 70 App. Div. 308, 75 N. Y. Supp. 234; People v. Wright, 136 N. Y. 625, 32 N. E. 629; People v. Owens, 148 N. Y. 648, 43 N. E. 71; People v. Razezicz, 206 N. Y. 249, 99 N. E. 557.

As matter of law, there was no evidence from which the jury could legally find that the defendant, although he did not actually do the killing, was connected as a principal with the person who did; and the submission of that question to the jury was reversible error.

People v. Flaherty, 162 N. Y. 532, 57 N. E. 73; People v. Pedro, 19 Misc. 300, 43 N. Y. Supp. 44; Herbst v. Kellogg Mfg. Co. 112 App. Div. 356, 98 N. Y. Supp. 444; Hall v. Cayuga Lake Cement Co. 111 App. Div. 801, 97 N. Y. Supp. 955; Perelli v. New York City R. Co. 120 App. Div. 372, 104 N. Y. Supp. 1047; Marshall v. Holbrook, C. & D. Contracting Co. 48 Misc. 622, 95 N. Y. Supp. 599; Dellapia v. American Ice Co. 95 N. Y. Supp. 605; People v. Elliott, 5 N. Y. Crim. Rep. 204, 8 N. Y. S. R. 223.

It was reversible error to deny the motion to acquit the defendant upon the ground that the evidence in the case is not incompatible with the innocence of the accused, and is not incapable of explanation upon any other reasonable hypothesis than his guilt.

Perkins v. State, — Miss. —, 23 So. 579; Harper v. State, — Miss. —, 27 So. 621; State v. Nesenhener, 164 Mo. 461, 65 S. W. 230; State v. Gragg, 122 N. C. 1082, 30 S. E. 306; Wilson v. State, — Tex. Crim. Rep. —, 58 S. W. 1009.

If the blows inflicted on the deceased's head, before the decapitation, caused his death, as the evidence plainly indicates, there is no evidence in the case from which the jury could find murder in the second degree.

Daly v. People, 32 Hun, 182.

Messrs. John W. Barrett and **James Mann**, for respondent:

The killing of Francesco Manzella, and the fact that the defendant was one of those concerned in the homicide, were clearly established beyond a reasonable doubt.

Knickerbocker v. People, 43 N. Y.

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177; Stover v. People, 56 N. Y. 315; Goldstein v. People, 82 N. Y. 231; State v. Dickson, 78 Mo. 438.

It was not reversible error for the court to deny the defendant's motion, made at the close of the people's case, to acquit the defendant on the ground that the corpus delicti had not been proved.

People v. Lagroppo, 90 App. Div. 219, 86 N. Y. Supp. 116, affirmed in 179 N. Y. 126, 71 N. E. 737.

As long as the verdict is not clearly against the evidence, and it appears that the defendant has had a fair trial, before an impartial judge and a jury of his own selection, as well as the aid of competent counsel, it is the duty of this court to affirm the conviction, even if it might have decided differently, if acting as the jury.

People v. Taylor, 138 N. Y. 398, 34 N. E. 275; People v. Rodawald, 177 N. Y. 408, 70 N. E. 1; People v. Long, 150 App. Div. 500, 135 N. Y. Supp. 491, affirmed in 206 N. Y. 693, 99 N. E. 1114.

Cardozo, J., delivered the opinion of the court:

The body of Francesco Manzella was found on October 30, 1911, at the bottom of a deep ravine along the Webster road near the city of Rochester. The head and legs had been cut off, and the body forced into a barrel. There must have been a violent struggle before death. The coroner's physician describes twenty-two wounds and bruises. Wounds on the temple had made the victim unconscious; and then with a sharp knife the head had been severed. Whoever used the knife disclosed a surgeon's skill. The legs were cut off later; and again a surgeon's skill was shown. Manzella was a strong, athletic man; and the wounds and bruises bear witness to a vigorous resistance. The defendant is a cripple; he has lost both his legs. He was under arrest within thirty-six hours of the murder; he did not show a scratch or a bloodstain. The people connect him with the murder by evidence that he attempted to secrete the body. They connect him in no other way. We are to determine whether the evidence sustains a verdict that he was a principal in the crime.

There was a joint indictment of Domenico Galbo, the defendant, and his brother, Guieseppe or Joseph; but Domenico was tried alone. The brothers were in business together. Their business was the sale of bananas. They had a store on the corner of Railroad street and the public market in Rochester, and in the rear was a barn where they kept their horses. Domenico was unmarried, and slept above the store. Joseph was married, and lived at the home of his father-in-law. They had some acquaintance with Manzella, who slept once, if not oftener, above the store with Domenico. Manzella had served a term in prison for extortion. He was known as a "blackhander." It seems to be conceded that he made a business of blackmail. On Saturday, October 28, 1911, two days before the finding of his dead body, he requested a loan of Joseph Galbo, but was repulsed. He then said that he would get the money from Joseph's father-in-law, one Ollis. There is evidence that later in the day he made a like request of Ollis, and was told to come back in the evening. He was never seen again. On Monday morning, before it was yet dawn, the farmers and marketmen, driving with their burdens toward Rochester along the Webster road, saw the Galbo wagon, drawn by a gray and a sorrel horse, and Domenico Galbo in the seat. It was going away from the city. In the rear there seemed to be a barrel covered with canvas. Some of the witnesses could describe the wagon and the horses only. Others had noticed the barrel. Others, though unacquainted with the driver, recalled his appearance. An hour or two later, the same wagon with the same driver came back along the same road. Those who saw it then make no mention of a barrel. Two men identify the driver as Domenico. One of them jumped on the wagon and rode part of the way.

By 8 o'clock on that morning the body of Francesco Manzella was at the bottom of the ravine. It had

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come there since the afternoon of the day before. On Sunday, October 29th, about 3 o'clock in the afternoon, a young man went to the ravine to set a trap for a skunk. There was no barrel and no body then. Eight o'clock the next morning the same man went to the ravine, found the barrel and the dismembered body, and notified the police. On the afternoon of the same day the Galbo brothers were in jail.

A trail of circumstantial evidence leads from the ravine to the Galbo store. The barrel was a wine barrel, with iron hoops; in the Galbo store four barrels of the same kind were found by the police. Adhering to the barrel in the ravine was a fragment of a printed card. The card of one Blandi, a wine dealer of Pittsburg, was identical in size and form and space of type. Five barrels of Blandi's wine were sold in March, 1910, to Joseph Galbo. The waybill and receipt produced by the railroad company establish its delivery. Five barrels reached the Galbo store; four were still there after the body was discovered. Near the body in the ravine was a printed time card. The cards had been printed for one Hahn of the McCabe Electrical Company, who kept them in his desks. The desks were sold to the Capon-Sullivan Company, which occupied a store owned by Joseph Galbo. It was next door to the store of the Galbo brothers. Less than a week before the murder, on October 23, 1911, a member of the Capon-Sullivan Company found the time cards in the desks, and threw them into the Galbo yard. As late as November 1st some of the cards were discovered in front of the Galbo barn. Near the barrel in the ravine there was a part of a burlap sack, which had once been filled with chicken feed. It was stained with blood, and had doubtless been used to cover the top of the barrel. It was stamped with the label of the Dickinson Company of Chicago. It bore the tag of "Lathrop's Pet Shop." Six bags of the same kind, with the same label, were found in the Galbo store, and there was another in the Galbo wagon. A fortnight before the murder, Joseph Galbo bought from nine to twelve sacks of chicken feed from the Clark Douglass Company, which bought them from "Lathrop's Pet Shop." Near the burlap sack were also parts of a rope. Rope of the same material and weight was suspended from hooks, and carried bunches of bananas in the Galbo store. The rope from two hooks was missing. The tailboard of the wagon showed traces of white paint. White paint was found on the fence which ran along the Webster road at the top of the ravine. Discolored shavings of wood were found in the barrel, and other shavings, apparently discolored in the same way, were found in the Galbo barn. A chemist showed that all the shavings had been colored by the same dye. In the stall of the barn there were breaks in the cement, which indicated a recent excavation of a size suitable for a grave. But nothing else that even remotely suggested guilt was found, either in the barn or in the store. The police took possession at once, ransacked the buildings from top to bottom, tore the woodwork open, and searched in every nook for traces of blood and for implements of crime. Nothing was found. A detective was then stationed in a near-by cell to listen to the brothers' talk. Domenico said: "They are looking for the driver of the wagon." "You drove the wagon," said Joseph. "I know I did," said Domenico.

This, in rough outline, was the people's case. The defendant met it with a sweeping denial. He denied that he had driven a wagon along the Webster road on the morning of October 30th. He often went along that road with his burden of bananas, but he did not go that day; that day he drove to Fairport, in a different direction. He did not leave the barn till about 6 o'clock, and, when he left, he did not take the gray horse along. The gray horse was

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sick, and could not go. That is the defendant's statement. But a witness for the people, one Cira who worked in the Galbo barn, said that he reached there before 6, and that Domenico and the gray horse were gone. It would not be helpful to review the defendant's narrative at length. The jury found him guilty of murder in the second degree, and to reach that verdict must have found that his narrative was false. The credibility of witnesses is not for our consideration, except where the judgment is of death. We must therefore assume that the defendant did drive along the Webster road in the early morning of October 30, 1911. He was there, and spoke falsely when he denied it; he was bearing with him some burden, which to onlookers seemed to be a barrel; and about that hour a barrel, proved by many tokens to have come from the Galbo store, landed with the dead body of Francesco Manzella at the bottom of the ravine. The jury had the right to find that Domenico Galbo had the body with him, and threw it into the ravine to bury it from the sight of men.

Appeal—consideration of credibility of witnesses.

The people say that these acts of possession and concealment stamp the defendant as the murderer. They do, we think, beyond question, justify the inference that in some way and at some stage he became connected with this crime. But the question remains: In what way and at what stage? Was he a principal, and, if so, did he himself commit the offense, or aid and abet its commission, or counsel or induce another to commit it? Was he, on the other hand, an accessory after the fact, aiding the offender to avoid arrest or punishment? Principals in the first and second degree at common law, and accessories before the fact (Wharton Crim. Law, 11th ed. §§ 240, 245, 263) are classed alike as principals to-day (Penal Law, § 2). Accessories after the fact are classed simply as accessories. Which of these degrees of guilt attaches to the defendant?

Evidence—sufficiency—inference.

Criminal law—accessories.

It is the law that recent and exclusive possession of the fruits of crime, if unexplained or falsely explained, will justify the inference that the possessor is the criminal. That rule has most frequently been applied in cases of burglary (Knickerbocker v. People, 43 N. Y. 177) and larceny (Stover v. People, 56 N. Y. 315), and receiving stolen goods (Goldstein v. People, 82 N. Y. 231); but it is not unknown in cases of murder (People v. Jackson, 182 N. Y. 66, 78, 74 N. E. 565; Wilson v. United States, 162 U. S. 613, 619, 40 L. ed. 1090, 16 Sup. Ct. Rep. 895; Williams v. Com. 29 Pa. 102, 106). The highwayman kills his victim; the purpose of the murder is robbery; the same inference that identifies the robber identifies the murderer. Possession of the dead body, the subject of the crime itself, has much the same significance as possession of jewels or money or other fruits of crime. If there is any distinction, it is one chiefly of degree. The fruits of crime are themselves objects of desire; the possessor, at least presumably, has them because he wishes to enjoy them. But the possessor of the dead body wishes only to be rid of it. Its possession is thus associated more readily than that of money or jewels with the notion of concealment, and thus with the form of guilt that attaches distinctively to the accessory after the fact. Often, an attempt to secrete the body has played no other part than that of corroborative evidence. State v. Dickson, 78 Mo. 438; People v. Jackson, supra; Burrill, Circumstantial Ev. p. 440. We do not say that it may not sometimes, if not explained or rebutted, be sufficient by itself. We must look to all the circumstances.

Only half of the problem, however, has been solved when guilty possession fixes the identity of the offender. There remains the ques-

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tion of the nature of his offense. Here, again, the facts must shape the inference. Is the guilty possessor the thief, or is he a receiver of stolen goods? Judges have said that, if nothing more is shown, we may take him to be the thief. Reg. v. Langmead, 9 Cox, C. C. 464, Leigh & C. C. 427, 10 L. T. N. S. 350. But as soon as evidence is offered that the theft was committed by someone else, the inference changes, and he becomes a receiver of stolen goods. Goldstein v. People, supra; People v. Friedman, 149 App. Div. 873, 877, 134 N. Y. Supp. 153; 2 Russell, Crimes, 6th ed. pp. 287 et seq. Sometimes the circumstances may make it proper for a jury to say which inference is the true one. Reg. v. Langmead, supra. Learned commentators have said that in many cases the wrong inference has been drawn. Best, Ev. § 210; Burrill, Circumstantial Ev. 456; Wills, Circumstantial Ev. 6th ed. 91, 92. Men whose crime was that they had received stolen property have been convicted of stealing it themselves. Best, supra. A warning was sounded as long ago as the time of Lord Hale. These presumptive evidences, he said, "must be very warily pressed, for it is better five guilty persons should escape unpunished than one innocent person should die." 2 Hale, P. C. 289. He couples the warning with instances drawn from his own experience where wrong had been done.

The problem is a hard one. To solve it we must steadily bear in mind that the inference of guilt to be drawn from possession is never one of law. It is an inference of fact. Wigmore, Ev. § 2513. Other facts may neutralize it, or repel it, or render it so remote or tenuous or uncertain that in a given case we should reject it. The man who secretes a body and lies about it may be found, in most cases, to be concealing his own crime, and therefore to be the murderer. That is so because personal guilt, unless the circumstances point to some other connection, is the reasonable inference. We are not to assume, without evidence, that someone else is implicated. He who conceals the crime may be taken to be the perpetrator. But how, if he proves an alibi? Are we then at liberty to infer that, even if he did not commit the murder himself, he incited someone to do it, and thus, in spite of his proved absence, hold him as a principal? A is seen to shoot B, but C later has the body, and will not tell how he came by it. The law must say whether his silence is to condemn him as principal or as accessory. The same problem arises if a child or a frail woman secretes the body of a man who has been robbed and murdered on the highway. In these cases, the inference of actual perpetration is repelled. Even then, incriminating inferences remain possible; but, unless other circumstances are shown, there is no principle of selection, aside from the presumption of innocence, to guide the choice between them. The guilty possessor of the body, though he did not use the weapon, may still have aided and abetted; but, unless there are tokens that several joined in the affray, the likelihood of his presence is no greater than the likelihood of his absence. He may still be an accessory; whether before the fact or after is the problem. If the circumstances make one inference just as reasonable as the other, we must give the defendant the benefit of the conclusion that would mitigate his guilt. People v. Lamb (Ct. of App.) 2 Abb. Pr. N. S. 148, 165.

Trial—jury—inference from possession of fruits of crime.

Criminal law—mitigation of offense.

In this case a legless cripple is charged to have murdered a strong man. The murder followed a fierce fight in which the strong man was beaten and wounded. It seems certain that the wounds were inflicted and the head severed as parts of a single combat. We cannot with rea-

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son say that the cripple did these things. Least of all can we say that he was able to do them, and escape without a scratch or a blood-stain. "Insufficient evidence is, in the eye of the law, no evidence" (Re Case, 214 N. Y. 199, 203, 108 N. E. 409); and, when we say that something is impossible, we do not mean impossible in the strictest sense, but so nearly impossible that a jury ought not to believe it (Hudson v. Rome, W. & O. R. Co. 145 N. Y. 408, 40 N. E. 8; Re Harriot, 145 N. Y. 540, 545, 40 N. E. 246). But as soon as we concede that the defendant did not kill Manzella, we lose ourselves in mystery when we attempt to measure the degree of his connection with the crime. We have no evidence, direct or circumstantial, that the actual perpetrator was assisted by anyone. We have nothing to tell us when or where the crime occurred. We have no sign that it was committed in the defendant's presence. He may have known of it in advance, and planned or encouraged it. He may have learned of it later, and attempted to shield the criminal. The trial judge told the jury that the burden was on the people to prove beyond a reasonable doubt that the defendant, though he did not kill with his own hand, was none the less a principal; he must have become connected with the crime while Manzella was yet alive. If all that he did was to help the murderer to escape, he was not a principal, but an accessory, and the jury, under the charge, were then required to acquit him. Penal Law, § 2. The charge is sound, but it propounded to the jury a problem incapable of reasoned solution. Men do become accessories after the fact, and help others to cheat the law. Particularly is that so when they are related to the perpetrator. We have had to deal with such cases in this court. Such a case was People v. Farmer, 196 N. Y. 65, 89 N. E. 462, where a husband tried to shield his wife by burying the victim's body. That the defendant has lied about the crime does not prove that he must have been implicated as a principal. There is a motive to falsify, whatever the degree of the connection. An accessory after the fact may be punished by imprisonment for not more than five years, or by a fine of not more than $500, or by both. Penal Law, § 1934; Consol. Laws, chap. 40. There is thus a serious penalty to be avoided. Moreover, the very fact that one becomes an accessory is proof of the strength of the desire to shield the principal.

Homicide—attempt to dispose of body—evidence of guilt.

Evidence—sufficiency.

—impossibility.

Homicide—assisting murderer to escape.

In these circumstances, we cannot see that the jury had any chart or compass by which to guide their judgment. A conviction upon circumstantial evidence is not to be sustained unless the circumstances are inconsistent with innocence. People v. Harris, 136 N. Y. 423, 453, 33 N. E. 65; Lopez v. Campbell, 163 N. Y. 340, 347, 57 N. E. 501. We may multiply inferences at times, but, in multiplying them, we must not refine and rarefy them beyond measure. A body is hidden. The evidence forbids the inference that the hider is the slayer. That inference excluded, something more must be shown, some probability of time or place or circumstance, before the concealment of the body can be said to prove anything more than *concealment* of a crime. Small things may turn the scale. But something there must be.

Appeal—conviction on circumstantial evidence.

We are thus led to the conclusion that the defendant was not proved to be a principal in the commission of this crime. He ought to have been indicted, and might then have been convicted, as an accessory. Penal Law, § 2. It is a mere accident that the jury found him

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guilty of murder in the second degree. To sustain their verdict, we must be prepared to hold that on the same evidence they might have sent him to his death. The law is not so lax in its forfeiture of life. We cannot close this record with any sense of assurance that his connection with the crime preceded the event. The people charge in the indictment that the brother, Joseph, was one of the murderers. Like the defendant, he did not show a scratch or a bloodstain. If the crime was his work, the defendant had a strong motive for concealment. If it was another's work, the mystery is deepened. We know that Manzella had led a life of crime in which bitter enmities must have been aroused, and we cannot say how the defendant was connected with the man or men by whom those enmities were avenged. In connecting him as a principal, conjecture has filled the gaps left open by the evidence, and the presumption of innocence has yielded to a presumption of guilt.

—sufficiency of evidence—second degree murder.

The judgment of conviction should be reversed, and a new trial ordered.

Willard Bartlett, Ch. J., and **Hiscock**, **Chase**, **Collin**, and **Seabury**, JJ., concur; **Hogan**, J., concurs in result.

ANNOTATION.

Attempt to conceal or dispose of body as evidence connecting accused with homicide.

The concealment or attempted destruction of the body of a person murdered is regarded as an incriminating circumstance, and will be given probative force in connection with other facts.

Indiana.—Dunn v. State (1903) — Ind. —, 67 N. E. 940.

Iowa.—State v. Cumberland (1894) 90 Iowa, 525, 50 N. W. 885.

Kentucky.—Roberts v. Com. (1888) 10 Ky. L. Rep. 433, 8 S. W. 270.

Massachusetts. — Com. v. Best (1902) 180 Mass. 492, 62 N. E. 748.

Missouri.—State v. Howell (1893) 117 Mo. 307, 23 S. W. 263; State v. Tettaton (1901) 159 Mo. 354, 60 S. W. 743.

Montana. — Territory v. Bryson (1899) 9 Mont. 32, 22 Pac. 147; State v. Calder (1899) 23 Mont. 504, 59 Pac. 903.

Nebraska. — Bradshaw v. State (1885) 17 Neb. 147, 22 N. W. 361, 5 Am. Crim. Rep. 499; Hawkins v. State (1900) 60 Neb. 380, 83 N. W. 198; Bush v. State (1901) 62 Neb. 128, 86 N. W. 1062.

New Hampshire.—State v. Small (1917) — N. H. —, 102 Atl. 883.

New York.—People v. Beckwith (1886) 103 N. Y. 360, 8 N. E. 662 and People v. Beckwith (1888) 108 N. Y. 67, 15 N. E. 53.

Ohio.—Schneider v. State (1885) 2 Ohio C. C. 420, 1 Ohio C. D. 565.

Oklahoma.—Borah v. State (1916) — Okla. Crim. Rep. —, 160 Pac. 27.

Oregon.—State v. Farnam (1916) — Or. —, 161 Pac. 417.

Tennessee. — Lancaster v. State (1892) 91 Tenn. 267, 18 S. W. 777.

Utah.—State v. Hayes (1896) 14 Utah, 118, 46 Pac. 752.

Washington. — State v. Erving (1898) 19 Wash. 435, 53 Pac. 717.

In the reported case (PEOPLE v. GALBO, ante, 1220), although the facts were held not to justify a conviction, the court recognizes the fact that possession and attempted concealment of the body of one murdered are incriminating circumstances.

An inference of guilt may be drawn from an attempt to conceal the death of a person by hiding or destroying his remains. State v. Feltes (1879) 51 Iowa, 495, 1 N. W. 755; Com v. Webster (1850) 5 Cush. (Mass.) 295, 52 Am. Dec. 711; State v. Dickson (1883) 78 Mo. 438; State v. Brown (1902) 168 Mo. 449, 68 S. W. 568.

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Concealment of death by the destruction or attempted destruction of human remains is said to be a prejudicial circumstance, in Wills on Circumstantial Evidence, p. 118, citing Rex v. Gardelle, 4 Celebrated Trials, 400; Rex v. Cook, Leicester Summer Assizes 1834, and Reg. v. Good, C. C. C. May, 1842.

In Com. v. Williams (1898) 171 Mass. 461, 50 N. E. 1035, it is pointed out as possibly significant that the accused, when told that the shanty of the deceased was burned, and that the deceased, who had been robbed and murdered, was burned in it, asked: "Was he all burned up?"

It is said arguendo in People v. Place (1899) 157 N. Y. 584, 52 N. E. 576: "If the defendant, instead of assaulting her husband to prevent his discovery of the death of his daughter before she effected her contemplated escape, had set fire to the building to avoid detection, there would be no doubt, we apprehend, that evidence of that fact would be admissible."

Testimony confirming the evidence of an accomplice, who had testified that he aided the accused in removing the body of the murdered man from the barn, in which it was temporarily hidden, to the river, where it was afterward found, was held admissible in Lindsay v. People (1875) 63 N. Y. 143, both as tending to support the testimony of the accomplice as to a material fact, and as tending to connect the accused with the commission of the crime.

In several cases, the concealment or attempted destruction of a dead body has been regarded as so strong an incriminating circumstance, as to overcome a defense that the death was due to accident or suicide, and a claim that the body was hidden through fear.

In Kugadt v. State (1898) 38 Tex. Crim. Rep. 681, 44 S. W. 989, where the defendant, who attempted to destroy the dead body of his sister by burning it, claimed that she was accidentally killed, the court, in indicating the circumstances pointing to his guilt, remarks: "Why did he resort to the concealment of her body? Is this consistent with innocence, or is it explained on the theory that he was deprived of his reasoning powers by excitement? The books lay it down that concealment, if not anticipated beforehand, is one of the immediate resorts after the perpetration of a crime."

In Reg. v. Laurie (Eng.) Times, November 9, 11, 1889, cited in Wills, Circumstantial Evidence, p. 119, the body of the deceased was found at the base of a cliff, where it had been hidden by stones. The defense was that the death was accidental, but this theory failed to explain how the body became covered up, and the jury found the accused guilty of murder.

It was contended in Rex v. Greenacre (1837) 8 Car. & P. (Eng.) 35, that the death of the woman with whose murder defendant was charged was accidental, and that he secreted the body through fear. Counsel for the defendant stated to the jury that "the concealment of the body must not lead you to conclude that the crime of murder was committed by him, though concealment is, in general, a difficult thing to get over." The jury found the defendant guilty.

In Rex v. Corder (Eng.) Bury St. Edmunds Summer Assizes (1828) cited in Wills, Circumstantial Evidence, p. 292, defendant claimed that deceased committed suicide upon his refusal to marry her, and that, alarmed by the situation, he formed the determination of burying the corpse and accounting for her absence as well as he could, and in attempting to do so he made contradictory statements. On the discovery of the remains about a year after burial he was tried and convicted of murder.

Knowledge as to where the body of a person who was murdered is hidden is circumstantial evidence, tending to prove the guilt of the possessor of such knowledge. Com. v. Umilian (1901) 177 Mass. 582, 59 N. E. 439; Elizabeth v. State (1863) 27 Tex. 329.

The fact that inquiries as to the help employed in caring for the church, and as to the heating apparatus, were made of the pastor, within hearing of the defendant, who was janitor of a church where a girl who had been missing for

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some months was last seen, is admissible to show the alarm and apprehension of the defendant, where shortly after hearing the conversation he fled from the state, and the body of the murdered girl was found concealed in the basement. Wendling v. Com. (1911) 143 Ky. 587, 137 S. W. 205.

That accused purposely kept the searchers away from the place where the body was found and, while the search was being made, left the others, and removed the body from where it originally lay to a place of greater concealment a short distance away, is strong evidence of guilt. Lillystrom v. State (1911) 146 Wis. 525, 132 N. W. 132.

Similarly, concealment of homicide by failure to report it, and by leaving the body of the deceased in a place where it would be found some hours later by other persons, is strong evidence of guilt. Hedger v. State (1911) 144 Wis. 279, 128 N. W. 80.

That defendant removed from in front of his house the body of the deceased, who had been shot there, to a point one lot distant, and caused sand to be swept over the bloodstains and along the trail where the body was dragged, so as to divert suspicion from himself, is a relevant circumstance, tending to show guilt. State v. Atwood (1918) 176 N. C. 704, 97 S. E. 12.

The burning of a house in which lay the body of a murdered man is an incriminating circumstance which may be invoked in aid of a confession. Lott v. State (1910) 60 Tex. Crim. Rep. 162, 131 S. W. 553.

The inference of guilt from the possession and concealment of the body of a murdered person is, of course, as held in the reported case (PEOPLE v. GALBO, ante, 1220), one of fact, which may be repelled by other facts. In this case the defendant was shown to have had possession of the dismembered body of a murdered man which had been placed in a barrel, and to have attempted to conceal it by hiding it in a ravine. But the inference that the hider was the slayer was excluded by the fact that defendant was a legless cripple, and, although under arrest within thirty-six hours after the murder, he did not show a scratch or a blood stain, whereas the deceased was a strong man, whose body showed that he had succumbed only after a fierce fight, in which he was beaten and wounded.

In Sykes v. State (1908) 92 Miss. 247, 45 So. 838, it is held that a conviction, resting on the testimony of a witness that the defendant murdered the deceased, and that the witness aided the defendant in burying the body at the place where it was discovered, will not be sustained, where the witness had, on two examinations, testified that she knew nothing about the killing.

Alleged statements of a third person, indicating that he had knowledge of the place where the body of a murdered girl was hidden, are properly excluded as hearsay testimony, especially where the body was discovered, not in consequence of his statements, but because of the suspicious conduct of the defendant, who was seen to look down into the well in which the body was concealed. Tillman v. State (1914) 112 Ark. 236, 166 S. W. 582.

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J. R. WATKINS MEDICAL COMPANY, Appt.,
v.
L. A. MARTIN et al.

SAME, Appt.,
v.
S. G. NETTLE et al.

Arkansas Supreme Court — December 17, 1917.

(132 Ark. 108, 200 S. W. 283.)

Evidence — proof of right to do business in state.

1. If the statutes direct the issuance by the secretary of state of a certificate to a foreign corporation of authority to do business in the state upon compliance with certain terms prescribed by the legislature, such certificate is the best evidence of such authority, and must be received in evidence by the courts when the right of the corporation is called in question.

[*See note on this question beginning on page* 1235.]

Appeal — conflicting rulings — reversible error.

2. An apparent conflict in rulings at the trial that a certificate of the secretary of state, of compliance by a corporation with necessary laws, was admissible upon the question of its right to do business in the state and that it was not sufficient to establish such right, is not reversible error for the corporation, if the later ruling was correct.

Corporation — foreign — noncompliance with laws — effect.

3. A contract by a foreign corporation before complying with the laws entitling it to do business in the state is not void, but may be enforced if the statutes are complied with before institution of the action.

Evidence — contents of instrument — officer's certificate.

4. The existence and contents of documents in the custody of a public officer cannot be proved merely by the officer's certificate of contents.

Statute — construction — grant of authority.

5. Authority to grant certificates of authority to do business in the state to foreign corporations is conferred upon the secretary of state by a statute designating the conditions with which a corporation seeking such authority must comply, and providing that before authority "is granted to a foreign corporation to do business in the state" it must have provided for agents upon whom process may be served, followed by a provision permitting revocation of authority by such secretary.

— repeal by later enactment.

6. A statutory provision that the secretary of state shall cause to be issued to a foreign corporation desiring to do business in the state a certified copy of the articles which it is required to file with him, which copy shall be taken by all courts as evidence that the corporation has complied with the laws and is entitled to do business in the state, is superseded by later statutes, requiring such secretary to issue to such corporation a certificate showing authority to do business, and such authority is thereafter proved by the secretary's certificate and not by the copy of the articles.

(Wood and Hart, JJ., dissent.)

APPEAL by plaintiff from judgments of the Circuit Court for Randolph County in favor of defendants in consolidated actions brought to recover

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amounts alleged to be due for sales of merchandise under written contracts. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. S. A. D. Eaton and Jerry Mulloy, for appellant:

Plaintiff, having complied with the provisions and requirements of Act No. 313, was entitled to recover.

Waxahachie Medicine Co. v. Daly, 122 Ark. 451, 183 S. W. 741.

It was error to permit defendants to file, over plaintiff's objection, an amendment to their respective answers.

Caldwell v. Meshew, 53 Ark. 263, 13 S. W. 761; Freeman v. Lazarus, 61 Ark. 247, 32 S. W. 680; Sarber v. McConnell, 64 Ark. 450, 43 S. W. 395; Patrick v. Whitely, 75 Ark. 465, 87 S. W. 1179, 5 Ann. Cas. 672; Hall & B. Woodworking Mach. Co. v. Louisiana & N. W. R. Co. 78 Ark. 536, 95 S. W. 799; 31 Cyc. 373.

If, as appellees contend, the contracts sued upon were modified in a material particular, the effect, of course, would be to create a new contract.

Richardson v. Thomas, 28 Ark. 387.

The giving of instructions as to change or modification of the contract was reversible error.

McDonough v. Williams, 77 Ark. 261, 8 L.R.A.(N.S.) 452, 92 S. W. 783, 7 Ann. Cas. 276; Mann v. Urquhart, 89 Ark. 238, 116 S. W. 219; 2 Thomp. Trials, 1395; 1 Elliott, Contr. 44.

The burden of proving that there was a definite proposition made by one side to change, alter, or modify the original contracts, and an unqualified acceptance of such proposition by the other side, rests upon the defendants.

1 Elliott, Contr. 44; Brown v. McKnight, — Ark. —, 118 S. W. 409.

The contracts of guaranty are absolute and unconditional, and carry with them all the liability of original undertakings.

Friend v. Smith Gin Co. 59 Ark. 86, 26 S. W. 374.

As defendants do not pretend that there was any fraud practised, or that any mistake in said accounts, or either of them, was made, they are estopped to deny the correctness of said accounts and balances.

Lawrence v. Ellsworth, 41 Ark. 507; Dunavant v. Fields, 68 Ark. 540, 60 S. W. 420; Weed v. Dyer, 53 Ark. 155, 13 S. W. 592.

Mr. E. G. Schoonover, for appellees:

Where faith is given to papers on credit of an official certificate, or where they are admissible in evidence because they have passed under the critical examination of the officer having charge of the original, all of the forms and solemnities of the law should be fully complied with in their authentication.

2 Elliott, Ev. § 1354; Fagan v. United States 24 Ct. Cl. 217; United States v. Gaussen, 19 Wall. 213, 22 L. ed. 43; New Milford v. Sherman, 21 Conn. 101; Ayres v. Stewart, 1 Overt. 221.

McCulloch, Ch. J., delivered the opinion of the court:

This appeal is from judgments rendered in two consolidated actions at law, instituted by appellant to recover amounts alleged to be due for sales of merchandise under written contracts which are identical in form and substance. Each of the purchasers under the alleged contracts was required to furnish guarantors, who signed the respective bonds as such. In the action against appellee Martin his guarantors were joined as defendants, and the same course was pursued in the action against appellee Nettle. The contract in the Martin Case was executed on February 18, 1914, and the contract in the Nettle Case was executed on December 1, 1913. On the trial of the cases below there was a verdict for the defendants in both cases.

Appellant is a Minnesota corporation domiciled at the city of Winona in that state, and, at the time of the execution of the contracts in each of these cases, had not complied with the laws of Arkansas, permitting foreign corporations to do business here. The contention of appellant was, and is, that the contracts were for the sale of merchandise, and that the sales constituted interstate commerce, which is not subject to the regulations of this state. In other words, that in each instance there was a sale of goods, which took place in another state where the contract was lawful, and that the shipment of the goods into this

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state constituted interstate commerce.

The sole issue tendered by the answer in each case, so far as related to the principal defendant, was that the contract was not for the sale of merchandise, but for the creation of an agency for the sale of merchandise by retail in the state of Arkansas, and that the contract was void because of the fact that appellant had not complied with the laws of this state, allowing corporations to do business here. The guarantors also made the defense that there had been changes in the contract without their consent, and during the progress of the trial the court, over appellant's objections, permitted the pleadings to be amended so as to allow the guarantors to interpose the additional defense in one of the cases that they had notified appellant of their withdrawal from the contract as guarantors. During the progress of the trial appellant introduced in evidence a certificate of the secretary of state, bearing date of November 30, 1915, which was prior to the institution of these actions, to the effect that appellant had complied with the laws of this state by filing in the office of the secretary of state a duly certified copy of its articles of incorporation, a certificate designating an agent upon whom service of summons or other processes might be had in any of the courts of this state, and resolutions of the board of directors, consenting that summons or other process might be had upon said agent, or upon the secretary of state, and a statement of its assets and liabilities, a statement showing the number of shares of capital stock and the par value of each, the value of property owned and used by said corporation in the state of Arkansas, the proportion of capital stock of the company which is represented or employed in its business in the state, etc., and that said corporation had paid the fees required by law, and in all other things complied with the provisions of the statute.

The court allowed appellant to introduce this certificate over the objections of appellees, but, in finally submitting the case to the jury, the court gave instructions telling the jury that they must return a verdict for defendants unless they found from a preponderance of the evidence that the laws of this state had been complied with. Other instructions were given, submitting the issue of the withdrawal of the guarantors, but we do not deem it necessary to review that feature of the case, since we have reached the conclusion that the judgment in each case must be reversed, on account of the error of the court in its instructions concerning the authority of appellant to do business in this state. The effect of the court's rulings was to first hold that the certificate of the secretary of state was admissible, and later, by its instructions, to take that evidence away from the jury or weaken its force; because, if the certificate was admissible, it made a case of undisputed evidence as to the right of appellant to do business here. If the court was correct in its final ruling in the instruction that the authority to do business here had not been established by legal evidence, then there should be no reversal because of the apparent conflict in the rulings of the court in admitting the certificate, and in finally instructing the jury, in effect, that the certificate was insufficient to establish the authority to do business. Hightower v. Hightower, 128 Ark. 95, 193 S. W. 518.

Appeal—conflicting rulings—reversible error.

We have decided that a contract made by a foreign corporation before complying with the laws of this state is not void, and that, where the statutes are complied with before the institution of the action, the contract is enforceable. Waxahachie Medicine Co. v. Daly, 122 Ark. 451, 183 S. W. 741. Counsel for appellees defend the ruling of the court solely on the ground that the

Corporation—foreign—noncompliance with laws—effect.

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authority of appellant to do business in the state was not properly proved, the contention being that proof of the authority to do business is controlled by the general statute (Kirby's Dig. § 3058), providing for the introduction of certified copies of documents on file in the office of the secretary of state, or by the terms of the Act of May 8, 1899 (Acts 1899, p. 305; Kirby's Dig. § 827), which provides that the secretary of state "shall cause to be issued to said corporation a copy of such charter, or articles of incorporation, or certificate so filed, properly certified under the seal of his office, and a copy of such charter, or articles of incorporation, or certificate, certified to by the secretary of state, shall be taken by all the courts of this state as evidence that the said corporation has complied with the provisions of this act, and is entitled to all the rights and benefits therein conferred."

It must be readily conceded that, unless the statutes of this state direct the secretary of state to grant to a foreign corporation a certificate of authority to do business in this state, such authority must be proved, when called in question, by the introduction of the documents on file in the office of the secretary of state, showing compliance with the laws of the state, for it is well settled that the existence and contents of documents in the custody of a public officer cannot be proved merely by the officer's certificate of contents. On the other hand, it seems equally clear that, if the statutes of the state which prescribe the terms upon which corporations shall do business in the state direct the issuance by the secretary of state of a certificate of authority to do business, then such certificate is the best evidence of such authority, and must be received in evidence by the courts when the right of a corporation to do business here is called in question. The Act of 1899, supra, contains an express provision as to how the authority of a foreign corporation to do business in the state shall be evidenced, and the provision is that it must be by a certified copy, issued by the secretary of state, of the articles of incorporation, etc., filed in his office. If that statute is still in force, and no other method has been provided by law for evidencing the authority of a corporation to do business here, then the certificate of the secretary of state was not admissible, and the ruling of the trial court was correct. We have decided, however, in the case of Western U. Teleg. Co. v. State, 82 Ark. 302, 101 S. W. 745, that the Act of 1899, regulating the doing of business by foreign corporations in this state, has been repealed by the Act of April 23, 1901 (Acts 1901, p. 386), which contained no express provision as to how the authority of a corporation to do business should be certified. As to that feature of the act we said: "It is true that the old act provided that the secretary of state should issue to the corporation so complying with the law, a certified copy of the articles or certificates so filed, but this added nothing to requirements upon the corporation. The same end is accomplished under the new act, by filing the copy of the articles of incorporation with the proper officer, and a certified copy furnished by such officer would, in the absence of an express provision by statute to that effect, be evidence of compliance with the statute. Another statutory provision covers that as a rule of evidence. Kirby's Dig. § 3058. At any rate, the fact that the old act contains provisions not embraced in the new does not prevent the application of the doctrine of repeal by implication or by substitution."

The law on the subject stood in that condition until the general assembly of 1907 enacted the statute which still remains in force, prescribing the conditions upon which foreign corporations may do business in this state. The first section,

Evidence—contents of instrument—officer's certificate.

—proof of right to do business in state.

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which is the only one bearing on the present subject, reads as follows: "Section 1. Every company or corporation incorporated under the laws of any other state, territory or country, including foreign railroad and foreign fire and life insurance companies, now or hereafter doing business in this state, shall file in the office of the secretary of state of this state a copy of its charter or articles of incorporation or association, or a copy of its certificate of incorporation, duly authenticated and certified by the proper authority, together with a statement of its assets and liabilities and the amount of its capital employed in this state, and shall also designate its general office or place of business in this state, and shall name an agent upon whom process may be served. Provided, before authority is granted to any foreign corporation to do business in this state, it must file with the secretary of state a resolution adopted by its board of directors, consenting that service of process upon any agent of such company in this state, or upon the secretary of state of this state, in any action brought or pending in this state, shall be a valid service upon said company; and if process is served upon the secretary of state it shall be his duty to at once send it by mail, addressed to the company at its principal office; and if any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this state, remove said suit or proceeding to any Federal court, or shall institute any suit or proceeding against any citizen of this state in any Federal court, it shall be the duty of the secretary of state to forthwith revoke all authority to such company and its agents to do business in this state, and to publish such revocation in some newspaper of general circulation published in this state; and if such corporation shall thereafter continue to do business in this state, it shall be subject to the penalty of this act for each day it shall continue to do business in this state after such revocation."

Assuming that the general statute on the subject of evidence (Kirby's Dig. § 3058) controlled at that time, it seems clear to us, from the reading of the above-quoted section, that the legislature intended to confer upon the secretary of state the power to grant a certificate of authority to corporations after the statutes have been complied with, and if that be true such certificate is the evidence of such authority. The statute provides that a copy of the charter or articles of incorporation, or a copy of the certificate of incorporation, shall be filed with the secretary of state. Then follows the provision that, "before authority is granted to any foreign corporation to do business in this state, it must file with the secretary of state a resolution," etc. In whom, then, does the statute vest the power to grant a certificate of authority? Certainly in the secretary of state; and, as there is no requirement in the statute for the issuance of a certified copy of the articles of incorporation so filed, then it necessarily follows that the lawmakers meant that the secretary of state should merely issue a certificate of authority. This is made plain by the later provision in that statute with respect to revocation by the secretary of state of the authority granted to a corporation. The two powers, of granting the authority and of revoking the same, are clearly implied, we think, from the language of the statute. It has been so treated by this court in several cases, although the point has not been expressly raised before as to the form of certificate of authority issued by the secretary of state. In the opinion of this court in Waxahachie Medicine Co. v. Daly, 122 Ark. 451, 183 S. W. 741, the statement was made that the corporation suing in the case had complied with the laws of this state, "and was issued a certificate, authorizing it to do business in the state." Moreover,

Statute—construction—grant of authority.

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if there had been any doubt as to the meaning of the Act of 1907, the question of the form of certificate is set at rest by the statute subsequently enacted by the general assembly of 1911 (Acts 1911, p. 48), the title of which is "An Act to Prescribe the Fees to Be Paid by Corporations, and for Other Purposes." That statute is a lengthy one, and prescribes the filing fees for corporations, both domestic and foreign. Section 13 provides that all of the filing fees shall be paid to the state treasurer, and that "if the payment is made by a foreign corporation, and such corporation has complied with all the laws of the state of Arkansas, regulating foreign corporations, the secretary of state shall issue it a certificate showing that it is authorized to do intrastate business in Arkansas."

It is not conceivable that the legislature intended to prescribe two methods of proving the authority of a corporation to do business in this state, and the method impliedly prescribed by the Act of 1907, and expressly by the Act of 1911, are identical, and afford the exclusive method, which is by a certificate of the secretary of state, and not a certified copy of the articles of incorporation and other documents, required to be filed in that office.

—repeal by later enactment.

It follows that the trial court erred in submitting to the jury the question of appellant's authority to do business in this state, for, under the certificate introduced in evidence, that authority was indisputably established. The judgments are reversed and the causes remanded for new trial.

Wood and Hart, JJ., dissent.

ANNOTATION.

Mode of proving authority of foreign corporation to do business within state.

I. In general, 1235.
II. Proof by parol, 1236.
III. Proof of noncompliance, 1237.

I. In general.

When a statute expressly provides how the authority of a foreign corporation to do business in a state shall be evidenced, and no other method is provided, the statutory method is the only available one. J. R. WATKINS MEDICAL CO. v. MARTIN (reported herewith) ante, 1230; Turner v. National Cotton Oil Co. (1908) 50 Tex. Civ. App. 468, 109 S. W. 1112. And see American Ins. Co. v. Smith (1885) 19 Mo. App. 627, and St. Louis Expanded Metal Fireproofing Co. v. Beilharz (1905) — Tex. Civ. App. —, 88 S. W. 512.

In Turner v. National Cotton Oil Co. (1908) 50 Tex. Civ. App. 468, 109 S. W. 1112, supra, it was held that the receipt for the payment of a franchise tax by a foreign corporation was not admissible in evidence, to prove that such corporation had complied with the local requirements, so as to enable it to do business within the state.

But where the statute which prescribes the terms upon which foreign corporations shall do business in a state merely, either expressly or impliedly, directs the issuance of a certificate of authority to do business, such certificate is the best, and at least prima facie, evidence of such authority, and must be received by the courts when the question of the right to do business is raised; it not being necessary to produce the papers filed by the corporation, with the certification of the officer with whom they were filed. Western U. Teleg. Co. v. State (1907) 82 Ark. 302, 101 S. W. 748, 12 Ann. Cas. 82; J. R. WATKINS MEDICAL CO. v. MARTIN (reported herewith) ante, 1230; Gutzeil v. Pennie (1892) 95 Cal. 598, 30 Pac. 836; Strasbaugh v. Silver Steward Sanitary Can Co. (1916) 127 Md. 632, 96 Atl. 863; Fikes v. State (1905) 87 Miss. 251, 39 So. 783; Washington Nat. Bldg. Loan & Invest. Asso. v. Stanley (1901) 38

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Or. 319, 58 L.R.A. 816, 84 Am. St. Rep. 793, 63 Pac. 489. And in such a case the certificate is prima facie evidence, although it does not expressly state that the foreign corporation has complied with the local requirements, the presumption being that the officer, in issuing it, properly performed his duty. Gutzeil v. Pennie (1892) 95 Cal. 598, 30 Pac. 836.

But it has been said that if the statute, prescribing the terms upon which foreign corporations shall do business within the state, does not authorize the issuance of a certificate of authority so to do business, such authority must be proved by the introduction of the papers on file, showing actual compliance, and not by a certificate of contents; since the existence and contents of documents in the custody of a public officer cannot be proved merely by the officer's certificate of contents, at least, in the absence of statutory permission. J. R. WATKINS MEDICAL CO. v. MARTIN. It was, however, held that the statute did authorize such a certificate and that it was the mode of proof.

However, there is authority to the effect that the production of the certificate of the officer in whose office the necessary papers are filed, authorizing a foreign corporation to do business in the state, is a sufficient showing of such right, and this without reference to statutory authority to issue such a certificate. Thus, in Southern Lumber Co. v. Holt (1911) 129 La. 273, 55 So. 986, where the Constitution and statutes merely provide that foreign corporations shall not do business in the state without having known local places of business and agents, which places and agents must be designated by a declaration filed with the secretary of state, it was held that a certificate of such official, showing that such a declaration had been filed, was sufficient proof of authority to do business within the state. And in People v. Forster (1917) 280 Ill. 486, 117 N. E. 761, affirming (1917) 204 Ill. App. 338, it was again held that a license or certificate, issued by the secretary of state to a foreign corporation, allowing it to do business in the state, was sufficient proof of its authority to so transact business. In Washington County Mut. Ins. Co. v. Chamberlain (1860) 16 Gray (Mass.) 165, it was held that proof of compliance with a statute, requiring a foreign corporation to deposit with the state treasurer a copy of its charter before doing business in the state, was not made by the production of a certificate of the state treasurer that such a copy was deposited with him; but this decision turned upon the fact that the certificate did not show that the filing preceded the contract in question, and was not upon the ground that proper proof could not be made by a certificate of the treasurer.

In Washington, under statutes which provide that a copy of any certificate of incorporation of a domestic corporation, certified by the secretary of state, shall be received as prima facie evidence of the facts therein stated, and expressly puts foreign corporations upon the same footing as domestic corporations, and requires them to file with the secretary of state certified copies of their charters and articles of incorporation, it has been held that copies of the articles of incorporation of a foreign corporation, and of the appointment by it of a resident agent, certified by the secretary of state as being of record in his office, constitute prima facie proof of the right of such corporation to do business in the state. Knapp, B. & Co. v. Strand (1892) 4 Wash. 686, 30 Pac. 1063.

II. Proof by parol.

That parol evidence is not admissible to show that a foreign corporation is authorized to do business in Louisiana was the rule laid down in Pattison v. Gulf Bag Co. (1906) 116 La. 963, 114 Am. St. Rep. 570, 41 So. 224.

However, in Lycoming F. Ins. Co. v. Wright (1888) 60 Vt. 515, 12 Atl. 103, it was held that parol evidence was admissible to prove that a foreign corporation had been licensed to do business in Vermont, the loss of the license having been established, and there being no law requiring such a

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license, or the fact that one had been issued, to be recorded.

And compliance with Alabama Const. art. 14, § 4, forbidding foreign corporations to do any business in Alabama, "without having at least one known place of business and an authorized agent or agents therein," was held in New England Mortg. Secur. Co. v. Ingram (1890) 91 Ala. 337, 9 So. 140, to have been shown, by the uncontradicted testimony of the local agent that he had been appointed as such, that the corporation had a local place of business, and that it was placarded with both the name of the corporation, and his own as agent. See also, to the same effect, Marx v. District Grand Lodge, I. O. B. B. (1908) 157 Ala. 107, 47 So. 207.

III. Proof of noncompliance.

Noncompliance with a provision requiring foreign corporations to file a certain certificate of appointment of a local agent, as a condition precedent to the validity of contracts entered into by it in the state, cannot be shown by proof that such a certificate, as filed, did not comply with the statutory requirements, where it is not also shown that another and valid certificate of appointment was not made and filed. Sidway v. Harris (1899) 66 Ark. 387, 50 S. W. 1002. G. J. C.

TRUSTEES OF PRESBYTERIAN CHURCH, Somerset, Kentucky, Appts.,
v.
C. C. MIZE.

Kentucky Court of Appeals — October 11, 1918.

(181 Ky. 567, 205 S. W. 674.)

Life tenant — power to enjoy property — rights and duties.

1. A life tenant, given an estate to enjoy during his natural life with remainder over, cannot waste the estate, give it away, nor dispose of it except for his own necessary use.

[*See note on this question beginning on page* 1243.]

Will — object of construction.

2. The primary object in construing a will is to ascertain and determine the intention of the testator.

Same — purpose of rules of construction.

3. The rules adopted and adhered to by the courts for construction of wills have for their purpose the ascertainment of the intention of the testator, and are invoked as aids to the great primary principle of determining the intention of the testator.

Same — consideration of entire will.

4. The intention of the testator which is to be given effect by the courts in construing a will is to be gathered from a consideration of the entire will.

Same — all provisions to be given effect.

5. Every provision of a will must be given effect if the provisions can be construed so as to make them consistent with each other.

Same — devise of property undisposed of.

6. A limitation over of the property undisposed of at the death of the life tenant is valid in case of a devise of a life estate with power of disposition.

Same — intention gathered from words used.

7. The intention of a testator is, in the construction of a will, to be gathered from the words used or the necessary inferences which result from their use.

Same — life estate with power of disposition — effect.

8. A life estate with power of disposition only so far as necessary for a reasonable and comfortable support is conferred by a will giving testatrix's husband all her estate, to have

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and to enjoy same during his natural life, and giving at his death anything left to a designated church.

Same — remainder after life estate with power of disposition — validity.

9. Where property is devised to one absolutely with the power of unlimited disposition of it, and by another clause of the will, it is attempted to devise over an undisposed-of remainder of the property, the limitation over is void, but where a life estate only is devised and the life tenant given the power of disposition, the limitation over of such of the property as may remain undisposed of by the life tenant at his death, is a valid limitation.

Same — vested remainder.

10. In case of a devise to one, to have and to enjoy same during his natural life, and giving at his death anything left to another, the latter has a vested right to whatever portion of the estate may remain undisposed of at the death of the life tenant.

Life tenant — bond to secure remainderman.

11. A life tenant under a will who is placed in possession of the property will, ordinarily, be required to execute a bond to secure the interests of the remainderman.

Will — power of life tenant — construction.

12. The question whether a life tenancy created by will is accompanied with a power of disposition, and if so, to what extent, and for what purpose it may be exercised, is ascertained from the language used, the entire will, and the purpose and intention of the testator as gathered from the will.

Same — conferring power of disposition.

13. Power of disposition is given to a life tenant where the will provides that he shall have the property "to enjoy during his natural life and at his death should there be anything left" it shall be given to another, where no other method of diminishing the estate is provided.

Definition — necessary implication.

14. The necessary implication which will carry by will an estate not specifically devised means, not natural necessity, but so strong a probability of intention, that an intention contrary to that which is imputed to the testator cannot be supported.

Will — absolute power in life tenant — implication.

15. An absolute power of disposition in the life tenant will not be implied where there is a devise over of what shall be left at his death.

Life tenant — requirement of bond.

16. Where the intention of testator is that the life tenant shall have the possession and use of the property, no bond will be required of him for the protection of the remainderman if no disposition on his part to waste or destroy the property or make use of it other than as authorized by the will is shown.

Same — duty to account.

17. A life tenant with power of disposition for support must report the property which comes into his hands, and make settlements with the proper authorities, which will show his receipts and disbursements and any disposition which he may make of the property.

APPEAL by plaintiffs from a judgment of the Circuit Court for Pulaski County dismissing a petition filed to construe the will of defendant's deceased wife, and to require defendant to file an itemized inventory of all property coming into his hands as executor and life tenant under the will. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. **Ben V. Smith & Son**, for appellants:

The will should be construed to give the defendant only a life estate in both the real and personal property, and as such life tenant he should not be permitted to encroach upon the principal of either.

Bradshaw v. Butler, 33 Ky. L. Rep. 531, 110 S. W. 420; Stallcup v. Cronley, 117 Ky. 547, 78 S. W. 442; 16 Cyc. 618–623; Bradshaw v. Baker, 132 Ky. 66, 16 S. W. 262; Breidenbach v. Walter, — Ky. —, 119 S. W. 204; Watkins v. Watkins, — Ky. —, 120 S. W. 341, Taggart v. Taggart, — Ky. —, 121 S. W. 693.

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Messrs. Denton, Kennedy, & Hays also for appellants.

Messrs. O. H. Waddle & Son for appellee.

Hurt, J., delivered the opinion of the court:

This action involves the construction of the last will and testament of Mamie McBeath Mize. She was a married woman and was childless. Her husband, C. C. Mize, did not own any property. So much of the will as is necessary to consider is as follows:

"First. It is my will and I so direct that my executor hereinafter named shall pay all my just debts, my funeral expenses and medical bills as soon after my death as he conveniently can out of any money that I may have on hands at the time of my decease.

"Second. I direct my executor to erect over my grave a modest, but neat, monument, such as he may deem suitable and appropriate and pay for same out of such funds as may come to his hands as my executor.

"Third. The remainder of my property both real and personal of every kind and description, I give and bequeath to my beloved husband, C. C. Mize, to have and to enjoy same during his natural life and at his death, should there be anything left, it is my wish that it shall go to the Presbyterian Church of the city of Somerset, same to be used as the church may direct.

"Fourth. I hereby nominate as executor of this my last will and testament my beloved husband, C. C. Mize, and direct that he be permitted to qualify as such executor without bond."

The appellants, trustees of the Presbyterian Church, contend that there is devised to the appellee, C. C. Mize, a life estate only, and that, as the devisee of such estate, he is given only the use of the property in kind, and the income arising from the other property of which the estate consists, during his natural life, and that, as a devisee of the remainder, the church has a vested interest in all the property. The appellee, C. C. Mize, contends that the will gives to him an absolute fee-simple title to all the property of the testatrix, and that the appellant has no interest therein whatever. The parties each requested the court to construe the will and determine what kind of an estate it devised to the appellee, and thus determine all the questions in controversy between them. Thereupon the circuit court adjudged that, under and by the terms of the will, C. C. Mize has a fee-simple estate in and to all the property of the testatrix, with power to use, sell, and convey same or any part of it during his natural life, if he desires to exercise it, and that the appellant church under the terms of the will does not have any vested interest in the property, or any interest of any kind during the natural life of C. C. Mize; but, if any of the property is left at the death of Mize, and which he had not disposed of in the enjoyment of same during his life, the church was entitled to such part so left undisposed of. This judgment resulted in the dismissal of the petition of appellant church, and a denial of the relief prayed therein. The trustees of the church have appealed from the judgment.

(a) The first question to be determined is: What estate in the property was devised to C. C. Mize? It is insisted that the primary object in construing a will is to ascertain and declare the intention of the testator. This doctrine is elementary, and it might be further added that the rules of construction adopted and adhered to by the courts in the construction of wills have for their purpose the ascertainment of the intentions of the testator, and are invoked as aids to the great primary principle of determining the intentions of the testator. The intentions of a testa-

Will—object of construction.

Same—purpose of rules of construction.

Same—consideration of entire will.

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tor are, however, to be gathered from a consideration of the entire will, and it is apparent, as a rule of common sense, that every provision of a will must be given effect, if they can be construed so as to make them consistent with each other. In the instant case, the testatrix devises all of her property to her husband, "to have and to enjoy same during his natural life and at his death should there be anything left, it is my wish that it shall go to the Presbyterian Church of the city of Somerset, same to be used as the church may direct." She expressly limits the possession and enjoyment of the property by her husband to the period of his natural life. It is expressly provided that at his death the property, or such as may be left, is to go to the church, to be used as it may direct. There is no antagonism between the provision which gives the possession and enjoyment of the property to the husband, during his natural life, and that which gives whatever may remain of the property, at his death, to the church. To hold that the will gives to the husband an absolute fee-simple estate in the property necessarily requires that the devise over to the church of what is left, at the death of the husband, be held to be entirely nugatory, and without meaning or effect at all; and it furthermore requires the language "to have and to enjoy during his natural life and at his death" to have a meaning altogether contrary to what it expressly says, according to accepted meaning of the language used. The intention of the testatrix must be gathered from the words used or the necessary inferences which result from their use. Anderson v. Hall, 80 Ky. 91. Hence it seems that the conclusion is irresistible that the testatrix did not intend to vest her husband with a fee-simple estate in her property, but a life estate, and it was held in Cecil v. Cecil, 161 Ky. 422, 170 S. W. 973, that when a life estate has been once expressly created by a will, that language thereafter used, which is short of plain and explicit terms, will not be construed as enlarging that estate. Whatever may have been the results of the attempted application of the doctrines hereinafter set out, in certain cases, it is well settled, in this state, that where property is devised to one absolutely, with the power of unlimited disposition of the property, and by an after clause of a will it is attempted to devise over an undisposed of remainder of the property, the limitation over is void; but where a life estate only is devised, and the life tenant given a power of disposition, a limitation over of such of the property as may remain undisposed of by the life tenant, at his death, is a valid limitation. Clay v. Chenault, 108 Ky. 77, 55 S. W. 729; Dulaney v. Dulaney, 25 Ky. L. Rep. 1659, 79 S. W. 195; Becker v. Roth, 132 Ky. 429, 115 S. W. 761; Nelson v. Nelson, 140 Ky. 410, 131 S. W. 187; Ball v. Hancock, 82 Ky. 107; Mitchell v. Campbell, 94 Ky. 347, 22 S. W. 549; Moore v. Webb, 2 B. Mon. 282; Watkins v. Watkins, — Ky. —, 120 S. W. 341; Lee v. Moore, 29 Ky. L. Rep. 495, 93 S. W. 911; McCullough v. Anderson, 90 Ky. 126, 7 L.R.A. 836, 13 S. W. 353; Pedigo v. Botts, 28 Ky. L. Rep. 196, 89 S. W. 164; Payne v. Johnson, 95 Ky. 175, 24 S. W. 238, 609; and many others. Hence, in the instant case, as a life estate only is devised, although it may be accompanied with a power of disposition by the life tenant, which question will be hereinafter determined, the devise over of what may remain of the property, undisposed of at the termination of the life estate, is a valid limitation. If the testatrix had in-

Same—all provisions to be given effect.

Same—devise of property undisposed of.

Same—intention gathered from words used.

Same—life estate with power of disposition—effect.

Same—remainder after life estate with power of disposition—validity.

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tended by the will to give her husband a fee-simple estate in the property, she could and would have naturally done so by much fewer words, and would have left out all reference to the possession and enjoyment of it during his lifetime, and also what should become of what should remain of it after his death. It would have been idle to make a devise in remainder of the property when she understood that there did not exist any remainder, and that there would not be. The time in which the husband is "to have and enjoy" the property is restricted by the language of the will to the duration of his natural life.

(b) If only a simple life estate is given the husband, the rights of the parties would be plain, as the life tenant would be entitled to the use and income of the property only, and the church, as the owner of the remainder interest, would have a vested estate; and, ordinarily, if the life tenant is given possession of the property, he could be required to execute a bond to secure the interest of the owners of the remainder interests. A difficult question arises when it is undertaken to determine whether the life estate given to C. C. Mize is accompanied with a power of disposition, and, if so, what is the extent of the power, and for what purposes may it be exercised? Where a life estate is devised, whether it is accompanied with a power of disposition, and, if so, to what extent, and for what purposes it may be exercised, is ascertained from the language used, the entire will, and the evident purpose and intention of the testator as gathered from the will, as the intention of the testator may be ascertained, relative to any other portion of a will. The following adjudications show, in the respective instances dealt with, that the life tenant, with a power of disposition, may sell and dispose of the estate, preserving the proceeds under the same terms as the property disposed of, or is restricted, in the exercise of his power, to a disposal of the property for certain purposes, or is limited to a disposal of the property to the necessities of a comfortable support for himself, or to only such disposition as one may make of a simple life estate, in accordance with the intention of the testator, to be ascertained from the entire will: Embry v. Embry, 31 Ky. L. Rep. 295, 102 S. W. 239; Martin v. Barnhill, 21 Ky. L. Rep. 1666, 56 S. W. 160; Coats v. Louisville & N. R. Co. 92 Ky. 263, 17 S. W. 564; Kleber v. Kleber, 24 Ky. L. Rep. 7, 67 S. W. 838; Pedigo v. Botts, 28 Ky. L. Rep. 196, 89 S. W. 164; McCormick v. McCormick, — Ky. —, 121 S. W. 450; Anderson v. Hall, supra; Botts v. Utley, 12 Ky. L. Rep. 555; Hosman v. Willett, 32 Ky. L. Rep. 908, 107 S. W. 334; Becker v. Roth, 132 Ky. 433, 115 S. W. 761; and many others.

Same—vested remainder.

Life tenant—bond to secure remainderman.

Will—power of life tenant—construction.

In the instant case, there is no express power of disposition given to the life tenant; but such a power exists, if it is necessarily implied from the terms of the will, and it must necessarily be implied, if any force or meaning is to be given to the words "to enjoy during his natural life and at his death should there be anything left." Evidently the testatrix, by the use of the language, contemplated a diminution of the property, and she provided no method for its diminution, except by the enjoyment of it by the life tenant. The devise over of what should be left at the death of the life tenant necessarily means that portion of the property bequeathed which shall not have been disposed of at that time, and not having provided, in the will, for any disposition of it by anyone else, it necessarily confers by implication such a power upon the life tenant for the purpose of its enjoyment. "Necessary implication" relative to such a matter was defined by this court, citing

Same—conferring power of disposition.

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Wilkinson v. Adam, 1 Ves. & B. 466, 35 Eng. Reprint, 180, in Galloway v. Durham, 118 Ky. 546, 111 Am. St. Rep. 300, 81 S. W. 659, as follows: "'Necessary implication' means, not natural necessity, but so strong a probability of intention, that an intention contrary to that which is imputed to the testator cannot be supposed."

Definition—necessary implication.

The words of a will containing language similar to that used in the will in the instant case was construed, in Parks v. McCombs, 146 Ky. 327, 142 S. W. 401, to imply a power of disposition in the life tenant. That this power is not unlimited is plain. There would be no reason for making a devise over of the property not disposed of at the death of the life tenant, if the life tenant had an unlimited power to dispose of it at such time and upon such occasion as he should choose. Neither would there exist any reason for the testatrix giving a life estate to her husband at all; but, if she had intended that he should have an absolute estate (and an unlimited power of disposal would be the equivalent), she would have so stated in the will, in place of the terms she did use to describe his estate. She was childless, and it is easy to be seen that it was her desire and intention to create for her husband the estate which she thought would be most beneficial to him, but probably not the estate which he might consider most beneficial to himself. She evidently contemplated and intended that the uses which the husband would make of the estate would not consume it all during his lifetime, or else there was no occasion for a devise of the remainder. She intended in the language of the will to give it to him to be "enjoyed" by him during his lifetime. If anything remained above what was necessary to be consumed for his reasonable support during his life, she intended that the church should receive it as the devisee in remainder. He cannot waste the estate nor give it away, nor dispose of it, except for his own necessary use. That is the meaning of the implied power of disposal. He has a right to the entire income from the property, and may encroach upon the principal, if such an encroachment is necessary to a reasonable and comfortable support for himself. He is authorized to make a sale of the property, or of such part of it as may be necessary for the attainment of the above results.

Will—absolute power in life tenant—implication.

Life tenant—power to enjoy property—rights and duties.

(c) Hence it is concluded that the appellee, C. C. Mize, has a life estate in the property, and entitled to its income, and that his life estate is coupled with a power to dispose of it, or such part as may be reasonably necessary to provide him a comfortable maintenance during his natural life, and that the appellant has a vested right to whatever portion of the estate may be left undisposed of at the death of the life tenant. The contingency is as to the amount of the estate which may be then undisposed of.

(d) The will provides that the life tenant is "to have and enjoy" the property during his natural life, and provides that as executor no security shall be required of him, which the expression, "be permitted to qualify as such executor without bond," evidently means. Where, from the entire will, it is apparent that the intention of a testator is that the life tenant shall have the possession and use of the property, and no disposition to waste or destroy the property, or to make use of it other than as authorized by the will, is shown, a bond for the security of the remainderman will not be required. Hill v. Harding, 92 Ky. 76, 17 S. W. 199, 437; Cecil v. Cecil, 161 Ky. 423, 170 S. W. 973.

Same—requirement of bond.

Although, under the above rule, the life tenant may not be required to execute bond before being per-

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mitted the possession of the property bequeathed to him for life, such condition will not excuse appellee from reporting the property, which came to his hands, and making settlements with the proper authorities, which will show the receipts and disbursements, and any disposition of the property, as is incumbent upon any other trustee.

Same—duty to account.

For the above reasons, the judgment is reversed, and cause remanded for proceedings consistent with this opinion.

ANNOTATION.

Rights and duties of life tenant with power to anticipate or enjoy principal.

I. Life estate with general power of anticipation:
 a. General rule, 1243.
 b. Illustrations, 1244.
II. Life estate with power of anticipation for support and maintenance:
 a. Purpose for which principal may be anticipated:
 1. General rule, 1248.
 2. Particular rights and uses:
 (a) Personal use, 1250.
 (b) Sale:
 (1) Express power to sell, 1258.
 (2) Implied power to sell, 1268.
 (c) Mortgage, 1273.
 (d) Lease, 1276.
 (e) Gift, 1276.
 (f) Devise, 1281.
 (g) Waste, 1285.
II.—continued.
 b. Necessity and extent of anticipation:
 1. Discretion of life tenant as unlimited:
 (a) Rule stated, 1285.
 (b) Illustrations, 1288.
 2. Limitations on discretion of life tenant, 1292.
III. Life estate with bequest over of "what remains," or equivalent phrase:
 a. General rule, 1297.
 b. Particular rights and uses:
 1. Personal use, 1299.
 2. Sale:
 (a) Express power to sell, 1304.
 (b) Implied power to sell, 1310.
 3. Mortgage, 1316.
 4. Gift, 1316.
 5. Devise, 1319.
 6. Waste, 1325.

I. Life estate with general power of anticipation.

a. General rule.

While the power of anticipation or enjoyment of the principal of an estate given to a life tenant is generally conditioned on a necessity for his comfortable support and maintenance, in some instances the grant of the power is coupled with an expression giving a broader power of disposition. It is held in these cases that the life tenant is given an absolute and unlimited power of disposition, and may dispose of the property as he pleases, so long as he acts in good faith, and does not waste or squander the property for the purpose of preventing the remainder of the estate from going to the remaindermen.

Illinois.—Bevans v. Murray (1911) 251 Ill. 603, 96 N. E. 546.

Indiana.—Downie v. Buennagel (1884) 94 Ind. 228.

Massachusetts.—Kent v. Morrison (1891) 153 Mass. 137, 10 L.R.A. 756, 25 Am. St. Rep. 616, 26 N. E. 427; Dana v. Dana (1904) 185 Mass. 156, 70 N. E. 49; Goodrich v. Henderson (1915) 221 Mass. 234, 108 N. E. 1062.

Mississippi.—Andrews v. Brumfield (1856) 32 Miss. 107.

New Hampshire.—Shapleigh v. Shapleigh (1899) 69 N. H. 577, 44 Atl. 107; Weston v. Second Orthodox Cong. Soc. (1915) 77 N. H. 576, 95 Atl. 146.

New York.—Re Ithaca Trust Co. (1917) 220 N. Y. 437, 116 N. E. 102, reversing (1916) 176 App. Div. 40, 162 N. Y. Supp. 355; Re French (1888) 6 Dem. 108, 13 N. Y. S. R. 759, affirmed in (1889) 52 Hun, 303, 5 N. Y. Supp. 249.

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Wisconsin.—Auer v. Brown (1904) 121 Wis. 115, 98 N. W. 966.

See also the following cases set out at length infra, III. b: Smith v. Courtney (1905) 27 Ky. L. Rep. 642, 85 S. W. 1101 (III. b, 1); Flanagan v. Flanagan (1880) 8 Abb. N. C. (N. Y.) 413 (III. b, 5); Greyston v. Clark (1886) 41 Hun (N. Y.) 125 (III. b, 1, 5); Re Davey (1910) 17 Ont. Week. Rep. 1034 (III. b, 1, 5).

b. Illustrations.

In Bevans v. Murray (1911) 251 Ill. 603, 96 N. E. 546, the will under consideration gave all the estate of the testatrix to her husband, "to be by him used and disposed of during his natural life precisely the same as I might do were I living, hereby giving to my said husband full power to sell, exchange, mortgage, invest and reinvest the same in the same manner as I might do if living, and to use so much of the income and principal thereof as he may desire," with remainder over of any of the estate undisposed of by the husband at the time of his decease. It was held that the authority to use so much of the income and principal as he might desire vested in the husband a large discretionary power as to the purposes for which he could use the proceeds of any sale of real estate. Under this authority, the court held he had the right, in addition to providing for his necessary support and maintenance, to provide means for his own pleasure and enjoyment, and, if he saw fit, to employ someone to relieve him of the management of the estate so devised. But the court held that the provisions were clearly made for his own personal benefit and advantage, and did not authorize him to give away any part of the property or change the residuary legatees, and hence held invalid a deed which purported so to do. The court, however, upheld the validity of a deed whereby the husband conveyed an undivided one-third interest to another in consideration of services to be rendered, money advanced to the husband by, and debts assumed by, the grantee.

In Goodrich v. Henderson (1915) 221 Mass. 234, 108 N. E. 1062, it appeared that a testatrix provided for the payment, from the income of the balance of her estate, of $25 a month to her two aunts jointly, during their natural lives, or to the survivor of them, and then gave the residue of her estate to her husband, for his life, empowering him to use the principal of the estate for any purpose which he might deem expedient. On his death, so much as might remain of the residue was to be divided equally among the testatrix's children. It was held that the husband was entitled under the will to the income of the residue of the property during his life, with a power of spending and consuming the principal, subject to the charge, amounting to $300 a year, in favor of the two aunts of the testatrix, until the death of the survivor of them. Until the death of both aunts, it was held, the husband could not exercise his power of spending and consuming the principal so that the remaining principal would not produce $300 a year; but, subject to that, he had the right during his lifetime to spend and consume the principal for any purpose which he in good faith might deem expedient.

In Kent v. Morrison (1891) 153 Mass. 137, 10 L.R.A. 756, 25 Am. St. Rep. 616, 26 N. E. 427, it appeared that a widow was given a life estate in her husband's property, with power "to sell and convey the same by deed (part or all of it), and the proceeds thereof are to be used for her comfort, and otherwise as she may think proper." It was held that this was a power to sell for any purpose, and to use the proceeds in any manner the devisee might think proper. The court held that the power given was as ample as that of an owner, save that it must be executed by a deed, and that under it, the devisee might sell all or any part of the real property and make the proceeds her own, whether necessary for her support or not. The court also held that, being an absolute and unrestricted power to sell for the benefit, and in the discretion, of the devisee, it included a power to mortgage.

In Dana v. Dana (1904) 185 Mass.

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156, 70 N. E. 49, the will under construction gave the testator's wife all the residue of his estate, not only to have and to hold, but to enjoy, during her life. She also, at her pleasure, might change the body of the estate so devised to her, into any form of investment that she deemed beneficial, and "sell and dispose of any or all of it, at her pleasure and discretion," as she thought necessary "for her own comfort and happiness, without accountability to any person whatsoever." In a later clause of the will, he devised and bequeathed "the reversion and residue of my said estate, if any," to certain specifically named relatives. It was held that the testator gave his wife, during her lifetime, as absolute and ample a power to dispose of the estate devised as would be possessed by an owner in fee; and hence that she might use part of the principal for charitable purposes.

In Auer v. Brown (1904) 121 Wis. 115, 98 N. W. 966, it appeared that a testator devised all his property to his wife, as follows: "For her life, without impeachment for waste, and without being in any way liable to account to any person or persons for said property or its use or the proceeds thereof. And I do also devise and give to my said wife full power and authority to grant, bargain, sell, transfer, exchange, barter, mortgage, or convey any or all of the said estate in fee simple and absolutely if she shall desire or choose so to do; also to convert any of said real estate into personal property, or any of said personal property into real estate, and so long as she lives she shall have and I do hereby give to her the full power and right to use all or any of said estate as she may desire, even if in so doing she shall use and exhaust the whole. She may not only use the same as she may need, but she may, during her life and subject only to her own discretion (in which I have all confidence), donate the same or its proceeds, or any part or portion thereof, to any person, persons or objects of her choice exactly the same as if and to the same extent as if she was the absolute owner in fee or absolutely." He disposed of any property that might remain at his wife's death, and then added: "Fifth. It is the true intent and meaning of the devise and bequest herein to my wife to give to her not only a technical life estate in said property, but also the right to exhaust the whole thereof if she choose so to do, trusting to her discretion, and to that end I do herein authorize and empower her to sell and convey absolutely in fee simple any or all of said property which I may die seised or possessed of, and to mortgage, transfer, or exchange the same as hereinbefore specified in subdivision two of this will, she being responsible to no one for any action she may take in the premises." It was held that an absolute power of disposition was conferred on the wife as life tenant, and that her conveyance of the property by a warranty deed carried the fee.

In Shapleigh v. Shapleigh (1899) 69 N. H. 577, 44 Atl. 107, the will construed bequeathed the residue of the testator's estate to his mother as follows: "All the rest, residue, and remainder of my estate, real, personal, and mixed, wherever found and however situate, I give, bequeath, and devise to my mother, Sarah A. Shapleigh, for and during her natural life, if she shall survive me, with the right and power to dispose of all and every portion thereof in her lifetime, if she shall find the same necessary to her comfortable support and maintenance, or shall desire so to do; hereby granting to the said Sarah A. Shapleigh the right to sell and convey, by absolute deed, any and all of my said estate, without license or orders from the probate court, and the right to manage the same as if this gift were entirely absolute, and the right to spend the whole income of the same and the principal, if she finds it necessary to do so for her comfort, or desires so to do. My will and wish being that she shall fully use, have, and enjoy said estate as if it were her own absolutely during her lifetime." All of his estate remaining at the decease of his mother, whether of principal or of accrued income, in whatever form the

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same might be, was bequeathed to a brother. The court said: "The question to be answered relates principally to the extent of the plaintiff's power to use the property devised. Is this power limited to providing for her reasonable necessities, or may it be exercised to gratify her desires? This question is answered by the express grant of 'the right to spend the whole income of the same [residue] and the principal, if she finds it necessary to do so for her comfort, or desires so to do.' Besides this provision, there are other provisions that tend very strongly to show the same intention. As has been seen from the foregoing analysis, there is a prior provision expressing this intent, but with less certainty. The testator's final expression of his 'will and wish' that the plaintiff 'shall fully use, have, and enjoy said estate as if it were her own absolutely during her lifetime' is unambiguous and emphatic to the same effect. The words, 'during her lifetime,' were evidently intended to limit the duration of her enjoyment of the estate and powers. They may be transposed without affecting the sense, so that the sentence will read: 'My will and wish being that she shall fully use, have, and enjoy said estate during her lifetime as if it were her own absolutely.' The bequest to Olivet College, in the ninth clause of the will, was made subject to a condition placed in the control of the plaintiff. If, in her judgment, the condition of the testator's estate did not warrant the bequest, it was to be void. The devise over after the termination of the life estate was not of the same property that was given to the plaintiff for life, but only of what remained of that property at her decease, 'whether of principal or of accrued income, in whatever form the same may be.' . . . There is no conflict in the evidence. It all tends to prove an intent that the plaintiff should have power to use the property during life as she desired, or 'as if it were her own absolutely.' If she desires to live in a more expensive style than she has lived in the past, or to travel, or to make charitable gifts, or to do any other thing within the bounds of good faith, she has power to use for the purpose the property bequeathed to her. Of course she must act in these matters in good faith, and not squander the estate for the mere purpose of preventing it from going to the remainderman. The power is not sufficiently extensive to allow her to dispose of the property by will. It is only to be exercised during the active enjoyment of the life estate and in aid of that enjoyment."

In Weston v. Second Orthodox Cong. Soc. (1915) 77 N. H. 576, 95 Atl. 146, it appeared that a testatrix gave the residue of her estate to her husband, to have and to hold during his natural life, or to dispose of for his support or benefit, or for the interest of the estate, as he might deem necessary. It was held that the general purport of the will was to place all the wife's property under the control of the husband, to do as he deemed necessary, without control or restriction; in other words, his power of disposition was not limited to his support, but was capable of exercise whenever he deemed it necessary for his benefit.

In Fitts v. Free Baptist Soc. (1910) 75 N. H. 608, 77 Atl. 484, the will therein construed gave the testatrix's husband the residue of her estate, in trust, to use for himself or for benevolent purposes, according to the wishes of her father, as expressed in his will, with the right to sell and convey the whole property, and to use and expend so much of it as might be necessary for his comfort and convenience. It was held that the husband took the property in trust, with power to sell and convey the same and to use the proceeds for himself if his comfort or convenience required, or for benevolent purposes, if he so desired, during his lifetime, with power to dispose by will of what remained.

In Re French (1888) 6 Dem. 108, 13 N. Y. S. R. 759, it appeared that by her will a testatrix gave all her personal property to her husband, and then added: "And wish my said husband to do with said property as he shall think best during his life, with-

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out any let or hindrance from any source whatever." By the next provision, she bequeathed to her daughter $8,000, to be paid out of her real and personal estate, at and after the death of her husband, provided there was that amount remaining. In the next provision, she stated: "I wish it to be distinctly understood that my said husband may use so much of my real and personal estate as he may wish to during his lifetime, and, at his death, if there be the sum of $8,000 remaining in his hands, that that amount be paid to my daughter [naming her], . . . and if there be not the sum of $8,000 in his hands, then and in that case it is my wish that my said daughter have and receive whatever then remains in my said husband's hands, to do with as she shall think best." It was held that while the disposition of the estate by the husband was limited to his lifetime, during that period he had the right to use and dispose of the whole estate; and this right was not limited to his maintenance and support, but he might provide himself with the comforts and luxuries of life,—with anything that would gratify his appetites or his tastes; and if, after all his wants had been supplied and his tastes gratified, any remained unexpended, that remainder he could not dispose of by will. In affirming the decree in (1889) 52 Hun, 303, 5 N. Y. Supp. 249, it was said that the adjudication made by the court below was with respect to the personal property only.

In the case of Re Ithaca Trust Co. (1917) 220 N. Y. 437, 116 N. E. 102, reversing (1916) 176 App. Div. 40, 162 N. Y. Supp. 355, it appeared that a testator's will gave all his property to his wife and mother, to be divided equally between them. A codicil to the will made by him later provided: "I hereby will and direct that the one half (½) of my estate which in said will I gave to my mother, Harriet Simpson, shall be hers absolutely to use up, spend or give away, in any way she sees fit, but I will and direct, in the event there is any of the property hereby willed to her left and undisposed of by her at the time of her death, that sum or amount of property thus willed to her shall belong to my said wife, Mary A. Simpson, providing she shall be living at that time, and, as thus modified, I hereby confirm my said will in all respects." It was held that the mother took a life estate with power to use, spend, or give away the principal in her lifetime, but without power of disposition by will.

In Warren v. Ingram (1910) 96 Miss. 438, 51 So. 888, Ann. Cas. 1912B, 422, wherein it appeared that a testator gave his wife all his property, to have and to hold during his life, and to do with the same as, in her judgment, she might deem best, it was held that the wife took a life estate, with the power at her discretion to convey the fee in the land devised.

In Andrews v. Brumfield (1856) 32 Miss. 107, it appeared that a bequest of property to the testator's wife was, in the first clauses of the will, limited to her, expressly, for the term of her natural life. By a later clause he declared it his will that the property bequeathed her by the former clauses should be delivered into her possession as soon after his death as possible, that she might have full control of the same, and be empowered to dispose of the same as she might think proper. It was held that the will showed, first, that the property was given for life; and, second, that the legatee should possess the power to sell, give, or transfer to whomsoever she might elect.

In Downie v. Buennagel (1884) 94 Ind. 228, it appeared that a testator devised to his mother a life estate in all his property, "with full power to sell the same, or any part thereof, and appropriate the proceeds to her own use," it being his will that she should enjoy the same as though it were devised to her in fee. It was held that a conveyance by the life tenant by a deed of general warranty was an execution of the absolute and unlimited power of disposition conferred on her.

In Gibony v. Hutcheson (1899) 20 Tex. Civ. App. 581, 50 S. W. 648, un-

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der a will giving all the testator's property to his wife, she to control and manage the same during her life as to her seemed best, and empowering her to buy, sell, and manage as to her judgment should seem best, it was held that the widow took an absolute life estate in her husband's property, with power to manage, sell, and dispose of the fee for her own benefit, but that she did not have, under this power, the right to make a fraudulent disposition of the property for the purpose of defeating the rights of the residuary legatees and devisees.

II. Life estate with power of anticipation for support and maintenance.

a. Purpose for which principal may be anticipated.

1. General rule.

Where a will gives a life interest by its express terms, with the power of disposing of part or all of the property for the particular purpose of the support and maintenance of the life tenant, with a valid gift over to others, which may be disappointed by the exercise of his power by the life tenant and the application of the principal to the purposes indicated, the life tenant has a right to the entire income of the property, or of so much thereof as is devised to him, depending on the context of the particular will, and is entitled to encroach on any or all of the principal of the estate, or the proceeds of a sale of the whole or any part thereof, if such encroachment is necessary for the purpose of obtaining a comfortable support and maintenance for himself, and is made in good faith, and not for the purpose of defrauding the remaindermen. He cannot, however, use the corpus for another purpose, nor give it away, nor waste it; nor can he devise it, either by will or by a deed operating as a testamentary disposition.

Alabama.—Cain v. Cain (1899) 127 Ala. 440, 29 So. 846.

California.—Hardy v. Mayhew, 158 Cal. 95, 139 Am. St. Rep. 73, 110 Pac. 113; Luscomb v. Fintzelberg (1912) 162 Cal. 433, 123 Pac. 247.

Delaware.—Newlin v. Phillips (1905) — Del. Ch. —, 60 Atl. 1068.

Georgia.—Stark v. Chambers (1913) 140 Ga. 601, 79 S. E. 535.

Illinois.—Henderson v. Blackburn (1882) 104 Ill. 227, 44 Am. Rep. 780; Griffin v. Griffin (1892) 141 Ill. 373, 31 N. E. 131; Lehnard v. Specht (1899) 180 Ill. 208, 54 N. E. 315; Fleming v. Mills (1899) 182 Ill. 464, 55 N. E. 373; Barr v. Gardner (1913) 259 Ill. 256, 102 N. E. 287; Burke v. Burke (1913) 259 Ill. 262, 102 N. E. 293.

Indiana.—South v. South (1883) 91 Ind. 221, 46 Am. Rep. 591; John v. Bradbury (1884) 97 Ind. 263; Rowley v. Sanns (1895) 141 Ind. 179, 40 N. E. 674; Rinkenberger v. Meyer (1900) 155 Ind. 152, 56 N. E. 913. See also Anderegg v. Ross (1859) 13 Ind. 413.

Iowa.—Re Proctor (1895) 95 Iowa, 172, 63 N. W. 670; Baldwin v. Morford (1902) 117 Iowa, 72, 90 N. W. 487; Rowe v. Rowe (1903) 120 Iowa, 17, 94 N. W. 258; Hamilton v. Hamilton (1910) 149 Iowa, 321, 128 N. W. 380 (see, however, a former opinion in this case, reported in (1908) 140 Iowa, 282, 115 N. W. 1012, 118 N. W. 375); Southwick v. Southwick (1918) — Iowa, —, 168 N. W. 807.

Kentucky.—Scott v. Scott (1867) 2 Bush, 147; Paxton v. Bond (1891) 12 Ky. L. Rep. 949, 15 S. W. 875; Hosman v. Willett (1908) 32 Ky. L. Rep. 906, 107 S. W. 334; Watkins v. Watkins (1909) — Ky. —, 120 S. W. 341.

Maine.—Hall v. Preble (1875) 68 Me. 100; Hall v. Otis (1880) 71 Me. 326; Nash v. Simpson (1886) 78 Me. 142, 3 Atl. 53; Pierce v. Stidworthy (1887) 79 Me. 234, 9 Atl. 617, judgment modified in (1888) 81 Me. 50, 16 Atl. 333; Richardson v. Richardson (1888) 80 Me. 585, 16 Atl. 250; Merrill v. Hayden (1893) 86 Me. 133, 29 Atl. 949; Hatch v. Caine (1894) 86 Me. 282, 29 Atl. 1076; Small v. Thompson (1899) 92 Me. 539, 43 Atl. 509; Haseltine v. Shepherd (1904) 99 Me. 495, 59 Atl. 1025; Richards v. Morrison (1906) 101 Me. 424, 64 Atl. 768.

Maryland.—Benesch v. Clark (1878) 49 Md. 497; Mills v. Bailey (1898) 88 Md. 320, 41 Atl. 780; Roberts v. Roberts (1905) 102 Md. 131, 1 L.R.A.

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(N.S.) 782, 111 Am. St. Rep. 344, 62 Atl. 161, 5 Ann. Cas. 805; Davison v. Safe Deposit & T. Co. (1906) 103 Md. 479, 63 Atl. 1044.

Massachusetts.—Dodge v. Moore (1868) 100 Mass. 335; Hoxie v. Finney (1888) 147 Mass. 616, 18 N. E. 593; Stocker v. Foster (1901) 178 Mass. 591, 60 N. E. 407; Champney v. Bradford (1907) 196 Mass. 259, 81 N. E. 993; Allen v. Hunt (1913) 213 Mass. 276, 100 N. E. 552; Kemp v. Kemp (1916) 223 Mass. 32, 111 N. E. 673; Griffin v. Kitchen (1917) 225 Mass. 331, 114 N. E. 431; Sparhawk v. Goldthwaite (1917) 225 Mass. 414, 114 N. E. 718; Homans v. Foster (1919) — Mass. —, 121 N. E. 417.

Michigan.—Glover v. Reid (1890) 80 Mich. 228, 45 N. W. 91; McCarty v. Fish (1891) 87 Mich. 48, 49 N. W. 513; Farlin v. Sanborn (1910) 161 Mich. 615, 175 Am. St. Rep. 525, 126 N. W. 634; Walsh v. Backus (1914) 183 Mich. 527, 149 N. W. 1022; Drier v. Gracey (1918) — Mich. —, 169 N. W. 835; Woolfitt v. Preston (1918) — Mich. —, 169 N. W. 838.

Missouri.—Dougherty v. Dougherty (1907) 204 Mo. 228, 102 S. W. 1099; Griffin v. Nicholas (1909) 224 Mo. 275, 123 S. W. 1063; Trigg v. Trigg (1917) — Mo. —, 192 S. W. 1011.

New Hampshire.—Tilton v. Tilton (1900) 70 N. H. 325, 47 Atl. 256; Barker v. Clark (1903) 72 N. H. 334, 56 Atl. 747; Gage v. O'Neill (1918) — N. H. —, 103 Atl. 262.

New York.—Bell v. Warn (1875) 4 Hun, 406; Thomas v. Pardee (1877) 12 Hun, 151; Re Grant (1891) 61 Hun, 624, 40 N. Y. S. R. 944, 16 N. Y. Supp. 716, followed in (1895) 86 Hun, 617, 66 N. Y. S. R. 822, 33 N. Y Supp. 193; Terry v. Wiggins (1872) 47 N. Y. 512, affirming (1869) 2 Lans. 272; Smith v. Van Ostrand (1876) 64 N. Y. 278, reversing (1873) 3 Hun, 450, 5 Thomp. & C. 664; Rose v. Hatch (1891) 125 N. Y. 427, 26 N. E. 467, affirming (1890) 55 Hun, 457, 8 N. Y. Supp. 720; Swarthout v. Ranier (1894) 143 N. Y. 499, 38 N. E. 726, affirming (1893) 67 Hun, 241, 22 N. Y. Supp. 198; Simmons v. Taylor (1897) 19 App. Div. 499, 46 N. Y. Supp. 730; Re Hunt (1903) 84 App. Div. 159, 82 N. Y. Supp. 538, affirmed in 179 N. Y. 570, 72 N. E. 1143; Hasbrouck v. Knoblauch (1909) 130 App. Div. 378, 114 N. Y. Supp. 949, modifying judgment and affirming point under discussion in (1908) 59 Misc. 99, 112 N. Y. Supp. 159; Re Briggs (1917) 180 App. Div. 752, 168 N. Y. Supp. 597, modifying (1917) 101 Misc. 191, 167 N. Y. Supp. 632; Peck v. Smith (1918) 183 App. Div. 336, 170 N. Y. Supp. 500; Blauvelt v. Gallagher (1897) 22 Misc. 564, 49 N. Y. Supp. 608; Huggins v. Lewis (1900) 31 Misc. 292, 64 N. Y. Supp. 355; Re Weeden (1902) 37 Misc. 716, 76 N. Y. Supp. 462; Re Hunt (1902) 38 Misc. 30, 76 N. Y. Supp. 968, affirmed in (1903) 84 App. Div. 159, 82 N. Y. Supp. 538, which is affirmed in (1904) 179 N. Y. 570, 72 N. E. 1143; Re Parsons (1902) 39 Misc. 126, 78 N. Y. Supp. 975; Re Trelease (1906) 49 Misc. 205, 96 N. Y. Supp. 318, affirmed in (1906) 115 App. Div. 654, 100 N. Y. Supp. 1051; Re Hibbard (1907) 53 Misc. 196, 104 N. Y Supp. 583. See also Re Rogers (1914) 149 N. Y. Supp. 462.

Pennsylvania.—Gross v. Strominger (1896) 178 Pa. 64, 35 Atl. 852; Yetzer v. Brisse (1899) 190 Pa. 346, 42 Atl. 677; Tyson's Estate (1899) 191 Pa. 218, 43 Atl. 131; Trout v. Rominger (1901) 198 Pa. 91, 47 Atl. 960; Henninger v. Henninger (1902) 202 Pa. 207, 51 Atl. 749; Kennedy v. Pittsburg & L. E. R. Co. (1907) 216 Pa. 575, 65 Atl. 1102; Allen v. Hirlinger (1907) 219 Pa. 56, 13 L.R.A.(N.S.) 458, 123 Am. St. Rep. 617, 67 Atl. 907; Nieman's Estate (1910) 229 Pa. 41, 77 Atl. 1095; Watson's Estate (1913) 241 Pa. 271, 88 Atl. 433; Morel v. Oakley (1916) 253 Pa. 107, 97 Atl. 1029; Aurand's Estate (1916) 25 Pa. Dist. R. 725. See also Doran v. Piper (1894) 164 Pa. 430, 30 Atl. 306; Richey's Estate (1915) 251 Pa. 324, 96 Atl. 748.

Rhode Island.—Phillips v. Wood (1887) 16 R. I. 274, 15 Atl. 88; Phillips v. Brown (1888) 16 R. I. 279, 15 Atl. 90; Gardner v. Whitford (1901) 23 R. I. 396, 50 Atl. 642. See also Re Tilton (1899) 21 R. I. 426, 44 Atl. 223.

South Carolina.—Moody v. Tedder (1881) 16 S. C. 557.

Tennessee.—Matthews v. Capshaw

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(1902) 109 Tenn. 480, 97 Am. St. Rep. 854, 72 S. W. 964; Emert v. Blair (1908) 121 Tenn. 240, 118 S. W. 685.

Vermont.—Parks v. American Home Missionary Soc. (1889) 62 Vt. 19, 20 Atl. 107.

Wisconsin.—Otjen v. Frohbach (1912) 148 Wis. 301, 134 N. W. 832.

Canada.—Knapp v. King (1874) 15 N. B. 309.

The rule as heretofore stated is also applicable to such personal property as money. If given a life interest therein, with the power to use the principal for certain purposes, as for his support and maintenance, the life tenant may not use it for any other purpose and may not give it away. Hardy v. Mayhew (1910) 158 Cal. 95, 139 Am. St. Rep. 73, 110 Pac. 113.

In Pennsylvania, where a testator provides by his will for the comfortable maintenance of his widow, the orphans' court has jurisdiction to fix the amount and to enforce payment of the sum required for that purpose. Baylor's Estate (1915) 249 Pa. 5, 94 Atl. 442. See also Gelb v. Weisberger (1915) 247 Pa. 416, 93 Atl. 499. And it is held in that state that where a will contains a provision for the appropriation of so much of the principal as shall be necessary for the maintenance of the testator's widow during her life, this appropriation is not intended to be used merely as a supplement to the widow's own industry, or to the charity of her child or children, but is to be measured by the reasonable cost of her living, and it can matter nothing to the estate how she obtained that living. Mounts's Appeal (1884) 107 Pa. 402; Baylor's Estate (Pa.) supra. So, where a person has two funds to draw on for living expenses, one his own individual estate, and the other the estate of another in which he has a life interest with power to consume, in the absence of evidence to the contrary, there is a presumption that he would expend the latter before drawing on the former. Richey's Estate (1915) 251 Pa. 324, 96 Atl. 748. See also Welsh's Estate (1913) 239 Pa. 616, 86 Atl. 1091.

In the case of Richey's Estate (Pa.) supra, on an accounting by the executor of the estate of a decedent to whom her husband in his will had given a life interest with the power to consume so much of the principal as she might find necessary for her comfortable maintenance and support, the principal controversy at bar concerned a comprehensive claim by the accountant to cover money expended by his decedent in her lifetime for support and maintenance, he having placed a general item in the account embracing living expenses, doctor's bills, medicines, help in house, washing, and other expenses of like character, without any particularization. It was held that the court below had properly received testimony showing the position in life occupied by the life tenant, the style and manner in which she maintained herself, her state of health, etc., and had properly concluded that she must have spent at least the amount claimed, and for which credit was allowed.

2. Particular rights and uses.

(a) Personal use.

In each of the following cases it was held that, by the testamentary provision indicated, the life tenant took a power to anticipate the principal for his personal use as his necessities might require, but for no other purpose:

Barr v. Gardner (1913) 259 Ill. 256, 102 N. E. 287. The will gave the testator's widow, in addition to the use, interest, and income of one half of the remainder of the personal estate after the payment of debts, so much of the principal as might be necessary for her comfortable maintenance and support during her natural life.

Anderegg v. Ross (1859) 13 Ind. 413. The first item of the disposing part of a will was a bequest to the testator's wife of all his real and personal estate and everything which he had or owned at the time of his decease, for and during her natural life, she paying all his debts and a certain legacy,—not the executors. Other special legacies were then provided for, to be paid after the death of the widow out of such parts of his per-

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sonal estate, or the proceeds thereof, as might be in the hands of his wife at the time of her death; and it was further provided that if the personal property was not sufficient for that purpose, lands should be sold, etc., but no provision was made for a resort to the executors to obtain funds for that purpose. Certain residuary legacies were then set forth of all the residue of his personal and real estate, and the proceeds thereof, at the death of his wife, "which may remain unconsumed and unexpended in my said wife's hands," excepting the amounts necessary for the payment of the special legacies. Then followed a provision that the testator's wife should use all the personal estate and the rents and profits of the real estate, "or so much thereof as she may require for her use and benefit," but this was followed immediately by the language, "and may and shall have the absolute use and control of all my said real and personal estate for and during the term of her natural life, and no longer;" and then again the expression occurred that she should have "the right to use, expend, and consume such parts and portions of my said personal estate, and the rents, issues, and profits of my real estate, as she may require for her own use and benefit."

Scott v. Scott (1867) 2 Bush (Ky.) 147. The will contained the following clause: "I direct that my wife shall have as much of the stock, implements, furniture, and personal property, including money on hand at my death, as she may think necessary for her comfort, convenience, and maintenance."

Watkins v. Watkins (1909) — Ky. —, 120 S. W. 341. The testator directed the executors of his will to invest the money derived from the sale of his business in bonds, and to use the interest for his wife, "from year to year, enough to keep her comfortable, and if necessary to use some of the capital to keep her comfortable."

Pierce v. Stidworthy (1887) 79 Me. 234, 9 Atl. 617. The testator gave all his residuary estate to his wife "for the term of her life, with the right and power to dispose of the income, rents, profits and interest of the same, and with the further right to apply to her use, if needed, any part of the principal of the personal property, making her sole judge of the need of so doing."

Merrill v. Hayden (1893) 86 Me. 133, 29 Atl. 949. The will gave all the testator's property to his daughter for life, "the income thereof and so much of the principal as she shall need, to be spent by her," the residue both of the principal and income left at her decease to go to a missionary society.

Hatch v. Caine (1894) 86 Me. 282, 29 Atl. 1076. The will gave the residuary estate to the testator's wife, for her use and benefit during her life, with full power to sell and convey or exchange any or all of it, "and to use the principal thereof, if in her judgment her comfort requires it; she to be the sole judge of the amount needed, and having the right to spend the whole if she deems it necessary;" and whatever remained of his estate at her decease, not disposed of by her, was to go to a mission society.

Small v. Thompson (1899) 92 Me. 539, 43 Atl. 509. The testator gave all of his estate, after the payment of debts, funeral expenses, and charges of administration, to his widow for her life, with an absolute power of disposal for her use and benefit, and at her death and "after payment of her just debts and funeral expenses," the remainder, if any, to his children. In a codicil to the will, the testator stated: "But to make more clear my intention therein I declare that my will is, that the gift, bequest and devise to my said beloved wife is not to be absolute or an estate in fee but an estate for and during her natural life, with the right to dispose of the property so given, bequeathed and devised to her, by full title under the authority of the said will as therein provided, for her benefit, so far as she may deem necessary."

Richards v. Morrison (1906) 101 Me. 424, 64 Atl. 768. The will gave the residue of the estate in trust,

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and directed the trustees "pending the settlement of my (his) estate and until final division," to pay to his wife ten twenty-sevenths portion of the income "during her lifetime, or until final settlement of my (his) estate," for her sole use and benefit; and, after disposing of the balance of income to other parties, he provided that on "final settlement of my estate or distribution thereof, my trustees shall convey and deliver to my wife ten twenty-sevenths parts of this my residuary estate, and she may herself select such portion from any parcels of my residuary estate at the appraised value thereof. It is my will that my wife have the entire use and income, during her lifetime, of all said portion of my residuary estate; and in addition thereto, I do authorize and empower her to sell and convey by her own grant or deed any of said estate, real or personal, which she may in the exercise of her own discretion elect to sell and convey for her sole use and benefit, without license of probate court." Then followed a gift over to other parties of what "at her death shall remain unused, unexpended or unsold and unconveyed by her."

Mills v. Bailey (1898) 88 Md. 320, 41 Atl. 780. The residuary clause of a will gave the testator's wife all the residue of his estate, "to be held by her during the term of her natural life with full power to her to use, consume or dispose of any portion of the said personal estate, in her discretion, as her necessities or comfort may require."

Roberts v. Roberts (1905) 102 Md. 131, 1 L.R.A.(N.S.) 782, 111 Am. St. Rep. 344, 62 Atl. 161, 5 Ann. Cas. 805. The testator left his entire estate to his wife, "for and during the term of her natural life, in trust for the use and benefit of herself and our children," and gave her authority to use so much of the principal as might be required, "if it shall be necessary for the support of herself and our children, or for their education or advancement in life [all of which I confide to her discretion]."

Bamforth v. Bamforth (1877) 123 Mass. 280. The will gave the testator's parents the use and improvement of all his estate, "and so much of the estate itself as may be necessary for their comfortable support so long as either of them shall live," with a gift over of the estate then remaining.

Whitcomb v. Taylor (1877) 122 Mass. 243. The testator's widow was given a life estate in the property left by him, with the right to sell such parts as were necessary for her use and maintenance during her life.

Gibbins v. Shepard (1878) 125 Mass. 541. The will provided in part as follows: "After payment of my just debts and funeral expenses, I give and devise to my said executrix one third of all my real estate, to her sole use and behoof forever, together with all the furniture or personal property now in the house, and the other two thirds I leave in her power, and bequeath to her for her support during her lifetime, and leaving it as an injunction on her to divide it on the children at her death, as she deems best, and as they deserve."

McKenzie v. Ashley (1888) 145 Mass. 577, 15 N. E. 88. Under the will of her husband, a widow was entitled to the income for life of the residue of his estate after the payment of two legacies to herself, and also to so much of the principal as should be necessary to give her a good and comfortable support.

Allen v. Hunt (1913) 213 Mass. 276, 100 N. E. 552. The will devised all the testator's property to his wife, "to be used and enjoyed by her for her comfort and support during her natural life;" and further provided that in case any part of the estate devised to the wife as aforesaid was not used by her for her comfort and support during her natural life, and was remaining on her decease, it should be disposed of as therein stated.

Morford v. Dieffenbacker (1884) 54 Mich. 593, 20 N. W. 600. The will devised the residue of the estate to the mother of the testatrix "for and during her natural life; and in case the use of said property shall be insufficient for her support, then and

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in such case thereby authorized her to dispose of such of said property and such amounts thereof as shall be sufficient for her support, and whatever shall remain at her death" was then given to a cousin.

Glover v. Reid (1890) 80 Mich. 228, 45 N. W. 91. The will gave all the testator's estate to his wife "for her own use and benefit and disposal, for and during the term of her natural life, leaving said estate to be used and disposed of by her, wholly to the discretion and judgment of my said wife as she may decide her needs require," the remainder of his estate, after her decease, to go to his children.

McCarty v. Fish (1891) 87 Mich. 48, 49 N. W. 513. The will gave all the property of the testatrix to her husband "for and during his natural lifetime, to be used by my said husband, Reuben Palmer, during his lifetime in defraying his necessary expenses; and, should the income of said property not be sufficient for that purpose, then he is to use so much of the principal as may be necessary. Should there be any property left after the paying of the expenses of my said husband . . . then, in that case, after his death, I do will and dispose of the property remaining in the manner following."

Farlin v. Sanborn (1910) 161 Mich. 615, 137 Am. St. Rep. 525, 126 N. W. 634. The will devised all the estate of the testator to his wife, for and during her natural life, with full power and authority to use and dispose of the same for her use, support, and comfort, as to her should seem best, giving her full power to sell and convey all or any of the real estate, at her option, as fully as he himself could do, with a devise of all the property that might be remaining on her decease to his heirs.

Walsh v. Backus (1914) 183 Mich. 527, 149 N. W. 1022. The will gave the testator's wife, after the payment of funeral expenses and debts, all the testator's property, "to have, hold, use and enjoy the same for and during the term of her natural life, with full power to sell, convey or exchange any or all of said property, real or personal, and without any restrictions whatever as to the amount of said personal property she shall use for her support and benefit, should she need the same owing to sickness or other emergency which would require the use of more than the income from said real and personal property."

Eaton v. Straw (1846) 18 N. H. 320. The testator gave all his property to his daughter, "but in case she should die and leave no issue, so much of my real estate as she shall not need for her support during her natural life" was given to another.

Tilton v. Tilton (1900) 70 N. H. 325, 47 Atl. 256. The testator gave his wife the use and income of his residuary estate during life, without impeachment of waste. If such use and income should prove insufficient for her support and maintenance, he also gave her so much of the principal as might be necessary for that purpose. Whatever might be left unexpended at her decease, he gave to the plaintiffs. He nominated his wife sole executrix, and exempted her from giving a bond. He also gave her full power to sell, convey, invest, and reinvest the property, in her discretion.

Clough v. Clough (1902) 71 N. H. 412, 52 Atl. 449. The will gave the testator's wife the use and income of all his estate, to have and enjoy the same for and during her natural life if she remained his widow; and, in case the use and income should not be sufficient for her comfortable support, declared it his will that she should use so much of the principal of his estate as she might think sufficient for that purpose.

Gage v. O'Neill (1918) — N. H. —, 103 Atl. 262. The will gave all the estate to the testator's wife "during her natural life for her comfort, pleasure and maintenance, and the control and management of the same," and by another clause gave what remained of his estate after the death and burial of his wife, "or the proceeds thereof then remaining unconsumed and unexpended," to his legal heirs.

Bell v. Warn (1875) 4 Hun (N. Y.)

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406. A codicil provided as follows: "The sum of $1,250 bequeathed to my daughter Hannah J. Bell by my said will, I attach the following conditions and directions: The said sum of money shall be invested on good security, and the interest semiannually paid to her from my decease during her life, and if the said Hannah, by reason of sickness or want, shall require for her support any of the said principal sum, I direct my executors to pay to her such portion or portions of the same, from time to time, as she may require or need, even to the whole amount of said principal sum; if at her death any of the said principal sum remains, I bequeath the same to her children, share and share alike."

Thomas v. Pardee (1877) 12 Hun (N. Y.) 151. The testator first gave his wife, during her natural life, such portions of his library as she might wish, and, in effect, authorized her to dispose of the remainder in such manner as she should deem best. He then gave to her "all my real and personal estate, to be possessed and used by her at her discretion, and for her support and comfort during her natural life, having confidence in her that it will be used and retained, and the amount, the increase and the residue, whether more or less, left sacred to the purposes to which we mutually agreed to devote it." He then authorized her, in a certain contingency, to dispose of the household goods and furniture, and, after stating the reason therefor, he gave to certain benevolent societies all his estate in his wife's possession and held by her up to and at the time of her decease, after her funeral expenses were provided for, in the same clause adding, "to be held in trust by my executor," he to divide and pay over to the societies after her decease.

Re Grant (1891) 61 Hun, 624, 40 N. Y. S. R. 944, 16 N. Y. Supp. 716, followed in (1895) 86 Hun, 617, 66 N. Y. S. R. 822, 33 N. Y. Supp. 193. The will gave the testator's wife the right to possess and enjoy the rents and profits of his entire estate during her natural life, and further provided that if the use and profits were not sufficient for her support, a sale thereof might be made for her support. The remainder over after the death of the wife was given to his children and grandchildren.

Re Briggs (1917) 180 App. Div. 752, 168 N. Y. Supp. 597, modifying (1917) 101 Misc. 191, 167 N. Y. Supp. 632. The testatrix provided in her will for the payment of the income of her estate to her husband quarterly during his life, and then declared: "I further direct that he use during his life as much of the principal of my estate as in his judgment is necessary and proper, and that he in no way be held liable or accountable for such principal so used."

Re Hunt (1902) 38 Misc. 30, 76 N. Y. Supp. 968, affirmed in (1903) 84 App. Div. 159, 82 N. Y. Supp. 538, which is affirmed in (1904) 179 N. Y. 570, 72 N. E. 1143. The will gave the income of all his estate to the testator's wife, "and as much of the principal as she thinks proper for her support, and for the care which she shall give to our son," with the privilege of disposing of the real estate if she thought best, and remainder over to trustees for the support of the son. See also a later appeal in this case (1903) 84 App. Div. 159, 82 N. Y. Supp. 538, affirmed in (1904) 179 N. Y. 570, 72 N. E. 1143.

Hasbrouck v. Knoblauch (1909) 130 App. Div. 378, 114 N. Y. Supp. 949, modifying (1908) 59 Misc. 99, 112 N. Y. Supp. 159. The will devised his entire estate to his widow "for her use and behoof during her natural life, she to have absolute control and disposal of all the income to be derived therefrom and so much of the principal as she may deem necessary for her comfortable sustenance and support."

Re Weeden (1902) 37 Misc. 716, 76 N. Y. Supp. 462. The will gave the testatrix's husband the use and occupancy of all her estate, both real and personal, during his lifetime, "and to such extent as he may deem necessary for his comfort."

Re Hibbard (1907) 53 Misc. 196, 104 N. Y. Supp. 583. The will gave the wife of the testator the entire use

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of his real and personal property during her life, "to draw on principal for her necessary support during life."

Huggins v. Lewis (1900) 31 Misc. 292, 64 N. Y. Supp. 355. The will gave the wife of the testator possession, control, management, and all of the income from his property for and during her natural life, and then provided that "should my children, or either of them [naming them], by reason of sickness or unforeseen calamity, become necessitated as to require assistance in their proper and necessary care and support, and the income and profits arising from the real estate and investments in the hands of my said wife, as above mentioned, shall prove insufficient for her proper support and to afford the necessary contribution for the aid of my said children, or either of them, then my said wife as such trustee is empowered to use sufficient of my estate in meeting the requirements of the emergency to the extent her best judgment may dictate."

Re Parsons (1902) 39 Misc. 126, 78 N. Y. Supp. 975. The will provided that the husband of the testatrix was to have the use and income of her property, subject to the bequests therein made, during his life, "and any part of the principal that may be needed for his support."

Re Trelease (1906) 49 Misc. 205, 96 N. Y. Supp. 318, affirmed in (1906) 115 App. Div. 654, 100 N. Y. Supp. 1051. The testator gave his wife a certain sum, "the money to be invested on bond and mortgage or in other property, and she shall have the income thereof; and she shall have the right to use the principal as she may need it."

Marsh v. Consumers Park Brewing Co. (1917) 220 N. Y. 205, 115 N. E. 513, reversing (1914) 162 App. Div. 256, 147 N. Y. Supp. 695. The will contained the following codicil: "It is my wish that each of my sons shall receive a collegiate education and also such professional or business education as they shall respectively desire, and also that my daughters shall be thoroughly educated, and it is my will and I hereby direct that if, in the judgment and discretion of my wife, in order so to complete the education of my children, and to provide for the other necessary expenses of the family, and for her own support, the rents, income and profits of my estate shall be insufficient, then my said wife shall from time to time at her discretion use and expend for the purpose aforesaid so much of the principal of my estate as she may find necessary for such purposes."

It was held that the power to anticipate the principal was limited in three several particulars: (1) Lack of sufficient income; (2) to be exercised not at one time, but "from time to time;" (3) to "so much only of the principal as she may find necessary for such purposes."

Re Wyatt (1894) 9 Misc. 285, 30 N. Y. Supp. 275. The testator bequeathed the residue of his real and personal property to his wife, for and during her life, "to have, hold, use and enjoy the rents, issues and income thereof, and, if she shall need the personal property of which I may die seised for her comfort, maintenance and support, she may use the whole or any part of it therefor."

Gross v. Strominger (1896) 178 Pa. 64, 35 Atl. 852. A testator gave his wife all the residue of his estate "during her natural life," and authorized her to sell the same if she desired, to "put the money derived therefrom upon interest," and to "use all the said interest, if required for her own subsistence." He then provided that, if the interest was not sufficient "for her own personal wants and comfort," she might "take of the principal sufficient to make her comfortable," and directed that whatever was left at her decease be divided between his children and a grandson.

In La Bar's Estate (1897) 181 Pa. 1, 37 Atl. 111, the material portions of the will involved were as follows: "Second. I give and devise the house and lot where I now reside and the household furniture therein to Arminda Treible [testator's housekeeper], who now lives with me, for and during such part of her natural life as she remain unmarried; and upon

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her death or marriage, I direct the same to be sold by my executors hereafter named and the proceeds thereof to be distributed as is provided hereafter in regard to my residuary estate. . . . Third. I also direct that fifty-six shares of the stock of the First National Bank of Easton and fifty shares of the stock of the Northampton County Bank be held in trust for the said Arminda Treible so that she receive all the income or dividends arising or accruing therefrom, immediately from and after my death, so long as she remain unmarried, and if at any time or times she needs any part of the principal of the stock she is at liberty to receive it for her support and maintenance. If any part of said stock is remaining at her death or marriage it shall be distributed as is hereinafter provided in relation to my residuary estate. . . . Seventh. All the rest, residue, and remainder of my estate, real and personal, shall be divided as is provided and set forth in the intestate laws of the commonwealth of Pennsylvania. But I declare that it is my will and intention in the second and third items of this my will that Arminda Treible shall have the use and enjoyment of my Shawnee house and lot and everything therein contained for and during all the time of her life she remain unmarried, and, if she deems it necessary, may at any time or times use part or all of the principal of the bank stock for her support or maintenance."

Lininger's Appeal (1885) 110 Pa. 398, 1 Atl. 722. A will directed that the testator's wife should have the use and occupancy of all his real estate during her natural life, to be held and enjoyed by her as her own. It directed that she take into possession, hold, or convert into cash, his entire personal property, "and if the proceeds of my real estate be not sufficient to support her she is at liberty to take as much of the personal fund or money as she may see proper for that or any other purpose," with remainder over, and provided that his executors should not enter on their duties as executors until after the death of his wife.

Trout v. Rominger (1901) 198 Pa. 91, 47 Atl. 960. A testator bequeathed all his residuary estate to his wife, "to have and to hold the same to her own use, benefit and behoof forever; the same to be and remain for her just and necessary support during the natural life of her." In case any of the above-bequeathed property should remain at the date of his wife's death, he directed that it be divided between his children.

Nieman's Estate (1910) 229 Pa. 41, 77 Atl. 1095. A codicil to a will declared that "it is my will and intention that my said wife, Johanna M. Nieman, shall have full power and authority to apply such portion or portions of my said estate, the principal as well as the income thereof, to her own use during her life; and after her death such property of which she shall die seised, shall be applied as in my said will directed."

Watson's Estate (1913) 241 Pa. 271, 88 Atl. 433. The testator gave his residuary estate to his wife, for her sole use, benefit, and support during her natural life, and to be in her sole control and direction. "Whatever remains of the same at her death" was to be converted into money, and all his "estate so remaining after the death of" his wife was to go to the heirs of his deceased brothers and sisters.

Aurand's Estate (1916) 25 Pa. Dist. R. 725. The testator bequeathed all his estate to his wife, "for her maintenance during her natural life," and "should there remain anything of" his estate at the death of his wife, he bequeathed "the same and all that remains not consumed by my wife" to his adopted daughter.

Hambright's Appeal (1859) 2 Grant, Cas. (Pa.) 320. A testator bequeathed a certain sum of money to his wife "for her full use during her lifetime, and at her death, if any left," he desired that it should go to others.

Moody v. Tedder (1881) 16 S. C. 557. The testator gave to his widow, "during the term of her natural life only, all his property, both real and personal, authorizing and empowering her to use and dispose of so much

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thereof as may be necessary for her comfortable support and maintenance in such style and manner as she may see fit," with a gift over, after the death of his wife, of "whatever portion may be remaining of his" property.

Pillow v. Rye (1851) 1 Swan (Tenn.) 185. Testatrix declared her intention to provide for the personal comfort and independence of her daughter during her natural life; and the will, after setting apart to this end certain property, proceeded as follows: "But it is my will and intention, that all the property, real and personal, and all the money herein set apart for her, the said Martha W., shall be for her sole and separate use, during her natural life, free from any debts or charges of any future husband she may have. My object is, to make a provision for her, and not to postpone her interests to those of my remote descendants; and if, for any cause, it becomes necessary for her ease and comfort, to use any portion of the principal of the property and money herein set apart for her, it is my wish that it should be done. It is my wish that she should have the full use and enjoyment of all this property and money during her natural life; and if she marries again, and has other children, or dies, leaving those only she now has, in either event, it is my will that the property and money, or the part remaining after providing for her in the manner herein declared, shall go to her children," etc.

McGavock v. Pugsley (1874) 12 Heisk. (Tenn.) 689, affirming (1873) 1 Tenn. Ch. 410. Testator gave all his residuary estate to his wife, "to be used and enjoyed by her during her natural life, hereby authorizing her to sell or dispose of the same in any way she may deem necessary for the convenience and support of herself and our two daughters," and if, at the death of his wife, any part or portion of his property should remain, it was to be divided between the daughters.

Emert v. Blair (1908) 121 Tenn. 240, 118 S. W. 685. A clause of the will was as follows: "In order to afford my wife, Mrs. Martha J. Emert, a comfortable and secure support during her life out of my estate, I hereby devise and bequeath to her, for the time of her natural life, all my property, real, personal and mixed, to have, manage, and use for her support during said time. At her death said property shall be divided among my lawful heirs and distributees, according to the laws of inheritance and distribution in Tennessee." The third clause was: "To more effectually provide for my said wife, I hereby invest her with power to sell and convey any of said property for the use aforesaid. This power is given because some of said realty consists of mountain farms which may fail to sufficiently contribute to my wife's support. My realty in Sevierville my wife shall not sell, unless, in her judgment, her support absolutely requires the same. Any of my other realty my wife may sell if in her judgment she can then make said property more conducive to her support. In case of sale of any of said realty, the proceeds shall be loaned out with good security or reinvested, the interest or income to be applied to her support, the principal or property so purchased to belong to my estate. But if my wife's comfortable support should in her judgment demand an appropriation by her of part or all of said principal or property, she is hereby vested with such power." The fifth clause provided as follows: "That there may be no mistake, I here again direct that, at my wife's death, the realty unsold of my estate or, in case my wife exercises the power of sale herein conferred, the proceeds of such sale or sales or the property purchased thereby in case of reinvestment, or the remainder of the principal, if any, of the proceeds, in case the principal is diminished, shall belong to my estate, and shall be divided among my lawful heirs and distributees according to the laws of inheritance and distribution in Tennessee." "My intention is to give my wife the use of my entire estate for her support during her life, or, if the

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profits of my estate are in her judgment insufficient, then to give her the right to convert to her own use so much of my estate as will be sufficient for that purpose, but the balance, if any, to belong to my estate at her death, in whatsoever shape it may be found."

(b) Sale.

(1) Express power to sell.

In general.

Where a life tenant is, in express terms, given a power to sell the property, he may, of course, make such a sale, provided the prescribed conditions as to the occasion of a sale exist.

Thus, in South v. South (1883) 91 Ind. 221, 46 Am. Rep. 591, it appeared that a testator gave his wife full authority to dispose of any of his personal property that she might think proper, either for the payment of his debts or for any other purpose that she might think proper, and if his personal estate should have become exhausted, then and in that case, he authorized her to sell and convey the real estate in as full and ample a manner as he could have done if he had been living. In upholding a deed by the widow, it was held that the effect of the provision was to invest the wife with a right to consume all the property she chose for her maintenance and comfort, and to sell, at her election, such property as she deemed necessary for her comfortable support.

In Rowley v. Sanns (1895) 141 Ind. 179, 40 N. E. 674, it appeared that land was devised to a husband by his wife for his life, with power to sell all or any part thereof, if it should be deemed necessary by him for his support and maintenance. In sustaining a deed by the husband, the court held that, under the will, he received a life estate in the whole property, with a qualified or limited power to sell so much thereof as he might think necessary for his support and maintenance.

In Henninger v. Henninger (1902) 202 Pa. 207, 51 Atl. 749, it appeared that a will contained the following provision: "All the residue of my estate, real, personal and mixed, of which I shall die possessed . . . I will and devise to my beloved wife, Sarah A. Coover, to be hers during her life, with the right in her, however, to use, sell and dispose of any or all of said estate for the use and support of herself and Mrs. Elizabeth W. Henninger. Should my wife die before Mrs. Elizabeth W. Henninger, my will is that such portion of my estate as shall then remain shall be for the use and support of Mrs. Elizabeth W. Henninger, with the right in her to sell and dispose of the same for her maintenance and support, and upon the death of both my wife, Sarah, and Mrs. Elizabeth W. Henninger, and after the payment of their funeral expenses, what portion of my estate shall then remain shall vest in and become the absolute property of my sister, Eliza Bishop, and her heirs." The court held that on the death of the widow, the surviving devisee, Mrs. Henninger, became sole life tenant of the property, with a superadded power of sale, and upheld a contract made by her for the sale of certain real estate covered by the devise.

In Drier v. Gracey (1918) — Mich. —, 169 N. W. 835, it appeared that a will, after giving all the testator's property to his wife for her life, declared it his will that "my said wife shall and I do hereby give to her the privilege and power of disposing and conveying away any portion of said real or personal estate that may be necessary to be disposed of for her support, maintenance and comfort so long as she shall live, provided the increase and rents and profits of the same estate shall not be sufficient for that purpose, and also the right to turn off and dispose of such of said personal estate as shall to her seem best on account of age or wear and tear, substituting others in the place and stead of the same, or keeping it good by increase, hereby giving to her full power to manage the same according to and dispose of it as in her judgment seems best," with remainder over to his children. It was held that the will clearly gave the power to sell the corpus for her support.

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In Nash v. Simpson (1886) 78 Me. 142, 3 Atl. 53, it appeared that a testator devised all his real estate to his wife, "to remain hers so long as she shall remain unmarried after my decease." He also stated that it was his desire and will that his real estate should remain as it then was for twenty years, giving, however, all the income thereof to his wife, and authorizing her, in case of necessity, to sell any part thereof for her support and maintenance during her widowhood. It was held that, by the will, the widow took a life estate, with a contingent power to sell any part of it during her widowhood.

In Haseltine v. Shepherd (1905) 99 Me. 495, 59 Atl. 1025, it was held that, under a will giving the testator's wife all his property during her life, until her death or remarriage, she to have full power to control or dispose of said property or any part thereof if needed for her support and benefit, the widow could convey the real estate devised to her in fee simple, in her lifetime, before remarriage, if needed for her support and benefit.

In Watson v. Watson (1900) — Tenn. —, 57 S. W. 385, wherein it appeared that a testator gave all his property to his wife for her life, with the privilege of selling and conveying all of the real estate, or any part thereof, for her use and benefit and support, the chancellor held that she was entitled to a life estate, and that she was authorized to sell such parts of the property as might be necessary for her support and maintenance in the event the rents and profits were not sufficient for her support; and he retained the case in court for the purpose of making such a sale of the land if it should appear necessary for her proper support and maintenance. The decree of the chancellor was affirmed.

In Rutter v. Anderson (1900) 48 W. Va. 215, 36 S. E. 357, the will in controversy gave the testator's farm to his wife, "to have and to hold the same to her for and during her natural life; or my wife [naming her] may sell said farm and live on the proceeds, if necessary." It was held that the testator did not intend to confine his wife to a life estate therein, but clearly intended to, and did, give her the power to sell and convey in fee simple any portion thereof, or the whole of it, if it should be necessary for her maintenance and support, in case the use of the property did not furnish the necessary support.

In Cresap v. Cresap (1890) 34 W. Va. 310, 12 S. E. 527, the will under consideration gave to the testator's wife "in trust and for her support and maintenance during her life, all my estate, both real and personal, with full power and privilege to sell and convey any, all or so much of my real estate in such a manner as she may see fit, in as full and complete manner as I myself can do, to sell and dispose of my personal estate, or so much as she may see fit, for her own support, according to her condition in life, and for the benefit of my estate, so far as she may see proper." It was held that the wife took a life estate, and that the right was conferred on her to sell and convey all or so much of the testator's real estate in such manner as she might see fit, in as full and complete a manner as he himself could do; yet she was not allowed to use the proceeds of the real estate for her support, but they were to be held in trust and for her support and maintenance during her life. But it was held that she was allowed to sell and dispose of the personal estate, or so much as she might see fit, for her own support, according to her condition in life, and, so far as she might see proper, to sell the same for the benefit of his estate.

Where it appeared that a testator devised all his property to his wife to hold during her life, and declared that "if at any time during her life the rents, profits, and issues of said property shall not be sufficient to maintain my said wife in a comfortable manner, then I hereby authorize my said wife to sell so much and such part of my property as she may think proper necessary for her support from time to time as necessity may require," with remainder over, it was held that the power of sale was per-

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sonal to the life tenant, and not assignable. Phillips v. Wood (1887) 16 R. I. 274, 15 Atl. 88; Phillips v. Brown (1888) 16 R. I. 279, 15 Atl. 90.

In the will construed in Trigg v. Trigg (1917) — Mo. —, 192 S. W. 1011, the testator stated that, for the purpose of supporting and maintaining his wife and children, he gave all his property to his wife, "with power to sell and dispose of as she may see fit and proper for the support of herself and our children, and whatever may be left of my estate at her death, if any, I desire that it shall go to my children." It was held that the testator neither required nor expected his wife to sell for cash only, if in her judgment she saw fit to pursue a different course, in complying with the provisions of the will. While she was not authorized to dispose of it in any other manner than that provided for in the will, the court held that the language used in that instrument conferred on her the right to sell for cash, on time, or to mortgage the property in order to raise the necessary funds for the support and maintenance of herself and the children. Hence the court held that a deed of the real estate executed by the wife to a son on account of money advanced to her for the support and maintenance of herself and children, payments made for the upkeep and improvement of the place, taxes paid, bills of the family paid, and advances made to a brother and sister by him, and in further consideration of his having obligated himself to support his mother during her lifetime, was authorized by the power conferred by the will.

In Griffin v. Kitchen (1917) 225 Mass. 331, 114 N. E. 431, it appeared that the will of a husband gave his wife a life estate for her support, comfort, and enjoyment, or for any other purpose for which she might deem it necessary to use it, with "full power during her lifetime, to sell in her sole and individual name, or dispose of in any way she may deem necessary, . . . any or all my said personal or real estate." It was held that the will gave an absolute and unlimited power to use the principal for any purpose which the widow in good faith thought reasonable and proper, to provide in a broad way for her support, comfort, and enjoyment. Hence, an agreement between the widow and her sister by which the latter was to care for the former during her last illness, she being afflicted with an offensive disease, and in consideration therefor was to receive whatever remained of the testator's property, was reasonably necessary, and was in fact a reasonable appropriation of the property for the widow's support and comfort.

In Kemp v. Kemp (1916) 223 Mass. 32, 111 N. E. 673, it appeared that a testator gave to his wife the use of and income from all of his estate "for her support, comfort and enjoyment, and for any other purpose as she in her judgment may deem necessary." If the income should be insufficient, in her judgment, for her support, comfort, and enjoyment, "or for any other purpose for which she may wish to spend money," the power was given her to sell "any of my estate, real, personal and mixed," and to spend the proceeds arising from the sale for her support, comfort, and enjoyment, or for any purpose she might wish to spend money, "and to convey and transfer by deed or other instrument in her own name for the above-named purpose or for investment." It was held that the wife was given a life estate with a power of disposal only in the event that the income became insufficient, and that her power was limited to a sale and to a conveyance and transfer by deed or other instrument, for the purposes mentioned in the will.

In Hoxie v. Finney (1888) 147 Mass. 616, 18 N. E. 593, it appeared that a clause of a will was in the following words: "Meaning and intending to make honorable and liberal provision for my wife, Susan Manter, during her natural life, out of my estate, I do give and bequeath to her the use and improvement of my whole estate, both real and personal, of which I may die seised and possessed, with liberty to use and appropriate so

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much of the principal, in addition to the income, as she may deem necessary for her comfort and support; and I do authorize and empower her to sell and dispose of the whole or any part of my real and personal estate at her discretion," the remainder after her death passing to his heirs. It was held that the widow might use her best judgment and discretion in disposing of the property, with a view to obtaining from it the maintenance and support to which she was entitled, and that so long as she acted in good faith, she might, in the exercise of the large discretion with which she was invested, retain for her use the life estate which was hers absolutely, and sell the remainder to obtain the necessary means of support.

In Cheney v. Stafford (1903) 76 Vt. 16, 56 Atl. 88, it appeared that a testatrix bequeathed to her husband the use of all her estate during his natural life, "but in case the use of such estate, together with the use of such property as he may own in his own right, shall be insufficient to support him comfortably and according to the requirements of his age, I hereby authorize and empower him to sell and convey such and so many of the building lots . . . as he shall from time to time judge and determine to be necessary to provide means for such support, and to use and appropriate so much of the proceeds for such support as he shall require." It was held that the husband was not authorized to convey a lot on which stood a tenement house, as necessary for his comfortable support.

Necessity of sale.

Where a power of sale for the purpose of maintenance and support is given to a life tenant, the question whether a sale is necessary to the support of the life tenant is generally considered as committed to his discretion.

Thus, in Cain v. Cain (1899) 127 Ala. 440, 29 So. 846, it appeared that a testator gave all his real and personal property to his wife, to have and control as he might if living, and "to sell and convey any property she may choose for her support or comfort, as she may see proper during her natural life, and at her death what may be left of my said estate the same to be divided according to law in such cases made and provided." In reversing a decree restraining the widow from selling or otherwise disposing of the property, the court held that the terms of the will imported a conveyance to her of a life estate in the testator's property, together with a power to dispose of the same inter vivos, which was unqualified, unless in respect of the purpose for which it was given, and that the title she might convey was not confined to her life interest, but extended to the absolute estate in so much of the property as might be subjected to the power. The court held, moreover, that the life tenant's power of disposition was not contingent and limited to only so much of the property as would suffice for her support and comfort, but was general, stating in this respect that, in the sentence, "to sell and convey any property she may choose for her comfort and support as she may see proper," the word "choose" seemed to have been used as synonymous with "wish" or "desire," and that by such use, together with the omission of all reference to her necessities, it appeared that the testator intended to invest his widow with full discretion in determining the occasion for selling, as well as the selection of the property to be sold. Hence, though the power was expressed to be for a purpose, the court held that its exercise was bounded only by the donee's judgment and discretion in fulfilling that purpose, and that her discretion was not subject to control by the courts.

In Matthews v. Capshaw (1902) 109 Tenn. 480, 97 Am. St. Rep. 854, 72 S. W. 964, it appeared that a testator gave his wife all his property during her life or widowhood, and in case of necessity authorized her to sell any of it for the benefit of the family. The court held that the existence of the necessity of a sale of his property was for the determination of the testator's widow, in accordance with her best judgment and discretion; and

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that any disposition of the property made by her in good faith, although others might differ with her as to the necessity, was valid, and vested in the purchaser a good title.

In Paxton v. Bond (1891) 12 Ky. L. Rep. 949, 15 S. W. 875, it appeared that a testator gave his wife all of his property, real and personal, for her support during her life. Supposing this to give her only the income or profits arising from his estate, which was practically all realty, he therefore further provided: "If at any time my wife should become needy, and the farm fail to make her a support, I give her the right to sell 50 acres of the land on either side she may choose, and to have the proceeds." The widow subsequently sold the land, the consideration being $200 in cash, and her support comfortably during life. It was held that she had the power to do this, being the only one authorized to determine the question of the necessity for selling the land, and that she was entitled absolutely to the proceeds.

In Hosman v. Willett (1908) 32 Ky. L. Rep. 906, 107 S. W. 334, the will under consideration gave the testator's sister and his niece all of his property that was left after the payment of his debts, to use or sell in any way they wished for their support. It further provided, however, that what was left after their death was to be divided equally between his brother and sisters, or their heirs. It was held that the effect of this provision was to give the beneficiaries a life estate in the testator's property, subject to be converted into a fee by their conveyance of the property in any way they might wish for their support; and the words, "in any way they may wish for their support," showed plainly that the testator intended that they should be the sole judges of the necessity of a sale of the property. Hence, one of the beneficiaries having elected, under the power given her by the will, to sell the property for her support, and she being the sole judge of the necessity, it was held that the judgment of the trial court, finding that there was no necessity for the sale, was certainly erroneous, as it had no power to pass on the question.

In Burke v. Burke (1913) 259 Ill. 262, 102 N. E. 293, it appeared that a devise to a widow was expressly of the rents and income of the real estate so long as she might live, with the right to occupy or lease the real estate as she might prefer, and in case at any time she should deem it necessary to sell the real estate, in order to supply herself with the comforts and necessities of life, the testator empowered her with full right, power, and authority to make such sale, and to convey the property so sold as her own. It was held that the widow's power of disposition was not unlimited, but was qualified, to be exercised only in case she, as life tenant, should deem it necessary, in order to supply herself with the comforts and necessities of life, and that a court of equity would restrain any exercise of the power of alienation without reference to the condition imposed.

In Scheidt v. Crecelius (1887) 94 Mo. 322, 4 Am. St. Rep. 384, 27 S. W. 412, it appeared that a testator gave all his property to his wife, and provided that she should, until her death, manage and dispose of it as she pleased, and that he desired to be understood as empowering her, in cases of necessity, to sell not only personal, but real, property. It appeared that the widow executed a deed, to take effect in possession after her death, which recited that the land was sold in consideration of the sum of $1 and unpaid and indispensable services rendered, said services having been matters of necessity towards the maintenance and existence of the widow, and in consideration of similar services yet to be rendered. It was contended that the widow was to be the sole judge as to whether her necessities required the sale of the land, and that, having sold it under the power, the deed could not be assailed at law. The court held, however, that it was the intention of the testator to invest only a life estate in his wife, with the power to dispose of the fee in case her necessities or actual needs required it, and that her power to con-

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vey the fee was dependent on a contingency which must have happened or existed before the power thus to dispose of the land could be called into exercise. The court held that, it appearing from the record that, by the consent of the parties, the facts as to whether the necessity contemplated by the will existed at the time the deed was executed, and whether it was made in good faith, for the purpose of securing such support and maintenance, were submitted to the jury, the judgment by consent, rendered on their finding to the contrary, would not be disturbed, the evidence tending strongly to show that the widow's object in making the deed was simply to deprive certain of the remaindermen of their interest under the will in the land conveyed.

In Dodge v. Moore (1868) 100 Mass. 335, it appeared that a testator gave his wife the income, use, and improvement, for and during her natural life, of all his estate, "and if the income of said estate shall be insufficient for her support, it is my will that she shall use so much of the principal as she may think necessary; and I hereby give her full power and authority to sell any part or all of either the real or personal estate whenever she may think it expedient, either for her support, or for investment," "and all of said estate, real and personal, that may remain at the decease of my said wife, I give and devise to my daughter." The court held that the will gave to the widow "full power and authority to sell any part or all of either the real or personal estate whenever she might think it expedient," the discretion given her being unlimited. The court said: "Although her right in the proceeds is only a life interest, and what may remain at her decease is given to the daughter of the testator, yet the authority of the widow to consume the principal for her support, if the income should be insufficient, is limited only by the measure of 'so much of the principal as she may think necessary.' Her right to sell the real estate is not contingent upon the insufficiency of the income; and if it were, she is herself the sole judge of the necessity."

In Sparhawk v. Goldthwaite (1917) 225 Mass. 414, 114 N. E. 718, the will in controversy gave all the testator's property to his wife, subject to the condition that his brother should receive a comfortable maintenance and support out of it in an amount discretionary with his wife, and then gave his wife power to sell and dispose of all and any part of his estate if at any time she should think it necessary for the comfortable support of herself or of the testator's brother. It was held that the power given the widow was broad enough to authorize such sale as she, acting in good faith, should deem necessary to provide comfortably for herself and the brother, and was not restricted to her "actual needs."

In Stocker v. Foster (1901) 178 Mass. 591, 60 N. E. 407, it appeared that a testatrix devised all of her estate to her husband during his natural life, with full power and authority to sell and dispose of any or every portion thereof whenever, in his judgment, he might deem it conducive to his comfort. It was held that the life tenant was authorized to sell or otherwise dispose of the estate for a valuable consideration only, and only when he, in good faith, deemed such sale or disposal to be conducive to his comfort by enabling him, by means of such a consideration, to supply his present or prospective needs.

In Stevens v. Winship (1823) 1 Pick. (Mass.) 318, 11 Am. Dec. 178, however, it appeared that a testator devised the use and improvement of a messuage to his wife for her life, she keeping it in repair, and after her death, to his brothers. His will also gave his wife, "in case she shall stand in need, full power to sell his whole estate, real as well as personal, for her comfortable support." It was held that the wife took a life estate, with power to sell on the happening of a contingency; that is, that she should stand in need, and that the disposition should have become necessary for her support. Whether this contingency had happened or not was, the court

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held, a question for the jury, on which their determination was decisive.

In Larned v. Bridge (1836) 17 Pick. (Mass.) 339, it appeared that a testator gave his wife the use and benefit of all his estate, which the court held was to be construed as an estate for life, both in the real and personal property. And the further clause, "should the income prove insufficient for her comfortable support, she to dispose of so much thereof as shall be necessary for that purpose," was a naked power, depending on a contingency. The court held that, in order to the due execution of the power, the happening of the contingency was a condition precedent, and that, in addition to the happening of the contingency, the power must be executed in the lifetime of the widow, and by herself personally.

In Minot v. Prescott (1782) 14 Mass. 496, it appeared that a testator devised the income of his real and personal estate to his wife during life, "and if not sufficient to support her comfortably, then power to sell any of his estate for that purpose." It was held that the power was not to dispose at will or pleasure, but on the happening of a particular event, viz., the income proving insufficient to support the wife, which, the court held, was a condition precedent. And the jury having found that there was a sufficiency of the personal estate for the comfortable support of the widow, the court held that her conveyance of the land could not be supported.

In Morse v. Natick (1910) 176 Mass. 510, 57 N. E. 996, it appeared that a testator gave all his residuary estate to his sister "for and during her natural life, and she is empowered to sell and dispose of so much of my estate as will insure her a comfortable living, and to that end she is authorized to sell such portion of my real estate by public or private sale, giving good and sufficient deeds therefor, meaning and intending to give her full control of the same, with full power to deed to her grantees, their heirs and assigns, forever." It was held that she took only a life estate therein, with power "to sell and dispose of so much . . . as will insure her a comfortable living;" and that the testator's purpose, which was expressed, "to give her full control, . . . with full power to deed to her grantees, their heirs and assigns, forever," was inserted only to make more clear her right to sell and convey in case it became necessary to do so in order to insure her a comfortable living.

In Hamilton v. Hamilton (1910) 149 Iowa, 321, 128 N. W. 380, it appeared that a testatrix gave the residue of her estate to her husband "during his life with full power to sell, transfer and dispose of the same or as much thereof as may from time to time be needed for his support and maintenance during his said lifetime," with remainder over to her children. It was held that, under the power annexed to the life estate, the life tenant was the sole judge of his needs, and that whenever he in good faith determined that his reasonable maintenance and support required it, he could sell or dispose of the property, in whole or in part, without first obtaining authority from the court.

In the case of Re Proctor (1895) 95 Iowa, 172, 63 N. W. 670, it appeared that the devise was to a wife "during her life, with full power to sell, transfer, and dispose of same as much as may from time to time be needed for her support and the cancelation of any indebtedness now and hereafter existing," and after her death, all the then remaining property was to revert to a son. It was held that the wife was given a life estate with a limited power of disposal, her authority being restricted to a sale, transfer, or disposition of the property if needed for her support, or if necessary to satisfy indebtedness then or thereafter existing, only.

In Rowe v. Rowe (1903) 120 Iowa, 17, 94 N. W. 258, it appeared that a testator devised his property to his wife, "she to have full use, management, control and disposal of the same for her use, comfort and support so long as she shall live," all property remaining to descend to any

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children living at the time of the wife's death. It was held that the widow took a life estate with a limited power of disposition for her use, comfort, and support so long as she should live, under which power she might sell the entire property for her support.

In Haines v. Brown (1915) 114 Me. 320, 96 Atl. 228, it appeared that a testator gave and devised the rest and residue of his estate to his wife, to her sole use as long as she should remain his widow or until her decease, with the privilege of selling any part thereof, if absolutely necessary, for her support and maintenance, "but under no other consideration." It was held that the power to sell, given the wife by the will, was contingent on the sale being absolutely necessary for her maintenance and support.

In Larsen v. Johnson (1890) 78 Wis. 300, 23 Am. St. Rep. 404, 47 N. W. 615, however, under a will giving his wife all the testator's land, "to be for her sole use and benefit so long as she shall live, with power to dispose of the same if it shall be necessary for her support and comfort in this life," it was held that the widow had the power to dispose of the corpus or fee of the estate, on the condition or contingency of its necessity for her support and comfort.

In Jones v. Deming (1892) 91 Mich. 481, 51 N. W. 1119, it appeared that a testator devised certain real estate to his wife, "subject to the condition that she is to receive the rents, profits, and benefits during her natural lifetime, and, in case necessary, to sell and dispose of the same according to law." It was held that the will expressly limited the wife's interest to a life estate, and, it appearing that her second husband was abundantly able to support her, that no necessity was shown to sell or dispose of any of the property for her support and maintenance.

In Reynolds v. Jones (1916) — N. H. —, 97 Atl. 557, wherein it appeared that a testator bequeathed the residue of his estate to his wife for life, and provided that "if at any time her property, including the income of said bequest, shall from any cause be so reduced as to be insufficient for her comfortable support, she is hereby authorized to sell so much of said property as her wants may require and apply the proceeds to her own maintenance," it was held that it was the testator's intention that his wife could sell and use his property only when his wife's property was exhausted and the income from his would not support her, the words, "if at any time her property," not meaning "if at any time her income," and the word "reduced" meaning impoverished,—in want,—that she had no property. This provision, it was held, could work no hardship on her, for she could dispose of and expend all of his property for her support if her wants required it, after she had expended her own, but it would simply prevent her from disposing of his property and retaining her own, to go at her death to her heirs or devisees, —a result which the testator apparently desired to avoid, considering that he had three children and his wife none.

In Yetzer v. Brisse (1899) 190 Pa. 346, 42 Atl. 677, the will under consideration gave all the testator's property to his wife, during her natural life, or so long as she should remain his widow, and directed that "in case my wife cannot support and maintain herself from my real estate, she is hereby authorized to sell the same and use the proceeds for her support and maintenance." The court held that the will left the ascertainment of the fact that she could or could not support and maintain herself from the real estate to the widow alone, and that her judgment was absolutely unfettered. Hence, the widow admitting that she could not support and maintain herself out of the real estate, the power to sell was created, and she was "authorized to sell the same and use the proceeds for her support and maintenance," her conveyance carrying the fee.

In Morford v. Dieffenbacker (1884) 54 Mich. 593, 20 N. W. 600, however, it appeared that the will of a testatrix devised all the residue of her es-

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tate to her mother, "for and during her natural life. And in case the use of said property shall be insufficient for her support, then and in such case, I hereby authorize her to dispose of such of said property, and such amounts thereof, as shall be sufficient for her support, and what shall remain at her death" was then given to a cousin. It was held that the power to dispose of the property being conditioned on the use thereof being insufficient for the beneficiary's support, the beneficiary could not justify an exercise of the power to sell for the purpose of raising money, when there was already money on hand with which the object of the testatrix's bounty could be accomplished.

In the case of Re Tyson's Estate (1899) 191 Pa. 218, 43 Atl. 131, the will under consideration gave the whole of the testator's estate, real and personal, to his wife, she "to have the same and use it at pleasure for her sole use as fully, largely and amply to all intents and purposes as I myself could or might have done in my lifetime with full power at any time to sell or dispose of any part or the whole of the same," and she to "have the proceeds of such sale at her own disposal." The will also provided that the management, control, and proceeds of the estate should be reserved for and to the sole use of the wife during her lifetime, and directed that, after her decease, the executors should sell the testator's property, real and personal, and divide the estate as provided therein. The court held that the intention of the testator was to give his wife so much, and only so much, though possibly amounting to the whole, as should be necessary for her own comfort and enjoyment of life, and the residue, be it much or little, was to pass under his will. The extent of the widow's consumption of the estate was, the court held, within her own control, and her decision was without appeal, but it must have been honestly reached, in accordance with the purpose the testator intended, and not merely colorably, to defeat his will. The court held that she had power to carry out his intention by sale, transfer, and consumption of the proceeds in such a way as to leave nothing at her death; but a transfer with intent not to consume for herself, but to preserve for others after her death, and to change the beneficiaries after her from those chosen by her husband to others of her own selection, would be a fraud on the testator and his will.

See also infra, II. b.

Purpose of sale.

Where an express power of sale for the support and maintenance of a life tenant is given, the power of sale is confined to that purpose and may be exercised for no other.

Thus in Luscomb v. Fintzelberg (1912) 162 Cal. 433, 123 Pac. 247, it appeared that a testator bequeathed and devised to his wife all his property, real and personal, to have and to hold, sell, lease, and otherwise dispose of for her own use and behoof during her life, and then provided for the distribution of all the property remaining at her death. The decree of distribution of the property gave the estate to the widow for the term of her natural life, with power to sell and convey the same in fee, as she might see fit, for her own use, with a devise over. It was held that while the widow was given a power of disposition of the property in fee by the decree of distribution, it was not a power of disposition with an unqualified right to the use of the proceeds for any and all purposes, but for the particular purpose that the proceeds might be devoted by her "for her own use;" such use meaning, of course, personal use by her for her support, comfort, and maintenance during life.

In Griffin v. Griffin (1892) 141 Ill. 373, 31 N. E. 131, it appeared that a testator gave his widow a life estate in his property "with the same right to sell the same for her support and maintenance that I would have if living." It was held that the power of disposition given the widow was not restricted to simply an authority to sell in the event that a sale was essential for her *necessary* support and maintenance, and that it was not for

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the courts to annex such a provision. The court further stated that the testator, in order more effectually to secure the comfort and happiness of his wife, had clothed her with a power, to be exercised in her discretion, to sell any or all of the real estate for her support and maintenance, the amount of money which she should use for those purposes being restricted by no words of limitation, but being left solely to her discretion, and upheld the validity of a deed made by her which contained the following recital: "This deed is made, and the sale of said land, in pursuance of the will of John Griffin, to obtain money for the support of the said Mary Griffin, the said widow of said John Griffin, as all the other personal effects bequeathed in said will are absorbed, and there is no other means left for the support of said widow." But the court held that the testator had only authorized his wife "to sell" his real estate, that is, to dispose of it for an equivalent in money, and hence that another deed by her to a third person who agreed to support and maintain her during life, and bury her when dead, was invalid.

In Fleming v. Mills (1899) 182 Ill. 464, 55 N. E. 373, wherein it appeared that, by the terms of a will, a life estate was conferred on the testator's widow, with a power of sale for the support and maintenance of herself or family, it was held that if it had become necessary to use the property for the support and maintenance of the widow or her family, and she had sold and conveyed the property to raise money for that purpose, the sale might have been sustained. But the court held that she had no authority to convey the property to pay a debt which one of her children had incurred in speculation, and that a sale for that purpose could not be sustained.

In Terry v. Wiggins (1872) 47 N. Y. 512, affirming (1869) 2 Lans. 272, it appeared that the residuary clause of a will bequeathed to the testator's wife all other property he died possessed of, "for her own personal and independent use and maintenance, with full power to sell or otherwise dispose of the same, in part or the whole, if she should require it or deem it expedient so to do," and on her decease, "whatever residue there may be of personal or real estate and effects" was directed to be transferred by the executors to the trustees of a specified church. It was held that the wife had a life estate, coupled with a power of disposal, which could only be exercised under the will in case the wife should require it or should deem it expedient; that is, with a view to her "personal use and maintenance," the purposes for which it was given, during her life, and by a deed only.

In Rose v. Hatch (1891) 125 N. Y. 427, 26 N. E. 467, affirming (1890) 55 Hun, 457, 8 N. Y. Supp. 720, the will under consideration was, in part, as follows: "I give, devise and bequeath all my estate and property, whether real, personal or mixed, of which I may die possessed, to my beloved husband, Asa Lyon Hatch, in trust, to be by him held, enjoyed and disposed of as follows, that is to say: 1st. To his own proper use, benefit and advantage during his natural life, meaning and intending that out of the said estate, its income, substance, profits and avails, my said husband may and shall derive his support in whole or in part, accordingly as said estate may be made available, and my said husband may determine; but it is my desire that so much of said estate or its profits and avails as my said husband shall die seised or possessed of, shall be by him so left secured and disposed of as to be devoted to the support and education of orphaned children in such way and manner as in his judgment may best conserve this object." And after appointing the husband executor, and requesting that no bond be required of him, it continued: "I furthermore give to and confer upon my before-mentioned executor and trustee full power and authority, by public or private sale, or in any such way or manner and at such price or prices and terms of credit as he shall deem expedient, to bargain, sell and convey any and all

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the real, personal and mixed estate of which I may die seised, and the trust hereby created is intended to confer such right and authority unqualifiedly, as well as to authorize and empower my said executor and trustee to make, execute and deliver any such deed or conveyance as shall be needful and proper to fully carry out and complete any sale, transfer or encumbrance of the whole or any part of said estate, and to use or invest the proceeds arising from such sale or sales in other real or personal property and estate with like powers of disposition over the same, as are hereby given in respect to the identical estate and property by me possessed at the time of my decease, provided, that if any portion thereof, or its avails, in money or valuables, be used by my said husband, such use shall be restricted to his personal wants and necessities in providing for his support and livelihood." It was held that the husband took a life estate, and in addition to the whole income was also authorized to use so much of the corpus of the estate as might be needed for this purpose of his support and maintenance, but that his use of the corpus was absolutely restricted to his "personal wants and necessities in providing for his support and livelihood;" and for the purpose of making the property more valuable to him, or its management easier, or of promoting his interests as life tenant, he could sell.

In Gibson v. Gibson (1912) 239 Mo. 490, 144 S. W. 770, it appeared that a will contained the following clause: "I will and bequeath to my wife Sarah Jane Gibson all of my property, real, personal and mixed, wheresoever the same may be situated, with the power to sell, control, manage and dispose of in the same way that I might do if living; but it is my wish and desire, and I so will that at her death, by will, or before if she so elect, that she shall divide among or settle upon my children and my grandchild the said property devised and bequeathed to her, and increase or proceeds of the same, in the following manner." The court held that the widow took, under the will, a life estate by clear implication, with full power of disposal for value, and that she had the right to consume such parts of the principal as might be reasonably necessary for her support in accordance with her station in life.

(2) Implied power to sell.

Though a gift of a life estate with a power to anticipate the principal for the support and maintenance of the life tenant does not embody an express power to sell, such a power is considered to be implied if it is essential to the full enjoyment of the power of anticipation.

Thus, in Swarthout v. Rainer (1894) 143 N. Y. 499, 38 N. E. 726, affirming (1893) 67 Hun, 241, 2 N. Y. Supp. 198, it appeared that, by the terms of a will, the testator's wife was given all his property "to have and to hold for her comfort and support all of the above-named property if she needs the same during her natural lifetime, if she should outlive me." It was held that the widow took a life estate, with the power to take also and to convert to her use so much of the corpus of the estate as she should need to apply to her comfort and support. The will thus giving the wife power to exhaust both the real and personal estate if needed for her comfort and support, the court held that in that event she was at liberty to sell the whole real estate and use the proceeds for her support, her judgment being conclusive in the absence of bad faith or fraud.

In Hasbrouck v. Knoblauch (1909) 130 App. Div. 378, 114 N. Y. Supp. 949, modifying (1908) 59 Misc. 99, 112 N. Y. Supp. 159, it appeared that a testator devised his entire estate to his widow "for her use and behoof during her natural life, she to have absolute control and disposal of all the income to be derived therefrom and so much of the principal as she may deem necessary for her comfortable sustenance and support." It was held that, as affecting the real property, there might be an implied power of sale (no express power having been given) to realize the prin-

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cipal if it became necessary for her comfortable maintenance and support, of which fact the widow was to be the judge.

In Simmons v. Taylor (1897) 19 App. Div. 499, 46 N. Y. Supp. 730, it appeared that a testatrix devised all her estate, both real and personal, to her husband, "for and during his natural life, with power and authority to use, in addition to the increase and income thereof, whatever portion of the principal of my said estate may be necessary for his comfort and convenience, at any time during his life, in providing for his necessities in case said income shall at any time be insufficient for that purpose." It was held that the husband plainly took a life estate under the will, and also whatever more should be "necessary for his comfort and convenience," not generally and without limit, but "in providing for his necessities;" and then only "in case said income shall at any time be insufficient for that purpose." Thus, the court held, the will invested him with a discretionary power to sell or not in his lifetime, as to him should "seem meet and proper."

In Blauvelt v. Gallagher (1897) 22 Misc. 564, 49 N. Y. Supp. 608, wherein it appeared that a wife was given the testator's entire estate while she "lives and remains unmarried," to support herself and the children, and at her death the "residue" was left to the children, it was held that the estate was given to her for life, or until her remarriage, with power to consume the principal, and that under it she might mortgage or sell.

In Griffin v. Nicholas (1909) 224 Mo. 275, 123 S. W. 1063, under a will giving the residue of his estate to the testator's wife, "to have and to hold and enjoy for her during her natural life, with full power to make such disposition thereof as may be necessary for her own comfort and support," it was held that the word "thereof" meant "of that," and that the latter word was a demonstrative pronoun referring to "estate" as its antecedent, and therefore that the power given the widow was to make such disposition and sale of the estate—that is, all the estate, and not merely her life interest—as might be necessary for her own comfort and support. The court held that this power of sale and disposal of the property rested in the discretion of the widow, where it did not appear that she was recklessly or fraudulently wasting the estate, and might be exercised without a court of equity previously finding as a fact that it was necessary for her comfort and support, and decreeing a sale. And even the fact that the widow might have been improvident in disposing of money that had before come into her hands would not, the court held, prevent her from disposing of the rest of the estate as might "be necessary for her comfort and support."

In Champney v. Bradford (1907) 196 Mass. 259, 81 N. E. 993, the will under construction gave the testator's estate to his wife, "to be used by her for her comfort and support during her natural life," and bequeathed all his estate that should remain at the death of his wife. It was held that the wife was given a life estate in the property, with the right to sell and dispose of any part of it as she might need for her comfort and maintenance, and this was indicated, not only by the language of the gift, but also by the clause giving the children only that part of the estate which should remain at her death.

In Chase v. Ladd (1891) 153 Mass. 126, 25 Am. St. Rep. 614, 26 N. E. 429, it appeared that a testator gave all his property to his wife, "to her use and behoof forever," and declared that "if any of the property which I have given my beloved wife aforesaid shall not have been expended by her, for her support and maintenance during her lifetime, then and in that case my will is that so much of said estate as shall remain unexpended at the time of her decease shall be disposed thereof in manner following, to wit." It was held that the most reasonable construction of the will was that the testator intended that the wife should have the use of the property for her support and maintenance,

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with the power of expending it—that is, of selling and conveying it, and using the proceeds—only so far as was necessary for her reasonable support and maintenance during her life, but with no other power of disposing of the property or of any part of it. This construction of the will was approved and followed in a later appeal in the same case. Ladd v. Chase (1892) 155 Mass. 417, 29 N. E. 637, wherein it was held that a quitclaim deed of the real property by the widow, the income of the estate being insufficient to support her, and she using the principal, was a sale and conveyance in execution of the power given her in the will, and conveyed a fee.

In Johnson v. Battelle (1878) 125 Mass. 453, under a will devising the residue of the testatrix's property to her husband, for his comfort, support, and maintenance during his natural life, and at his decease, whatever of her estate remained unexpended by him, to her nieces, it was held that the husband took an estate for life, with a power to sell and convey in fee, if necessary for his support and maintenance, and that the remainder over was contingent on its not becoming necessary for him to exercise that power.

The will construed in Stark v. Chambers (1913) 140 Ga. 601, 79 S. E. 535, gave the testator's wife all his property "for her support and control during her lifetime," and after her death "what property is left" was to be sold and divided, but the wife to "use it as she needs for her comfort and support." It was held that a sale of part of the land by the widow for its reasonable value, the money being needed for her support at the time, was authorized by the will and conveyed the fee.

In Richardson v. Richardson (1888) 80 Me. 585, 16 Atl. 250, wherein it appeared that a testator gave all his property to his wife, "to her use and behoof and dispose of for her maintenance during her natural life," it was held that a power to convey a portion or all of the property was conferred on the wife by the will, the manner and mode of disposition not being dictated to her, but the purpose for which it might be done being indicated. And it appearing that the wife conveyed the homestead property by absolute deed to another devisee, for the consideration of a life support to be furnished her by the grantee, the deed containing a condition that if the grantee should die before the grantor, it should be void, and the grantee giving a bond for the deed, it was held that she had disposed of the estate for her maintenance during her life, and that her judgment governed, even though it appeared that she had exercised poor judgment.

In Hall v. Preble (1878) 68 Me. 100, the will under consideration contained the following clause: "I give and bequeath all the residue and remainder of my estate, both real and personal, including all moneys that may be received upon my policy of insurance upon my life, unto my beloved wife, Annie E. Hall, during her life. It is my intention and desire that said Annie E. Hall shall hold and use to her benefit, all the property, both real and personal, owned by me at the time of my decease, during her life, the same as if absolutely hers, and at her death whatever may be left, I wish equally divided among the survivors of my brothers and sisters. To avoid all contentions and disputes, it is my request and directions that said Annie E. Hall shall immediately upon my decease, by will, devise and direct that such portion of said estate as shall be left at her decease, be divided between the survivors of my brothers and sisters according to my intention as expressed in this will. I wish it distinctly understood that I place no restriction upon my said wife in regard to her use of my said estate, desiring and intending that she shall use and expend every dollar of the same, if necessary, for her care, comfort and support." The court held that the provisions of the will, by direct terms as well as by necessary inference, gave the wife a life estate, with full power to convey the fee at her pleasure, without any re-

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striction on her use of the same, for her care, comfort, or support, and made her the sole judge of the necessity of a sale and the use thereof for her care, comfort, or support. Therefore, her conveyance by a deed of quitclaim to the tenant of the devised premises conveyed the fee therein, and not merely the life estate.

In Scott v. Perkins (1848) 28 Me. 22, 48 Am. Dec. 470, it was held that, under a bequest by a testator of all his property, and the income of the same, to his widow, to be used and disposed of by her, for her convenience and comfort, during life, and a later provision for the distribution of what might remain after the decease of the widow, the widow might dispose of the property whenever her comfort and convenience might require that she should do so. And the jury, under instructions from the court, found that it was necessary for the widow's comfort and convenience that she should sell the property, as she did.

In Warren v. Webb (1878) 68 Me. 133, it appeared that a clause of the will under consideration was as follows: "I give, bequeath and devise to my beloved wife, Abigail H. Whitmore, for and during her natural life, all my estate and property, real, personal and mixed, wherever found and however situated, to have and to hold the same to her and her assigns, for and during the term aforesaid, for her proper use, benefit and support and maintenance; and after her decease, said estate and property, or the residue and remainder thereof, to be legally divided to and among my children, namely," etc. The court held that the widow was not empowered to sell the estate bequeathed to her, in any event, at her will and pleasure, but that she took a life estate, with an implied power to sell on the happening of the contingency or contingencies, and to effectuate the purposes mentioned in the will; her power to sell depended on these, and if they did not require a disposal of the property, the widow had only a life estate.

In Benesch v. Clark (1878) 49 Md. 497, it appeared that a testator gave his wife, in addition to other realty, "the two houses and lots on Monument street to be disposed with as my said wife sees fit, at her decease; and also I give and bequeath unto my said wife, all my property real, personal and mixed, of every description, debts and demands, due to or in any wise belonging to me, she, my said wife, to have and to hold all the same, for her benefit, maintenance and comfort, during her life." One of the lots referred to in the will, which was held under a renewable lease, the widow conveyed to another by a deed of assignment of the residue of the unexpired term, with the right and benefit of renewal, from time to time, forever. It was held that the widow took but a life estate in the lots devised to her by the will, with a power of disposition, and that this power had been effectually executed by the deed of assignment.

In Otjen v. Frohbach (1912) 148 Wis. 301, 134 N. W. 832, it appeared that a testatrix gave all the rest and residue of her property, real and personal, to her son and daughter, or the survivor of them, share and share alike, during their natural lives and during the life of the survivor of them, with the right to use and consume such part of his or her share as either of them should find necessary, with disposition over of the remainder. It was held the will gave the children a life estate, with the right to use and consume without restraint not only the income of the property, but such part of the corpus as they should find necessary, and that this right to use and consume declared in the will clearly gave the right to use the corpus of the estate devised and bequeathed, and therefore the power to sell the personal property absolutely and convey the fee in the real estate necessarily followed.

In Woolfitt v. Preston (1918) — Mich. —, 169 N. W. 838, wherein it appeared that a testator gave his daughter certain real estate, she to have entire control of the property during her lifetime, with power to sell, and "if necessary to use the principal for herself and children's support, she

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may do so," it was held that the daughter took a life estate with the power to sell the property if she deemed best, and the further right to use such part of the proceeds as was necessary in the support of herself and children, but for no other purpose.

In Barker v. Clark (1903) 72 N. H. 334, 56 Atl. 747, it was held that a will devising all of a testator's property to his wife for and during the term of her natural life, she "to use and expend what may be necessary for her maintenance and support during said term," not only gave the wife a life estate in the property, but also, in language sufficiently clear, empowered her to dispose of the same for her maintenance and support where such course should become necessary. And the lower court having found that at the time the land was sold by the wife, it was necessary for her support and maintenance to sell it, that all the proceeds of the sale were applied to her support and maintenance during her lifetime, that the sale was made in good faith, and that the land brought all it was worth, it was held that these facts brought the deed clearly within the power given by the will.

In French v. Hatch (1854) 28 N. H. 331, it appeared that a will contained the following bequest: "Having implicit confidence in my beloved wife Sarah Gardner, I do hereby will and bequeath to her, the said Sarah Gardner, all the property, both real and personal, that I am possessed of, during her life, except my farm in Wendell; no part of the bank stock is to be disposed of unless her comfort should require it, but it is to be apportioned to my relations, according to her discretion, to be enjoyed by them after her decease." It was held that the bequest was for life, with an express limitation on her power of disposing of the stock, unless her comfort should require it. The court held that giving her "comfort" a reasonable construction of the word, it did not require, and she did not have the power, to sell the stock and lend the proceeds, nor to sell it for the payment of her debts, or to dispose of it if her necessities arose from her extravagance or improvidence, as the income of the property, with ordinary prudence, appeared to be sufficient, and there was no evidence of any necessity of a sale of the stock for her comfort. But if, by prudent management, the rest of the property had been exhausted, and her comfort required it, the court held that she might have sold the stock.

In Kennedy v. Pittsburg & L. E. R. Co. (1907) 216 Pa. 575, 65 Atl. 1102, it appeared that a testator gave his widow all his estate, both real and personal, during her natural life, "with privilege to use part of the principal if she should need it," and at her death directed that his executor sell all the real and personal estate not used by his wife in her lifetime, and divide the proceeds. It was held that the power to use the principal meant the power to consume it, both the real and the personal, and that the power to consume the real estate necessarily included the power to convey it.

In Allen v. Hirlinger (1907) 219 Pa. 56, 13 L.R.A.(N.S.) 458, 123 Am. St. Rep. 617, 67 Atl. 907, it appeared that the gift to the widow by a testator's will was of his estate, she to be "the real owner thereof, and for her only proper use, benefit and behoof during her natural life, or so long as she remains my widow, with full permission to her to use and live therefrom as her necessities may require, and she to have the full ownership thereof, the same as I now have, and have had during my natural life." The court held that the gift was of whatever the widow's necessities might require, even to the extent of the entire estate, and that in her unlimited power of consumption of the real as well as the personal estate was necessarily included the power to convey. The court also held that the words, "if any," in the expressed doubt, and the provision that on the death of the widow, "whatever may then remain of my estate, real, personal or mixed, I desire that the same remaining portion, if any, be given" to his daughter, im-

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plied an equal power to consume both the real and personal property.

In Merel v. Oakley (1916) 253 Pa. 107, 97 Atl. 1029, wherein it appeared that a testator gave the use of all his property to his wife during her natural life, "also the right to use of the principal of my estate in case she needs, with herself as the sole judge of such need," it was held that the wife took a life estate, with an unlimited power to consume the property, both real and personal, which carried with it the power to sell and convey in fee at her pleasure as a necessary incident.

In the case of Aurand's Estate (1916) 25 Pa. Dist. R. 725, it appeared that a testator bequeathed all his estate to his wife, "for her maintenance during her natural life," and "should there remain anything of" his estate at the death of his wife, he bequeathed "the same and all that remains not consumed by my wife" to his adopted daughter. The court held that the widow had the power to consume, and this included the power to sell and make title to, all the estate bequeathed to her, the corpus as well as the income, if necessary for her maintenance.

In Rinkenberger v. Meyer (1900) 155 Ind. 152, 56 N. E. 913, it appeared that a will gave the testator's wife a right to use and expend so much of all the testator's real and personal property which he had bequeathed and devised to her, as should be needful for her support, and what of his property was left should go to her niece. It was held that it was the intention of the testator to confer on his wife the power to sell any or all of the property, as she desired, and what was left should go to the niece, the power to convey the fee thereof arising by the clearest implication from the words "she may sell" the farm, and "what of my property shall be left at her decease shall go to said" niece.

(c) Mortgage.

Under a power annexed to a life estate giving the tenant the right to sell, transfer, and dispose of the same or so much thereof as may from time to time be needed for his support and maintenance during his lifetime, he is given an unrestricted right to mortgage, as well as to sell, the property, for that purpose, or to renew an existing mortgage. Hamilton v. Hamilton (1910) 149 Iowa, 321, 128 N. W. 380 (compare, however, a former opinion in this case, reported in (1908) 140 Iowa, 282, 115 N. W. 1012, 118 N. W. 875). In that case, it appeared that a testatrix gave the residue of her property to her husband "during his life, with full power to sell, transfer and dispose of the same or as much thereof as may from time to time be needed for his support and maintenance during his said lifetime. "The court declared that the primary and controlling purpose of the will was seen to be the assurance to the husband of proper maintenance and support, and that to that end power was given to him not only to "sell," but to "transfer" and "dispose of" the property devised, and said: "Ordinarily, a mortgage to meet pressing needs would be less inimical to the interests of the remainderman than an absolute conveyance. Its practical effect may be to preserve the life tenant a home and at the same time contribute to his support and maintenance to which the entire estate of the deceased is devoted by the will. The giving of a mortgage for such purpose should, in our judgment, be upheld by the court as a proper execution of the power conferred by the will. As the record incidentally discloses the fact that the devised real estate is already encumbered by an outstanding mortgage, and its payment or renewal may become essential to the preservation of the home as well as for the other beneficial uses provided for in the will, there can be no reasonable doubt of the authority of the plaintiff to make such renewal."

In the will construed in Trigg v. Trigg (1917) — Mo. —, 192 S. W. 1011, the testator stated that for the purpose of supporting and maintaining his wife and children, he gave all his property to his wife, "with power

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to sell and dispose of as she may see fit and proper for the support of herself and our children, and whatever may be left of my estate at her death, if any, I desire that it shall go to my children." It was held that the testator neither required nor expected his wife to sell for cash only, if in her judgment she saw fit to pursue a different course, in complying with the provisions of the will. While she was not authorized to dispose of it in any other manner than that provided for in the will, the court held that, in accordance with and under the broad power conferred on her by that instrument, she would have been authorized to borrow the necessary funds for the purposes stated therein, and to have secured the same by deed of trust in the property.

In Swarthout v. Ranier (1894) 143 N. Y. 499, 38 N. E. 726, affirming (1893) 67 Hun, 241, 2 N. Y. Supp. 198, it appeared that, by the terms of a will, the testator's wife was given all his property, "to have and to hold for her comfort and support all of the above-named property if she needs the same during her natural lifetime, if she should outlive me." It was held that the widow took a life estate with the power to take also and to convert to her use so much of the corpus of the estate as she should need to apply to her comfort and support. The will thus giving the wife power to exhaust both the real and personal estate if needed for her support, in which event she was at liberty to sell the whole real estate and use the proceeds for her support, the court held that likewise, instead of selling, she could mortgage the property and appropriate the proceeds in the same manner, her judgment being conclusive in the absence of bad faith or fraud.

In Blauvelt v. Gallagher (1897) 22 Misc. 564, 49 N. Y. Supp. 608, wherein it appeared that a wife was given the testator's entire estate while she "lives and remains unmarried," to support herself and the children, and at her death the "residue" was left to the children, it was held that the estate was given to her for life, or until her remarriage, with power to consume the principal, and that under it she might mortgage or sell.

In Lardner v. Williams (1898) 98 Wis. 514, 74 N. W. 346, it appeared that a testator gave his residuary estate to his wife during her life or widowhood, to be used and held by her for her own support, and for the education and support of his children, with power to carry on his business, and to sell and dispose of his property as she might, in her own judgment, deem best for supporting herself. It was held that the widow had the power to mortgage the property as well as to sell and convey it.

In Edmonson v. Nichols (1853) 22 Pa. 74, wherein it appeared that a testator ordered "that all his estate real and personal, and everything that belonged to him, should be given into the hands of his wife, for her use and maintenance as long as she lives," and added, "She must not give or sell anything only what is for her own good and support, or for the good of the place, or mortgage if she needs," it was held that the widow took a life estate coupled with a power to mortgage the fee for her support, and the court upheld a mortgage admittedly required for her maintenance.

But in Sheffield v. Grieg (1916) 105 S. C. 219, 89 S. E. 664, wherein it appeared that a testator gave his entire estate to his wife during her natural life or widowhood, she to have the right to dispose of any property as she might think best for the purpose of paying all just debts, or supporting and maintaining herself and children while she remained his widow, it was held that the widow had the power to mortgage the land so far as her own interest was concerned, but that, so far as the interests of her children were concerned, she did not. The court said: "The execution of a mortgage for support and maintenance is an exceedingly hazardous thing to do. If an estate does not afford support and maintenance unencumbered, how can it pay the debt and interest on the debt and still afford support and maintenance? Land may be sold for its full value. It is a matter of com-

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mon knowledge that it is rarely mortgaged for its value. There is not express power to mortgage and the purpose of the power forbids it. . . . In this case the limitation was not only to life, but widowhood. It would be a strange construction, and altogether untenable, to say that the widow whose estate was limited to her widowhood could defeat the remaindermen by a sale or mortgage in contemplation of a new and impeded second marriage. So far as she had a personal interest, she could bind her interest by a sale or mortgage. That right arises not from the will, but from the general power (unless restrained by the instrument) of a person to sell or encumber his or her individual interest."

And in Dougherty v. Dougherty (1907) 204 Mo. 228, 102 S. W. 1099, it was held that under a will devising all the testator's property to his wife, for and during her natural life or widowhood, with discretionary power to sell any or all of the property for the support of herself and the children, the power given the widow was a power to sell, and not a power to mortgage or otherwise encumber the property, and hence a deed of trust executed by the widow was invalid.

In Paine v. Barnes (1868) 100 Mass. 470, it appeared that a testator devised all his estate to his wife, "for her support and benefit during her natural life," with a certain disposition after her decease, "if anything of said estate should remain." It was held that the devise could only be construed as giving the wife an estate for life with a contingent power of disposition of the remainder only in case of its being needed for her support. But, without deciding whether a power to sell for the purpose of support only, and which would be limited to the extent of the necessity for such support, would include a power to make a mortgage in fee, it was held that the widow could not mortgage the land without showing that the whole sum for which the land was mortgaged was needed for her support.

In Hoyt v. Jaques (1880) 129 Mass. 286, it appeared that a testatrix gave her husband so much of her estate "as may be sufficient for his comfortable maintenance and support for and during the term of his natural life, he having full power to sell and convey any and all of my real estate, at any time, if necessary to secure such maintenance." In holding that this power to sell for the purpose of support did not include a power to make a mortgage in fee, the court said: "In the case at bar, the power given to the life tenant is 'to sell and convey any and all of my real estate, at any time, if necessary to secure such maintenance.' This language does not in its terms import a power to mortgage; and we find in the will no decisive indications that the testatrix intended to use it in any other than its natural and obvious meaning. Thus used, it gives the husband the power to sell and convey for a fair price any or all of the real estate, if necessary for his comfortable support, but it does not give the right to mortgage the estate for a part only of its value. The intention appears from her language to have been that her husband, if it became necessary for his support, might sell the real estate and convert it 'out and out,' and not that he might at his discretion charge it with encumbrances and liens."

In Chase v. Chase (1899) 173 Mass. 483, 53 N. E. 897, however, it appeared that a testator gave to his wife a defeasible life estate in all the rest of his estate, real and personal, remaining after the payment of certain small bequests contained in the second item, with a remainder in his heirs at law if she married again, and with a remainder to certain of his descendants if she remained unmarried until her death. Later he made a codicil in which, after expressly ratifying and confirming his will except so far as changed by his codicil, he used this language: "Whereas by said will I gave my wife, A. Maria Chase, the use, income, and improvement of all residue of my property, on condition she did not marry again, I hereby ——— her $800 per year for her comfortable support, and hereby

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authorize and empower her to mortgage any part of my real estate sufficient to give her the said $800 per year, providing the net income of my said estate does not produce said amount of $800 per year." It was held that the will and codicil were to be read as one instrument, and that, thus read, they said, in substance, that the wife was to have a life estate during her life or widowhood, and, in case the net income of the estate did not equal $800, she might mortgage to meet the deficiency.

(d) Lease.

In Knapp v. King (1874) 15 N. B. 309, the will under consideration contained the following devise: "I give to my dear wife Margaret the possession, use and occupation of my moiety of the house in which I now reside, and also my moiety of the upland and marsh connected with the homestead farm, and also all the plate, linen, goods, chattels and effects, together with all the household furniture of which I shall be possessed at the time of my decease; as also the rents and profits of all my other personal and real estate whatsoever whether consisting of land, tenements, goods, chattels, debts, moneys, or choses in action, including all that I may own in the world at the time of my death, for the support and maintenance of herself and such of my younger children as shall be living with her and still unmarried." Another clause provided: "It is further my will, that if the rents and profits of my real and personal estate be not sufficient for the maintenance and support of my said wife and younger children, she may from time to time employ such of the principal as may be necessary for that purpose. It is also my will, and I hereby direct, that whatever of my real or personal estate may remain after the death of my said wife, and what has not been previously otherwise disposed of in this will, shall be equally divided, share and share alike, between my children." In holding that the widow, during her life estate, had the right to lease the property, the court said: "We have no doubt the testator intended to give a power of sale, both as to the real and personal estate. The words of the will are, that if the rents and profits of his real and personal estate are not sufficient for the maintenance of his wife and children, his widow may employ such of the principal (that is, both of the real and personal estate) as may be necessary for that purpose. This is evident from the subsequent words of the will, that whatever of his real or personal estate might remain after the death of his wife, should be divided among his children, —clearly showing that he contemplated that his wife might sell a part of his real estate for the support of herself and the younger children. Then, if she had a power to sell in order to obtain means for the support of herself and children, surely she had a power to lease for a short term of years, in order to raise money for the same purpose. The lesser power would seem to be contained in the greater. . . . Had the object of the power been a sale, out and out, and not merely to raise money to support the widow and children, the case might have been different. Here, also, the use of the word 'rents' seems to point to a right of leasing, for how otherwise could she get the rents?"

(e) Gift.

Under a will giving a life interest, with a power of disposition of part or all of the property for the particular purpose of the support and maintenance of the life tenant, with a gift over, to others, subject to the exercise of that power, and the application of the principal to that purpose, the life tenant cannot dispose of the property by gift inter vivos. Baldwin v. Morford (1902) 117 Iowa, 72, 90 N. W. 487. In that case, by the language of the will under consideration, the testator's widow was authorized "to have and to hold, enjoy and use, during her natural life, with full power to sell and convey for the purpose of paying said debts, and for her own support, comfort, and maintenance, without let or hindrance from anyone whatever, and in her own discretion,"

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the testator's property. It was held that this power to dispose of the property did not include authority to the widow to dispose of the estate in whole or in part by gift, and that the purchase by her of a certain lot in the name of another was, in effect, a gift to him of the purchase price, and void.

In Davison v. Safe Deposit & T. Co. (1906) 103 Md. 479, 63 Atl. 1044, the will there construed gave the testator's wife all his estate in trust, for her own use and during her natural life, with full power and authority to invest, convert, and reinvest the same, and to use and to expend from time to time not merely the income, but any part of the principal, should she deem it for the best interest of herself and their children to do so. In holding that the power conferred on the wife to use and expend portions of the corpus of the trust estate was not intended to authorize a gift to the daughters of one third of the estate on the marriage of one and the coming of age of the other, the court said: "The authority to use and expend part of the principal is not given independently, but is coupled with and made secondary and supplemental to that to appropriate the income to the uses of herself and children. The just inference to be drawn from these terms of the will is that the testator, conscious of the vicissitudes to which even the best investments are exposed, intended to provide more perfectly for the comfort and independence of his wife and children by supplying 'from time to time' out of the principal of the estate any insufficiency of the income to maintain them in that style of living which she might deem to be for their best interest. The fact that the will provides for the recurrent exercise from time to time of this discretionary power to consume a part of the principal strongly indicates that it was intended only to provide for such emergencies as might be expected to occasionally arise in the life of the family, and was not intended to authorize a change in the form of title to any portion of the corpus of the estate not so consumed. That the testator intended the corpus of the estate not thus consumed to continue to be held in trust is apparent from the fact that he named in his will the Safe Deposit & Trust Company as the trustee to hold it after the death of his wife for the benefit of his daughters so long as they lived. The appellant would, under a fair construction of the power, be authorized to use and expend a reasonable portion of the principal of the estate to provide for the exceptional outlay incident to the marriage of the daughters, but the power cannot be so expanded by construction as to justify the withdrawal in bulk from the trusts of the will of substantial parts of the corpus of the estate, and handing them over absolutely to the daughters in their own right under the guise of providing them with marriage portions."

In Richards v. Morrison (1906) 101 Me. 424, 64 Atl. 768, it appeared that a will gave the residue of the testator's estate in trust, and directed the trustees "pending the settlement of my [his] estate and until final division," to pay to his wife ten twenty-sevenths portion of the income "during her lifetime, or until final settlement of my [his] estate," for her sole use and benefit, and after disposing of the balance of income to other parties he provided that "upon final settlement of my estate or distribution thereof, my trustees shall convey and deliver to my wife ten twenty-sevenths parts of this my residuary estate, and she may herself select such portion from any parcels of my residuary estate at the appraised value thereof. It is my will that my wife have the entire use and income, during her lifetime, of all said portion of my residuary estate; and in addition thereto, I do authorize and empower her to sell and convey by her own grant or deed any of said estate, real or personal, which she may in the exercise of her own discretion elect to sell and convey for her sole use and benefit, without license of probate court." Then followed a gift over to other parties of what "at her death shall remain unused, unexpended or unsold and un-

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conveyed by her." The court held that the widow was given a life estate with a power of sale for a limited purpose, to wit, "for her sole use and benefit," of any part of the property, but that she was not authorized to bestow it by gift.

In Griffin v. Kitchen (1917) 225 Mass. 331, 114 N. E. 431, it appeared that the will of a husband gave his wife a life estate for her support, comfort, and enjoyment, or for any other purpose for which she might deem it necessary to use it, with "full power during her lifetime, to sell in her sole and individual name, or dispose of in any way she may deem necessary, . . . any or all my said personal or real estate." It was held that while the will gave an absolute and unlimited power to use the principal for any purpose which the wife in good faith thought reasonable and proper to provide in a broad way for her support, comfort, and enjoyment, a gift of a hundred dollars to each of four persons was not a use to the support, comfort, and enjoyment of the wife in the sense and meaning of the will.

In Stocker v. Foster (1901) 178 Mass. 591, 60 N. E. 407, it appeared that a testatrix devised all of her estate to her husband during his natural life, with full power and authority to sell and dispose of any or every portion thereof whenever, in his judgment, he might deem it conducive to his comfort. The court held that the life tenant was authorized to sell the estate for a valuable consideration only, and only when he, in good faith, deemed such sale or disposal to be conducive to his comfort by enabling him, by means of such consideration, to supply his present or prospective need; and that the words "sell and dispose" meant a disposition by sale, and not by gift. The court said: "All along, the language used by the testatrix seems clearly to refer to such comfort as can be attained by the application of the proceeds of the property to the reasonable needs of the life of the donee of the power, and not to that peace of mind which arises from a knowledge that the property has been so disposed of as to contribute to the enjoyment and support of others. The comfort experienced by the philanthropist in giving away his property, whether to relatives, friends, or strangers, does not seem to us to be the kind of comfort which the testatrix had in mind when she was engaged in making this will." Hence, the court held that a transaction between the husband and another, which the lower court characterized as "a colorable transaction, made without consideration, and carried out for the purpose of transferring the property in question so that it might descend to his children regardless of the will," was not a valid execution of the power.

In Farlin v. Sanborn (1910) 161 Mich. 615, 137 Am. St. Rep. 525, 126 N. W. 634, it appeared that the material portions of a will devised all the testator's estate to his wife, for and during her natural life, with full power and authority to use and dispose of the same for her use, support, and comfort, as to her should seem best, giving her full power to sell and convey all or any of the real estate, at her option, as fully as he himself would do, with a devise of all the property that might be remaining on her decease to his heirs. It was held that the will created a life estate in the widow, and that thereunder she had the right to use the property and to dispose of and convey it for a specific purpose, to wit, for her use, support, and comfort, only, and that this did not give her a right to give away the property by gift inter vivos.

In the will construed in Trigg v. Trigg (1917) — Mo. —, 192 S. W. 1011, the testator stated that, for the purpose of supporting and maintaining his wife and children, he gave all his property to his wife, "with power to sell and dispose of as she may see fit and proper for the support of herself and our children, and whatever may be left of my estate at her death, if any, I desire that it shall go to my children." It was held that the testator neither required nor expected his wife to sell for cash only, if in

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her judgment she saw fit to pursue a different course, in complying with the provisions of the will, but that she was not authorized to give it away.

In Gibson v. Gibson (1912) 239 Mo. 490, 144 S. W. 770, it appeared that a will contained the following clause: "I will and bequeath to my wife Sarah Jane Gibson all of my property, real, personal, and mixed, wheresoever the same may be situated, with the power to sell, control, manage and dispose of in the same way that I might do if living; but it is my wish and desire, and I so will that at her death, by will, or before if she so elect, that she shall divide among or settle upon my children and my grandchild the said property devised and bequeathed to her, and increase or proceeds of the same, in the following manner." The court held that the widow took, under the will, a life estate by clear implication, with full power of disposal for value, but that she had no power to give away the property or any part of it, except that she might, if she so chose, divide the whole property among the children and grandchildren, as provided in the will, before her death. The court further held that she had the right to consume such parts of the principal as might be reasonably necessary for her support in accordance with her station in life.

In Lehnard v. Specht (1899) 180 Ill. 208, 54 N. E. 315, it appeared that a wife gave her husband the income of her property to "have, take, keep and use enough for his own support and maintenance in a comfortable living, and for such charitable and benevolent purposes and gratuitous donations and other purposes as he may, in his discretion, think proper or desires, and, if necessary for any or all of these purposes, he may draw upon the principal of the property hereby bequeathed." The court held that no doubt, if the income, after a judicious management of the property, became insufficient to furnish him a comfortable living, then he might draw on the principal, but that it could not become necessary, within the meaning of the will, for him to take the principal estate and give it away for a charitable or benevolent purpose, as he was only authorized to resort to the principal of the property when it was necessary to do so for his maintenance and support.

In Smith v. Van Ostrand (1876) 64 N. Y. 278, reversing (1875) 3 Hun, 450, 5 Thomp. & C. 664, it appeared that a will contained the following clause: "I give and bequeath unto my beloved wife Catharine, the sum of $1,650, in lieu of dower on my real estate, for her support during her natural life, or as long as she remains my widow, then her said dower shall be transferred to my three children hereinafter mentioned. Fifty dollars of the above named sum shall be paid her as soon as practicable after my decease, and the remainder on or about six months after. Also, I further give her any part of the household furniture that she wishes for her own use and that she may will to whom she chooses, and I further provide that she may occupy our dwelling house six months after my decease, and necessary provisions for her support and comfort, which shall be provided out of my estate." The conclusion of the court was that the widow was given the use of the sum of money specified during her life or widowhood, and was empowered to apply so much of the principal as might be necessary, to her support, but that no power of disposition, testamentary or otherwise, was given to her.

In the case of Re Trelease (1906) 49 Misc. 205, 96 N. Y. Supp. 318, affirmed in (1906) 115 App. Div. 654, 100 N. Y. Supp. 1051, it appeared that a testator gave his wife a certain sum, "the money to be invested in bond and mortgage or in other property, and she shall have the income thereof; and she shall have the right to use the principal as she may need it." It was held that the wife could use the principal as necessity required, and that of this necessity she was the sole judge, but that she could not give away the estate.

In the case of Re Briggs (1917) 180

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App. Div. 752, 168 N. Y. Supp. 597, modifying (1917) 101 Misc. 191, 167 N. Y. Supp. 632, it appeared that a testatrix provided in her will for the payment of the income of her estate to her husband quarterly during his life, and then declared: "I further direct that he use during his life as much of the principal of my estate as in his judgment is necessary and proper, and that he in no way be held liable or accountable for such principal so used." The court held that the husband's necessity for the use of the principal must be such that there was a propriety in using the funds for that purpose, and that the testatrix did not mean that he should found a great charity, or give the principal to others, or give away his property and live on the principal of her estate, or that he should so manage that her property should go to his, rather than her, family and friends.

In Gardner v. Whitford (1901) 23 R. I. 396, 50 Atl. 642, wherein it appeared that a testatrix bequeathed all her estate to her husband, to use according to his discretion for and during his natural life, giving him "full power and authority to use the income, interest and profits for his support, and if he shall find it necessary, also power and authority to use any part of the principal and to sell and dispose of any part of the same." After the death of her husband, if any part of the property and estate included in and covered by the gift to him should be left, she gave to others. It was held, although the terms of the power were broad and ample, they were limited and confined to the exigency on which they were to be exercised, which was for the husband's support "if he shall find it necessary;" that he was to be the sole judge of what was necessary for his support, but that the power did not extend beyond it. Hence, the court held that the husband could not give a sum of money, part of his deceased wife's estate and on deposit in her name, to another as against the remainderman, by withdrawing it and depositing it in another bank in the name of himself "or" such other person.

In Parks v. American Home Missionary Soc. (1889) 62 Vt. 19, 20 Atl. 107, the will under consideration gave the use of the testator's estate to his wife, for and during her natural life, and so much of the principal as she might see fit to use for her necessary and comfortable support, and for charitable and benevolent purposes, and contributions for worthy objects, in her own discretion, "without limitation or restriction on my part, believing that she will exercise prudence and good discretion." The court held that the widow was given unlimited discretion to use so much of the principal as she saw fit to, for her necessary and comfortable support, and for charitable and benevolent purposes, and contributions to worthy objects, within the limits designated. So long as she devoted it to any purpose contributing to her necessary and comfortable support, she was to be her own judge as to the fitness of the particular object to which she devoted it; and so in regard to charitable and benevolent or other worthy objects. The court held that if she purposed to devote any part of the principal to support, it must be "necessary and comfortable support," and that with a view to all her circumstances, station in life, etc., and that it was manifest that so long as the income, which was hers absolutely, sufficed for this purpose, the necessity contemplated by the testator would not have arisen. And the court held that an attempted application, under the provision defining her power of disposition, to charitable and benevolent purposes and contributions for worthy objects, in the form of an assignment of certain stock, and expressed to be in recognition of kindness and in testimony of affection and regard, was a gift of a purely private nature and in excess of her power under the will.

In Murray v. Kluck (1894) 87 Wis. 566, 59 N. W. 137, it appeared that by his will a testator devised and bequeathed a part of his real estate to his wife in fee; the remainder of his real estate to his wife "so long as she

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shall live;" all his personal estate to his wife, "to have and to hold the same to her sole use, benefit, and behoof, with all the increase and increment thereof, so long as she shall live;" "of my estate that may remain after the death of my said wife," he gave certain sums to two sons, and the residue to others. It was held that the will should be construed as meaning that the wife could use the corpus of the personal estate so far as reasonably necessary for her support, but no further, and that an attempted gift by her in paying a mortgage on a son's property was an infringement on the rights of the remainderman.

The rule that a life tenant cannot make a gift of the principal is necessarily applicable to such personal property as money. Given a life interest therein, with the power to use the principal for certain purposes, as for his support and maintenance, the life tenant may not use it for any other purpose and may not give it away. Hardy v. Mayhew (1910) 158 Cal. 95, 139 Am. St. Rep. 73, 110 Pac. 113. In that case a will was construed by the superior court having jurisdiction of the estate as giving the husband of the testatrix only the use of a sum of money bequeathed to him in her will, with the right to the custody of the principal for his life, and on his death, the sum to be distributed to certain named heirs. On appeal, the appellate court, concluding that the will contemplated that the legatee might use the principal sum according to his discretion for his "comfort or pleasure,"—even to the extent of using it all,—modified the decree by inserting the words, "the unused portion of," making the decree read, "for his use, during his natural life, and on his death the unused portion of said sum" to the persons named. Re Mayhew (1906) 4 Cal. App. 162, 87 Pac. 417. In a later appeal in the same case (1910) 158 Cal. 95, 139 Am. St. Rep. 73, 110 Pac. 113) it was held that the "use" authorized was only such personal use as the husband of the testatrix might desire to make of the money for *himself*, and that it did not include a disposition of practically the whole thereof, either by will or by gift during his life, and especially gifts made for the very purpose of excluding one of the remaindermen from participating in what otherwise would have been "unused" by him at the time of his death.

(f) Devise.

Under a will giving a life interest with the power to dispose of all or any of the principal as may be necessary for the tenant's support and maintenance, with remainder over to others, which may be defeated by the exercise of the power to that end and the application of the principal to that purpose, the life tenant is not authorized to devise the property, either by will or by a deed operating as a testamentary disposition.

Thus, in Newlin v. Phillips (1905) — Del. Ch. —, 60 Atl. 1068, the court construed a provision in a will wherein a testator stated that it was his will and desire that his wife should carefully husband and keep intact, as nearly as possible, the estate, in order that the revenues therefrom might give her a comfortable and sufficient livelihood for the remainder of her life. It was held that the widow was given an implied power of disposal limited to what might be necessary, on emergency, possibly, for her support, but that she had no power of disposal by will.

In Henderson v. Blackburn (1882) 104 Ill. 227, 44 Am. Rep. 780, it appeared that a devise of property for life to a testator's wife was "to have and to hold, or to dispose of so much of the same as she may need or wish to use during her lifetime." The court held that there was no doubt but that, had the widow needed all the property for her support during her lifetime, she might have disposed of it for that purpose; but, the power of disposition being limited to the need and personal use of the widow, she might dispose of it for that purpose only, and not for any other purpose. Hence, it was held that the widow could not dispose of the property by a deed in the nature of a testamentary disposition, which was in

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reality for the benefit of the grantee therein, rather than to meet the requirement of any need or use of hers, in as much as the deed, instead of disposing of the property to meet any need or personal use of the widow herself, expressly retained the property for her use and enjoyment as long as she should live, and was not to take effect until her death.

In Griffin v. Griffin (1892) 141 Ill. 373, 31 N. E. 131, it appeared that a testator gave his widow a life estate in his property, "with the same right to sell the same for her support and maintenance that I would have if living." The court held that the power of disposition given the widow was not restricted to simply an authority to sell in the event that a sale was essential for her *necessary* support and maintenance, and that it was not for the courts to annex such a provision. But the court held that the testator had only authorized his wife, in her discretion, "to sell" any or all of his real estate; that is, to dispose of it for an equivalent in money; and hence held that a deed by her to third person who agreed to support and maintain her during life, and bury her when dead, was invalid as an execution of the power in the will for the maintenance and support of the widow.

In Homans v. Foster (1919) — Mass. —, 121 N. E. 417, it appeared that a testatrix devised all her estate to her husband, "for and during the term of his natural life, with the full power to dispose of the whole or any part of said property by deed or otherwise, if he may deem it conducive to his comfort so to do." The court held that the husband was given simply a life estate, with a power of disposal "if he may deem it conducive to his comfort so to do;" but that, assuming that the power authorized him to dispose of the property by will, this authority was limited to its disposition when conducive to his comfort. Hence, while he was given full control over the estate, and could dispose of it and secure his comfort by the application of the proceeds to his physical wants, he was not empowered to part with the property for every purpose, nor was he permitted to convey the estate for the comfort of anyone except himself, thus prohibiting a bequest to a second wife.

In Smith v. Snow (1877) 123 Mass. 323, it appeared that a testator gave all his estate to his wife, "for her comfortable support and maintenance during her life, with full power and authority to dispose of the same as she may find needful for that purpose," and provided that all the estate that might remain after the death of his wife should go to another. The wife devised the estate to her brother. The court held that the wife having been given only a life estate with a power to sell, and not having exercised that power in her lifetime, the devise over in the testator's will took effect on her death.

In Morse v. Natick (1900) 176 Mass. 510, 57 N. E. 996, it appeared that a testator gave all his residuary estate to his sister, "for and during her natural life, and she is empowered to sell and dispose of so much of my estate as will insure her a comfortable living, and to that end she is authorized to sell such portion of my real estate by public or private sale, giving good and sufficient deeds therefor, meaning and intending to give her full control of the same, with full power to deed to her grantees, their heirs and assigns forever." It was held that she took only a life estate therein, with power "to sell and dispose of so much . . . as will insure her a comfortable living," but that there was nothing which gave her a power to dispose of it by will.

In Richards v. Morrison (1906) 101 Me. 424, 64 Atl. 768, it appeared that a testator's will gave the residue of his estate in trust, and directed the trustees "pending the settlement of my [his] estate and until final division," to pay to his wife ten twenty-sevenths portion of the income "during her lifetime, or until final settlement of my [his] estate," for her sole use and benefit, and after disposing of the balance of income to other parties he provided that "final settlement of my estate or distribution thereof, my

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trustees shall convey and deliver to my wife ten twenty-sevenths parts of this my residuary estate, and she may herself select such portion from any parcels of my residuary estate at the appraised value thereof. It is my will that my wife have the entire use and income, during her lifetime, of all said portion of my residuary estate; and in addition thereto, I do authorize and empower her to sell and convey by her own grant or deed any of said estate, real or personal, which she may in the exercise of her own discretion elect to sell and convey for her sole use and benefit, without license of probate court." Then followed a gift over to other parties of what "at her death shall remain unused, unexpended or unsold and unconveyed by her." The court held that the widow was given a life estate with a power of sale for a limited purpose, to wit, "for her sole use and benefit" of any part of the property, but that she was not authorized to dispose of it by will.

In Hall v. Otis (1880) 71 Me. 326, it appeared that a testator's will gave all his residuary estate to his wife, during her life, to hold and use the same as if absolutely hers, and at her death whatever might be left was to be divided among the survivors of the testator's brothers and sisters, adding: "I wish it distinctly understood that I place no restriction upon my said wife in regard to her use of my said estate, desiring and intending that she shall use and expend every dollar of the same, if necessary, for her care, comfort, or support." It was held thereunder, in effect, that the widow could not devise whatever remained of the testator's estate at her death to others than his surviving brothers and sisters, for while the testator was careful to secure to his widow the right to use so much of his estate as she should deem necessary for her comfort and support, he was equally careful to say that it was his wish that whatever should be left at her death should be equally divided among the survivors of his brothers and sisters.

In Farlin v. Sanborn (1910) 161 Mich. 615, 187 Am. St. Rep. 525, 126 N. W. 634, it appeared that the material portions of a testator's will devised all his estate to his wife, for and during her natural life, with full power and authority to use and dispose of the same for her own use, support, and comfort, as to her should seem best, giving her full power to sell and convey all or any of the real estate, at her option, as fully as he himself could do, with a devise of all the property that might be remaining on her decease to his heirs. It was held that the will created a life estate in the widow, and that thereunder she had the right to use the property and to dispose of and convey it for a specific purpose, to wit, for her use, support, and comfort only, and that this did not give her a right to give away the property by testamentary disposition.

In Terry v. Wiggins (1872) 47 N. Y. 512, affirming (1869) 2 Lans. 272, it appeared that the residuary clause of a testator's will bequeathed to his wife all other property he died possessed of, "for her own personal and independent use and maintenance, with full power to sell or otherwise dispose of the same, in part or the whole, if she should require it or deem it expedient to do so," and on her decease, "whatever residue there may be of personal or real estate and effects" was directed to be transferred by the executors to the trustees of a specified church. It was held that the wife had a life estate coupled with a power of disposal which could only be exercised under the will in case the wife should require it or deem it expedient; that is, with a view to her "personal use and maintenance,"—the purposes for which it was given,—during her life, and by deed, but that she could not dispose of it by will.

In Smith v. Van Ostrand (1876) 64 N. Y. 278, reversing (1875) 3 Hun, 450, 5 Thomp. & C. 664, it appeared that a will contained the following clause: "I give and bequeath unto my beloved wife Catharine, the sum of $1,650, in lieu of dower on my real estate, for her support during her natural life, or as long as she remains

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my widow, then her said dower shall be transferred to my three children hereinafter mentioned. Fifty dollars of the above-named sum shall be paid her as soon as practicable after my decease, and the remainder on or about six months after. Also, I further give her any part of the household furniture that she wishes for her own use and that she may will to whom she chooses, and I further provide that she may occupy our dwelling house six months after my decease, and necessary provisions for her support and comfort, which shall be provided out of my estate." The conclusion of the court was that the widow was given the use of the sum of money specified during her life or widowhood, and was empowered to apply so much of the principal as might be necessary to her support, but that no power of testamentary disposition was given to her.

In Peck v. Smith (1918) 183 App. Div. 336, 170 N. Y. Supp. 500, it appeared that a testator gave his wife "the use of the sum of $20,000 for and during the term of her natural life, with the right and privilege to use such part or portion of the principal thereof as to her shall seem meet and proper." Another clause gave her "for and during the term of her natural life, the use, rents and income" of a house, "with the right and privilege of selling the same if at any time she should deem it necessary, and the right and privilege to use such part or portion of the proceeds of the sale of such house, as to her shall seem meet and proper." It was held that the widow could not dispose of the money and house by her will or by transfers and instruments operating as a testamentary disposition thereof.

In the case of Re Trelease (1906) 49 Misc. 205, 96 N. Y. Supp. 318, affirmed in (1906) 115 App. Div. 654, 100 N. Y. Supp. 1051, it appeared that a testator gave his wife a certain sum, "the money to be invested on bond and mortgage or in other property, and she shall have the income thereof and she shall have the right to use the principal as she may need it." It was held that the wife could use the principal as necessity required, and that of this necessity she was the sole judge, but that she could not will away the estate.

In the case of Tyson's Estate (1899) 191 Pa. 218, 43 Atl. 131, the will under consideration gave the whole of the testator's estate, real and personal, to his wife, she "to have the same and use it at pleasure for her sole use as fully, largely and amply to all intents and purposes as I myself could or might have done in my lifetime with full power at any time to sell or dispose of any part or the whole of the same," and she to "have the proceeds of such sale at her own disposal." The will also provided that the management, control, and proceeds of the estate should be reserved for and to the sole use of the wife during her lifetime, and directed that after her decease the executors should sell the testator's property, real and personal, and divide the estate as provided therein. The court held that the intention of the testator was to give his wife so much, and only so much, though possibly amounting to the whole, as should be necessary for her own comfort and enjoyment of life, and the residue, be it much or little, was to pass under his will. The extent of the widow's consumption of the estate was, the court held, within her own control, and her decision was without appeal, but it must have been honestly reached in accordance with the purpose the testator intended, and not merely colorably to defeat his will. Hence, the court held that a transfer by will, with intent not to consume for herself, but to preserve for others after her death, and to change the beneficiaries after her from those chosen by her husband to others of her own selection, would be a fraud on the testator and his will.

In Morel v. Oakley (1916) 253 Pa. 107, 97 Atl. 1029, wherein it appeared that a testator gave the use of all his property to his wife during her natural life, "also the right to use of the principal of my estate in case she needs, with herself as the sole judge of such need," it was held that the

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wife took a life estate with an unlimited power to consume the property, both real and personal, which, however, did not include the power of alienation by will.

In John v. Bradbury (1884) 97 Ind. 263, it appeared that a testator devised his real and personal property to his widow, "to hold and possess, sell, use and dispose of as she may see fit, for her own comfort and convenience," and empowered her "to sell what realty I may be in possession of at my death, and convey the same by deed in fee simple, if her necessities or comfort require it." "The residue of my property or moneys, if any should be left after her death and full payment of her funeral expenses, be equally divided between my two children." It was held that the will gave the widow only a life estate, with power to dispose of the property absolutely, for her own comfort and convenience, leaving such portion as might be undisposed of at her death, and after payment of her funeral expenses, to his children. Hence it was held that she could not devise the property undisposed of at her death to her heirs and devisees, to the exclusion of the testator's children.

(g) Waste.

In Glover v. Reid (1890) 80 Mich. 228, 45 N. W. 91, the will under construction gave all the testator's estate to his wife, "for her own use and benefit and disposal, for and during the term of her natural life, leaving said estate to be used and disposed of by her, wholly to the discretion and judgment of my said wife as she may decide her needs require," the remainder of his estate, after her decease, to go to his children. It was held that the widow took a life estate only, and in her use of it would be governed by the rules applicable to tenants of life estates. She might not waste or squander it in profligate living, but no complaint could be made of her use of so much of the estate as her own sound judgment and discretion "decide her needs require." Only an abuse of that discretion, the court held, could be inquired into.

b. Necessity and extent of anticipation.

1. Discretion of life tenant as unlimited.

(a) Rule stated.

It is, of course, true that a grantor or testator may, if he so elect, make the exercise of a power annexed to a life estate authorizing the life tenant to sell or dispose of the estate or so much thereof as may be needed for his support and maintenance during his lifetime, subject to the order or approval of the court, or to any other restriction which he sees fit to impose, and a sale or conveyance in disregard thereof will be void as against the remaindermen. Since, however, it is competent for the grantor or testator to make the power full and unlimited, the court will not ordinarily impose any restriction or assume any control over its exercise which is not expressed or clearly implied in the grant or devise by which it is created. Hamilton v. Hamilton (1910) 149 Iowa, 321, 128 N. W. 380.

And where the grant or devise of power to the life tenant is limited to a sale or other disposition to meet some contingency which may or may not arise, as where power is given to sell, transfer, or dispose of the property or as much thereof as may, from time to time, be needed for the life tenant's support and maintenance, the question who is to determine when the contingency so provided against has arisen, thus maturing the power to convey, is one which has frequently occupied the attention of the courts, and in the great majority of cases it is held that if the grant of power is otherwise full or general in its terms, and the determination of the question is one which involves the exercise of judgment and discretion, the decision made in good faith by the life tenant himself is final. It is likewise held in these cases that the amount required or used by the life tenant for his support and maintenance rests entirely in his honest judgment and discretion, which cannot be controlled or limited by the courts in the absence of bad faith or fraud.

Alabama.—Cain v. Cain (1900) 127 Ala. 440, 29 So. 846.

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Iowa.—Hamilton v. Hamilton (1910) 149 Iowa, 321, 128 N. W. 380 (see, however, a former opinion in this case reported in (1908) 140 Iowa, 282, 115 N. W. 1012, 118 N. W. 375).

Kentucky.—Scott v. Scott (1867) 2 Bush, 147; Paxton v. Bond (1891) 12 Ky. L. Rep. 949, 15 S. W. 875; Hosman v. Willett (1908) 32 Ky. L. Rep. 906, 107 S. W. 334.

Maine.—Hall v. Preble (1878) 68 Me. 100; Richardson v. Richardson (1880) 80 Me. 585, 16 Atl. 250; Small v. Thompson (1899) 92 Me. 539, 43 Atl. 509. Compare Scott v. Perkins (1848) 28 Me. 22, 48 Am. Dec. 470; Warren v. Webb (1878) 68 Me. 133.

Massachusetts.—Dodge v. Moore (1868) 100 Mass. 335. Compare Minot v. Prescott (1782) 14 Mass. 496; Stevens v. Winship (1822) 1 Pick. 318, 11 Am. Dec. 178.

Michigan.—Glover v. Reid (1890) 80 Mich. 228, 45 N. W. 91. Compare Morford v. Dieffenbacker (1884) 54 Mich. 593, 20 N. W. 600.

Missouri.—Griffin v. Nicholas (1909) 224 Mo. 275, 123 S. W. 1063. Compare Scheidt v. Crecelius (1887) 94 Mo. 322, 4 Am. St. Rep. 384, 7 S. W. 412.

New Hampshire.—Compare Eaton v. Straw (1846) 18 N. H. 320.

New York.—Re Grant (1891) 61 Hun, 624, 40 N. Y. S. R. 944, 16 N. Y. Supp. 716, approved and followed in (1895) 86 Hun, 617, 66 N. Y. Supp. 822, 33 N. Y. Supp. 193; Re Hunt (1903) 84 App. Div. 159, 82 N. Y. Supp. 538, affirmed in (1904) 179 N. Y. 570, 72 N. E. 1143; Hasbrouck v. Knoblauch (1909) 130 App. Div. 378, 114 N. Y. Supp. 949, modifying judgment and affirming point under discussion in (1908) 59 Misc. 99, 112 N. Y. Supp. 159; Re Briggs (1917) 180 App. Div. 752, 168 N. Y. Supp. 597, modifying (1917) 101 Misc. 191, 167 N. Y. Supp. 632; Re Parsons (1902) 39 Misc. 126, 78 N. Y. Supp. 975; Re Trelease (1906) 49 Misc. 205, 96 N. Y. Supp. 318, affirmed in (1906) 115 App. Div. 654, 100 N. Y. Supp. 1051.

Pennsylvania.—Yetzer v. Brisse (1899) 190 Pa. 346, 42 Atl. 677; Tyson's Estate (1899) 191 Pa. 218, 43 Atl. 131; Henninger v. Henninger (1902) 202 Pa. 207, 51 Atl. 749; Aurand's Estate (1916) 25 Pa. Dist. R. 725.

Rhode Island.—Gardner v. Whitford (1901) 23 R. I. 396, 50 Atl. 642.

South Carolina.—Moody v. Tedder (1881) 16 S. C. 557.

Tennessee.—Matthews v. Capshaw (1902) 109 Tenn. 480, 97 Am. St. Rep. 854, 72 S. W. 964; Emert v. Blair (1908) 121 Tenn. 240, 118 S. W. 685.

Vermont.—Parks v. American Home Missionary Soc. (1889) 62 Vt. 19, 20 Atl. 107.

Only an abuse of that discretion can be inquired into. Glover v. Reid (1890) 80 Mich. 228, 45 N. W. 91.

Where the preservation or exhaustion of an estate has been committed largely to the life tenant's judgment, while that judgment may not be conclusive, yet the court is bound to respect it and uphold it until evidence is given that it was exercised in bad faith and fraudulently as against the heirs at law. Swarthout v. Ranier (1894) 143 N. Y. 499, 38 N. E. 726, affirming (1893) 67 Hun, 241, 2 N. Y. Supp. 198.

In Re French (1888) 18 N. Y. S. R. 759, affirmed in (1889) 52 Hun, 303, 5 N. Y. Supp. 249, the court said: "The decisions may name maintenance and support as the ground, but when they give such first taker the possession of the property, their effect is to permit such first taker to dispose of the entire estate either for his maintenance, support, comfort, taste, or fancy, and make him the sole judge."

Where a will gives a life tenant, in addition to the income of an estate, the right to use so much of the principal as, in his judgment, is "necessary and proper," the necessity evidently relates to his personal wants, compared with his means, income, and position in life; the propriety evidently calls for consideration of the fact, with others, that he, as trustee for the remaindermen, may seek to use some of the principal given to his cestuis que trustent. Hence, the exercise of the power depends on an honest judgment on his part that his wants, under all the circumstances then existing, make it necessary and

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proper for him to use for his own benefit the property which was intended under ordinary circumstances for the remaindermen. And while the power should be liberally exercised to cover his needs, the judgment on his part must be an honest, and not an arbitrary or wilful, judgment, for he is exercising a power which it was intended he should exercise only under unusual circumstances, not then foreseen. Hence, the existence of some such circumstance, some changed condition, tending in a way to show that it is necessary and proper for him, under all the conditions, to use some part of the principal, is necessary as a basis for his action in that respect, and on such basis his honest judgment controls. Re Briggs (1917) 180 App. Div. 752, 168 N. Y. Supp. 597, modifying (1917) 101 Misc. 191, 167 N. Y. Supp. 632; Peck v. Smith (1918) 183 App. Div. 336, 170 N. Y. Supp. 500. In the case first cited, it appeared that a testatrix provided in her will for the payment of the income of her estate to her husband quarterly during his life, and then declared: "I further direct that he use during his life as much of the principal of my estate as in his judgment is necessary and proper, and that he in no way be held liable or accountable for such principal so used." In discussing the rights of the husband, as life tenant, to use the principal, the court said: "The meaning of the words 'necessary and proper' in the will must be determined by considering the respective rights and duties of all the parties and the evident intent of the testatrix. The necessity evidently relates to his personal wants, compared with his means, income, and position in life; the propriety evidently calls for consideration of the fact, with others, that he, the trustee, may seek to use some of the principal given to his cestuis que trustent. The exercise of the power depends upon an honest judgment on his part that his wants, under all the circumstances then existing, make it necessary and proper for him to use for his own benefit the property which was intended under ordinary circumstances for them. In determining his rights under the power we must not forget his duties as trustee. Nevertheless, the strict duties of a trustee were not imposed upon him with reference to the exercise of his power."

In Scheidt v. Crecelius (1887) 94 Mo. 322, 4 Am. St. Rep. 384, 27 S. W. 412, it appeared that a testator gave all his property to his wife, and provided that she should, until her death, manage and dispose of it as she pleased, and that he desired to be understood as empowering her, in cases of necessity, to sell not only personal, but real, property. It appeared that the widow executed a deed to take effect in possession after her death, which recited that the land was sold in consideration of the sum of $1, and unpaid and indispensable services rendered, said services having been matters of necessity towards the maintenance and existence of the widow, and in consideration of similar services yet to be rendered. It was contended that the widow was to be the sole judge as to whether her necessities required the sale of the land, and that, having sold it under the power, the deed could not be assailed at law. The court held, however, that it was the intention of the testator to invest only a life estate in his wife, with the power to dispose of the fee in case her necessities or actual needs required it, and that her power to convey the fee was dependent on a contingency which must have happened or existed before the power thus to dispose of the land could be called into exercise. The court held that, it appearing from the record that, by the consent of the parties, the fact as to whether the necessity contemplated by the will existed at the time the deed was executed, and whether it was made in good faith, for the purpose of securing such support and maintenance, was submitted to the jury, the judgment by consent rendered on their finding to the contrary would not be disturbed, the evidence tending strongly to show that the widow's object in making the deed was simply to deprive certain of the

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remaindermen of their interest under the will in the land conveyed.

In Minot v. Prescott (1782) 14 Mass. 496, it appeared that a testator devised the income of his real and personal estate to his wife during life, "and if not sufficient to support her comfortably, then power to sell any of his estate for that purpose." It was held that the power was not to dispose at will and pleasure, but on the happening of a particular event, viz., the income proving insufficient to support the wife comfortably; which, the court held, was a condition precedent. And the jury having found that there was a sufficiency of personal estate for the comfortable support of the widow, the court held that her conveyance of the land could not be supported.

(b) Illustrations.

In each of the following cases it was held that, under the testamentary provision indicated, the life tenant was the judge as to whether a necessity of anticipating the principal had arisen, and as to the extent of the needful anticipation:

Cain v. Cain (1900) 127 Ala. 440, 29 So. 846. The testator gave all his real and personal property to his wife, to have and control as he might if living, and "to sell and convey any property she may choose for her support or comfort, as she may see proper during her natural life, and at her death what may be left of my said estate the same to be divided according to law in such cases made and provided."

Hamilton v. Hamilton (1910) 149 Iowa, 321, 128 N. W. 380. A testatrix gave the residue of her estate to her husband "during his life, with full power to sell, transfer and dispose of the same or as much thereof as may from time to time be needed for his support and maintenance during his said lifetime," with remainder over to her children.

Scott v. Scott (1867) 2 Bush (Ky.) 147. A clause of a testator's will provided as follows: "I direct that my wife shall have as much of the stock, implements, furniture, and personal property, including money on hand at my death, as she may think necessary for her comfort, convenience, and maintenance."

Paxton v. Bond (1891) 12 Ky. 949, 15 S. W. 875. The will gave the testator's wife all of his property for her support during her life, and then provided: "If at any time my wife should become needy, and the farm fail to make her a support, I give her the right to sell 50 acres of the land on either side she may choose, and to have the proceeds."

Hosman v. Willett (1908) 32 Ky. L. Rep. 906, 107 S. W. 334. The will gave all the testator's property left after the payment of debts to his sister and his niece, "to use or sell in any way they may wish for their support," what was left to go to the testator's brother and sisters.

Warren v. Webb (1878) 68 Me. 133. A clause of the will under consideration was as follows: "I give, bequeath and devise to my beloved wife, Abigail H. Whitmore, for and during her natural life, all my estate and property, real, personal and mixed, wherever found and however situated, to have and to hold the same to her and her assigns, for and during the term aforesaid, for her proper use, benefit and support and maintenance; and after her decease, said estate and property, or the residue and remainder thereof, to be legally divided to and among my children, namely," etc.

Scott v. Perkins (1848) 28 Me. 22, 48 Am. Dec. 470. The will gave all of the testator's property, and the income of the same, to his widow, to be used and disposed of by her, for her convenience and comfort, during life, and by a later provision for the distribution of what might remain after the decease of the widow, the widow might dispose of the property whenever her comfort and convenience might require that she should do so.

Hall v. Preble (1878) 68 Me. 100. The will provided in part as follows: "I give and bequeath all the residue and remainder of my estate, both real and personal, including all moneys that may be received upon my policy of insurance upon my life, unto my beloved wife, Annie E. Hall, during

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her life. It is my intention and desire that said Annie E. Hall shall hold and use to her benefit, all the property, both real and personal, owned by me at the time of my decease, during her life, the same as if absolutely hers, and at her death whatever may be left, I wish equally divided among the survivors of my brothers and sisters. To avoid all contentions and disputes, it is my request and directions that said Annie E. Hall shall immediately upon my decease, by will, devise and direct that such portion of said estate as shall be left at her decease, be divided between the survivors of my brothers and sisters according to my intention as expressed in this will. I wish it distinctly understood that I place no restriction upon my said wife in regard to her use of my said estate, desiring and intending that she shall use and expend every dollar of the same, if necessary, for her care, comfort and support."

Richardson v. Richardson (1888) 80 Me. 585, 16 Atl. 250. The testator bequeathed the residue of his property to his wife, "to her use and behoof and dispose of for her maintenance during her natural life."

Dodge v. Moore (1868) 100 Mass. 335. The will gave the testator's wife the income, use, and improvement, for and during her natural life, of all his estate, "and if the income of said estate shall be insufficient for her support, it is my will that she shall use so much of the principal as she may think necessary; and I hereby give her full power and authority to sell any part or all of either the real or personal estate whenever she may think it expedient, either for her support, or for investment," "and all of said estate, real and personal, that may remain at the decease of my said wife, I give and devise to my daughter."

Glover v. Reid (1890) 80 Mich. 228, 45 N. W. 91. The will gave the testator's widow all his estate "to and for her own use and benefit and disposal, for and during the term of her natural life, leaving said estate to be used and disposed of by her, wholly to the discretion and judgment of my said wife as she may decide her needs require," the remainder of the estate, after her decease, to go to the testator's children.

Griffin v. Nicholas (1909) 224 Mo. 275, 123 S. W. 1063. The will gave the residue of the estate to the testator's wife, "to have and to hold and enjoy for and during her natural life, with full power to make such disposition thereof as may be necessary for her own comfort and support."

Thomas v. Pardee (1877) 12 Hun (N. Y.) 151. The testator first gave his wife, during her natural life, such portions of his library as she might wish, and, in effect, authorized her to dispose of the remainder in such manner as she should deem best. He then gave to her "all my real and personal estate, to be possessed and used by her at her discretion, and for her support and comfort during her natural life, having confidence in her that it will be used and retained, and the amount, the increase and the residue, whether more or less, left sacred to the purposes to which we mutually agreed to devote it." He then authorized her, in a certain contingency, to dispose of the household goods and furniture, and, after stating the reason therefor, he gave to certain benevolent societies all his estate in his wife's possession and held by her up to and at the time of her decease, after her funeral expenses were provided for, in the same clause adding, "to be held in trust by my executor," he to divide and pay over to the societies after her decease.

Huggins v. Lewis (1900) 31 Misc. 292, 64 N. Y. Supp. 355. The will gave the testator's wife possession, control, management, and all of the income from his property for and during her natural life, and then provided that "should my children, or either of them [naming them] . . . by reason of sickness or unforeseen calamity become necessitated as to require assistance in their proper and necessary care and support, and the income and profits arising from the real estate and investments in the hands of my said wife as above mentioned, shall

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prove insufficient for her proper support and to afford the necessary contribution for the aid of my said children, or either of them, then my said wife as such trustee is empowered to use sufficient of my estate in meeting the requirements of the emergency to the extent her best judgment may dictate."

Re Grant (1891) 61 Hun, 624, 40 N. Y. S. R. 944, 16 N. Y. Supp. 716, approved and followed in (1895) 86 Hun, 617, 66 N. Y. S. R. 822, 33 N. Y. Supp. 193. The will gave the testator's wife the right to possess and enjoy the rents and profits of his entire estate during her natural life, and further provided that if the use and profits were not sufficient for her support, a sale thereof might be made for her support. The remainder over after the death of the wife was given to his children and grandchildren.

Re Hunt (1902) 38 Misc. 30, 76 N. Y. Supp. 968. The will gave the income of all the estate to the testator's wife, "and as much of the principal as she thinks proper for her support, and for the care which she shall give to our son," with the privilege of disposing of the real estate if she thought best, and remainder over to trustees for the support of the son. See also (1903) 84 App. Div. 159, 82 N. Y. Supp. 538, affirmed in (1904) 179 N. Y. 570, 72 N. E. 1143.

Re Trelease (1906) 49 Misc. 205, 96 N. Y. Supp. 318, affirmed in (1906) 115 App. Div. 654, 100 N. Y. Supp. 1051. A testator gave his wife "the money to be invested on bond and mortgage or in other property, and she shall have the income thereof; and a certain sum, she shall have the right to use the principal as she may need it."

Re Parsons (1902) 39 Misc. 126, 78 N. Y. Supp. 975. The will provided that the husband of the testatrix was to have the use and income of all her property, subject to the bequests therein made, during his life, "and any part of the principal that may be needed for his support."

Hasbrouck v. Knoblauch (1909) 130 App. Div. 378, 114 N. Y. Supp. 949 modifying (1908) 59 Misc. 99, 112 N. Y. Supp. 159. The testator devised his entire estate to his widow, "for her use and behoof during her natural life, she to have absolute control and disposal of all the income to be derived therefrom and so much of the principal as she may deem necessary for her comfortable sustenance and support."

Swarthout v. Ranier (1894) 143 N. Y. 499, 38 N. E. 726, affirming (1893) 67 Hun, 241, 2 N. Y. Supp. 198. The testator's wife was given all his property, "to have and to hold for her comfort and support all of the abovenamed property if she needs the same during her natural lifetime, if she should outlive me."

Lininger's Appeal (1885) 110 Pa. 398, 1 Atl. 722. The testator directed that his wife should have the use and occupancy of all his real estate during her natural life, to be held and enjoyed by her as her own. He directed that she take into possession, hold, or convert into cash, his entire personal property, "and if the proceeds of my real estate be not sufficient to support her she is at liberty to take as much of the personal fund or money as she may see proper for that or any other purpose;" with remainder over, and provided that his executors should not enter on their duties as executors until after the death of his wife.

Hambright's Appeal (1855) 2 Grant, Cas. (Pa.) 320. The testator bequeathed a certain sum of money to his wife "for her full use during her lifetime, and at her death, if any left," he desired that it should go to others.

Tyson's Estate (1899) 191 Pa. 218, 43 Atl. 131. The will gave the whole of the testator's estate, real and personal, to his wife, she "to have the same and use it at pleasure for her sole use as fully, largely and amply to all intents and purposes as I myself could or might have done in my lifetime, with full power at any time to sell or dispose of any part or the whole of the same," and she to "have the proceeds of such sale at her own disposal." The will also provided that the management, control, and proceeds of the estate should be reserved for and to the sole use of the wife during

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her lifetime, and directed that, after her decease, the executors should sell the testator's property, real and personal, and divide the estate as provided therein.

Trout v. Rominger (1901) 198 Pa. 91, 47 Atl. 960. The testator bequeathed all his residuary estate to his wife, "to have and to hold the same to her own use, benefit and behoof forever; the same to be and remain for her just and necessary support during the natural life of her." In case any of the above-bequeathed property should remain at the date of his wife's death, he directed that it be divided between his children.

Henninger v. Henninger (1902) 202 Pa. 207, 51 Atl. 749. The will contained the following provision: "All the residue of my estate, real, personal and mixed, of which I shall die possessed . . . I will and devise to my beloved wife, Sarah A. Coover, to be hers during her life, with the right in her, however, to use, sell and dispose of any or all of said estate for the use and support of herself and Mrs. Elizabeth W. Henninger. Should my wife die before Mrs. Elizabeth W. Henninger, my will is that such portion of my estate as shall then remain shall be for the use and support of Mrs. Elizabeth W. Henninger, with the right in her to sell and dispose of the same for her maintenance and support, and upon the death of both my wife, Sarah, and Mrs. Elizabeth W. Henninger, and after the payment of their funeral expenses, what portion of my estate shall then remain shall vest in and become the absolute property of my sister, Eliza Bishop, and her heirs."

Aurand's Estate (1916) 25 Pa. Dist. R. 725. The testator bequeathed all his estate to his wife, "for her maintenance during her natural life," and "should there remain anything of" his estate at the death of his wife, he bequeathed "the same and all that remains not consumed by my wife" to his adopted daughter.

Moody v. Tedder (1881) 16 S. C. 557. The will gave to the testator's widow, "during the term of her natural life only, all his property, both real and personal, authorizing and empowering her to use and dispose of so much thereof as may be necessary for her comfortable support and maintenance in such style and manner as she may see fit," with a gift over, after the death of his wife, of "whatever portion may be remaining of his" property.

Matthews v. Capshaw (1902) 109 Tenn. 480, 97 Am. St. Rep. 854, 72 S. W. 964. The testator gave his wife all his property during her life or widowhood, and in case of necessity authorized her to sell any of it for the benefit of the family.

Emert v. Blair (1908) 121 Tenn. 240, 118 S. W. 685. A clause of the will was as follows: "In order to afford my wife, Mrs. Martha J. Emert, a comfortable and secure support during her life out of my estate, I hereby devise and bequeath to her, for the time of her natural life, all my property, real, personal and mixed, to have, manage, and use for her support during said time. At her death said property shall be divided among my lawful heirs and distributees, according to the laws of inheritance and distribution in Tennessee." The third clause was: "To more effectually provide for my said wife, I hereby invest her with power to sell and convey any of said property for the use aforesaid. This power is given because some of said realty consists of mountain farms which may fail to sufficiently contribute to my wife's support. My realty in Sevierville my wife shall not sell, unless, in her judgment, her support absolutely requires the same. Any of my other realty my wife may sell if in her judgment she can then make said property more conducive to her support. In case of sale of any of said realty, the proceeds shall be loaned out with good security or reinvested, the interest or income to be applied to her support, the principal or property so purchased to belong to my estate. But if my wife's comfortable support should in her judgment demand an appropriation by her of part or all of said principal or property, she is hereby vested with such pow-

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er." The fifth clause provided as follows: "That there may be no mistake, I here again direct that, at my wife's death, the realty unsold of my estate or, in case my wife exercises the power of sale herein conferred, the proceeds of such sale or sales or the property purchased thereby in case of reinvestment or the remainder of the principal, if any, in case the principal is diminished, shall belong to my estate, and shall be divided among my lawful heirs and distributees according to the laws of inheritance and distribution in Tennessee." "My intention is to give my wife the use of my entire estate for her support during her life, or if the profits of my estate are in her judgment insufficient, then to give her the right to convert to her own use so much of my estate as will be sufficient for that purpose, but the balance, if any, to belong to my estate at her death, in whatsoever shape it may be found."

Otjen v. Frohbach (1912) 148 Wis. 301, 134 N. W. 832. The testatrix gave all the rest and residue of the property, real and personal, to her son and daughter, or the survivor of them, share and share alike, during their natural lives and during the life of the survivor of them, with the right to use and consume such part of his or her share as either of them should find necessary, with disposition over of the remainder.

2. Limitations on discretion of life tenant.

In some jurisdictions it is held that, under a will devising a life estate with a power of disposal of the principal thereof, conditioned on a necessity in providing for the life tenant's comfortable support and maintenance, the life tenant's authority and power to sell and dispose of the property are not general, but contingent. That is, they are to be exercised only on the happening of the particular contingency, viz., that he stands in need and that the disposition has become necessary for his comfortable support; and then only in proportion to the extent of the necessity; being limited to so much only of the property as will suffice for his support and comfort. Hull v. Culver (1867) 34 Conn. 403; Peckham v. Lego (1888) 57 Conn. 553, 7 L.R.A. 419, 14 Am. St. Rep. 130, 19 Atl. 392; Little v. Geer (1897) 69 Conn. 411, 37 Atl. 1056; Bartlett v. Buckland (1906) 78 Conn. 517, 63 Atl. 350; Hooker v. Goodwin (1917) 91 Conn. 463, 99 Atl. 1059, Ann. Cas. 1918D, 1159; Reeve v. Beekman (1887) 42 N. J. Eq. 613, 9 Atl. 27; Stevens v. Flower (1889) 46 N. J. Eq. 340, 19 Atl. 777; Cox v. Wills (1891) 49 N. J. Eq. 130, 22 Atl. 794 (reversed in (1892) 49 N. J. Eq. 573, 25 Atl. 938, on other grounds, the appellate court expressly sustaining the opinion of the lower court on the point under discussion); Bradway v. Holmes (1892) 50 N. J. Eq. 311, 25 Atl. 196; Hunt v. Smith (1899) 58 N. J. Eq. 25, 43 Atl. 428; Komp v. Thomas (1912) 81 N. J. Eq. 103, 85 Atl. 815; Du Bois v. Waterman (1916) 87 N. J. Eq. 119, 99 Atl. 143; Miller v. Potterfield (1890) 86 Va. 876, 19 Am. St. Rep. 919, 11 S. E. 486. Compare Mansfield v. Shelton (1896) 67 Conn. 390, 52 Am. St. Rep. 285, 35 Atl. 271 (set out at length); Reed v. Reed (1907) 80 Conn. 401, 68 Atl. 849 (set out at length).

The right to resort to the principal is founded on necessity and restricted by necessity. Peckham v. Lego (1888) 57 Conn. 553, 7 L.R.A. 419, 14 Am. St. Rep. 130, 19 Atl. 492. In this case, it appeared that a will bequeathed to a niece and her husband "the use and improvement" of the remainder of the estate of which the testatrix was possessed, "during their natural lives." "Should it be necessary for their personal comfort to use any portion of said property, it is my will that they do so, exercising good judgment, and saving as much of it as possible for the children born to them." The court held that the language used necessarily implied a consciousness on the part of the testatrix that she had given only a life estate; but that it had occurred to her that the income might be so limited and their circumstances so reduced that they might lack the means of comfortable support, and hence she added this clause.

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The right to resort to the principal was founded on necessity, and restricted by necessity. In this connection, the court held that the words, "necessary for their personal comfort," must be held to mean, "necessary for their support."

The contingency is the life tenant's actual need, and not his expectation or opinion of it. Hull v. Culver (1867) 34 Conn. 403, wherein it appeared that the testatrix devised all her estate to her husband, "to use and improve during his natural life, and if he should want for his support, to sell any part or the whole of it for his maintenance, my will is that it shall be at his disposal." It was held that this language very clearly implied a limitation or restriction of the husband's power of disposal to a case of necessity, the sale to be proportioned to the extent of the necessity. Nor was the husband to be the sole judge of his necessity, but the contingency was to be his actual need, not his expectation or opinion of it. And it appearing that he had property in his own right sufficient for his maintenance and support at the time of the execution of a deed thereof, it was found that there was not any necessity for the conveyance of the land for that purpose.

Even if it were not required, in order to justify a sale, to show that the life tenant was in a condition of immediate want, it should at least appear that there was so much danger of it that the raising of money had become reasonably necessary. Ibid.

What is necessary in law does not always—nor often—mean a strict, absolute necessity. It is a relative and variable term, and restricted or enlarged according to the surrounding circumstances. It means here, as in the case of the obligation of a husband to furnish necessaries for his wife, all reasonable necessaries suitable to the situation, condition, and status in life of the life tenant. Peckham v. Lego (Conn.) supra; Hooker v. Goodwin (1917) 91 Conn. 463, 99 Atl. 1059, Ann. Cas. 1918D, 1159.

In Cox v. Wills (1891) 49 N. J. Eq. 180, 22 Atl. 794, reversed in (1892) 49 N. J. Eq. 573, 25 Atl. 938, on other grounds, the appellate court expressly sustaining the opinion of the lower court on the point under discussion, it was held that power given to a life tenant to expend for comfortable maintenance should be construed to mean what was reasonably necessary for that purpose, having regard to the previous habits, tastes, and style of living of the donee, and the amount of the estate.

Hence, if a life tenant acts within the legal limits of a necessity in law, he may not be responsible; but he is, if he appropriates a portion of the principal when not needed for his support, or indulges in wastefulness, or seeks to appropriate to his own use more of the estate than is reasonable for his support. Peckham v. Lego (1888) 57 Conn. 553, 7 L.R.A. 419, 14 Am. St. Rep. 130, 19 Atl. 392; Little v. Geer (1897) 69 Conn. 411, 37 Atl. 1056. See also Hull v. Culver (1867) 34 Conn. 403.

In Little v. Geer (1897) 69 Conn. 411, 37 Atl. 1056, it appeared that a testator devised the use, income, and improvements of his property to his wife so long as she remained his widow or until her decease, and in case the use and income of his estate should be insufficient for her comfortable and proper maintenance and support, empowered his executor to sell any of his estate, and "to appropriate and freely use the avails arising from such sale for her proper and comfortable maintenance and support." A codicil named the wife as executrix and gave her the privilege of using as much of the principal as she might desire for her comfort and maintenance, with full power to sell and convey any of the estate, as she might see fit, and to freely use the avails thereof as long as she remained his widow. It was held that the widow was confined to what she might require for her comfortable and proper maintenance and support, and so long as she conducted reasonably and in good faith, the amount she might appropriate must be left to her own discretion. If, however, she should indulge in wastefulness, or should seek

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to appropriate to her own use more of the estate than was reasonable for her support, as stated in the will, then she would be restrained by a court of equity on the complaint of any of the remaindermen. See to the same effect Hooker v. Goodwin (1917) 91 Conn. 463, 99 Atl. 1059, Ann. Cas. 1918D, 1159.

While the kind and extent of the support needed is thus left in a measure to the judgment and discretion of the life tenant, he may not use the principal to gratify his mere whims and fancies. Peckham v. Lego (1888) 57 Conn. 553, 7 L.R.A. 419, 14 Am. St. Rep. 130, 19 Atl. 392.

Thus, so long as a life tenant exercises a discretion within the law, and confines his or her use of the principal to so much as may be necessary for his or her support in a manner suitable to his or her station and condition of life, as disclosed by the circumstances of each case, his discretion cannot be interfered with by the courts. Little v. Geer (1897) 69 Conn. 411, 37 Atl. 1056; Hooker v. Goodwin (Conn.) supra.

In the case last cited it appeared that the provisions of a testator's will gave his widow, as life tenant while she remained his widow, the entire income of his estate, which he gave in trust, together with the right to use if the income should not be sufficient for the support of herself and his children, "in addition to the income, so much of the principal of said estate as may be necessary for that purpose." By the terms of the will, the widow became the trustee of the life estate, but resigned; and another was appointed and qualified in her stead. It was held that the conclusion of the trial court, that the widow was the sole judge of what was a sufficient support for herself and children, and its holding that the existence of a finding of necessity to authorize the use of any of the principal for the life tenant's support was not required by the will, were erroneous. But it was held that the conclusion of the trial court that, so long as the widow exercised a sound and honest discretion in the use of the principal for the support of herself and children, the court could not deprive her of that discretionary power, was correct, if the support was confined to that which was reasonably necessary for her station and condition in life. So, too, it was held that the trial court was correct in ruling that the widow retained her discretionary power after her resignation as trustee, and in determining that the use of the principal by the widow was not conditioned on proof that the income was insufficient for her support.

But though, for the time being, the life tenant exercises his judgment, he is not the sole and ultimate judge of what is necessary; but a court of equity, and perhaps in some cases the probate court, will review and revise his judgment, and determine whether the contingency has arisen so as to give him any right to resort to the principal, and, if so, whether he has exceeded the liberty given him. Hull v. Culver (1867) 34 Conn. 403; Peckham v. Lego (1888) 57 Conn. 553, 7 L.R.A. 419, 14 Am. St. Rep. 130, 19 Atl. 392; Hooker v. Goodwin (Conn.) supra.

So, where, by the terms of the will, the power to sell is based on and restricted by a necessity, the actual existence of the necessity at the time of each sale establishes the right of the life tenant to exercise the power without any order of any court. Bartlett v. Buckland (1906) 78 Conn. 517, 63 Atl. 350. And where a will provided that the widow or life tenant had the right, in case of the insufficiency of the income from the testator's estate for her support and that of the children, to use in addition thereto so much of the principal of the estate as might be necessary for that purpose, the trustee of the life estate was bound to pay over to the life tenant on her application such part of the principal as was necessary to furnish her reasonable and comfortable support, and he was not required to await an order of court. Hooker v. Goodwin (1917) 91 Conn. 463, 99 Atl. 1059, Ann. Cas. 1918D, 1159. Otherwise, the very purpose of the testator might have been defeated and his widow

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been deprived of the continued support from all of his estate, if its use became necessary during the pendency of the court application. Bartlett v. Buckland and Hooker v. Goodwin (Conn.) supra.

But the power to sell, under a will giving a life estate with the power to sell the whole or any part thereof if it is necessary to secure the life tenant a comfortable maintenance and support, does not include the power to make a mortgage in fee. O'Brien v. Flint (1902) 74 Conn. 502, 51 Atl. 547, wherein it appeared that a testator gave all his property to his wife, with remainder to his son, adding in his will, "If it should be necessary for the support of my wife and son to sell a portion of the land, I hereby give my wife, C., full power to sell and convey as she may judge best," it was held that the wife was not only empowered to make a single sale, and convey part of the lands, but, if it became necessary to sell a portion, in order to provide for her support, she might afterwards sell other portions for the same purpose, the language of the will justifying a sale of all, if that were judged by her to be the best way of raising the sum required. But it was held that this power of sale did not authorize her to mortgage the lands.

In Stevens v. Flower (1889) 46 N. J. Eq. 340, 19 Atl. 777, wherein it appeared that a testator bequeathed the use and income of all the residue of his estate to his wife, during her natural life, she "to use as much of the principal as she may need," it was held that the widow was empowered to consume the principal of the estate according to her need, and that her right to consume depended on the happening of her necessity.

In Hunt v. Smith (1899) 58 N. J. Eq. 25, 43 Atl. 428, wherein it appeared that a testator's will gave his wife all his personal estate for and during her natural life, and, "if needed by her for her comfort and maintenance, she shall use the principal as well as the interest," it was held that the bequest of the personal estate was expressly limited to a life estate in the wife, with a superadded power of using so much of the principal as might be needed for her support and maintenance.

In Bradway v. Holmes (1892) 50 N. J. Eq. 811, 25 Atl. 196, it was held that a bequest to his wife by a testator of the residue of his personal property, and the issues and profits of his real estate, "for her maintenance so long as she shall live, with power to sell and dispose of so much of my personal property or real estate as in her judgment may be necessary for her comfortable support and maintenance, and apply the proceeds for her support and maintenance as aforesaid," and at her death, the rest and residue of his estate remaining in her hands undisposed of to designated persons, gave the wife a life estate with a power of disposition, limited, as to the principal of the estate, to so much as might be necessary for her comfortable support and maintenance.

In Komp v. Thomas (1912) 81 N. J. Eq. 103, 85 Atl. 815, the court construed a will giving one half of the residue of the testatrix's estate to a daughter for and during the term of her natural life, with the right to use and dispose of so much of said estate in addition to the income, rents, issues, and profits thereof, as she might deem necessary for her comfortable support and maintenance, and on her death, such share, or so much thereof as there remained, to another daughter for the same term, and with the same rights as the first taker. It was held that the first daughter had a life estate, with the right to use what might be deemed necessary for her comfortable support and maintenance.

In Cox v. Wills (1891) 49 N. J. Eq. 130, 22 Atl. 794, reversed in (1892) 49 N. J. Eq. 573, 25 Atl. 938, on other grounds, the appellate court expressly sustaining the opinion of the lower court on the point under discussion, under a will bequeathing the residue of the testator's estate to his wife "in good faith, believing that she will make a will and thereby distribute so much of the last-named legacy among my near relatives as

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she may not use for comfortable maintenance; and it is my will that my said wife shall make such distribution," it was held that the bequest was subject to a trust, first, in favor of the widow for so much thereof as she might need and actually use for her comfortable maintenance, and as to the remainder, with its earnings, for the testator's next of kin.

In Du Bois v. Waterman (1916) 87 N. J. Eq. 119, 99 Atl. 143, it appeared that a testator gave his wife "the free use (of the principal, if necessary for her maintenance) and improvements, rents, profits and income of all the rest, residue and remainder of all my estate, real, personal and mixed, etc., for and during the term of her natural life." The court held that this provision of the will gave an interest for life to the widow in all of the estate of the testator, with the right to use the principal, if necessary, for her maintenance; and that this implied a power of sale of the real estate as well as of the personal property.

In Bryan v. Bryan (1900) 61 N. J. Eq. 45, 48 Atl. 341, the will there construed devised all the testator's estate to his wife, as long as she remained his widow, and to her children that she might have by him, but the remainder that might be left after the death or marriage of his wife was to be divided between her children. The court held that it was the testator's intention that his wife and children should have the right to use some part of the body of the estate, as well as its income, as their necessities might require, and that his wife should determine the necessity and its extent. Hence the court held that conveyances by the wife for her support and maintenance which produced no more than sufficient for that purpose were valid.

In Miller v. Potterfield (1890) 86 Va. 876, 19 Am. St. Rep. 919, 11 S. E. 486, it appeared that a testator gave all his property to his wife for her own use and benefit, and empowered her "also to make such disposition of the same that she in her judgment may deem best, should it become necessary that a part or all should become necessary for the support of herself and" another. It was held that the widow had the use of the property for life, but that she did not have the power to dispose of it unless a sale, in her judgment, should become necessary for the support of herself and the person named. In that event, and in that event only, the court held, was she authorized to dispose of the corpus of the estate.

In Reed v. Reed (1907) 80 Conn. 401, 68 Atl. 849, however, the principal question was as to the meaning of a provision by a testator for his widow, whereby he gave her a life estate in all his property, "with the privilege of expending from time to time so much of the principal of said estate as she may find necessary for her comfortable support and maintenance." The court held that by the words used, whatever encroachments on the principal she might make from time to time for use in her support, she could rightfully make, provided she, acting in good faith, should be of the opinion that they were necessary for her support in comfort. She could use the proceeds for no other purpose; but, if used for what she, in good faith, deemed to be required for that purpose, her disposition of them could not be questioned by those interested in remainder. In this case, no exception having been taken to the allowance to the life tenant in her account as executrix of a credit for the sum paid for a house, it was held that it followed that any reasonable charges incident to the purchase and to making the house, after possession was delivered, habitable in comfort, should also have been allowed. Subsequent payments for repairs, insurance, and taxes, the court held, would be primarily chargeable against the income, but she could, in effect, throw them on the principal, if she in good faith found the remaining income insufficient for her comfortable support. And the court stated that while, though the finding in this case did not disclose anything amounting to bad faith on the part of the widow, it did show that she had been extravagant and wasteful,—that she had ex-

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pended an unreasonable amount in her support and maintenance,—yet in so far as it was expended for that purpose to procure what she herself deemed to be necessary for her comfortable support, her acts were warranted by the privilege which the testator gave her in making her judgment regarding their necessity superior to that of any court. The court distinguished this case from the other Connecticut cases (cited supra) on the grounds that the testator was childless, and that in no part of the will was there anything to indicate an intention to limit the honest discretion of the widow in taking from the principal whatever she might think necessary for her comfortable support, or to evince solicitude that something should be left for his collateral relatives, the remaindermen.

In Adams v. Lillibridge (1901) 73 Conn. 655, 49 Atl. 21, the testator in the will therein construed gave his wife all the balance of his estate, both real and personal, "and at her death the balance, if any remains, to my lawful heirs," meaning to convey to his wife, the testator declared, "the right to sell and convey all or any part of my estate, either real or personal, or use the same in such manner as she may see fit during her lifetime." The court held that the widow was given a life interest in her husband's property and the right to use the estate devised "in such manner as she might see fit during her lifetime," with "the right to sell or convey all or part" of the estate to enable her so to use it.

III. Life estate with bequest over of "what remains," or equivalent phrase.

a. General rule.

Where a will gives a life estate for the use and benefit of the life tenant, by its express terms, with a power of sale or disposition and an express remainder over of "whatever may remain" or "be left," "so much as may remain unexpended" or "undisposed of," "what may not be consumed," or some equivalent phrase, the life tenant is entitled to the full possession, control, and management of the property during his natural life, with power to dispose of the whole of it, or so much of the principal as his necessities may require or his judgment dictate. The sole restrictions are that the power shall be exercised by the life tenant during his lifetime for his own use, thus excluding any testamentary disposition thereof; and that it shall be exercised in good faith, and not for the purpose of defrauding the remaindermen.

California.—Hardy v. Mayhew (1910) 158 Cal. 95, 139 Am. St. Rep. 73, 110 Pac. 113; Adams v. Prather (1917) — Cal. —, 167 Pac. 534.

Connecticut.—Mansfield v. Shelton (1896) 67 Conn. 390, 52 Am. St. Rep. 285, 35 Atl. 271.

Illinois.—Markillie v. Ragland (1875) 77 Ill. 102; Henderson v. Blackburn (1882) 104 Ill. 227, 44 Am. Rep. 780 (set out at length supra, II. a, 2 (f)); Hamlin v. United States Exp. Co. (1883) 107 Ill. 443; Walker v. Pritchard (1887) 121 Ill. 221, 12 N. E. 336, affirming (1887) 22 Ill. App. 286; Re Cashman (1890) 134 Ill. 88, 24 N. E. 963; Skinner v. McDowell (1897) 169 Ill. 365, 61 Am. St. Rep. 183, 48 N. E. 310; Kirkpatrick v. Kirkpatrick (1902) 197 Ill. 144, 64 N. E. 267; Kenny v. Keplinger (1900) 89 Ill. App. 570; Teel v. Mills (1904) 117 Ill. App. 97.

Indiana.—Rapp v. Matthias (1871) 35 Ind. 332; Clark v. Middlesworth (1882) 82 Ind. 240; John v. Bradbury (1884) 97 Ind. 263; Silvers v. Canary (1887) 109 Ind. 267, 9 N. E. 904; Goudie v. Johnston (1887) 109 Ind. 427, 10 N. E. 296; Tower v. Hartford (1888) 115 Ind. 186, 17 N. E. 281; Jenkins v. Compton (1890) 123 Ind. 117, 23 N. E. 1091; Levengood v. Hoople (1890) 124 Ind. 27, 24 N. E. 373; Crew v. Dixon (1891) 129 Ind. 85, 27 N. E. 728; Rinkenberger v. Meyer (1900) 155 Ind. 152, 56 N. E. 913; Brookover v. Branyan (1916) 185 Ind. 1, 112 N. E. 769. See also Anderegg v. Ross (1859) 13 Ind. 413 (set out at length supra, II. a, 1 (a)); McMillan v. Deering (1894) 139 Ind. 70, 38 N. E. 398.

Iowa.—Spaan v. Anderson (1901) 115 Iowa, 121, 88 N. W. 200; Simpkins v. Bales (1904) 123 Iowa, 62, 98

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N. W. 580; Haviland v. Haviland (1906) 130 Iowa, 611, 5 L.R.A.(N.S.) 281, 105 N. W. 354.

Kansas.—Ernst v. Foster (1897) 58 Kan. 438, 49 Pac. 527; Greenwalt v. Keller (1907) 75 Kan. 578, 90 Pac. 233.

Kentucky. — Anderson v. Hall (1882) 80 Ky. 91; Coats v. Louisville & N. R. Co. (1891) 92 Ky. 263, 17 S. W. 564; McClelland v. McClelland (1909) 132 Ky. 284, 116 S. W. 730; Hickman v. Moore (1914) 160 Ky. 474, 169 S. W. 827. And see the reported case (PRESBYTERIAN CHURCH v. MIZE, ante, 1237); Graham v. Botner (1896) 18 Ky. L. Rep. 637, 37 S. W. 583; Loeb v. Struck (1897) 19 Ky. L. Rep. 935, 42 S. W. 401; Martin v. Barnhill (1900) 21 Ky. L. Rep. 1666, 56 S. W. 160, s. c. on subsequent appeal (1904) 25 Ky. L. Rep. 1384, 77 S. W. 1097; Poland v. Chism (1901) 23 Ky. L. Rep. 1072, 64 S. W. 833; Smith v. Courtney (1905) 27 Ky. L. Rep. 642, 85 S. W. 1101; Pedigo v. Botts (1905) 28 Ky. L. Rep. 196, 89 S. W. 164; McCann v. McCann (1906) 29 Ky. L. Rep. 537, 93 S. W. 1045; Offutt v. Beall (1906) 30 Ky. L. Rep. 247, 97 S. W. 1113; Embry v. Embry (1907) 31 Ky. L. Rep. 295, 102 S. W. 239; Hosman v. Willett (1908) 32 Ky. L. Rep. 906, 107 S. W. 334 (set out at length supra, II. a, 2 (b)); Watkins v. Watkins (1909) — Ky. —, 120 S. W. 341 (set out at length supra, II. a, 2 (a)).

Maine.—Shaw v. Hussey (1856) 41 Me. 495; Hall v. Otis (1880) 71 Me. 326 (set out at length supra, II. a, 2 (f)); Stuart v. Walker (1881) 72 Me. 145, 39 Am. Rep. 311; Copeland v. Barron (1881) 72 Me. 206; Merrill v. Hayden (1893) 86 Me. 133, 29 Atl. 949 (set out at length supra, II. a, 2 (a)); McGuire v. Gallagher (1904) 99 Me. 334, 59 Atl. 445; Young v. Hillier (1907) 103 Me. 17, 125 Am. St. Rep. 283, 67 Atl. 571.

Massachusetts.—Harris v. Knapp (1839) 21 Pick. 412; Chase v. Ladd (1891) 155 Mass. 126, 25 Am. St. Rep. 614, 26 N. E. 429 (set out at length supra, II. a, 2 (b)); Ford v. Ticknor (1897) 169 Mass. 276, 47 N. E. 877; Woodbridge v. Jones (1903) 183 Mass. 549, 67 N. E. 878; Reed v. Reed (1907) 194 Mass. 216, 80 N. E. 219; Champney v. Bradford (1907) 196 Mass. 259, 81 N. E. 993 (set out at length supra, II. a, 2 (b)); Dallinger v. Merrill (1916) 224 Mass. 534, 113 N. E. 279.

Michigan. — Gee v. Hasbrouck (1901) 128 Mich. 509, 87 N. W. 621; Chamberlain v. Husel (1913) 178 Mich. 1, 144 N. W. 549.

Mississippi.—Murdoch v. Murdoch (1910) 97 Miss. 690, 53 So. 684; Selig v. Trost (1915) 110 Miss. 584, 70 So. 699; Rives v. Burrage (1916) 110 Miss. 789, 70 So. 893.

Missouri.—Turner v. Timberlake (1873) 53 Mo. 371; Harbison v. James (1886) 90 Mo. 411, 2 S. W. 292; Redman v. Barger (1893) 118 Mo. 568, 24 S. W. 177; Evans v. Folks (1896) 135 Mo. 397, 37 S. W. 126; Threlkeld v. Threlkeld (1911) 238 Mo. 459, 141 S. W. 1121; Ricketts v. People's Bank (1917) — Mo. —, 196 S. W. 26; Westminster College v. Dimmitt (1905) 113 Mo. App. 41, 87 S. W. 536.

Nebraska.—Re Nichol (1913) 93 Neb. 80, 139 N. W. 719.

New Hampshire.—Eaton v. Straw (1846) 18 N. H. 320 (set out at length supra, II. a, 2 (a)); Burleigh v. Clough (1872) 52 N. H. 267, 13 Am. Rep. 23; Kimball v. New Hampshire Bible Soc. (1889) 65 N. H. 139, 23 Atl. 83–85; Langley v. Tilton (1891) 67 N. H. 88, 36 Atl. 610. See also Langley v. Farmington (1891) 66 N. H. 431, 49 Am. St. Rep. 624, 27 Atl. 224.

New Jersey.—Robeson v. Shotwell (1897) 55 N. J. Eq. 318, 36 Atl. 780, affirmed in (1896) 55 N. J. Eq. 824, 41 Atl. 1115; Parker v. Travis (1908) 74 N. J. Eq. 812, 71 Atl. 612; Smith v. Wagner (1914) — N. J. Eq. —, 91 Atl. 599. See also Cory v. Cory (1883) 37 N. J. Eq. 198.

New York.—Flanagan v. Flanagan (1880) 8 Abb. N. C. 413; Re Williamson (1888) 1 Connoly, 139, 9 N. Y. Supp. 476; Colt v. Heard (1877) 10 Hun, 189; Greyston v. Clark (1886) 41 Hun, 125; Wortman v. Robinson (1887) 44 Hun, 357; Wells v. Seeley (1888) 47 Hun, 109; Thomas v. Wolford (1888) 49 Hun, 145, 21 Abb. N. C. 231, 1 N. Y. Supp. 610; Kendall v. Case (1895) 84 Hun, 124, 32 N. Y.

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Supp. 553; Re Cager (1888) 111 N. Y. 343, 18 N. E. 866, affirming (1887) 46 Hun, 657; Leggett v. Firth (1892) 132 N. Y. 7, 29 N. E. 950, affirming (1889) 53 Hun, 152, 6 N. Y. Supp. 158; Seaward v. Davis (1910) 198 N. Y. 415, 91 N. E. 1107, modifying (1909) 133 App. Div. 191, 117 N. Y. Supp. 468, and approving Tuthill v. Davis (1907) 121 App. Div. 290, 105 N. Y. Supp. 672; Minges v. Mathewson (1901) 66 App. Div. 379, 72 N. Y. Supp. 612; Mitchell v. Van Allen, (1902) 75 App. Div. 297, 78 N. Y. Supp. 149; Terry v. St. Stephen's Protestant Episcopal Church (1903) 79 App. Div. 527, 81 N. Y. Supp. 119; Dodin v. Dodin (1906) 116 App. Div. 327, 101 N. Y. Supp. 488, affirmed in (1908) 191 N. Y. 530, 84 N. E. 1112; Tuthill v. Davis (1907) 121 App. Div. 290, 105 N. Y. Supp. 672, approved in Seaward v. Davis (1910) 198 N. Y. 415, 91 N. E. 1107, modifying (1909) 133 App. Div. 191, 117 N. Y. Supp. 468; Baumgras v. Baumgras (1893) 5 Misc. 8, 24 N. Y. Supp. 767; Re Davis (1908) 59 Misc. 310, 112 N. Y. Supp. 265; Phillips v. Wisner (1912) 75 Misc. 278, 132 N. Y. Supp. 1006, affirmed in (1912) 152 App. Div. 911, 137 N. Y. Supp. 1138; Re Granfield (1913) 79 Misc. 374, 140 N. Y. Supp. 922. See also Crozier v. Bray (1890) 120 N. Y. 366, 24 N. E. 712; Re Comer (1911) 72 Misc. 321, 131 N. Y. Supp. 187.

Ohio.—Huston v. Craighead (1872) 23 Ohio St. 198; Johnson v. Johnson (1894) 51 Ohio St. 446, 38 N. E. 61.

Pennsylvania.—Dickinson's Estate (1904) 209 Pa. 59, 58 Atl. 120; Keown's Estate (1913) 238 Pa. 343, 86 Atl. 270; Seigworth's Estate (1915) 61 Pa. Super. Ct. 235. See also Fox's Appeal (1882) 99 Pa. 382; Nieman's Estate (1890) 131 Pa. 346, 18 Atl. 900; Doran v. Piper (1894) 164 Pa. 430, 30 Atl. 306. See also the following cases, set out at length supra, II. a, 2; Trout v. Rominger (1901) 198 Pa. 91, 47 Atl. 960 (II. a, 2 (a)); Allen v. Hirlinger (1907) 219 Pa. 56, 13 L.R.A.(N.S.) 458, 123 Am. St. Rep. 617, 67 Atl. 907 (II. a, 2 (b)); Nieman's Estate (1910) 229 Pa. 41, 77 Atl. 1095 (II. a, 2 (a)); Watson's Estate (1913) 241 Pa. 271, 88 Atl. 433 (II. a, 2 (a)).

Rhode Island.—Mooy v. Gallagher (1914) 36 R. I. 405, L.R.A.1916C, 1040, 90 Atl. 663, Ann. Cas. 1916D, 395.

Tennessee.—Downing v. Johnson (1867) 5 Coldw. 229.

Wisconsin. — Perkinson v. Clarke (1908) 135 Wis. 584, 116 N. W. 229; Olson's Will (1917) 165 Wis. 409, 162 N. W. 429.

England.—Herring v. Barrow (1879) L. R. 13 Ch. Div. 144, affirmed in (1880) L. R. 14 Ch. Div. 263, 49 L. J. Ch. N. S. 622, 43 L. T. N. S. 25, 28 Week. Rep. 802; Surman v. Surman (1820) 5 Madd. Ch. 123, 56 Eng. Reprint, 842, 21 Revised Rep. 286; Upwell v. Halsey (1720) 1 P. Wms. 651, 24 Eng. Reprint, 554. See also Scott v. Josselyn (1839) 26 Beav. 174, 53 Eng. Reprint, 863, 28 L. J. Ch. N. S. 297, 5 Jur. N. S. 560; Constable v. Bull (1849) 3 De G. & S. 411, 64 Eng. Reprint, 539, 18 L. J. Ch. N. S. 302, 13 Jur. 619, followed in Bibbens v. Potter (1879) L. R. 10 Ch. Div. 733, 27 Week. Rep. 804; Re Rowland (1902) 86 L. T. N. S. 78.

Canada.—Re McDonald (1903) 35 N. S. 500; Re Johnson (1912) 27 Ont. L. R. 472, 8 D. L. R. 746; Re Story (1909) 14 Ont. Week. Rep. 904; Re Davey (1910) 17 Ont. Week. Rep. 1034; Re Mair (1913) 25 Ont. Week. Rep. 219, 5 Ont. Week. N. 277; Re Achterberg (1914) 5 Ont. Week. N. 755, 25 Ont. Week. Rep. 700; Hodges v. Goodnough (1916) 9 Sask. L. R. 124, 34 West. L. R. 42, 27 D. L. R. 790.

b. Particular rights and uses.

1. Personal use.

In each of the following cases, a will giving a life estate for the use and benefit of the life tenant, with an express remainder over of "what remains," or some equivalent phrase, was held to give the life tenant a right to the full possession, control, and management of the property during his natural life, with power to use the whole or so much of the corpus for his own use as his necessities might require or his judgment dictate:

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Upwell v. Halsey (1720) 1 P. Wms. 651, 24 Eng. Reprint, 554, 10 Mod. 441, 88 Eng. Reprint, 801. The testator directed that such part of his estate as his wife should leave of her subsistence should return to his sister and the heir of her body.

Surman v. Surman (1820) 5 Madd. Ch. 123, 56 Eng. Reprint, 842, 21 Revised Rep. 286. The testator gave all his personal estate to his wife for her life, or widowhood, with power for her to use, apply, employ, and appropriate the same as she thought proper, for her own benefit and the proper maintenance of the testator's nephew and daughter-in-law during their respective minorities, and on her decease, bequeathed the same, "or so much as shall then remain," to his nephew and daughter-in-law.

Re Johnson (1912) 27 Ont. L. Rep. 472, 8 D. L. R. 746. The testator gave the whole of his property to his wife for life; after her death, the house, furniture, and any live stock or chattels were to go to a daughter, and certain legacies were to be paid to various sons, these to be "paid forthwith if there is sufficient funds to pay the same; if not, then a corresponding deduction shall be made in every case." All the residue of the estate was given to the daughters.

Re Storey (1909) 14 Ont. Week. Rep. 904. The testator gave his wife "the benefit of all my real and personal property particular all moneys as long as she remains my widow: and in the event of her having any of my money at the time of her death the same shall be divided amongst my children or their heirs equally."

Re Davey (1910) 17 Ont. Week. Rep. 1034. The clause of the will in question was as follows: "I give, devise and bequeath all my property of every nature and kind to my wife for her use and benefit so long as she lives, with full power to use and enjoy the same and such corpus of the estate as she may require or desire to use for her own benefit during her life, and should any part of my estate remain unused at her death then such part so remaining is to be divided equally among my brothers and sisters, and my wife is not to be required to account for my estate or any part thereof."

Hodges v. Goodnough (1916) 9 Sask. L. R. 124, 34 West. L. R. 42, 27 D. L. R. 790. The testator gave his wife the whole of his real and personal estate for her use and benefit during her lifetime, and at her decease anything remaining to be divided among his children.

Re Achterberg (1914) 5 Ont. Week. N. 755, 25 Ont. Week. Rep. 700. The testator gave his widow "the benefit and use of the rest of" his estate during her lifetime, his estate being mainly personal, and "rest" meaning the residue after the payment of debts and legacies, and after her death, the "residue" was to be divided.

Adams v. Prather (1917) — Cal. —, 167 Pac. 534. The will gave all the property of the testatrix to her husband, with power to sell any or all of her real estate and personal property without an order from the court. On the death of the husband, it bequeathed one half of the unexpended portion of the estate to a niece, and the other half to the surviving daughters of a brother.

Mansfield v. Shelton (1896) 67 Conn. 390, 52 Am. St. Rep. 285, 35 Atl. 271. The testator devised his residuary estate to his wife, "to be used and appropriated by her, as much as she may wish for her happiness, without any restrictions or limitations whatsoever," and on her decease, bequeathed whatever should then remain undisposed of in trust for distribution among certain persons.

Kenny v. Keplinger (1900) 89 Ill. App. 570. The testator gave to his wife "all my real estate, personal property, moneys, goods, chattels and effects of any and every nature whatever, to her sole use and benefit, her lifetime;" and after her death "that whatever remains of my property, I will that it be divided as hereinafter mentioned."

Teel v. Mills (1904) 117 Ill. App. 97. The will provided as follows: "All my personal estate and personal property, after paying debts, costs of

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administration and executing this will, legacies and bequests, I give and bequeath and the free and liberal use thereof, to my said wife [naming her], for and during her natural lifetime, and whatever may remain thereof at her decease I hereby give and bequeath to my aforesaid children in equal parts."

Walker v. Pritchard (1887) 121 Ill. 221, 12 N. E. 336, affirming (1887) 22 Ill. App. 286. The testator devised certain land to his wife in lieu of dower, and gave her full power and authority to sell and convey title to the lands at any time and convert the avails to her own use. After bequeathing certain personal property to her for life, the testator further provided that, on her death, all the property thereby devised or bequeathed to her, or so much thereof as might remain unexpended, should go to his sons.

Re Cashman (1890) 134 Ill. 88, 24 N. E. 963. The will devised certain lands to the testator's widow, during her natural life, and provided that she might elect to have those lands sold and to accept in lieu thereof the sum of $3,000, to be held by her during her natural life, and after her death all of the property to her devised and bequeathed (or so much thereof as might remain unexpended) was to be converted into money and divided equally between the children of the testator.

Brookover v. Branyan (1916) 185 Ind. 1, 112 N. E. 769. The testator bequeathed all his property, both real and personal, to his wife, "giving her the power to sell and convey any or all of my real estate for her use," and provided that if any of the property should be left at his wife's death, it was to go to his daughter.

Martin v. Barnhill (1900) 21 Ky. L. Rep. 1666, 56 S. W. 160. The will devised all the testator's property to his wife, "to have and to hold, and to dispose of as her own property, as long as she shall live, and after her death to be equally divided among my children." See also second appeal in (1904) 25 Ky. L. Rep. 1384, 77 S. W. 1097.

Pedigo v. Botts (1905) 28 Ky. L. Rep. 196, 89 S. W. 164. The will gave the testator's wife his whole estate, "to have and to hold the same in her own right, title and interest, to control the same and manage it in her own way and interest, and to enjoy the same during the remainder of her natural lifetime; to have the power of selling, conveying and transferring any or all of my personal property that she may see fit or deem necessary, or any or all of my real estate likewise; to have the control, management and education of my children during their minority, and so long as she may live. But at the death of my aforesaid wife, then and not till then, I desire that all my estate or the entirety of the estate that she may then have or be possessed of to be equally divided between my children."

Presbyterian Church v. Mize (reported herewith) ante, 1237. The will gave the husband of the testatrix all the residue of her property, "to have and to enjoy same during his natural life, and at his death, should there be anything left, it is my wish that it shall go to" a designated church.

Anderson v. Hall (1882) 80 Ky. 91. The testator gave all his property to his wife, "giving her the right to sell and reinvest, as she may desire, any part of the same for her own separate use and benefit, and at her death, I desire that any portion of my estate remaining undisposed of shall go to my three daughters," naming them.

Smith v. Courtney (1905) 27 Ky. L. Rep. 642, 85 S. W. 1101. The testator bequeathed the remainder of the proceeds of a sale of the real estate, after the deduction of a bequest to his wife, to a daughter, adding that she "may use the estate so willed her, but at her death it is to go to her bodily heirs."

Hickman v. Moore (1914) 160 Ky. 474, 169 S. W. 827. The will, in giving property to the testator's wife, after enumerating the whole of his property, "all of which I bequeath unto her own behoof *or so much as may be necessary*," used the further expression: "That during her life the executors shall have the exclusive right to convey," and, in connection

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with the provision in the second clause, that "the remainder of my effects, *if there be any*," should be divided between his two grandchildren.

Copeland v. Barron (1881) 72 Me. 206. The testator bequeathed to his father and mother, or the survivor of the two, a sum of money, "to be paid to them," "for their use and support during the term of their lives, and if any part of said sum shall remain unexpended after their death," it was to go to the testator's son.

McGuire v. Gallagher (1904) 99 Me. 334, 59 Atl. 445. The will gave the testator's wife, during her life, all his property, "to be used by her according to her desire," and after her death "all the property remaining" was to be divided among his brothers and sisters.

Gee v. Hasbrouck (1901) 128 Mich. 509, 87 N. W. 621. The testator gave all his property to his wife, "to have during her life, or as long as she remains my widow," and he gave to others all the property "that may revert to my estate on the decease of my said wife."

Chamberlain v. Husel (1913) 178 Mich. 1, 144 N. W. 549. The will gave all the testator's property to his wife for her use and benefit during her natural life, with a gift over of the property at her death, or so much thereof as might then remain unexpended, to his next of kin. A later clause appointed the wife executrix, and gave her full power and authority to sell and convey any or all of the testator's property without applying to any court.

Murdoch v. Murdoch (1910) 97 Miss. 690, 53 So. 684. The will provided as follows: "I leave to my wife Annie A. Murdoch, the entire use and management of all my property, both real and personal during her life. At her death it all goes to my living brother and sisters, or their heirs."

Rives v. Burrage (1916) 110 Miss. 789, 70 So. 893. The will contained the following provision with reference to the testator's wife: "I desire she should take, for her natural life, all of such property and effects as I may own at my death, whether exempt from execution under the law, or not, this to include not only all property of every kind, but all money, claims and choses in action of every kind. I wish her to use and enjoy all of the same as her own for her natural life, knowing that she will permit and encourage any and all of my unmarried children to enjoy the homestead and other property and effects with her, she controlling same as the mother and they rendering her due respect and obedience as children; and knowing also she will pay out of my effects such other debts as I may owe as far as she can do so without reducing such effects to less than $6,000 in value; . . . I will and desire that, at the death of my wife, all my property of every kind and all my effects of every kind shall go to my children in equal parts, share and share alike, the heirs of my deceased children to take his or her share." A codicil provided: "At my death I wish my wife, Amanda F. Rives, to hold and enjoy not for her life merely, but absolutely as her own property, subject only to the provisions hereinafter stated, all my property, real and personal, including all my homestead and other exempt property and all choses in action, rights, credits and equities, as fully and completely as if she had lawfully and rightfully purchased the same and held it as an innocent purchaser for value without notice. But while this is intended to give her the full right to hold, sell, give away or otherwise dispose of any or all of such property, so that the same shall vest absolutely and without limitations in the taker under her, yet, if as to any of such properties she shall not exercise such rights of disposition to take effect during her life, then such property shall at her death inure to the benefit of any descendants in the following manner, to wit. . . ."

Harbison v. James (1886) 90 Mo. 411, 2 S. W. 292. The will gave the testator's wife all his property and the right to sell and reinvest, as she might desire, any part of the same for her separate use and benefit, and at her death any portion of the estate

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remaining undisposed of should go to his daughters.

Threlkeld v. Threlkeld (1911) 238 Mo. 459, 141 S. W. 1121. The testator devised to his wife one third of all of his estate, and provided that at her death the remainder of her estate was to be divided equally among his children.

Westminster College v. Dimmitt (1905) 113 Mo. App. 41, 87 S. W. 536. The will gave the testator's wife all his property to hold, possess, and enjoy during her natural life, and provided that after her death all his estate should be converted into money and paid to the remainderman.

Re Nichols (1913) 93 Neb. 80, 139 N. W. 719. The testator gave to his wife all his property, both real and personal, "for and during her natural life, and at her death the remainder of the personal property, and all of the real estate," was to vest in his children.

Burleigh v. Clough (1872) 52 N. H. 267, 13 Am. Rep. 23. The testator devised all his property to his wife, "to her use and disposal during her natural life," "and what is remaining at her decease, undisposed of by her," was to go to a named person.

Kimball v. New Hampshire Bible Soc. (1889) 65 N. H. 139, 23 Atl. 83–85. The will gave all the testator's property to his wife during her natural life," to be used and managed by her as she shall see fit," and providing for the disposition of "whatever may remain of my property after her decease."

Langley v. Farmington (1890) 66 N. H. 431, 49 Am. St. Rep. 624, 27 Atl. 224. The will contained the following clause: "As to all the rest, residue, and remainder of my estate, I give and bequeath the same to my beloved wife, Mary S. Langley, to have and to hold the same to her use and benefit forever. It is distinctly understood that my said wife is to be amply supported and maintained out of said estate, during her natural life, and to use and dispose of the same as she sees fit, and at her decease the remainder of said estate, if any, shall go in equal shares to my brothers." See also Langley v. Tilton (1886) 67 N. H. 88, 36 Atl. 610, involving the same will.

Smith v. Wagner (1914) — N. J. Eq. —, 91 Atl. 599. The testator gave all his property to his wife, "to hold and to possess and own during her natural life," after the payment of his funeral expenses and debts, and then declared that "after her death it shall go over to my children if she does not decide otherwise."

Colt v. Heard (1877) 10 Hun (N. Y.) 189. The testatrix bequeathed all the residue of her estate to her husband, "but such part thereof as he may have at the time of his decease," she gave to a niece and nephew.

Wells v. Seeley (1889) 47 Hun (N. Y.) 109. The testator bequeathed the residue of his estate to his wife, to be held and used by her as she should see fit and proper, during the full term of her life, and at her death, if any part of his estate remained unexpended, it was to be divided equally between his son and daughter.

Kendall v. Case (1895) 84 Hun, 124, 32 N. Y. Supp. 553. The testator gave the control, use, and income of all his property, both real and personal, to his wife, for her own benefit, so long as she lived; and after her death, "if any of said real or personal property is left," ordered his executors to divide said remainder as provided in his will.

Thomas v. Wolford (1888) 49 Hun, 145, 21 Abb. N. C. 231, 1 N. Y. Supp. 610. The testator, after the payment of his debts, gave to his wife "all of my real and personal estate, that I may die possessed of, during her lifetime, and at my wife's death the property, should there be any left, to be divided among the children or their heirs."

Greyston v. Clark (1866) 41 Hun (N. Y.) 125. The will gave all the testator's property to his wife, absolutely, to have and to hold the same for her own use and benefit forever, and with full power and authority to sell or mortgage as she thought proper; on her death, whatever property she might die seised of that belonged to the testator, and remained in her by

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virtue of his will, to be divided among certain relatives named in the will.

Re Williamson (1888) 1 Connoly, 139, 9 N. Y. Supp. 476. The will gave all the testator's personal property to his wife, "for her own use and benefit during her natural life," and directed his executors, after her death, to "proceed to sell, collect and settle up the personal property that may be left by her," and divide the same between his five children. It was held that no other reasonable interpretation could be given the language than that the testator contemplated that his widow should use from the principal, if necessary.

Mitchell v. Van Allen (1902) 75 App. Div. 297, 78 N. Y. Supp. 149. The will devised to the testator's wife all his property, "for her own personal use and benefit during her natural life, and at her death all that may remain and be left is to go to our daughter." This gave her not only a life estate in the land, but power of disposition, and the use of the proceeds.

Re Davis (1908) 59 Misc. 316, 112 N. Y. Supp. 265. The will gave the entire use and control of all the testator's property to his wife during the period of her natural life, "with full power to her, to use from the principal of my estate for her own use and benefit and for the benefit and support of any or all of my children, so much thereof as she shall elect so to use, in all respects the same as though said estate and property were her own individual estate. Any and all of my said property and estate, left at the death of my said wife and not used or expended by her," he gave to his children.

Huston v. Craighead (1872) 23 Ohio St. 198. The testator gave all his property to his wife, to be held by her during her natural life, she to have the entire sole control and management thereof, and provided that she might sell and dispose of it, at such times and in such manner as she might think best for herself and heirs, and if, at the death of his wife, anything was left of his estate, it was to be divided equally among his children.

Johnson v. Johnson (1894) 51 Ohio St. 446, 38 N. E. 61. After providing for the payment of his debts, the testator devised to his wife all of the remainder of his property, with full power to bargain, sell, convey, exchange, or dispose of it as she might think proper. But if, at the time of her decease, any of the property should remain unconsumed, it was his will that it should be equally divided between his brothers and sisters and their children.

Siegworth's Estate (1915) 61 Pa Super. Ct. 235. The testator gave all his property, real and personal, to his wife, and then gave legacies of sums of money to his sons after the death of his wife. He then requested that "what part of my estate real and personal is left after the death of my said wife and the bequests heretofore mentioned paid," be divided equally between persons named.

See also, with respect to the subject of this subdivision, the cases set out in III. b, 2, 4–6, infra.

2. Sale.

(a) Express power to sell.

Where a gift of a life estate with a power to anticipate the principal and a gift over of "whatever remains" contains an express power of sale, the life tenant may, of course, exercise that power for the purpose and on the occasion specified in the grant thereof.

Thus, in Coats v. Louisville & N. R. Co. (1891) 92 Ky. 263, 17 S. W. 564, it appeared that a testator gave his wife all his estate, to be at her "absolute disposal to sell, convey, transfer, or expend, as she may deem proper, during her lifetime, without restraint," and after her death provided for the distribution of the remainder of his estate unexpended by her. It was held that the widow was given an estate for life on the property devised, with an absolute power of disposal at her discretion; that the exercise of this power could be given to another, and therefore that the sale and transfer of certain stock by her attorney in fact was valid. The court said: "She was accountable to

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no one if she sold the estate and applied the proceeds as she saw proper. The exercise of the power was for her benefit alone, and not of those in remainder. They could not have prohibited its exercise by her unless her mind had become so impaired as to prevent her from contracting and disposing of such an estate. The entire property was devised to her that she might use and dispose of it as she saw proper during her lifetime. The words 'as she saw proper' and 'without restraint' show a manifest purpose on the part of the testator that this right of disposal on the part of the wife should be unlimited, and upon her failure to exercise the power depended the rights of those in remainder. . . . It is said by the appellant's counsel that the power of disposition by Beulah Coats, the widow, was discretionary, and in transferring or conveying the estate intrusted to her she could not lawfully delegate the exercise of this discretion to Hopkins. There was, in one sense, a trust by reason of this provision of the will, for so long as she held the property undisposed of it was for the benefit of those in remainder at her death; but when selling the corpus of the estate, she was executing the power for her own benefit. If she had plenary power to sell and transfer this estate or any part of it, not for those in remainder, but for her own benefit, and did so either in person or delegated that power to an agent when he might deem it necessary to sell, we cannot perceive in what manner any trust or confidence reposed in her by the testator has been abused. The sale of the property affected those in remainder by depriving them of any interest in it, and the right to do so was expressly given by the will. The power to sell an estate for the benefit of another or those in remainder would be in the nature of a trust, but the unlimited power to sell for one's own benefit, and that power to be unrestrained, cannot well create a trust as to anyone else, and with such plenary power the widow had the same right to delegate this power to another to sell for her when he saw proper, that she would have had in giving the power if there had been no remainder. The power to sell in this case was absolute, and to sell for herself and not for anyone else. The time of selling, the place of selling, and the mode of selling could be determined by an agent authorized to sell at a time and place and upon such terms as he saw proper, for the reason that this estate was, by the provisions of her husband's will, at her absolute disposal to sell, convey, transfer, or expend as she may deem proper during her lifetime, without restraint, etc. The purpose of the husband was to give to the wife the same power that he could have exercised with reference to this estate during his life, with the exception of the right to devise it. She was, at the date of the will, near eighty years of age, and must, of necessity, have required an agent to dispose of and control the estate. He believed, no doubt, that the devisees would not be molested in the property they then held possession of, to which he had title, nor does it appear that his confidence has been misplaced. It is true the will provides that she is to receive all rents, dividends, or interest on investments, or to convert the same into money or other investments at her discretion, but this does not affect the question of her right to alienate and transfer the estate, for in this she was unrestrained, and no broader power could have been conferred. It is manifest that the power of attorney executed to Hopkins authorized him to make this sale and transfer of the railroad stock, and it is admitted that he did make the sale, receive the proceeds, and that the certificates in the name of the testator were surrendered to the corporation. There is no fraud alleged on the part of the appellee nor any averment that it knew of the manner in which this stock was obtained from Beulah Coats. Hopkins held the power of attorney and the stock in his possession when it was sold and transferred. The evidence of his right to sell was in the power of attorney, and of the

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right of the widow to give it on the face of the husband's will."

In Anderson v. Hall (1882) 80 Ky. 91, it appeared that a testator gave all his property to his wife, "giving her the right to sell and reinvest, as she may desire, any part of the same for her own separate use and benefit, and at her death, I desire that any portion of my estate remaining undisposed of shall go to my three daughters," naming them. The court held that while the testator's intention was that his wife's right to use and dispose of the estate for her comfortable support might not be limited to the income, but was to give her the additional power to sell and use so much of the principal as might be necessary to maintain her, the words following directly after the power to sell and reinvest, viz., "the estate remaining undisposed of shall go to my three daughters," showed an intention not to give her unlimited dominion over the estate.

In Offutt v. Beall (1906) 30 Ky. L. Rep. 247, 97 S. W. 1113, the will under construction gave the testator's wife all the rents and proceeds of all his property during her life, after the payment of his debts, and provided that at her death three nieces were to have equal shares of what might be left. The testator requested that the real estate be managed or sold to the best interest of his wife, and if best to rent all the property and pay the interest on the mortgage debt, that the balance, if any, be paid to his wife. The court held that it was manifest that the testator desired his wife to use the property for the purpose of supplying her wants and comforts for the remaining years of her life, keeping it intact, if possible, but authorizing its sale if necessary to carry out the purpose of providing for the support and maintenance of his wife. The court held, however, that she was not authorized by the will to sell the property at her pleasure.

In McCann v. McCann (1906) 29 Ky. L. Rep. 537, 93 S. W. 1045, it appeared that a testator bequeathed to his wife all the property belonging to him, to have, hold, and control for her use and benefit as she might desire so long as she lived; he appointed her executrix, and gave her full power to sell and convey, manage, and control all of the estate as she saw fit and deemed proper; and whatever might remain of his estate he desired be sold, and the proceeds divided among certain persons. It was held that it was the testator's intention to vest in his wife a life estate in all of his property, with power to sell, convey, manage, and control the estate for her use and benefit, as she saw fit and deemed proper, and that she was not confined to the income, but might, if necessary, use the principal.

In Dodin v. Dodin (1906) 116 App. Div. 827, 101 N. Y. Supp. 488, affirmed in (1908) 191 N. Y. 530, 84 N. E. 1112, it appeared that a testator gave the homestead property for life to his wife, with power to sell the whole or any part of it "as she may deem to be for the best benefit of my estate," and with the right to use and enjoy the proceeds of such sale without accounting in any manner thereafter, and if any part of such proceeds should remain after her death, the same was to pass to his children. It was held that the widow had power of sale and the privilege of using the proceeds of such sale even to their entire exhaustion; the children having an interest only in such part thereof as should chance to remain undisposed of at her death.

In Phillips v. Wisner (1912) 75 Misc. 278, 132 N. Y. Supp. 1006, affirmed in (1912) 152 App. Div. 911, 137 N. Y. Supp. 1138, under a will giving all the residue of the testatrix's estate to her husband for life, and authorizing him, at any time during his life, to sell and dispose otherwise of any part of the same, as he might deem expedient, and then providing for the payment of certain legacies "of and from such of my estate as shall be left and undisposed of by my said husband at the time of his death," it was held that the husband took a life estate, with the right to use and dispose of the entire estate during his lifetime.

In the case of Re Granfield (1913)

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79 Misc. 374, 140 N. Y. Supp. 922, it appeared that a testator gave his daughter one half of his residuary estate during her natural life, with power to invest and reinvest it as she might see fit, and to dispose, by sale or otherwise, of such portions thereof as she might deem necessary, with remainder over on her death of so much thereof as should then remain to persons named. The court held that the daughter was given not only a life estate in the corpus of the estate, but the power of disposition and the use of the proceeds.

In Rapp v. Matthias (1871) 35 Ind. 332, it appeared that a testator devised all his real and personal estate to his wife for her use and benefit during her natural life, and after her death, "said property, both real and personal, that may remain unconsumed," was to be distributed as provided in the will. A later clause directed that the wife should have the right to sell and dispose of both the real and personal property, if she wished. It was held that it was the evident intention of the husband to secure his widow a competency, and that, if it was necessary thereto that she should sell the land, she might do so.

In Brookover v. Branyan (1916) 185 Ind. 1, 112 N. E. 769, it appeared that a testator bequeathed all his property, both real and personal, to his wife, "giving her the power to sell and convey any and all of my real estate for her use," and provided that if any of the property should be left at his wife's death, it was to go to his daughter. It was held that the devise to the wife was that of a life estate, and, while general and indefinite, it was not accompanied with full power of disposition, but, on the contrary, was limited solely to sales for "her use," and did not contemplate a sale except for that purpose.

In Jenkins v. Compton (1890) 123 Ind. 117, 23 N. E. 1091, it appeared that a testator's will bequeathed to his wife all his real estate and personal property for her maintenance and the maintenance of his four children, his wife to have full control and management of his property, to sell or dispose of any or all of it, and to collect all debts due the testator, and to do any and all things necessary to fully settle up his estate without administration, or being accountable to any person, court, or tribunal. The next item provided that "should there be any of my estate remaining after the death of my wife," the same should go to the children in equal portions. Other items related to the management of the estate, the education of the children, and the building of a dwelling house. The court held that the testator's intention was to give to his wife the use, management, and control of his entire estate during her life, for the purpose of settling his estate and supporting herself and his children named in the will, and for the purpose of educating the latter, and if it became necessary for the purpose of paying his debts, settling his estate, or supporting herself and the children, then and in that event she should have the full power to sell both the personal and the real estate, and to use the proceeds for that purpose without accounting to any person or court; but whatever remained undisposed of and unconsumed for such purpose at the date of the death of his wife should go to his children. The court held that it was evident that the testator did not intend the wife to take more than a life estate or the use of the property during her life, unless it became necessary for her to use the principal, or a portion of it, for the purposes named, and in that event he intended to place it in her power to sell and dispose of it without unnecessary expense or being compelled to give bonds or render an account, and that whatever should remain at her death should go to his children.

In Levengood v. Hoople (1890) 124 Ind. 27, 24 N. E. 373, it appeared that a testator devised his real and personal property to his wife, "for her to dispose of as she sees best, sell, bargain, and convey, as much so as myself in person, to all intents and purposes," "during the time she lives a widow or in my name." Then the land was to be divided among the present heirs of the testator and his wife, "or the proceeds thereof, as the

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case may be." It was held that the will vested in the widow an estate in the land during her widowhood, coupled with an absolute power to sell and dispose of it during the continuance of her estate, and that had she sold and conveyed the land during that period, the purchaser would have acquired a good title.

In Perkinson v. Clarke (1908) 135 Wis. 584, 116 N. W. 229, it appeared that a testatrix bequeathed to her husband, without words of inheritance, all her estate, both real and personal, with full power to sell the same, and to use and enjoy during his natural life, and, on his decease, such of the estate as remained should descend to her children. It was held that the will created a life estate in the husband, with power of sale for the purpose designated.

In Walker v. Pritchard (1887) 121 Ill. 221, 12 N. E. 336, affirming (1887) 22 Ill. App. 286, it appeared that a testator devised certain land to his wife in lieu of dower, and gave her full power and authority to sell and convey title to the lands at any time and convert the avails to her own use. After bequeathing certain personal property to her for life, the testator further provided that on her death, all the property thereby devised or bequeathed to her, or so much thereof as might remain unexpended, should go to his sons. The holding of the lower court, that under the will the widow took a life estate in the land, with power to sell and convey the same in fee, and convert the proceeds and avails thereof to her own use and benefit, with remainder in the land, if unsold under the power, and if sold, then the remainder in such portions of the proceeds and avails as remained unexpended at the time of the death of the donee, to the testator's sons, was affirmed.

In Skinner v. McDowell (1897) 169 Ill. 365, 61 Am. St. Rep. 183, 48 N. E. 310, it was held that the legal effect of that clause in a testator's will granting to his widow the residue of his estate, "to be sold, retained, and exchanged, used, and managed by her as she may think proper, during her life; and in case anything may be left after her death, . . . she shall make some arrangements to have it equally divided," was to give to the life tenant the right to sell, retain, exchange, use, and manage the property "as she may think proper."

In Kirkpatrick v. Kirkpatrick (1902) 197 Ill. 144, 64 N. E. 267, under a will giving a testator's property to his wife during her life, with power to manage, rent, or sell, as she might direct, and providing that after her death, if not already disposed of, it should go to his heirs, it was held that the power of the life tenant was limited to a disposition of the property by a sale thereof.

In Markillie v. Ragland (1875) 77 Ill. 98, it appeared that a testator stated that it was his will that his wife should take his "whole estate, real and personal, in form as it may be, and manage the same at discretion, and deal with the same as though she were entire and sole owner; that she pay all my debts, and all proper charges against my estate, out of the same, in such manner as she may deem expedient, without any sale of the same, except such as she may, in her discretion, voluntarily make, and that such possession, and entire control and disposal, continue to and in her during her natural life." In the next clause, the testator stated that it was his will that, at the decease of his wife, "whatever may remain of my estate, real and personal," should descend to his heirs, according to law, with a proviso in the event of the remarriage of his wife. It was held that the will devised to the widow a life estate in the property, with a power to sell it or any thereof, at her uncontrolled discretion, and convey the fee, the court declaring that if the testator had not intended that his wife should have the power to sell his real estate, why should he have spoken of what should remain at his wife's death?

In Hamlin v. United States Exp. Co. (1883) 107 Ill. 443, it appeared that a testator's will gave all his property to his wife, for her own use and benefit, with full power to hold, use, enjoy, or dispose of in any manner she might choose, and if she so desired, power

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to convey the real estate by absolute conveyance in fee simple. After her death he provided that all his real estate not conveyed by her should be sold and the proceeds invested for the use of others. It was held that the testator designed that his wife should have the use of his entire estate during her life, with the privilege of conveying whatever part of it she might deem necessary.

In Chamberlain v. Husel (1913) 178 Mich. 1, 144 N. W. 549, the will under construction gave all the testator's property to his wife for her use and benefit during her natural life, with a gift over at her death of the property, or so much thereof as might then remain unexpended, to his next of kin. A later clause appointed the wife executrix, and gave her full power and authority to sell and convey any or all of the testator's property without applying to any court, and without giving any bond as executrix. It was held that the widow was given a life estate, with the right to use from the corpus of the estate, and, in view of the fact that the power of sale was to continue during her lifetime, that it was conferred on her as legatee. Hence, the court held that, after the estate was administered, the life tenant would be entitled to the possession of it to care for, sell, and convey as she chose, without permission from any court, the only limitation imposed on her being that of "good faith."

In Ricketts v. People's Bank (1917) — Mo. —, 196 S. W. 26, it appeared that a testator gave all the residue of his estate to his wife, "to have the absolute control of the same, to sell or use for her own use and benefit, absolutely during her lifetime, and 4th. At her demise there is to be $800 taken from the estate and divided equally between" to named heirs, "and the remainder of all the property both real and personal to be equally divided between all the heirs," naming them. It was held that the will vested a life estate, with an added power of sale, in the wife as life tenant, under which she had two rights: She might have chosen thereunder to keep the land and to use it for her own use and benefit, or, on the other hand, she might, as she elected to do, sell the whole title, and use the proceeds of such sale for her own use and benefit during her life, or as her necessities might require.

The will construed in Redman v. Barger (1893) 118 Mo. 568, 24 S. W. 177, gave the testator's wife all his estate, real, personal, and mixed, with power to sell or dispose of it at pleasure, also all his moneys, and also the use, improvement, and income of his dwelling house, land, and its appurtenances, during her natural life, and after her decease, the remaining part of said real, personal, or mixed estate and hereditaments to be divided equally among his children. It was held that the wife was given the whole of the testator's estate, to manage, sell, or dispose of according to her own pleasure during her life, and at her death, whatever the form or condition of what was left, it was to go to the children.

In Robeson v. Shotwell (1897) 55 N. J. Eq. 318, 36 Atl. 780, affirmed in (1896) 55 N. J. Eq. 824, 41 Atl. 1115, it appeared that a testator gave all his property to his wife, "for her sole use, benefit, and enjoyment during her life, with full power to sell and dispose of any of the said property, both real and personal, and to use the proceeds thereof in such manner as she may desire." After the death of his wife, he directed his executors to divide "such property as may then remain" among the legatees named. By a codicil to the will, the testator gave his wife, for her sole use and benefit, with full power to dispose of the same by will or otherwise, the sum of $10,500. It was held that the widow had not an absolute title to the personal property, other than the $10,500, but only a life estate, with a power of sale and disposal, which she had the right to exercise for her own benefit.

In Selig v. Trost (1915) 110 Miss. 564, 70 So. 699, it appeared that a testator willed all his property to his wife, "to use, enjoy and control the same and the proceeds thereof, with the full power to sell, mortgage and dispose of the same and to make good

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and perfect title thereto," and after her death what remained of his property was to be divided equally among his children. "In no wise, however, to be construed to limit the power of my said wife over the said property or to prevent my said wife from selling or disposing of the same, or mortgaging the same or from using and enjoying the same or the proceeds thereof." It was held that the wife had the use and enjoyment of the property during her lifetime, with full power to sell or mortgage it.

In the case of Keown's Estate (1913) 238 Pa. 343, 86 Atl. 270, under a will giving all the testator's property to his wife, "she to have and to hold the same with power to sell, transfer and make title to the same or any part thereof as fully and legally as I myself could have done," and providing at her death for the disposition of the property remaining of the testator's estate, it was held that, during her life estate, the widow might consume part or the whole of the property, and that she might sell and transfer the "title" for the purpose of maintenance, but for no other purpose.

In Reed v. Reed (1907) 194 Mass. 216, 80 N. E. 219, it appeared that a testatrix gave all her real estate and personal property to her sister for and during her natural life, with the privilege of disposing of any or all of said real estate if she should at any time deem it expedient to do so, at her decease "the property to be equally divided" among named relatives. It was held that the sister having been given a life interest in the estate as a whole, with unlimited power to convey, the word "property" in the latter part of the will should be construed as including whatever might remain at the death of the tenant for life, in order to carry out the testatrix's object of providing for the comfortable support of her sister, even if the whole of the property should be exhausted.

In Woodbridge v. Jones (1903) 183 Mass. 549, 67 N. E. 878, it appeared that a testator who was childless and had a small estate, the income of which he apparently felt would not be sufficient for his wife's support, gave all his estate to his wife "during her life, to use and dispose of the same as she may think proper with remainder thereof on her decease" to persons named. The court held that by the use of the word "dispose," the life tenant had the power during her life to make a fee-simple conveyance of a part or the whole of the property, and that the word "remainder" must, though used in a technical sense, be held as subordinate to the power.

(b) Implied power to sell.

Though a gift of a life estate with a power to anticipate the principal and a gift over of "whatever remains" does not contain an express grant of power to sell, such a power is implied where it is essential to the enjoyment of the power of anticipation.

Thus, in Shaw v. Hussey (1856) 41 Me. 495, the will there involved bequeathed to the testator's wife all his estate, during her natural life, subject to the payment of certain legacies, and provided that "at the decease of my wife, all my real estate, that may remain unexpended," be divided between the two persons named. In holding that it was the design of the testator that his wife should dispose of the real estate as her wants might require or as she might deem expedient, the court said: "The will imposed no restraint upon the wife, touching the objects for which sale of the real estate might be made, but the whole was left to her discretion. It is obvious that the testator believed that some of his real estate might remain undisposed of at his wife's decease. Whether such would or would not be the case might be expected to depend much upon the portion required to raise means to pay the debts due from the estate, and charges of administration; and also upon the time which should elapse from his own to her death, her individual necessities, and the propriety, in her judgment, of converting the real estate into money. If she should survive him but a short time, the real estate which might be left after the payment of the charges upon the whole would probably remain unex-

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pended by her. But if she should live to extreme old age, her wants would probably require for their proper supply a sum equal to the value of the whole residue. The case finds that at the time of the death of the testator, his wife was an invalid; by the will, the payments required for settling the estate and for the payment of debts must all be from the avails of the sales of the lands, so far as sales were required for such purpose. Portions of the personal property, bequeathed to the wife, might not be so valuable to her as the price put thereon in the inventory, and but a part of it was of such a character as would yield an income till sold. It would appear from the will that the testator had no descendants, none being named as such. The only relatives mentioned therein, besides his wife, are two brothers-in-law, and a nephew and a niece. From certain articles of furniture, and other things appraised as parts of the testator's estate, it is manifest that the family had lived in comfort and in a respectable manner, though not in affluence. It is due to him to suppose that he would wish to leave to his wife the means, so far as he had them, sufficient to enable her to live in the same comfort and respectability, so long as she should survive him. No others are shown to have held such relations to him, or to have been in the low condition of life, that would awaken his sympathies for them, so far as to induce him to make a diversion of his property from his wife to others, and thereby expose her to want. But he had a choice, when he determined who of his relatives should be the objects of his bounty, if his wife should not, for any reason, dispose of all his real estate. If his design in the devise and bequest to his wife was that she might subsist in comfort after his death, beyond all contingency against which he could provide, and he conferred the power of disposal of real estate, to promote such an object, he left her to be the judge of the time, the mode, and extent of doing it. And if she did, from the avails of the sales of real estate, obtain more than she expended before her decease, this fact cannot defeat the conveyances. Even if the will had provided that the conveyances of real estate should be only for the removal of her wants, and if no other was appointed to be the arbiter touching those wants, the power to decide this question would be with her, and her decision, shown by her deed, would be conclusive, and would protect her grantee. . . . But the power of alienation is not limited to any condition, and, if it exists at all, was to be exercised entirely in the discretion of the wife of the testator."

In Young v. Hillier (1907) 103 Me. 17, 125 Am. St. Rep. 283, 67 Atl. 571, wherein the will in controversy gave the testator's wife all his estate "for her use during life," and at her death "whatever may remain of said estates" to his daughter, it was held that the use given the wife extended to a sale of the real property as well as the personal property, if she wished or needed, as otherwise there was no practical significance in the use of the word "remain" in this connection.

In the reported case (PRESBYTERIAN CHURCH v. MIZE, ante, 1237), it appeared that the will under construction gave the husband of the testatrix all the residue of her property, "to have and to enjoy the same during his natural life, and at his death should there be anything left, it is my wish that it shall go to" a designated church. The court holds that while the husband cannot dispose of the estate except for his own necessary use, he has a right to the entire income from the property, and by necessary implication may encroach on and dispose of the principal, if such encroachment is necessary to a reasonable and comfortable support for himself. And the court holds that he is authorized to make a sale of the property, or of such part thereof as may be necessary, for the attainment of the above result.

In McClelland v. McClelland (1909) 132 Ky. 284, 116 S. W. 730, the court construed a will which was in part as follows: "I bequeath all the residue of my estate both real and personal, or of any other description to my wife, Sallie, forever; but charge

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this residue which I give my wife with the following bequests: . . . Third. That at my wife's death her executor or administrators shall turn over to my brother, Wallace McClelland, and my sister, Mrs. Lucy Shishmanian, or their children if either or both are dead (excepting Frances McClelland, my niece) one fourth of whatever remains of the residue of the estate that I had bequeathed to my wife, Sallie, forever. Fourth. That at my wife's death her executors or administrators shall turn over one half of whatever remains of the residue of my wife, Sallie, forever, to my niece, Frances McClelland, for her sole and separate use. Fifth. The remaining one fourth of residue I left my wife, she may dispose of by will or if she makes no will to follow the law of descent." The court held that the testator bequeathed to his wife only a life estate in three fourths of his property, and the fee in one fourth thereof, with full power to sell and dispose of so much of it, or the whole of the property, should it become necessary for her support in comfort during her life. The court said: "There is no express power given Mrs. McClelland, enabling her to sell or dispose of the property. Such power, if any exists, can only be implied from the words 'whatever remains' in the third and fourth clauses of the will. From the use of these expressions, it is evident that the testator thought that a portion of his estate would remain at the death of his wife after she had used the income from it and as much of the principal as was necessary to support her comfortably. In our opinion the use of the words referred to does not imply an absolute and unlimited power on the part of Mrs. McClelland to dispose of the property; but, on the other hand, implied only that she have such power, if necessary, to enable her to subsist comfortably. The very fact that by his will he gave her the right to dispose of only one fourth of what remained at her death, after using the estate for the purposes mentioned, by will, shows a purpose on the part of the testator to limit her right of dis-

In Embry v. Embry (1907) 31 Ky. L. Rep. 295, 102 S. W. 239, it appeared that all the testator's estate was devised to his wife, "to do with as she may please, during her life, and at her death if there is anything remaining of my estate," it was to go to his daughter and her children. In construing this clause, the court held that the widow had the right to use, sell, and convey so much of the real estate owned by her husband as might be necessary for her comfortable support and maintenance, but denied her contention that she had the right to dispose of the property as she pleased without reference to whether or not it was necessary for her support and maintenance.

In Graham v. Botner (1896) 18 Ky. L. Rep. 637, 37 S. W. 583, it appeared that a testator's will gave a sister all his property, "to have and to hold as her separate property during her life; and at her death all said property, real and personal, not disposed of by my sister during her lifetime," was to go to the heirs of another sister; "but this will is not to be understood or construed in any way to prevent my sister Nancy from selling and using any part of said estate that she may desire to during her life." It was held thereunder that the sister had power to sell if she saw proper, and apply the proceeds for her support and maintenance.

In Leggett v. Firth (1892) 132 N. Y. 7, 29 N. E. 950, affirming (1889) 53 Hun, 152, 6 N. Y. Supp. 158, it appeared that by his will, a testator bequeathed to each of his children the sum of $1, and to his wife, the household furniture and all the rest of his personal property, "after paying from the same legacies already named, to her forever," and directed that if the personal property should not be sufficient to pay said legacies, enough real estate should be sold to raise money to pay them. The remainder of the disposing part of the will was in these words, viz.: "I also give, devise and bequeath to my wife Ellisheba all the rest and residue of my real estate, but, on her decease, the remainder thereof, if any, I give and devise to my said children, or

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their heirs, respectively, to be divided in equal shares between them." It was held that the widow took a life estate with a power of sale to be exercised during her life for her own benefit.

In Baumgras v. Baumgras (1893) 5 Misc. 8, 24 N. Y. Supp. 767, it appeared that a testator gave his wife all his real and personal property, "to be by her owned and enjoyed, the same as if I had never owned it, during her lifetime," and after her death whatever might be left was to be divided among his children in equal parts. The court held that, in addition to her life estate in the property, the widow owned any part or all of the principal, which, during her life, she might use up and consume in the enjoyment thereof, with power to sell and convey the principal or any part thereof in fee.

In Seaward v. Davis (1910) 198 N. Y. 415, 91 N. E. 1107, modifying (1909) 133 App. Div. 191, 117 N. Y. Supp. 468, and approving Tuthill v. Davis (1907) 121 App. Div. 290, 105 N. Y. Supp. 672, it appeared that a testator bequeathed all his personal property except his piano to his wife, and provided that "whatever personal estate may remain at the decease of my wife" was to go to her parents. It was held that the effect of the will was to give the widow a life estate with an absolute power of disposition during her lifetime, with remainder over of such part as she might not dispose of to the persons named in the will.

In Rinkenberger v. Meyer (1900) 155 Ind. 152, 56 N. E. 913, it appeared that a will gave the testator's wife a right to use and expend so much of all the testator's real and personal property which he had bequeathed and devised to her as should be needful for her support, and "what of" his property was left should go to her niece. It was held that it was the intention of the testator to confer on his wife the power to sell any or all of the property, as she desired, and what was left should go to the niece, the power to convey the fee thereof arising by the clearest implication from the words "she may sell" the farm and "what of my property shall be left at her decease shall go to said niece."

In Silvers v. Canary (1887) 109 Ind. 267, 9 N. E. 904, it appeared that a will, after giving the testator's widow a life estate in certain property, directed that a certain disposition be made of "what may not be consumed of personal and real estate at my wife's decease." It was held that it was the intention of the testator to appropriate solely for the benefit of his widow the property devised her, and to give the others named only so much of it as remained unconsumed at the death of his widow. Hence she could convey the fee in the land devised.

In Clark v. Middlesworth (1882) 82 Ind. 240, it appeared that a testator devised all his property, real and personal, to his wife, during her life, "and, at her death, should anything remain, the same to be divided among my heirs at law." It was held that the widow took a life estate, with, by the clearest implication, a power to dispose of it in fee prior to her death. Otherwise, the court held, the words, "and at her death, should anything remain," were senseless and without meaning.

In Goudie v. Johnston (1887) 109 Ind. 427, 10 N. E. 296, the will involved gave the widow "for her use during her natural lifetime" all the residue of the testator's estate, "she to have the control and management of the same, and at her death all of said personal property remaining, and all of my real estate" was otherwise disposed of by the testator. The court held that, the bequest being "for her use during her natural lifetime," there was, therefore, a clear restriction, not only to her life, but to her use, and the later words, "all of said personal property remaining," etc., were of but feeble effect as compared with the former ones. It was held that the widow could not be inhibited from managing and controlling the property, for that right was expressly given her by the will; but she might be prohibited from destroying it or disposing of it, unless it was necessary that it be disposed of for her

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use and support, or for the purpose of making a change in the investments. Thus, while she had a right to make sales for the purpose of changing an investment, or for the purpose of securing money for her support, she had no absolute power of alienation of the property.

In Tower v. Hartford (1888) 115 Ind. 186, 17 N. E. 281, wherein it appeared that a testator's will gave the residue of his personal property to his wife and directed that whatever property was left undisposed of at the death of his wife should descend to his son, it was held that the widow was given at least an absolute power of disposition, if not more.

In the case of Olson's Will (1917) 165 Wis. 409, 162 N. W. 429, wherein it appeared that a testator gave all his property to his wife, with full power over and control of the same, and stated that after the death of his wife it was his wish that what remained of the property should be equally divided between his sons, it was held that the widow was given a life estate, coupled with the power to dispose of the corpus of the property if necessary for her maintenance.

In Greenwalt v. Keller (1907) 75 Kan. 578, 90 Pac. 233, it appeared that a testator's will stated that he wished his wife to have all his property for her own use and benefit while she might live, and at her death all the property that might be left by her to go to others named. The court held that the use of the last clause added a power of disposal in fee to that which would otherwise constitute a life estate only, and clearly indicated that the testator intended his wife to use and permanently dispose of a part of the estate so that it would not be in existence at the time of her death, for the benefit of the heirs.

In the case of Re Mair (1913) 25 Ont. Week. Rep. 219, 5 Ont. Week. N. 277, wherein it appeared that a testatrix left her estate to her brothers "entirely in their hands," stating that they might use "the corpus for their own benefit," and that "any balance which may be left" was to go to a nephew, it was held that a power of sale was clearly implied, and that, when a sale had been effected, they would have a right, if they required it, to encroach on the principal money.

In the case of Re Davey (1910) 17 Ont. Rep. 1034, the clause of the will in question was as follows: "I give, devise and bequeath all my property of every nature and kind to my wife for her use and benefit so long as she lives, with full power to use and enjoy the same and such corpus of the estate as she may require or desire to use for her own benefit during her life, and should any part of my estate remain unused at her death then such part so remaining is to be divided equally among my brothers and sisters, and my wife is not to be required to account for my estate, or any part thereof." The court held that it was the intention of the testator that his wife should have a free hand to use and enjoy during her life as much of his estate as she might, not merely from necessity require, but what she might desire to use for her own benefit, and that she should not be restricted to the income merely, but might resort to the corpus without being called on to account during her lifetime for his estate or any part of it which she might expend for her personal use and benefit. And for the purpose of giving effect to her right to use the corpus, the court held that she had by necessary implication a power to sell and convert the real estate into money, for without this power, effect could not be given to her right to use the corpus.

In Simpkins v. Bales (1904) 123 Iowa, 62, 98 N. W. 580, it appeared that a testator devised all his property to his wife, "to be used and enjoyed and disposed of as seemeth the best to her, during her natural life or so long as she remains my widow," and after her death or when she ceased to be his widow, his property was to go to his children. It was held that the widow was given the property not only to use and enjoy, but also to dispose of should she so elect, and on the exercise of the power within the period of her life and widowhood, a fee-simple title passed.

In Haviland v. Haviland (1905) 130 Iowa, 611, 5 L.R.A.(N.S.) 281, 105 N.

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W. 354, it was held that under a will devising all the testator's property to his wife for her exclusive use and benefit during her life, and after her death and the payment of her funeral expenses, what remained to be divided between his children, if a power to sell could be implied from this clause, it was very clear that the sale could only be made for the purpose of her "support, comfort and maintenance."

In Wenger v. Thompson (1905) 128 Iowa, 750, 105 N. W. 333, under a will giving the testator's wife all his property for her use and for the maintenance and education of his children during her natural life, and after her death all of the property then remaining in her possession, or the proceeds thereof, to be divided among the children, it was held that this amounted to a gift, whether of the fee or of an estate for life was immaterial, with full and unlimited power of disposal at the widow's discretion "during her natural life."

In Turner v. Timberlake (1873) 53 Mo. 371, it appeared that a testator gave the remainder of all his land and other property, and all of his estate and effects whatever that might remain after the liquidation of his just debts, to be disposed of by his wife in any way she might think best, so that the property or its effects might be appropriated to her use and benefit during her natural life, and at her natural death the remainder of the property or its effects might be appropriated to the use and benefit of his two children. It was held that the will gave the wife the power to sell the property.

In Parker v. Travers (1908) 74 N. J. Eq. 812, 71 Atl. 612, the portion of the will under construction was as follows: "To my wife while she remains my widow, all of my property of every description and character not hereinbefore disposed of, with full power of disposition and alienation, provided, however, that in case my daughter survives her, that all the property not disposed of prior to my wife's decease, shall be and become the property of our said daughter, and in the event of my wife contracting another marriage, then it is my will that she shall possess and enjoy as of her own right, only one third of the property then remaining, and that the other two thirds shall be invested and held in trust for my daughter Annie, and paid to her upon attaining her majority." The court held that the interest acquired by the widow was a life estate, determinable on her remarriage, with the power of disposal and alienation during the continuance of the estate, subject to a gift over of what remained undisposed of at her death should she remain unmarried, and also subject to the condition that, in the event of her remarriage, she should take in her own right one third of the property then remaining, and invest the residue for the benefit of her daughter. The widow having exercised her power of disposal, it was claimed that she thereby became entitled to an absolute estate and title in the lands, thus defeating the gift over to the daughter, which was to become effective at the termination of the life estate. However, the court said: "I find myself unable to accept this result, for, assuming that the contention of the complainant that the conveyance was executed for the purpose of defeating the gift over is correct, it could not be supported as a bona fide exercise of the power conferred, which must always be executed in good faith, looking to the carrying out of the expressed intention of the party creating the power. By the gift over of what remained undisposed of at the death of the life tenant, and the substituted disposition on the remarriage of the widow of what then remained, the testator plainly indicated that it was his intention that his widow should exercise the power of disposal and alienation to such extent as might be required for the beneficial enjoyment of the property during her tenancy; but clearly a transference of title which did not alter the identity of property or owner, for the purpose of defrauding the remainderman, was not such an exercise of the power of disposal granted as to change a life estate to a fee-simple, nor do I think

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it would have made any difference in this case if there had been an actual sale and the property converted into money, for the proceeds thereof which remained in her hands undisposed of when the tenancy ended would have been a part of the estate 'that remains,' and be subject to the alternative bequest." The court held that the evidence negatived the claim that the conveyance was intended to be, and was, an exercise of the power of disposal for the purpose of conversion, but, on the contrary, showed that it was an alienation of the property for other purposes, and was not intended to change the character of the estate then held by the life tenant.

In the case of Dickinson's Estate (1904) 209 Pa. 59, 58 Atl. 120, wherein it appeared that a testatrix gave all her estate, after the payment of her debts, to her husband, and provided that should he not expend the whole of her estate, then it was her desire at his death to give so much of it as remained to her sister and brothers, it was held that the husband was given the use and enjoyment of his wife's estate, with the right to consume it, and to exercise full ownership over it, but, in case he did not expend or consume all of it in his lifetime, then to give what remained unexpended or unconsumed at his death to other persons. It was held that the gift of the estate to the husband carried with it the power to convert, sell, convey, assign, and transfer.

3. Mortgage.

The few authorities on the point are not in accord as to the power of a life tenant to mortgage the property where a life estate with a power of anticipation is given and a gift over is made of "whatever remains."

In Selig v. Trost (1915) 110 Miss. 584, 70 So. 699, it appeared that a testator willed all his property to his wife, "to use, enjoy and control the same and the proceeds thereof, with the full power to sell, mortgage and dispose of the same and to make good and perfect title thereto," and after her death what remained of his property was to be divided equally among his children. "In no wise, however, to be construed to limit the power of my said wife over the said property or to prevent my said wife from selling or disposing of the same, or mortgaging the same or from using and enjoying the same or the proceeds thereof." It was held that the wife had the use and enjoyment of the property during her lifetime, with full power to sell or mortgage it.

In Downie v. Downie (1880) 9 Biss. 353, 4 Fed. 55, however, it appeared that a testator gave all his property to his mother, "to hold and enjoy the same during her life, with full power to sell the same, or any part thereof, and to appropriate the proceeds to her own use and benefit, and all deeds and conveyances of real estate by her made shall pass a title in fee to the purchasers, it being my will that she shall enjoy the same as though it were devised to her in fee," and on her death all the remainder of his estate was to go to a half brother. It was held that while the mother had a life estate with the power to sell, and when sold, had the right to appropriate the proceeds to her own use and benefit as though the property were devised to her in fee, this did not, in terms, give the power to mortgage the estate.

In Rhode Island Hospital Trust Co. v. Commercial Nat. Bank (1884) 14 R. I. 625, the will therein involved gave all the testatrix's property to her husband for life, "with full power and authority at pleasure to sell, transfer, and convey any portion of my personal property and estate, execute the requisite conveyance or conveyances thereof, receive the proceeds of any such sale or sales, and apply and appropriate the net proceeds thereof to and for his own use, benefit, and behoof forever," with legacies and devises over on the husband's decease of "all my estate there remaining." It was held that the life tenant had no power to mortgage certain bonds included in the property of the testatrix, under the power given to him to sell and appropriate the proceeds.

4. Gift.

Where a will gives a life estate for the use and benefit of the life tenant,

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with a power of sale or disposition, and an express remainder over of "what remains," or some equivalent phrase, while the life tenant is entitled thereunder to the possession and control of the property during his life, with power to dispose of the whole or any part of the principal thereof as his necessities may require or his judgment dictate, he cannot dispose of it by gift inter vivos.

Thus, in Adams v. Prather (1917) — Cal. —, 167 Pac. 534, the will under consideration gave all the property of the testatrix to her husband, with power to sell any or all of her real estate and personal property without an order from the court. On the death of the husband, it bequeathed one half of the unexpended portion of the estate to a niece, and the other half to the surviving daughters of a brother. It was held that it was her intention to limit the estate given her husband to such part thereof only as he might in his lifetime expend, consume, or make use of, without in any manner restricting him in the control and disposition thereof for such uses. Subject to this control and disposal for his use and consumption to its complete exhaustion, the court held, it was the estate of the testatrix, and, after such carving therefrom as the husband might make for his use and consumption, the portion, if any, remaining at his death, and designated by her as "the unexpended portion of my estate," she made the subject of testamentary disposition, directing it "to be given," not by her husband, but by her executor and the law. Hence, while as to the property, persons dealing with the husband in good faith would be entitled to protection as fully and to like extent as though he were absolute owner in fee thereof, he could not, as of right in his lifetime, give it away.

In Brookover v. Branyan (1916) 185 Ind. 1, 112 N. E. 769, it appeared that a testator bequeathed all his property, both real and personal, to his wife, "giving her the power to sell and convey any or all of my real estate for her use," and provided that if any of the property should be left at his wife's death, it was to go to his daughter. It was held that the devise to the wife was that of a life estate with a power of disposition limited solely to sales for "her use," and that it did not authorize a deed of conveyance by way of gift.

In Johnson v. Johnson (1894) 51 Ohio St. 446, 38 N. E. 61, it appeared that, after providing for the payment of his debts, a testator devised to his wife all the remainder of his property with full power to bargain, sell, convey, exchange, or dispose of it as she might think proper. But if, at the time of her decease, any of the property should remain unconsumed, it was his will that it should be equally divided betwen his brothers and sisters and their children. It was held that the property was given to the widow, by her to be used and consumed, with power to bargain, sell, convey, exchange, or dispose of it as she might think proper. But the court held that the devise over to the testator's brothers and sisters and their children was of itself enough to show that the testator intended that his widow should use and consume the property only during her lifetime, and that he did not intend to empower her to dispose of the fee by gift during her life.

In the reported case (PRESBYTERIAN CHURCH v. MIZE, ante, 1237), it appeared that the will under construction gave the husband of the testatrix all the residue of her property, "to have and enjoy same during his natural life, and at his death should there be anything left it is my wish that it shall go to" a designated church. It was held that while the husband had a right to the entire income from the property, and might, by necessary implication, encroach on and dispose of the principal, if such encroachment was necessary to a reasonable and comfortable support for himself, he could not give the estate away.

In Anderson v. Hall (1882) 80 Ky. 91, it appeared that a testator gave all his property to his wife, "giving her the right to sell and reinvest, as she may desire, any part of the same for her own separate use and benefit,

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and at her death, I desire that any portion of my estate remaining undisposed of shall go to my three daughters," naming them. The court held that while the testator's intention was that his wife's right to use and dispose of the estate for her comfortable support might not be limited to the income, but was to give her the additional power to sell and use so much of the principal as might be necessary to maintain her, the words following directly after the power to sell and reinvest, viz., "the estate remaining undisposed of shall go to my three daughters," showed an intention not to give her unlimited dominion over the estate. The court held, therefore, that she had no power to give it to another.

In Spaan v. Anderson (1901) 115 Iowa, 121, 88 N. W. 200, the will under consideration gave the testator's wife all his property during her life, with power to sell and convey any of it as she might think best, and then gave "all the property remaining at her death" to his four sons in equal shares. The court held that the widow took a life estate with the additional power of disposal of the entire estate, and then said: "The situation of the parties was this: The widow had the right to dispose of the estate so as to partially or completely extinguish the contingent remainder given to the sons by the will. She, no doubt, could have converted a part of all of the property into money, and made a gift of the proceeds to one of the sons, and the others could probably not have held him accountable therefor. On the other hand, so far as she converted the property of the testator in which she had a life estate, with power of disposal, into funds or into other property which remained undisposed of by her at the time of her death, no doubt such proceeds or property received in exchange would still have passed to the sons under the contingent provision in their behalf. What the widow did was to convert some of the property into money, which she paid to Joseph, and to directly transfer to him a promissory note of a third party belonging to testator's estate at the time of his death; and this she did, according to the testimony, not by way of gift, but with the express provision that it should be treated as an advancement out of his interest in the estate which should be left undisposed of at her death. In other words, she waived her life estate and her power of disposal with reference to so much of the estate as was given to Joseph, and required that he should accept it as a portion of the share in the estate which he would become entitled to enjoy after her death. Such a disposition, made by agreement with all the heirs, would unquestionably have been a valid partition beforehand, which would be binding; and, although it does not appear that there was any express consent on the part of the other heirs to this form of distribution, yet, when the other heirs ratified and acquiesced therein, we can see no good reason for denying to the arrangement between the widow and Joseph the effect which it was, as between them, intended to have."

In Wortman v. Robinson (1887) 44 Hun (N. Y.) 357, it appeared that a testator gave his wife all his estate, "or so much thereof as she may use during her life," and to other persons, the rest, residue, and remainder of his estate which should remain unused at the death of his wife. It was held that it was the intention of the testator to give his wife so much of his estate as she desired to use, and to give the unused portion to the remaindermen named. Hence, it was held that it was beyond the power of the wife to assign to others the undisposed portion of a fund on deposit in the savings bank in the names of the testator and the wife, but of which the testator was the sole owner.

The rule that a life tenant cannot make a gift of the principal is necessarily applicable to such personal property as money. Given a life interest therein, with the power to use the principal for certain purposes as for his support and maintenance, the life tenant may not use it for any other purpose and may not give it away. Re Mayhew (1906) 4 Cal. App.

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162, 87 Pac. 417. In this case, it appeared that a will was construed by the superior court having jurisdiction of the estate as giving the testatrix's husband only the use of a sum of money bequeathed to him in her will, with the right to the custody of the principal, for his life, and on his death distributed the sum to certain named heirs. On appeal, the appellate court, concluding that the will contemplated that the legatee might use the principal sum according to his discretion, for his "comfort or pleasure," even to the extent of using it all, modified the decree by inserting the words, "the unused portion of," making the decree read, "for his use, during his natural life, and on his death the unused portion of said sum" to the persons named. In a later appeal in the same case (Hardy v. Mayhew (1910) 158 Cal. 95, 139 Am. St. Rep. 73, 110 Pac. 113), it was held that the "use" authorized was only such personal use as the testatrix's husband might desire to make of the money for *himself*, and that it did not include a disposition of practically the whole thereof, either by will or by gift during his life, and especially gifts made for the very purpose of excluding one of the remaindermen from participating in what otherwise would have been "unused" by him at the time of his death. The court said: "The decree of partial distribution in Mrs. Mayhew's estate as modified by the district court of appeal is, of course, a conclusive adjudication as to the construction to be given to Mrs. Mayhew's will in this regard, and the rights of the respective parties must be measured solely by that decree. Though entirely immaterial, in view of the conclusiveness of this decree, it may be said in passing that we are satisfied that the decree as modified was certainly as favorable to Judge Mayhew as the will warranted. The decree distributed the property to him 'for his use, during his natural life, and on his death the unused portion of said sum to' the three children and the grandchild in equal shares. Herein was clearly a distribution to Judge Mayhew of a life estate simply,—an estate limited by express terms to his natural life, with the power of disposing of the principal, even to the extent of entirely consuming it, in such ways as might be consistent with his 'use' thereof, and a distribution of the remainder to plaintiff and the three children in equal shares. This power of disposition and consumption in the life tenant is to be implied solely from the words 'unused portion of,' inserted in the decree by the district court of appeal; for without this addition the word 'use' in the decree, applied as it was to the money distributed, would mean a use without impairment of the principal. The added words, however, necessarily give to the word 'use' a different meaning, and make it include not only a mere appropriation of the profits or interest, but also an impairment or consumption by the distributee of a part or even all of the principal, to the extent that he might deem proper in his use of the same. But it appears very clear to us, and our conclusion is fully supported by the language of the opinion of the district court of appeal, which we have the right to consider in determining the sense in which the word was used by that court, that the 'use' authorized was only such personal use as the distributee might desire to make of the money for himself, and that it did not include a disposition of practically the whole thereof, either by will or by gift during his life; especially a gift made for the very purpose of excluding one of the remaindermen from participating in what otherwise would have been 'unused' by him at the time of his death. If the district court of appeal had concluded that such was the effect of the provisions of the will in this regard, it would necessarily have modified the decree of the superior court in accord with the contention of the petitioner, making it one whereby the $40,000 was distributed to him absolutely, and not merely for his life."

5. Devise.

Where a will gives a life estate for the use and benefit of the life tenant, with a power of sale or disposition,

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and an express remainder over of "what remains," or some equivalent phrase, while the life tenant is entitled thereunder to the possession and control of the property during his life, with power to dispose of the whole or any part of the principal as his necessities may require or his judgment dictate, he cannot dispose of the property by will or by a deed operating as a testamentary disposition.

Thus, in Herring v. Barrow (1879) L. R. 13 Ch. Div., (Eng.) 144, affirmed in (1880) L. R. 14 Ch. Div. 263, 49 L. J. Ch. N. S. 622, 43 L. T. N. S. 35, 28 Week. Rep. 802, it appeared that a testator gave all his property to his wife for the term of her natural life, to be disposed of as she might think proper for her own use and benefit according to the nature and quality thereof, and in the event of her decease, "should there be anything remaining of the said property or any part thereof," gave it to other persons named. It was held that the widow took only an estate for life, with a power of disposition only during her life; that is, not extending to a disposition by a testamentary instrument.

In Doe ex dem. Stevenson v. Glover (1845) 1 C. B. 448, 135 Eng. Reprint, 615, it appeared that after giving his wife an estate for life in his property, a testator gave and devised it to his son and his heirs, but provided that in case his son "shall happen to depart this life" without leaving lawful issue, and "he my said son shall not have disposed and parted with his interest of, in, and to the aforesaid copyhold estate and premises," then it was to go to another. It was held that while the son had an absolute dominion over the estate, provided he chose to exercise it during his lifetime, and might have disposed of it during that time if his wants had made it necessary for him to part with it, he could not dispose of it by will.

In Adams v. Prather (1917) — Cal. —, 167 Pac. 534, the will under consideration gave all the property of the testatrix to her husband, with power to sell any or all of her real estate and personal property without an order from the court. On the death of the husband, it bequeathed one half of the unexpended portion of the estate to a niece, and the other half to the surviving daughters of a brother. It was held that the intention of the testatrix was to limit the estate given her husband to such part thereof only as he might in his lifetime expend, consume, or make use of, without in any manner restricting him in the control and disposition thereof for such uses. Subject to this control and disposal for his use and consumption to its complete exhaustion, the court held, it was the estate of the testatrix, and, after such carving therefrom as the husband might make for his use and consumption, the portion, if any, remaining at his death, and designated by her as "the unexpended portion of my estate," she made the subject of testamentary disposition. Hence, he could not, as of right in his lifetime, make it the subject of testamentary disposition at his death.

In Johnson v. Johnson (1894) 51 Ohio St. 446, 38 N. E. 61, it appeared that, after providing for the payment of his debts, a testator's will devised to his wife all of the remainder of his property with full power to bargain, sell, convey, exchange, or dispose of it as she might think proper. But if, at the time of her decease, any of the property should remain unconsumed, it was his will that it should be equally divided between his brothers and sisters and their children. It was held that the property was given to the widow, by her to be used and consumed, with power to bargain, sell, convey, exchange, or dispose of it as she might think proper. But the court held that the devise over to his brothers and sisters and their children was of itself enough to show that the testator intended that his widow should use and consume the property only during her lifetime, and that he did not intend to empower her to dispose of the fee by will at her death.

In Rapp v. Matthias (1871) 35 Ind. 332, it appeared that a testator de-

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vised all his real and personal estate to his wife for her use and benefit during her natural life, and after her death, "said property, both real and personal, that may remain unconsumed," was to be distributed as provided in the will. A later clause directed that the wife should have the right to sell and dispose of both the real and personal property, if she wished. It was held that it was the evident intention of the husband to secure his widow a competency, and that, if it was necessary thereto that she should sell the land, she might do so, but the part of the estate left unconsumed at her death, she could not devise.

In Brookover v. Branyan (1916) 185 Ind. 1, 112 N. E. 769, it appeared that a testator bequeathed all his property, both real and personal, to his wife, "giving her the power to sell and convey any and all of my real estate for her use," and provided that if any of the property should be left at his wife's death, it was to go to his daughter. It was held that the devise to the wife was that of a life estate, with a power of disposition limited solely to sales for "her use," and that it did not authorize a devise thereof by will.

In John v. Bradbury (1884) 97 Ind. 263, it appeared that a testator's will devised his real and personal property to his widow, "to hold and possess, sell, use and dispose of as she may see fit, for her own comfort and convenience," and empowered her "to sell what realty I may be in possession of at my death, and convey the same by deed in fee simple, if her necessities or comfort require it." "The residue of my property or moneys, if any should be left after her death and full payment of her funeral expenses, to be equally divided between my two children." It was held that the will gave the widow only a life estate, with power to dispose of the property absolutely, for her own comfort and convenience, leaving such portion as might be undisposed of at her death, and after payment of her funeral expenses, to his children. Hence, she could not devise the property undisposed of at her death to her heirs and devisees, to the exclusion of the testator's children.

In Ford v. Ticknor (1897) 169 Mass. 276, 47 N. E. 877, the material part of the will under consideration gave the residue of the testator's estate to his wife, "to hold to her during her lifetime, with full power to use and dispose of the same as she shall deem right and proper," and provided that after his wife's decease, all the remainder of his estate should go to his son. It was held that the dominant purpose of the will was to give the wife a life estate, with a remainder to the son, and that the power of disposal was merely incidental to the life estate, to make it fully effectual, and so that, if she deemed best, her use of it during her life might exhaust the full value of the property. The court held, however, that the power was one only to be exercised during the active enjoyment of the life estate, and in aid of that enjoyment, and hence that the wife had no power to dispose by will of part of the property.

In Robeson v. Shotwell (1897) 55 N. J. Eq. 318, 36 Atl. 780, affirmed in (1896) 55 N. J. Eq. 824, 41 Atl. 1115, it appeared that a testator gave all his property to his wife, "for her sole use, benefit and enjoyment during her life, with full power to sell and dispose of any of the said property, both real and personal, and to use the proceeds thereof in such manner as she may desire." After the death of his wife, he directed his executors to divide "such property as may then remain" among the legatees named. By a codicil to the will, the testator gave his wife, for her sole use and benefit, with full power to dispose of the same by will or otherwise, the sum of $10,500. It was held that the wife took a life estate only, with a power of disposal and appointment, which she had the right to exercise if she chose, by act taking effect during her life for her own benefit, and with power to use the proceeds thereof at her pleasure. In holding that she could not dispose of the property by will, the court said: "By the testator's gift over of what 'may then remain' after the

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death of his wife, he indicates clearly that his will, and not that of his wife, is to direct the disposition of the property which she has not during her life disposed of under the power, and that her power is not to extend to a disposition by will. . . . The express extension of the power over the $10,500 made by the codicil to a disposition by will or otherwise indicates also the opinion of the testator at that time that power to dispose of the estate by will had not been given by the original will, and, if the will and codicil are now to be read as parts of one paper or will, speaking from the date of the codicil, then the intention gathered from this one will must be that the power did not extend to a disposition by will, except as to the $10,500. Upon this branch of the case I conclude, therefore, that Mrs. Shotwell had not an absolute title to the personal property, but only a life estate with a power of sale and disposal which she had the right to exercise for her own benefit."

In Wooster v. Cooper (1895) 53 N. J. Eq. 682, 33 Atl. 1050, it appeared that a testator's will directed that all his estate should, during the life of his wife, "should she survive me, pass into her hands, and be subject to her sole management and control, to keep and use or sell and dispose of the same as she shall see fit, and my executors hereinafter named shall not, during said time, be responsible therefor. From and after the death of my wife, should she survive me, otherwise from and after my death, all my estate, real, personal and mixed, which shall then remain, I order and direct my executors hereinafter named, or the survivor of them, to dispose of, as soon as conveniently may be thereafter, as follows." It was held that the wife took a life estate with a power of disposal, which, however, she could not exercise by will.

In Evans v. Folks (1896) 135 Mo. 397, 37 S. W. 126, wherein it appeared that a testator's will gave his wife "all of his whole estate, consisting of both real and personal, absolutely, and to the use of her own interest and benefit during her natural life," and directed that if, at the death of his wife, "there should be any of either of the personal or real estate hereinbefore mentioned," it should be divided among his blood relations in a specified manner, it was held that the widow was given a life estate with a power of disposal, which she could not execute by will.

In the case of Keown's Estate (1913) 238 Pa. 348, 86 Atl. 270, under a will giving all the testator's property to his wife, "she to have and hold the same with power to sell, transfer and make title to the same or any part thereof as fully and legally as I myself could have done," and providing at her death for the disposition of the property remaining of the testator's estate, it was held that, during her life estate, the widow might consume part or the whole of the property; she might sell and transfer the "title," for the purpose of maintenance, but for no other; but power of disposition of "the property remaining," if any, was denied her.

In Selig v. Trost (1915) 110 Miss. 584, 70 So. 699, it appeared that a testator willed all his property to his wife, "to use, enjoy and control the same and the proceeds thereof, with the full power to sell, mortgage and dispose of the same and to make good and perfect title thereto," and after her death what remained of his property was to be divided equally among his children. "In no wise, however, to be construed to limit the power of my said wife over the said property or to prevent my said wife from selling or disposing of the same, or mortgaging the same or from using and enjoying the same or the proceeds thereof." It was held that while the wife had the use and enjoyment of the property during her lifetime, with full power to sell or mortgage it, she had no power to dispose of it by will.

In the case of Re Davey (1910) 17 Ont. Week. Rep. 1034, the clause of the will in question was as follows: "I give, devise and bequeath all my property of every nature and kind to my wife for her use and benefit so long as she lives, with full power to

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use and enjoy the same and such corpus of the estate as she may require or desire to use for her own benefit during her life, and should any part of my estate remain unused at her death then such part so remaining is to be divided equally among my brothers and sisters, and my wife is not to be required to account for my estate or any part thereof." The court held that it was the intention of the testator that his wife should have a free hand to use and enjoy during her life as much of his estate as she might, not merely from necessity require, but what she might desire to use for her own benefit, and that she should not be restricted to the income only, but might resort to the corpus without being called on to account during her lifetime for his estate or any part of it which she might expend for her personal use and benefit. But the court held that the testator had not intended that she should have the right by will to dispose of any part that might remain unused at her death.

In Mooy v. Gallagher (1914) 36 R. I. 405, 90 Atl. 663, L.R.A.1916C, 1040, Ann. Cas. 1916D, 395, it appeared that a testatrix devised her residuary estate to her husband "for his sole use and benefit during the term of his natural life, and upon the death of my said husband, John Donnelly, I direct that that which there is remaining in possession of said John Donnelly be divided as follows." A later clause stated that while having left her estate to her husband during his lifetime, it was the testatrix's will that he be not restricted in any manner from using or disposing of all or any part of her personal property or real estate (with the exception of a certain piece of realty). It was held that while the husband took an estate for life in all the testatrix's property "for his sole use and benefit," with the power to use or dispose of all or any part thereof during his lifetime, and therefore, if he had need, to exhaust the same during his lifetime, the power of disposition given him could only be exercised by conveyance during his lifetime, and not by disposition by will.

In Kirkpatrick v. Kirkpatrick (1902) 197 Ill. 144, 64 N. E. 267, under a will giving a testator's property to his wife during her life, with power to manage, rent, or sell, as she might direct, and providing that after her death, if not already disposed of, it should go to his heirs, it was held that the power of the life tenant was limited to a disposition of the property by a sale thereof, and hence that she could not devise the property.

In the case of Re Cager (1888) 111 N. Y. 343, 18 N. E. 866, affirming (1887) 46 Hun, 657, under a will giving all the testator's property to his wife, to be used and enjoyed, and at her disposal during the term of her natural life, with one third of the property "that may remain" at the decease of his wife to an adopted daughter and the "remaining" two thirds to the heirs of the adopted daughter, it was held that the widow took a life estate with a limited power of disposition of the corpus of the estate for her use and enjoyment during her life, but had no power of disposing of it by will.

In Flanagan v. Flanagan (1880) 8 Abb. N. C. (N. Y.) 413, it appeared that a testator bequeathed to his widow one third of all the rest and remainder of his estate, in lieu of dower, to be hers absolutely; and the use of all the remainder during life; and "the portion left of said remainder" to be distributed to the poor of a named church. It was held that the words quoted necessarily implied a right in the donor of the use to make disposition of the fund; and that, too, in part and in whole, at her pleasure as to object, purpose, and mode, save by will. It was held that the testator did not intend that the widow should make disposition by will, as he gave directions himself as to the distribution of "the portion left" on her decease, but it was plainly intended, and the intention expressed, that the widow should have the power to dispose of the fund at will during her life, and that she might diminish it even to a possible exhaustion of it.

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In Greyston v. Clark (1886) 41 Hun (N. Y.) 125, the will under consideration gave all the testator's property to his wife, absolutely, to have and to hold the same for her own use and benefit forever, and with full power and authority to sell or mortgage as she thought proper; on her death whatever property she might die seised of that belonged to the testator, and remained in her by virtue of his will, to be divided among certain relatives named in the will. It was held that the widow had an unlimited power to dispose of the property during her lifetime, which was not restricted to her maintenance and support only, but that she could not dispose of it by will.

In Minges v. Mathewson (1901) 66 App. Div. 379, 72 N. Y. Supp. 612, it appeared that a testator's will gave his daughter an undivided one-fourth part of all his property, "the rents and profits, use, interest and income thereof; and on her death whatever may remain of said property, principal, interest, or income, unexpended by" her, to her children. He further stated that it was his will that she should "use, dispose of, or expend so much of the said property and estate, real or personal, use, income and interest, as she may choose, during her life." It was held that the daughter took a life estate, with the privilege of disposing during life of the principal as well as the income, but not by will.

In Terry v. St. Stephen's Protestant Episcopal Church (1903) 79 App. Div. 527, 81 N. Y. Supp. 119, it appeared that a testator gave the residue of his property to his wife for life, "with the right to use and dispose of so much of the principal of said residuary estate during her lifetime as she shall see fit." On her death, he gave "all that shall then remain of my said residuary" to certain named legatees. The court held that the power of disposition given the widow was limited to what was in her judgment reasonably necessary for her use and enjoyment during her life, and that she had no power to make what were in effect testamentary provisions; viz., assignments of the residuary estate under agreements whereby the assignee paid her the income during her life, and on her death he was to assign the estate to another.

Where, however, a life tenant is given a power of disposition by will, he may, of course, dispose of the property by that method.

In Dallinger v. Merrill (1916) 224 Mass. 534, 113 N. E. 279, wherein it appeared that a testator's will provided that if at any time after a year from his decease no child of his should be surviving, his wife should use all the residue of his estate for her sole and separate use and benefit in all respects as she should think best (both principal and interest), and might dispose of it by will, but if she died after the death of all his children and without having disposed of his estate by will or otherwise, the residue was to be divided among his sisters, it was held that the widow was given full power of using up, i. e., consuming, the property during her life, and also full power of disposing of it by will.

In Burbank v. Sweeney (1894) 161 Mass. 490, 37 N. E. 669, it appeared that a testator first gave all his estate to his wife for life, and then gave out of the remainder, legacies to two of his heirs, and concluded with the following provision: "The remainder of my estate I leave for my wife to dispose of as she may deem expedient, but in the event that she should make no disposition of the same during her lifetime, I give the remainder of my estate not disposed of as above to my heirs at law." It was held that the will gave the widow a power of disposal by will, and that her power was not limited to conveyances to take effect during her life.

In Crew v. Dixon (1891) 129 Ind. 85, 27 N. E. 728, however, the material portions of the will there in controversy were as follows: "I give, bequeath and devise to my said wife all of my other property of every kind, to be held and used by her during her natural life; the house and lot where I now live to be entirely under her control so long as she shall live, together with all the furniture in the

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same; and the notes that I may have, to be collected by her in her individual name as they may fall due; the principal of such notes to be held or invested by her as she may deem proper, with the privilege to her to use so much thereof as she may deem necessary to carry on her business or to furnish a comfortable support. But before her death I desire her to provide by will, or otherwise, for a distribution of whatever of my estate may remain in her hands, among her and my children in such manner as she, in her judgment, shall deem best and most equitable; such distribution not to take effect until after her death." It was held that only possession and control of the real property was given to the widow, but the personal property was given to her to use and to consume. Hence the court held that as she was not empowered to distribute the property generally, but her authority was limited to "whatever remains in her hands," and as she could not convey the fee of the real property, but could transfer the personal, the phrase, "whatever remains in her hands," could only mean personal property; and as to this a right was vested in the widow to use such of it as she chose, and to distribute what remained at her death at her pleasure, subject only to the limitation that it must be distributed among the members of the class designated by the testator.

6. Waste.

Where a will gives a life estate for the use and benefit of the life tenant, with a power of sale or disposition, and an express remainder over of "what remains," or some equivalent phrase, while the life tenant is entitled thereunder to the possession and control of the property during his life, with power to dispose of the whole or any part of the principal thereof as his necessities may require or his judgment dictate, he cannot waste or extravagantly and recklessly squander the estate.

Thus, in Cross v. Hendry (1906) 39 Ind. App. 246, 79 N. E. 531, under a will giving the testator's widow all his real and personal estate for life, to be hers during her lifetime, and at her death what property was left to be applied toward building a church, it was held that waste was not a legitimate enjoyment of the life estate, and a judgment granting an injunction against her and those claiming in fee under a deed by her from cutting and removing timber or trees growing on the real estate was affirmed.

In Johnson v. Johnson (1894) 51 Ohio St. 446, 38 N. E. 61, it appeared that, after providing for the payment of his debts, a testator's will devised to his wife all of the remainder of his property with full power to bargain, sell, convey, exchange, or dispose of it as she might think proper. But if, at the time of her decease, any of the property should remain unconsumed, it was his will that it should be equally divided between his brothers and sisters and their children. It was held that the property was given to the widow, by her to be used and consumed, and that while so using and consuming it, she was empowered to bargain, sell, convey, exchange, or dispose of it as she might think proper, limited, however, in the exercise of such power, to the purpose of the consumption. While the testator gave her the right to consume in good faith, and she could use and enjoy the estate to its fullest extent for her support, consuming the whole of it if necessary, the court held that she could not recklessly squander or give away the estate.

In McClelland v. McClelland (1909) 132 Ky. 284, 116 S. W. 730, the court construed a will which was in part as follows: "I bequeath all the residue of my estate both real and personal, or of any other description, to my wife, Sallie, forever; but charge this residue which I give my wife with the following bequests: . . . Third. That at my wife's death her executors or administrators shall turn over to my brother, Wallace McClelland, and my sister, Mrs. Lucy Shishmanian, or their children if either of both are dead (excepting Frances McClelland, my niece) one fourth of whatever remains of the residue of the estate that I had bequeathed to my wife, Sallie,

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forever. Fourth. That at my wife's death her executors or administrators shall turn over one half of whatever remains of the residue of my wife, Sallie, forever, to my niece, Frances McClelland, for her sole and separate use. Fifth. The remaining one fourth of residue I left my wife, she may dispose of by will or if she makes no will to follow the law of descent." The court held that the testator bequeathed to his wife only a life estate in three fourths of his property, and the fee in one fourth thereof, with full power to sell and dispose of so much of it, or the whole of the property, should it become necessary for her support in comfort during her life. But the court held that while the testator did not desire to confine his wife to the income from his estate, if it should become insufficient to support her in comfort, but intended that she should have so much of the principal as might become necessary for her comfortable maintenance, he did not intend that she should waste it.

In the reported case (PRESBYTERIAN CHURCH v. MIZE, ante, 1237), it appears that the will under construction gave the husband of the testatrix all the residue of her property "to have and to enjoy same during his natural life, and at his death should there be anything left, it is my wish that it shall go to" a designated church. It is held that while the husband has a right to the entire income from the property, and may by necessary implication encroach on and dispose of the principal, if such encroachment is necessary to a reasonable and comfortable support for himself, he cannot waste the estate.

In Anderson v. Hall (1882) 80 Ky. 91, it appeared that a testator gave all his property to his wife, "giving her the right to sell and reinvest, as she may desire, any part of the same for her own separate use and benefit, and at her death, I desire that any portion of my estate remaining undisposed of shall go to my three daughters," naming them. The court held that while the testator's intention was that his wife's right to use and dispose of the estate for her comfortable support might not be limited to the income, but was to give her the additional power to sell and use so much of the principal as might be necessary to maintain her, the words following directly after the power to sell and reinvest, viz., "the estate remaining undisposed of shall go to my three daughters," showed an intention not to give her unlimited dominion over the estate. The court held that she had no power to waste it in extravagance for the purpose of depriving the children of their interest in it.

In Offutt v. Beall (1906) 30 Ky. L. Rep. 247, 97 S. W. 1113, the will under construction gave the testator's wife all the rents and proceeds of all his property during her life, after the payment of his debts, and provided that at her death three nieces were to have equal shares of what might be left. The testator requested that the real estate be managed or sold to the best interest of his wife, and if best to rent all the property and pay the interest on the mortgage debt, that the balance, if any, be paid to his wife. The court held that it was manifest that the testatrix desired his wife to use the property for the purpose of supplying her wants and comforts for the remaining years of her life, keeping it intact, if possible, but authorizing its sale if necessary to carry out the purpose of providing for the support and maintenance of his wife. The court held, however, that she was not authorized by the will to waste the property.

In Downing v. Johnson (1867) 5 Coldw. (Tenn.) 229, a testator's will gave the whole of his estate, both real and personal, choses in action, etc., to his wife for and during her natural life, to be by her freely possessed and enjoyed, and then stated that "the balance of my property, money, or other effects that may be on hand, at the death of my wife, I dispose of in the following manner," etc. The court held that the widow was, under the will of her deceased husband, entitled to the possession,

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use, and enjoyment, during her life, of all the property belonging to her husband at the time of his death; and that if her support and maintenance, in her discretion, required it, she might consume the corpus of the estate, except the land. The court said: "We do not say that, in a proper case made out, a court of chancery would not interfere to restrain a fraudulent and extravagant waste of the property given to Mrs. Johnson for her support during her life, in order to protect the interests of remaindermen; but no such case is made out in this record, as will authorize any such interposition. The record, so far from showing that Mrs. Johnson has been wasteful or extravagant, shows that she is remarkably careful, industrious, and economical."

H. D. B.

M. J. WRAGG
v.
GRIFFIN, Sheriff, et al.

Iowa Supreme Court—January 20, 1919.

(— Iowa, —, 170 N. W. 400.)

Health — rules — compulsory examination of suspect.

1. A rule of a board of health directing officers to make such examinations of persons suspected of having venereal disease as may be necessary to carry out the health regulations, and making it the duty of the mayor to have suspected persons investigated, does not authorize the forcible examination of the person of a suspect, or the extraction of blood from his veins for a "Wasserman test."

[*See note on this question beginning on page* 1332.]

— contagious disease — suspect — test.

2. One suspected of being affected with a venereal disease cannot, in the absence of express legislative authority, be subjected to forcible examination of his person and extraction of blood from his veins for a "Wasserman test." to determine whether or not he is fact so affected.

Constitutional law — liberty — due process — forcible examination of one suspected of disease.

3. The detaining by local health authorities, without clear and definite legislative authority, of a person suspected of having a venereal disease, for the purpose of forcing the exposure of his body to visual examination and compelling the extraction of blood from his veins in search of evidence of such disease, which may or may not exist, is a deprivation of liberty without due process of law.

PETITION for a writ of habeas corpus to secure petitioner's release from custody to which he had been committed by order of the health authorities, for the purpose of subjecting him to physical examination and blood tests to determine whether or not he was affected with a certain disease. *Writ sustained and release of petitioner ordered.*

The facts are stated in the opinion of the court.

Messrs. **Dunshee, Haines, & Brody,** for petitioner:

Boards of health are creatures of the statute, and can have and exercise only such powers as are expressly granted, and will be held to a strict observance of the legislative authority.

State v. Kirby, 120 Iowa, 26, 94 N. W. 254.

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respondents is authorized by the statutes or the rules of the board of health, such statutes and rules are void, as being in contravention of the provisions of the Constitution of Iowa with reference to due process of law and unreasonable search and seizure.

State v. Height, 117 Iowa, 650, 59 L.R.A. 437, 94 Am. St. Rep. 323, 91 N. W. 935.

Messrs. H. M. Harner, Attorney General, and George F. Henry for respondents.

Weaver, J., delivered the opinion of the court:

The petitioner alleges that he is illegally restrained of his liberty by the respondent sheriff of Polk county, Iowa, and the custodian of the county jail; that such restraint has been so imposed pursuant to an order made by the mayor of the city of Des Moines, who is ex officio chairman of the local board of health, and by Dr. Witte, acting as health officer of the United States, directing that petitioner be arrested and compelled to submit to compulsory physical examination, in which examination blood shall be extracted from the veins of the petitioner for submission to the state bacteriologist, to determine whether petitioner is suffering from venereal disease; that no copy of such order has been served upon or furnished petitioner, but he alleges that the action was taken against him upon representations made against him by certain police and health officers. It is further said that such order is void and illegal, and in violation of the constitutional right of the citizen to be protected against unreasonable searches and seizures, and that, unless a writ of habeas corpus issue, he will be forcibly subjected to physical examination and violation of his person, and be further restrained of his liberty by confinement in the county jail or detention hospital.

Upon this petition, a writ of habeas corpus was issued and served upon the respondents, and, pending the hearing thereon, the petitioner was, by order of this court, enlarged upon bail.

to this proceeding, make the return to the writ, setting up as their sole and sufficient authority for the restraint of the petitioner a certain warrant or order in the following words:

In the Matter of the Restraint of M. J. Wragg by the Board of Health of the State of Iowa and Local Board of Health of the City of Des Moines.

Order of Restraint.

To the Peace Officer of the State of Iowa in Charge of the City Hospital of Des Moines: You are hereby ordered to hold in restraint M. J. Wragg and so hold him until the further order of said board, and this you will in no wise omit under penalty of the law.

Des Moines, Iowa, October 22, 1918.

Board of Health, City of Des Moines,
By Tom Fairweather, Health Officer.

The matter coming on for hearing before the court, it was submitted for decision upon a stipulated statement of facts and written arguments of counsel. So far as at present material, the following are the agreed facts:

On September 27, 1918, the petitioner was arrested upon an information filed in the municipal court of Des Moines, charging him and one Isabel Newman with the crime of lewdness. On September 30, 1918, the defendant, being arraigned upon said charge, entered a plea of "not guilty," whereupon the court made an order fixing his bail bond at $1,000, but further ordering that he be held subject to the order of the board of health. On the same day, the petitioner presented and filed a good and sufficient bail bond, as provided in the court's order. On October 4, 1918, the grand jury of Polk county returned an indictment, charging the petitioner and Stella Newman with lewd and vicious cohabitation. The court's order above mentioned, admitting petitioner to bail subject to the order of the board of health, having been

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certified to the local board of health, said board thereupon made the order set out in respondent's return to the writ of habeas corpus as their authority for the petitioner's restraint. At the date of said order, there was no room at the city detention hospital, and the sheriff therefore confined petitioner in the county jail.

It is further stipulated that, if he had not been released under the order of this court pending the habeas corpus proceedings, the petitioner would have been, and if he is remanded to the custody of respondents he will be, compelled to permit an expert to extract approximately 5 cubic centimeters of blood from petitioner's viens, for the purpose of having the same tested at the state laboratory in Iowa City, to determine whether or not he is afflicted with syphilis, such test being what is known as "Wasserman's reaction," a method the correctness of which is recognized by the medical profession generally, and to permit the expert also to take pus smears from his urethra, to be subjected to microscopical examination for the purpose of ascertaining whether the petitioner is afflicted with gonorrhea. It is also further agreed that respondents, acting under said order from the board of health, assert the authority to continue the restraint of the petitioner for treatment in the event that the state bacteriologist, upon completing such examinations and tests, shall report positive reaction; that the extraction of blood for such test does not involve substantial danger to life, but is somewhat painful, and the treatment does not involve such danger, but induces a considerable reaction, causing fever and nausea. It is further agreed that the matron of the city hospital would, if present, testify that, at and prior to their arrest, the petitioner and Miss Newman were registered at a hotel in Des Moines as husband and wife; that, upon such arrest being made, Miss Newman was taken to the hospital, where an examination developed the fact that she was afflicted with gonorrhea, and she was detained for treatment until October 21, 1918. Attached to and made part of the stipulation is a printed copy of the rules of the board of health of the city of Des Moines, also copy of a publication entitled: "Venereal Diseases. Iowa State Board of Health. Bulletin No. 7." So much of the exhibits named as appear to be material upon the matter in hearing will be hereinafter set out more particularly.

The question presented by the record and the arguments of counsel may, in its final analysis, be stated as follows: May the local board of health of the city of Des Moines, upon suspicion that the petitioner is afflicted with a venereal disease, or has been exposed to such contagion, lawfully order him under arrest, and subject him by force to an examination of his person, and compel him against his will to permit a quantity of blood to be extracted from his veins, and then be held in continued durance until the blood has been sent to an expert in a distant city and by test thereof it is determined whether such petitioner is or is not in fact so diseased?

It may be said at the outset that the objection raised by this petitioner does not necessarily challenge the validity of any statute or any rule of the board of health, by which authority is given to quarantine persons who are afflicted with contagious disease, or to remove or segregate a person so diseased from his own home for detention in a separate house or detention hospital, and there detain him until he has so far recovered his health as to be no longer a menace to the health of the community. All such measures may, for the purposes of this case, be sustained as a wise and valid exercise of the police power for the general good. But, admitting such to be the case, does it follow that a person not known to be so diseased, and (so far as here appears) showing no visible evidence, sign, or symptom of such disease, may be

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subjected to arrest, imprisonment, and violation of his person, for no better reason than that he is "suspected," by someone whose identity is not revealed, to be diseased, and to satisfy the board of health or some of its officers whether there is in fact any ground for such suspicion? If such extraordinary and drastic authority exists, it must be found in the statute, or in some valid rule or rules lawfully prescribed by the board of health. State v. Kirby, 120 Iowa, 26, 94 N. W. 254. This may be taken for granted.

Is such authority shown or pointed out by the respondents? We have examined with some care the various statutory provisions and rules to which counsel have called our attention, and are forced to the conclusion that the power is nowhere provided, either expressly or by necessary implication. The statute providing for a state board of health provides that it shall have charge and supervision over the interests of the health and life of the citizens of the state, including quarantine, and may make such rules and regulations and sanitary investigations as may be found necessary for the preservation and improvement of public health, and provide rules for enforcement by local boards. Code, § 2565.

Local boards may make sanitary rules and regulations, and establish quarantine against all contagious and infectious diseases. Code, § 2568.

Syphilis and gonorrhea are quarantinable diseases. Code Supp. § 2575a6a.

Peace officers and police officers are required to enforce rules of the board of health. Code, § 2572.

When any person shall be sick or infected with any contagious disease, the local board may take such action as is best calculated to protect the public therefrom, and may remove the person so afflicted to a separate house or detention hospital. Code Supp. §§ 2571a et seq.

It will be observed that these statutes are framed in general terms, within the proper scope of which boards of health prescribe specific rules and regulations; and, as we have already noted, while in terms authorizing boards of health and health officers to deal with quarantinable diseases, there is no express provision for interfering with the liberty of persons who are merely "suspected" of being diseased.

If the power is not found in the statute, is it discoverable in the rules of the board? The rules exhibited in the stipulation of facts include much matter irrelevant to the present discussion, and the paragraphs which have some bearing, near or remote, upon the issue, may be culled as follows:

The state board is found to have framed and approved a series of rules, which local boards were directed to adopt, record, and publish. The local board of the city of Des Moines did adopt rules as follows:

(1) "Every physician, nurse, attendant, hospital superintendent, druggist, member of police department, police magistrate, or other person having knowledge of a known or suspected case of syphilis or gonorrhea, must immediately report to the mayor" in writing, with certain specific details of information."

(2) "It shall be the duty of the chief of police to cause all persons arrested for being found in a disorderly house, all prostitutes, and all other persons held under arrest who are suspected of having syphilis or gonorrhea in the infectious stages, to be examined before released or discharged, and, if any such persons are found to be afflicted with either of said diseases, to report the same to the mayor as provided in rule 1."

(3) "It shall be the duty of the mayor upon receiving notice of the existence of a case of venereal disease . . . to immediately issue an order to the chief of police, directing him to cause the person afflicted with such disease to be removed to a separate house of detention or hospital, and there restrained" until

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the city's health physician authorizes his release.

Among the rules of the state board, though apparently not carried into the rules of the local board, is one which provides (fourth) that local health officers are directed to make such examinations of persons reasonably suspected of having syphilis or gonorrhea as may be necessary for carrying out the board's health regulations, "and to detain such persons for such length of time as may be necessary, in order to determine whether such persons are so affected." In still another clause (third), it is made the duty of the mayor, whenever a person is suspected of having such disease in the infectious stages, or is suspected of having been exposed to such disease, to direct the police or peace officer to cause such person to be investigated, and, in case such person is so afflicted, to cause him to be restrained at home or, if necessary, in a separate house or hospital.

It seems quite clear that rule 2 of the local board and the corresponding rule of the state board are intended to define the duty of the chief of police with reference to the herd of derelicts, which that officer and his aids are wont to round up in their occasional raids on disorderly resorts, and to make it his duty, if he discovers or finds reason to believe that any person so coming into his custody has either syphilis or gonorrhea in the infectious stage, to report it at once to the mayor. It does not appear that this petitioner was ever in the custody of the chief of police, or was by such officer reported to the mayor as a diseased person. Rule 3 of the local board is apparently designed to define the duty of the mayor in giving effect to that part of the statute above quoted (Code Supp. §§ 2571a et seq.), which provides that, when necessary, the diseased person may be removed from his home to a separate house or detention hospital. Reference to the statute shows it is made applicable only "when any person shall be sick or infected with any contagious or infectious disease," and neither by word nor inference does it justify such detention or segregation of one who is merely suspected of disease.

The language which may most plausibly be relied upon in support of the respondents' position is that to which we have referred as appearing in the rules of the state board of health alone. These rules were prepared May 28, 1918, with a provision or direction to local boards to adopt and make publication of the same. The rules of the local board attached to the stipulation appear to have been adopted and published in January, 1918, before the action of the state board, and the record is without mention of any adoption or publication by the local board of the later rules of the state board. No question is raised in argument because of this omission, and we mention it as explanatory of the apparent lack of harmony which appears at some points between the two codes of rules. The respondents place special emphasis on that part of the rules of the state board to which we have already referred, where it is made the duty of the mayor to direct the chief of police to cause persons suspected of being diseased, "to be investigated," and authorizing health officers in such cases "to make examinations" of suspected persons, and to detain them as long as it may be necessary to determine whether they are so afflicted. But even here there is an entire absence of any express authority to subject a suspected person to an examination by physical force, or by an extraction of blood from his body by violence for experimental purposes. Men and women were examined and treated by physicians for sexual diseases for generations before the so-called "Wasserman test" was discovered or invented, and, so far as we are informed, with reasonably reliable results. At least, there is no evidence that, even in the technical phrase of physi-

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cians, the word "examination," in such cases, is understood as necessarily meaning a blood test by the Wasserman method, or by any other method involving violation of the person, and, in the absence of explicit authority for the subjection of a person to such treatment, upon suspicion alone, it ought not to be approved as a valid exercise of authority. This petitioner may be a bad man, but we have no right to assume such a fact for the purpose of minimizing his claim to protection of the ordinary rights of person, which law and the usages of civilized life regard as sacred until lost or forfeited by due conviction or crime. Even when charged with the gravest of crimes, he cannot be compelled to give evidence against himself, nor can the state compel him to submit to a medical or surgical examination, the result of which may tend to convict him of a public offense (State v. Height, 117 Iowa, 650, 59 L.R.A. 437, 94 Am. St. Rep. 323, 91 N. W. 935); and, if there be any good reason why the same objections are not available in a proceeding which may subject him to ignominious restraint and public ostracism, it is, at least, a safe and salutary proposition to hold that, before the courts will uphold such an exercise of power, it must be authorized by a clear and definite expression of the legislative will. This we do not have, and, in our judgment, the restraint of the petitioner, not as a diseased person whose detention in a separate house or hospital the statute authorizes, but solely as a suspect and for the avowed purpose of forcing the exposure of his body to visual examination, and compelling the extraction of blood from his veins in search of evidence of a loathsome disease, which may or may not exist, is a deprivation of his liberty without due process of law, and he is entitled to be set free.

Health—rules—investigation of suspect.

—contagious disease—suspect—test.

Constitutional law—liberty—due process—forcible examination of one suspected of disease.

This conclusion rendered it unnecessary for us to decide or consider the further question, whether, under the concededly broad scope of power and discretion granted to boards of health, it is competent for them, by rule or otherwise, to provide that the mere fact that a person has been arrested, or is charged with a sexual offense, or is suspected of having a venereal disease, is sufficient ground upon which to seize and imprison him and forcibly subject him to physical examination and blood tests. It is enough for present purposes that such is not now the law, by statute or by rule of the board of health.

The Writ of Habeas Corpus is sustained, and the respondents are ordered to release him from restraint.

Ladd, Ch. J., and **Evans, Gaynor, Preston, Salinger**, and **Stevens**, JJ., concur.

ANNOTATION.

Compulsory examination for venereal disease.

Compulsory physical examination to determine whether a person is afflicted with a venereal disease has been held to violate his immunity from testifying against himself. This is asserted in State v. Newcomb (1909) 220 Mo. 54, 119 S. W. 405, which holds that it is a violation of the constitutional right of one accused of crime to be exempt from testifying against himself, where one in custody on a charge of rape, and when without counsel, was ordered by a justice of the peace, at the demand of the prosecuting attorney, to submit to an examination by a physician for the purpose of determining whether he was afflicted with a venereal disease, and who was examined

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by the physician in the presence of the sheriff, both of whom testified on the trial as to the result of the examination.

In State v. Horton (1912) 247 Mo. 663, 153 S. W. 1051, physicians who, at the request of a police captain, examined the accused after his arrest on a charge of rape, were allowed to testify to the fact that he was suffering from a venereal disease. The objection interposed to the evidence was placed on the ground that the physical examination took place after the preliminary examination before the committing magistrate, which was wholly insufficient to call the trial court's attention to the incompetency of the evidence. For this reason, the appellate court ruled the assignment of error against the defendant. But the court observed: "If the evidence of the physicians had been objected to on the ground that the physical examination which they made, under the orders of a police captain, amounted to compelling him to testify against himself, as prohibited by § 23, art. 2, of the Constitution of Missouri, then the admission of their evidence would undoubtedly have constituted reversible error."

In the reported case (WRAGG v. GRIFFIN, ante, 1327), it is held that the local board of health of a city may not, upon suspicion that a person is afflicted with a venereal disease or has been exposed to such contagion, and in the absence of a statute or rule of the board of health, lawfully order him under arrest, and subject him by force to an examination of his person, and compel him against his will to permit a quantity of blood to be extracted from his veins, and then hold him in continued durance until the blood has been sent to an expert in a distant city, and test made to determine whether the person suspected is or is not in fact so diseased.

It will be observed that the court in the WRAGG CASE, expressly refrained from passing upon the power of the board of health to adopt a rule authorizing substantially what was attempted in that case, without such a rule. Such a question, or one very closely analogous, was considered in State ex rel. McBride v. Superior Ct. (1918) — Wash. —, 174 Pac. 973, where municipal ordinances, providing for the examination of persons taken into custody by the police and suspected of being afflicted with any contagious or infectious disease, and further providing that persons known to be suffering from contagious venereal diseases shall be removed to and kept in such place as may be designated, and there properly treated, were upheld as a proper exercise of the police power.

It has been held that information obtained by physicians as to the condition, with reference to venereal disease, of a prisoner whom they examined against his will, is inadmissible, upon his trial for rape, in view of the constitutional provision that no person shall be deprived of life, liberty, or property without due process of law, and securing persons against unreasonable searches. State v. Height (1902) 117 Iowa, 650, 59 L.R.A. 437, 94 Am. St. Rep. 323, 91 N. W. 935. The court observed: "The search was for the mere purpose of securing evidence by an invasion of the private person of the defendant, and we think there is no consideration whatever which will justify it."

Since testimony is admissible concerning the results of a physical examination voluntarily submitted to, the consent of the party examined has been urged in justification in several cases. Testimony of physicians that one on trial for rape was suffering with venereal disease was held admissible in People v. Glover (1888) 71 Mich. 303, 38 N. W. 874, where the accused submitted to examination voluntarily, after being notified by the physicians that they made it by direction of the prosecuting attorney.

The voluntary nature of the examination should clearly appear, to render testimony concerning the facts disclosed by it admissible. Thus, in State v. Horton (Mo.) supra, where the state contended that the examination complained of was made with the consent of the prisoner, the court

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stated: "When a man is under arrest, without counsel, and, speaking metaphorically, is standing in the shadow of a policeman's club, it requires something much more substantial than silence to justify an invasion of his constitutional right not to be compelled to furnish evidence against himself."

And, in State v. Newcomb (Mo.) supra, the court remarked: "Some effort was made to show that defendant voluntarily consented to this violation of his person, but we think it is apparent that he simply submitted because he thought he was compelled to do so. When it is considered that he was at the time in custody for this very crime, that the prosecuting attorney demanded an order from the justice for this examination, that the sheriff took him into a private room for the purpose of the examination, it is not strange that the defendant thought that he was compelled to submit. It is idle to talk of his having voluntarily consented to this violation of his person."

Evidence of physicians that defendant, on trial for assault with intent to rape, was afflicted with the same venereal disease from which the prosecutrix was suffering, is inadmissible, where their information was obtained from a physical examination which they made at the instance of the prosecuting attorney, at the jail where the accused was confined, without apprising him of his right to resist the examination, and where he did not know but that the physicians were sent by his own attorney, who had notified him of his intention to send a physician to make an examination that day. State v. Matsinger (1915) — Mo. —, 180 S. W. 856.

The court refused, in Anonymous (1901) 34 Misc. 109, 69 N. Y. Supp. 547, 9 N. Y. Anno. Cas. 438, to compel the defendant, in an action brought against him by his wife for the annulment of their marriage, on the ground of fraud, to submit to examination, before trial, to determine whether he was afflicted at the time of the marriage, with syphilis. The court, while asserting its inherent power in that class of actions, to compel an inspection of the person, considered that the remedy was so extraordinary, and necessarily so violative of the privacy of person, that its application should be restricted to extreme cases, and then not exercised before it is apparent that no other means of proof are available.

There is a general statement that one accused of crime "should never be compelled to make any indecent or offensive exhibition of his person for any purpose whatever," in State v. Ah Chuey (1879) 14 Nev. 79, 33 Am. Rep. 530. And in State v. Nordstrom (1893) 7 Wash. 506, 35 Pac. 382, it is said "that an accused person cannot be compelled to exhibit those portions of his body which are usually covered, for the purpose of securing his identification, or in other ways affording evidence against him." A. W. R.

JAMES DONOVAN
v.
SUFFOLK COUNTY APPORTIONMENT COMMISSIONERS.

HERMAN HORMEL
v.
SAME.

Massachusetts Supreme Judicial Court — October 5, 1916.

(225 Mass. 55, 113 N. E. 740.)

Election district — apportionment — constitutional restrictions — inequality of population.

1. The constitutional requirement that counties shall be divided into

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representative districts so as to apportion the representatives assigned equally, as nearly as may be, according to the relative number of legal voters in the several districts, is violated by giving a district with five and a half thousand voters one representative, one with less than five thousand, two representatives, one with just less than eight thousand, three representatives, and one with more than eight and a half thousand but two representatives.

[*See note on this question beginning on page* 1337.]

Action — to set aside apportionment of representatives — who may maintain.

2. Voters in a district against which an unconstitutional discrimination is made in apportioning representatives may maintain an action to set aside the report of the commissioners.

Evidence — reasons for action of commissioners.

3. Evidence is not admissible, in an action to set aside an unconstitutional apportionment of representative districts of a county, of the reasons which influenced the commissioners in making the apportionment.

Election district — apportionment — presumption in favor of report.

4. If no provision is made by statute to review the report of commissioners in dividing the counties of the state into representative districts, and apportioning the representatives among them, the report stands unless it is void because manifestly contrary to the Constitution; the report is entitled to all the presumptions which are ordinarily made in favor of the constitutionality of a statute.

REPORT by the Supreme Judicial Court for Suffolk County for the determination by the full bench of petitions filed to set aside respondent's report of the division and apportionment of the county into representative districts, in alleged violation of petitioners' rights. *Division and apportionment held void.*

The facts are stated in the opinion of the court.

Messrs. **Nathan Matthews, A. D. Hill, and F. G. Goodale** for petitioners.

Mr. **Walter A. Buie** for respondents.

Rugg, Ch. J., delivered the opinion of the court:

These two petitions for writs of mandamus are brought to set aside a report of the commissioners (elected according to Stat. 1913, chap. 835, § 390) dividing Suffolk county into representative districts, and apportioning among them the number of representatives allotted under Stat. 1916, chap. 270, § 24, on the ground that it violates the rights of the petitioners, secured by art. 21 of the amendments of the Constitution.

Since the decision of Atty. Gen. v. Suffolk County Apportionment Comrs. 224 Mass. 598, 113 N. E. 581, wherein it was necessary to declare their first report manifestly contrary to the provisions of the Constitution, the commissioners have filed this new and second report of apportionment.

The present report is assailed as to four districts, each coterminous with a ward of Boston. District No. 3, containing 4,854 legal voters, is given two representatives or one for 2,427 legal voters. District No. 5, with 7,946 legal voters, is given three representatives. District No. 6, with 8,618 legal voters, is given two representatives. District No. 23, with 5,596 legal voters, is given one representative. The disparity between the smallest and largest number of legal voters for one representative is the difference between 2,427 in district No. 3 and 5,596 in district No. 23, or 3,169. Each voter in districts 3 and 5 is given more than twice the voting power, for representatives in the general court, given to each voter in district No. 23. District No. 5 is given one more representative than is given to 672 more legal voters in

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district No. 6. District No. 3 is given one more representative than is given to district No. 23, with 742 more voters.

The mandate of the Constitution is that the county shall be divided "into representative districts . . . so as to apportion the representation assigned . . . equally, as nearly as may be, according to the relative number of legal voters in the several districts." It is manifest that the constitutional mandate has not been followed in this report. It is not an approximation to equality to allot three representatives to 7,946 voters, and only two representatives to 8,618 voters, and to allot two representatives to 4,854 voters, and one representative to 5,596 voters. The number of these representatives is in inverse proportion to the number of voters. It requires no argument to demonstrate that a reversal of this allotment would be a much nearer approach to equality. This report confers special power in the election of representatives to voters in favored districts as compared with voters in other districts, against which discrimination is made. This disparity in favor of the privileged districts as against the disparaged districts is not insignificant nor negligible, but, besides the additional discriminatory representation given to each favored district, is 672 in one instance and 742 in another, in themselves very considerable numbers as compared with 3,258, which is the representative unit of Suffolk county.

Whenever this kind of inequality of apportionment has been before the courts, it has been held to be contrary to the Constitution. It has been said to be "arbitrary and capricious and against the vital principle of equality." Houghton County v. Blacker, 92 Mich. 638, 647, 653, 16 L.R.A. 432, 52 N. W. 951; Giddings v. Blacker, 93 Mich. 1, 13, 16 L.R.A. 402, 52 N. W. 944; Parker v. State, 133 Ind. 178, 197, 18 L.R.A. 567, 32 N. E. 836, 33 N. E. 119; Denney v. State, 144 Ind. 503, 535, 31 L.R.A. 726, 42 N. E. 929. See also Goodrich v. Lunenburg, 9 Gray, 38, and Stone v. Bean, 15 Gray, 42. This report does not apportion the representatives assigned to Suffolk county "equally, as nearly as may be, according to the relative number of legal voters." The inequality disclosed on the face of this report is grave, and might have been avoided to a considerable degree, if the rule established by the Constitution had been heeded. It is not in accordance with the Constitution. It is contrary to the principles discussed at length in Atty. Gen. v. Suffolk County Apportionment Comrs. 224 Mass. 598, 113 N. E. 581.

Election district—apportionment—constitutional restrictions—inequality of population.

The petitioners are entitled to maintain the present petitions. They are voters in districts against which discrimination is made.

Action—to set aside apportionment of representatives—who may maintain.

The single justice heard evidence as to the reasons which influenced the commissioners in making the apportionment, and found certain facts to be considered, "if deemed material by the full court." We are of opinion that evidence is not material upon this point. The commissioners act as independent officers in the performance of a duty imposed by the Constitution. No provision is made for a revision of their conduct or a review of their report. It stands, unless manifestly contrary to the Constitution, and therefore a nullity. The report is entitled to all the presumptions which ordinarily are made in favor of the constitutionality of a statute. See Com. v. Boston & N. Street R. Co. 212 Mass. 82, 86, 98 N. E. 1075; Com. v. Moore, 214 Mass. 19, 24, 100 N. E.

Evidence—reasons for action of commissioners.

Election district—apportionment—presumption in favor of report.

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1071. No evidence is received as to the motives or purposes of members of the legislature in enacting a statute. Good intentions of commissioners cannot make valid a report, on its face obnoxious to the requirements of the Constitution. The report must be judged by what appears on its face, in the light of facts of which the court can take notice.

Let the entry be, in substance, that the present division and apportionment of the county of Suffolk into representative districts, made and filed by the commissioners, is void, as not in conformity to the Constitution, and that the commissioners proceed, "as soon as may be," to divide the county of Suffolk into representative districts so as to apportion the number of representatives assigned to that county "equally, as nearly as may be, according to the relative number of legal voters" in the several districts, and otherwise in conformity to the Constitution and to art. 21 of the amendments to the Constitution, and to make due report thereof as required by said article of amendment.

So ordered.

ANNOTATION.

Inequality of population or lack of compactness of territory as invalidating apportionment of representatives.

I. Introduction, 1337.
II. Extent to which courts will review apportionment; rules of decision, 1339.
III. Scope of discretion of apportioning body under various constitutional provisions, 1344.
IV. Inequality of population as invalidating apportionment, 1347.
V. Want of contiguity as invalidating apportionment, 1355.
VI. Lack of convenience or compactness of territory, as invalidating apportionment, 1356.

I. Introduction.

The principle of equality of representation lies at the foundation of representative government, and requires that no voter shall exercise, in the selection of the legislature, a greater voting power than other voters. It is, therefore, a usual constitutional requirement that representative districts shall be equal in population as nearly as possible. In practice, however, this principle is qualified by the impracticability of mathematical exactness, by the desirability of providing for local representation, which finds expression in constitutional provisions preserving the integrity and requiring the contiguity of territorial units in laying out representative districts, and by various other constitutional provisions, such as those requiring convenience and compactness to be taken into consideration.

Most of these further constitutional requirements are intended as a safeguard against the political device known as the gerrymander,—a term employed to describe an apportionment of representative districts so contrived as to give an unfair advantage to the party in power. Its origin has been described as follows: "John Fiske in his Civil Government in the United States, . . . says that in 1812, when Gerry was governor of Massachusetts, the Democratic state legislature (in order, according to Winsor, to secure an increased representation of the Democratic party in the state senate) 'redistributed the districts in such wise that the shapes of the towns forming a single district in Essex county gave to the district a somewhat dragon-like contour. This was indicated upon a map of Massachusetts which Benjamin Russell, an ardent Federalist and editor of the Centinel, hung up over the desk in his office. The painter, Gilbert Stuart, coming into the office one day, and observing the uncouth figure, added with his pencil a head, wings, and claws, and exclaimed: "That will do for a salamander." "Better say a gerry-

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mander," growled the editor; and the outlandish name, thus duly coined, soon came into general currency.' . . . Stuart's drawing (reproduced in Fiske's book) was contrived so as to make the back line of the creature's body form a caricature of Gerry's profile." Eng. Britannica, 11th ed. p. 904. The coupling of Gerry's name with the apportionment, however, seemed to have been unfair, as it is said that he was opposed to it.

The question whether the constitutional requirement of equality of population or of compactness of territory has been satisfied in making an apportionment is necessarily complicated with the question of the extent to which the courts will undertake to review the action of the legislature in the matter; and this in turn requires an examination of the question as to the extent of the discretion vested in the legislature by the Constitution. In other words, an apportionment which the courts will not assume to declare invalid, where the provisions of the Constitution give the legislature a large measure of discretion, may be declared invalid where the scope of such discretion is more strictly limited. These questions may conveniently be considered herein in the order stated.

The subject is not one to lend itself readily to generalization. As said in Sherrill v. O'Brien (1907) 188 N. Y. 185, 117 Am. St. Rep. 841, 81 N. E. 124: "It is difficult, and perhaps impossible, to state rules by which future apportionments can be measured;" and it was said by Peckham, J., in Baird v. Kings County (People ex rel. Baird v. Broom) (1893) 138 N. Y. 95, 20 L.R.A. 81, 33 N. E. 827: "We have no trouble whatever in detecting the difference between noon and midnight; but the exact line of separation between the dusk of the evening and the darkness of advancing night is not so easily drawn." The effect of the cases may, however, be broadly expressed in the statement that inequality of population or lack of compactness of territory will not necessarily invalidate an apportionment; but the question in all cases must be whether there has been such a variation from the standard of equality and compactness as clearly to indicate that the legislature or other apportioning body has exceeded or failed to exercise its discretion in the matter.

Illinois.—See People ex rel. Woodyatt v. Thompson (1895) 155 Ill. 451, 40 N. E. 307; People ex rel. Heffernan v. Carlock (1902) 198 Ill. 150, 65 N. E. 109.

Indiana.—Parker v. Powell (1882) 133 Ind. 197, 18 L.R.A. 567, 32 N. E. 836, 33 N. E. 119; Denney v. State (1896) 144 Ind. 535, 31 L.R.A. 726, 42 N. E. 929; Brooks v. State (1904) 162 Ind. 568, 70 N. E. 980.

Kansas.—Prouty v. Stover (1873) 11 Kan. 235.

Kentucky.—Ragland v. Anderson (1907) 125 Ky. 141, 128 Am. St. Rep. 242, 100 S. W. 865.

Maine.—Opinion of Justices (1842) 18 Me. 458.

Massachusetts.—Atty. Gen. v. Suffolk County Apportionment Comrs. (1916) 224 Mass. 598, 113 N. E. 581; DONOVAN v. SUFFOLK COUNTY APPORTIONMENT COMRS. (reported herewith) ante, 1334; McGlue v. Essex County (1916) 225 Mass. 59, 113 N. E. 742; Brophy v. Suffolk County Apportionment Comrs. (1916) 225 Mass. 124, 113 N. E. 1040.

Michigan.—Houghton County v. Blacker (1892) 92 Mich. 647, 16 L.R.A. 432, 52 N. W. 951; Giddings v. Blacker (1892) 93 Mich. 16, 16 L.R.A. 402, 52 N. W. 944; Williams v. Secretary of State (1906) 145 Mich. 447, 108 N. W. 749; Stevens v. Secretary of State (1914) 181 Mich. 199, 148 N. W. 97.

Minnesota.—State ex rel. Neighen v. Weatherill (1914) 125 Minn. 336, 147 N. W. 105.

Missouri.—State ex rel. Barrett v. Hitchcock (1911) 241 Mo. 433, 146 S. W. 40.

Nebraska.—State ex rel. Harte v. Moorhead (1916) 99 Neb. 527, 156 N. W. 1067.

New Jersey.—State ex rel. Morris v. Wrightson (1883) 56 N. J. L. 126, 22 L.R.A. 548, 28 Atl. 56.

New York.—People ex rel. Carter v. Rice (1892) 135 N. Y. 473, 16 L.R.A. 836, 31 N. E. 921; Baird v. Kings Coun-

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ty (People ex rel. Baird v. Broom) (1893) 138 N. Y. 95, 20 L.R.A. 81, 33 N. E. 827; Re Baird (1894) 142 N. Y. 523, 37 N. E. 619, affirming (1894) 75 Hun, 545, 27 N. Y. Supp. 535; Smith v. St. Lawrence County (1896) 148 N. Y. 187, 42 N. E. 592, reversing (1895) 90 Hun, 568, 36 N. Y. Supp. 40; Sherrill v. O'Brien (1907) 188 N. Y. 185, 117 Am. St. Rep. 841, 81 N. E. 124, reversing (1906) 114 App. Div. 890, 101 N. Y. Supp. 858; Re Reynolds (1911) 202 N. Y. 430, 96 N. E. 87, 416, affirming (1911) 144 App. Div. 458, 129 N. Y. Supp. 629; Re Dowling (1916) 219 N. Y. 44, 113 N. E. 545, reversing (1916) 174 App. Div. 185, 160 N. Y. Supp. 362; People ex rel. Gleason v. New York (1895) 14 Misc. 105, 35 N. Y. Supp. 259; Re Timmerman (1906) 51 Misc. 192, 100 N. Y. Supp. 57; Re Livingston (1916) 96 Misc. 341, 160 N. Y. Supp. 462; Moore v. New York (1916) 160 N. Y. Supp. 471.

Ohio.—State ex rel. Gallagher v. Campbell, 48 Ohio St. 435, 27 N. E. 884.

Texas.—Williams v. Woods (1914) — Tex. Civ. App. —, 162 S. W. 1031.

Washington.—State ex rel. Warson v. Howell (1916) 92 Wash. 540, 159 Pac. 777.

Wisconsin.—State ex rel. Atty. Gen. v. Cunningham (1892) 81 Wis. 440, 15 L.R.A. 561, 51 N. W. 724; State ex rel. Lamb v. Cunningham (1892) 83 Wis. 90, 17 L.R.A. 145, 35 Am. St. Rep. 27, 53 N. W. 35.

II. Extent to which courts will review apportionment; rules of decision.

It is well settled that the passage of apportionment acts is not so exclusively within the political power of the legislature as to preclude a court from inquiring into their constitutionality when the question is properly brought before it.

Indiana.—Parker v. Powell (1882) 133 Ind. 178, 18 L.R.A. 567, 32 N. E. 836, 33 N. E. 119; Denney v. State (1896) 144 Ind. 503), 31 L.R.A. 726, 42 N. E. 929; Marion County v. Jewett (1915) 184 Ind. 63, 110 N. E. 553.

Kentucky—Ragland v. Anderson (1907) 125 Ky. 141, 128 Am. St. Rep. 242, 100 S. W. 865.

Massachusetts.—Atty. Gen. v. Suffolk County Apportionment Comrs. (1916) 224 Mass. 598, 113 N. E. 581.

Michigan.—Giddings v. Blacker (1892) 93 Mich. 1, 16 L.R.A. 402, 52 N. W. 944.

Missouri.—State ex rel. Barrett v. Hitchcock (1911) 241 Mo. 433, 146 S. W. 40.

Nevada.—State ex rel. Winnie v. Stoddard (1900) 25 Nev. 452, 51 L.R.A. 229, 62 Pac. 237.

New Jersey.—State ex rel. Morris v. Wrightson (1893) 56 N. J. L. 126, 22 L.R.A. 548, 28 Atl. 56.

Pennsylvania.—Com. ex rel. Biddle v. Crow (1907) 218 Pa. 234, 67 Atl. 355.

West Virginia.—Harmison v. Ballot Comrs. (1898) 45 W. Va. 179, 42 L.R.A. 591, 31 S. E. 394.

Wisconsin.—State ex rel. Atty. Gen. v. Cunningham (1892) 81 Wis. 440, 15 L.R.A. 561, 51 N. W. 724; State ex rel. Lamb v. Cunningham (1892) 83 Wis. 90, 17 L.R.A. 145, 35 Am. St. Rep. 27, 53 N. W. 35.

"An apportionment act which violates the provisions of the Constitution can no more become a law than can an unconstitutional act upon any other subject; nor has it any peculiar virtue or sanctity that lifts it above the power of the judiciary." Parker v. State (1882) 133 Ind. 178, 18 L.R.A. 567, 32 N. E. 836. The only intimation to the contrary is in Wise v. Bigger (1884) 79 Va. 269, where it was said, in answer to an objection that an apportionment bill was unconstitutional because congressional districts were not made of contiguous counties, cities, and towns, compact and as nearly as may be equal in population, that "the laying off and defining the congressional districts is the exercise of a political and discretionary power of the legislature, for which they are amenable to the people whose representatives they are." This statement is commented upon in Parker v. Powell (Ind.) supra, where, after quoting it, the court went on to say: "This would be literally true in the absence of some constitutional provision requiring the districts to be formed in some particular manner. The opinion cites no authority to the rule thus announced, nor does the judge who delivered it give any argument in its

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support; but, if it is construed as holding that all apportionment acts are but the exercise of a political or discretionary power, it is in conflict with the great weight of authority, and cannot be followed."

Although there are some slight differences of opinion (because of which it has been deemed desirable to preserve the form of expression used in each case) as to the point at which the discretion of the apportioning body will be deemed to have been exceeded, the courts agree that, while they may determine whether or not the apportionment act in question is within such discretion, it is beyond their power to review the action of the legislature, or other apportioning body, within the scope of the discretion vested in it by the Constitution, though it may have performed its duty very imperfectly.

Illinois.—See People ex rel. Woodyatt v. Thompson (1895) 155 Ill. 451, 40 N. E. 307.

Indiana.—Denney v. State (1896) 144 Ind. 503, 31 L.R.A. 726, 41 N. E. 929; Brooks v. State (1904) 162 Ind. 568, 70 N. E. 980.

Massachusetts.—Atty. Gen. v. Suffolk County Apportionment Comrs. (1916) 224 Mass. 598, 113 N. E. 581; Brophy v. Suffolk County Apportionment Comrs. (1916) 225 Mass. 124, 113 N. E. 1040.

Michigan.—Williams v. Secretary of State (1906) 145 Mich. 447, 108 N. W. 749.

Minnesota.—State ex rel. Meighen v. Weatherill (1914) 125 Minn. 336, 147 N. W. 105.

Nebraska.—State ex rel. Harte v. Moorhead (1916) 99 Neb. 527, 156 N. W. 1067.

New Jersey.—State ex rel. Morris v. Wrightson (1893) 56 N. J. L. 126, 22 L.R.A. 548, 28 Atl. 56.

New York.—Baird v. Kings County (People ex rel. Baird v. Broom) (1893) 138 N. Y. 95, 20 L.R.A. 81, 83 N. E. 827; Re Baird (1894) 142 N. Y. 523, 37 N. E. 619; Smith v. St. Lawrence County (1896) 148 N. Y. 187, 42 N. E. 592; Sherrill v. O'Brien (1907) 188 N. Y. 185, 117 Am. St. Rep. 841, 81 N. E. 124; People ex rel. Gleason v. New York (1895) 14 Misc. 105, 35 N. Y. Supp. 259; Re Livingston (1916) 96 Misc. 341, 160 N. Y. Supp. 462.

Ohio.—State ex rel. Gallagher v. Campbell (1891) 48 Ohio St. 435, 27 N. E. 884.

Washington.—State ex rel. Warson v. Howell (1916) 92 Wash. 540, 159 Pac. 777.

In State ex rel. Barrett v. Hitchcock (1911) 241 Mo. 453, 146 S. W. 40, it is said that the slight conflict of authority as to the extent to which the courts may go in reviewing the exercise of discretion in the apportionment of representative districts is largely due to the fact that there are no absolute limits fixed by the Constitution within which the discretion must be exercised, and the fact that the courts are disinclined to interfere where they find any discretion has been exercised by the legislature, even though the exercise of that discretion has exceeded the general bounds limiting its discretion; and also to the fact that the courts have been loathe to inquire into the motives that prompt the legislature in such matters, preferring naturally to leave the responsibilities of a co-ordinate branch of the government to the people who elected it. It is also said that confusion has arisen from the fact that the courts have not always drawn the proper distinction between the sovereign legislative bodies created by the Constitution itself, and those quasi legislative and judicial bodies created by statute, or appointment by some authorized officer of the state.

Scope of judicial review.

So far as the apportionment act is the expression of the unabridged discretion reposed in the legislature, its decision must be final, and not subject to review by the courts; but the courts have jurisdiction to interpret and construe the Constitution and the statute, in order to determine whether the act is within the legislative discretion or not. People ex rel. Woodyatt v. Thompson (1895) 155 Ill. 451, 40 N. E. 307.

If an apportionment law is within the bounds fixed by the Constitution to the discretion of the legislature, it

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is valid, though it may result in inequality and injustice; since the courts have no power to revise or annul an act of the legislature which is a mere exercise of its discretionary power, or which rests in the legislative judgment. Ibid.

The courts will undertake to decide whether the principle of compactness of territory has been applied at all or not, but not whether the nearest practical approximation to perfect compactness has been attained. Ibid.

If it clearly appears that in the formation of any district the requirement of compactness of territory and equality in population has been wholly ignored, has not been considered or applied at all to any extent, then the statute will be clearly unconstitutional; but if it has been considered and applied, though to a limited extent only, then the legislature has not transcended its power, although it may have performed its duty very imperfectly; and the act is valid. Ibid.

In so far as the Constitution makes the apportionment of the state discretionary with the legislature, that discretion will be scrupulously respected by the courts. Denney v. State (1896) 144 Ind. 503, 31 L.R.A. 726, 42 N. E. 929.

The approximation to the dual constitutional requirement of county representation and proportionate popular representation in the enactment of an Apportionment Law by the legislature is not reviewable by the courts, except for gross abuse of discretion, providing both objects contemplated in the Constitution are kept in view. Ibid.

The courts have a right to determine whether the discretion vested by the Constitution in the legislature, in the creation of representative districts, has been abused. Brooks v. State (1904) 162 Ind. 568, 70 N. E. 980.

The court has jurisdiction to determine whether the constitutional requirements have been violated. Atty. Gen. v. Suffolk County Apportionment Comrs. (1916) 224 Mass. 598, 113 N. E. 581.

The function of the court is not to review or revise the exercise of official judgment within its legitimate limits, but only to declare void a division and apportionment so vicious in its nature as to transcend the constitutional power to apportion. Brophy v. Suffolk County Apportionment Comrs. (1916) 225 Mass. 124, 113 N. E. 1040.

The duty of determining the apportionment and of directing the number of districts into which a county may be divided is reposed by the Constitution in the legislature, and the court will assume only to determine whether the legislature has exercised a constitutional discretion. Williams v. Secretary of State (1906) 145 Mich. 447, 108 N. W. 749.

The matter of redistricting the state into congressional or legislative districts is so essentially administrative or legislative, restrained only by the Constitution, that the courts interfere therein only when there appears a clear and palpable violation of the fundamental law. There is committed to the legislature a wide discretion in the premises, the bounds of which cannot be well defined. State ex rel. Meighen v. Weatherill (1914) 125 Minn. 336, 147 N. W. 105.

While the legislature may exercise a reasonable discretion in selecting the method of securing practical equality, the question whether constitutional requirements have been applied at all is a question for the court. State ex rel. Harte v. Moorhead (1916) 99 Neb. 527, 156 N. W. 1067.

Except as the power of the legislature to lay out assembly districts is restrained by constitutional limitations, it is beyond the control of the judicial department of the government. State ex rel. Morris v. Wrightson (1893) 56 N. J. L. 126, 22 L.R.A. 548, 28 Atl. 56.

The courts cannot overturn an apportionment act, passed within constitutional limitations, on the ground that it is unwise, impolitic, unjust, or oppressive, or even that it was procured by corrupt means. Ibid.

The courts will not undertake to review the act of the apportioning body within the limits of the discretion vested in them by the Constitution. Baird v. Kings County (People ex rel.

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Baird v. Broom) (1893) 138 N. Y. 95, 20 L.R.A. 81, 33 N. E. 827.

The court will not condemn an apportionment which, although not an ideal one, is within the limits of the discretion vested in the apportioning body. Re Baird (1894) 142 N. Y. 523, 37 N. E. 619, affirming (1894) 75 Hun, 545, 27 N. Y. Supp. 535.

The court will not feel justified in interfering with the division of a county into assembly districts, made by a board of officers thoroughly familiar with the territory and having an intimate knowledge of its towns, topography, and means of communication by land and water, unless convinced that there has been a clear abuse of discretion. Smith v. St. Lawrence County (1896) 148 N. Y. 187, 42 N. E. 592, reversing (1895) 90 Hun, 568, 36 N. Y. Supp. 40.

Where, by the Constitution, some discretion is vested in the legislature, the court cannot inquire into the motives of the legislators in exercising such discretion, and voting for a particular plan of apportionment; and it cannot inquire into the relative merits of several plans, to choose from which requires the exercise of sound judgment and judicial discretion. But if the legislature, under the assumption of an exercise of discretion, does a thing which is a mere assumption of arbitrary power, and which, in view of the provisions of the Constitution, is, beyond all reasonable controversy, a gross and deliberate violation of the plain intent of the Constitution, and a disregard of its spirit and the purpose for which express limitations are included therein, such act is not the exercise of discretion, but a reckless disregard of that discretion which is intended by the Constitution. A legislative apportionment act cannot stand as a valid exercise of discretionary power by the legislature, when it is manifest that the constitutional provisions have been disregarded. Sherrill v. O'Brien (1907) 188 N. Y. 185, 117 Am. St. Rep. 841, 81 N. E. 124.

It is not the function of the court to make the apportionment; but its power is confined to a review of the action of the apportioning body, and, if it finds that they have proceeded in violation of the Constitution, to reverse their action and to direct them to reconvene and make the apportionment according to the purpose and intent of the Constitution. People ex rel. Gleason v. New York (1895) 14 Misc. 105, 35 N. Y. Supp. 259.

While the making of an apportionment is not for the courts, yet when an apportionment has been made which is manifestly unfair and which violates the provisions of the Constitution, and when such an apportionment is shown to be absolutely unnecessary and to stand wholly unexplained and unjustified, the courts must interfere. Re Livingston (1916) 96 Misc. 341, 160 N. Y. Supp. 462.

In matters of apportionment the courts do not exercise an appellate jurisdiction, but may only proceed to require the apportioning body to make another apportionment, where the apportionment, as made, so far disregards the principles prescribed by the Constitution as to warrant the court in saying that it is no apportionment. State ex rel. Gallagher v. Campbell (1891) 48 Ohio St. 435, 27 N. E. 884.

It is sufficient that the apportioning body has the power, under the Constitution, to make the apportionment as it has been made. For the wisdom or unwisdom of what they have done within the limits of the powers conferred, they are answerable to the electors of the state, and no one else. Ibid.

Where a measure of discretion in making an apportionment is vested in the legislature, it must appear that its action partook of an arbitrary disregard of the requirements of the Constitution, or was so gross and inconsistent as to imply arbitrary action, before it will be declared invalid. State ex rel. Warson v. Howell (1916) 92 Wash. 540, 159 Pac. 777.

Presumption in favor of validity of apportionment.

The presumption of constitutionality attaches to apportionment acts in the same manner that it does to any other act of the legislature, and any doubt as to the power of the legislature to pass the particular act must

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result in a finding that the act is within the legislative power. People ex rel. Heffernan v. Carlock (1902) 198 Ill. 150, 65 N. E. 109; State ex rel. Fletcher v. Ruhe (1898) 24 Nev. 251, 52 Pac. 274; State ex rel. Warson v. Howell (Wash.) supra.

The facts adduced to show the alleged unconstitutionality of an apportionment act must be clear and convincing, and must establish beyond question that the legislature, in enacting the law, went entirely beyond the limits marked by the Constitution. State ex rel. Warson v. Howell (Wash.) supra.

Motives of apportioning body immaterial.

The court cannot inquire into the motives which may have moved the legislature to enact the statute in question. People ex rel. Woodyatt v. Thompson (1895) 155 Ill. 451, 40 N. E. 307; Re Livingston (1916) 96 Misc. 341, 160 N. Y. Supp. 462.

It will not inquire into nor consider the motives that may have actuated the legislature, except as those motives appear in their public acts or journals. The validity of an act does not depend upon the motive for its passage; but whenever and to the extent that the legislature transcends its powers, it is conclusively presumed that it intended to so transcend them, and parol evidence of good motives or other considerations are not allowed to obviate the effect of such unlawful intent. State ex rel. Harte v. Moorhead (1916) 99 Neb. 527, 156 N. W. 1067; State ex rel. Lamb v. Cunningham (1892) 83 Wis. 90, 17 L.R.A. 145, 35 Am. St. Rep. 27, 53 N. W. 35.

The court can declare an apportionment act unconstitutioual only where it is apparent that the requirements of equality of population and compactness of territory have been ignored; and they may not do so, because partisan spirit may have warped the judgment and discretion of the legislature. People ex rel. Heffernan v. Carlock (1902) 198 Ill. 150, 65 N. E. 109.

Force of contemporaneous construction.

The inequality of representation under former apportionment acts is irrelevant and immaterial in considering the constitutionality of an apportionment act, unless the language of the Constitution securing such equality is ambiguous and doubtful, and a long-continued legislative construction has been given to it. State ex rel. Morris v. Wrightson (1893) 56 N. J. L. 126, 22 L.R.A. 548, 28 Atl. 56; State ex rel. Atty. Gen. v. Cunningham (1892) 81 Wis. 440, 15 L.R.A. 561, 51 N. W. 724; State ex rel. Lamb v. Cunningham (Wis.) supra.

The court will not decide moot questions.

The courts will not spend time in attempting to remedy errors in an apportionment of members of the legislature among the inhabitants of the state, which injure no one, and which raise nothing but abstract questions for adjudication. People ex rel. Carter v. Rice (1892) 135 N. Y. 473, 16 L.R.A. 836, 31 N. E. 921.

A writ of error in a proceeding attacking the validity of an apportionment act will be dismissed as presenting a moot case, where the election to be affected by the decree has long since been held, and the persons elected have been admitted to their respective seats, and their successors elected according to the same scheme of apportionment. Richardson v. McChesney (1910) 218 U. S. 487, 54 L. ed. 1121, 31 Sup. Ct. Rep. 43.

— will not decline to pass on validity of statute, though obliged to deny relator relief.

A court will not decline to pass upon the validity of an apportionment act because the act which it supplants may also be subject to the same vice, and the court may consequently be obliged to deny to the relator the relief sought. People ex rel. Woodyatt v. Thompson (1895) 155 Ill. 451, 40 N. E. 307; Parker v. Powell (1882) 133 Ind. 178, 18 L.R.A. 567, 32 N. E. 836; Denney v. State (1896) 144 Ind. 503, 31 L.R.A. 726, 42 N. E. 929; Contra: State ex rel. Winnie v. Stoddard (1900) 25 Nev. 452, 51 L.R.A. 229, 62 Pac. 237.

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— will not declare statute invalid unless there is a valid act to fall back on.

The courts will decline to interfere and declare an apportionment act unconstitutional, when there is no prior or antecedent valid apportionment act to fall back to. State ex rel. Sullivan v. Schnitger (1908) 16 Wyo. 479, 95 Pac. 698; Fesler v. Brayton, 145 Ind. 71, 32 L.R.A. 578, 44 N. E. 37; State ex rel. Winnie v. Stoddard (1900) 25 Nev. 452, 51 L.R.A. 229, 62 Pac. 237.

And the court will decline to pass upon the constitutionality of an apportionment act, where the effect of falling back upon a prior apportionment would be to deprive some counties entirely of representation. State ex rel. Winnie v. Stoddard (Nev.) supra.

— may refuse to consider question on ground of laches.

The courts will not interfere with an unconstitutional apportionment which has been acquiesced in for a considerable time. See Fesler v. Brayton (1896) 145 Ind. 71, 32 L.R.A. 578, 44 N. E. 37; Ragland v. Anderson (1907) 125 Ky. 141, 128 Am. St. Rep. 242, 100 S. W. 865; Adams v. Bosworth (1907) 126 Ky. 61, 10 L.R.A.(N.S.) 1184, 102 S. W. 862; Re Reynolds (1911) 202 N. Y. 430, 96 N. E. 87, 416; State ex rel. Warson v. Howell (1916) 92 Wash. 540, 159 Pac. 777.

— will take effect of decision into consideration.

That the effect of setting aside an apportionment act would be to cause every subsequent act to be brought before the courts for review, which might happen at a critical time; to originate the greatest confusion as to an intending election, with a possible total suppression of it; and at all events to continue in force an act containing greater inequalities than the one attached,—is of itself sufficient to induce the courts to say that only in a case of plain and gross violation of the spirit and letter of the Constitution should it exercise such power. People ex rel. Carter v. Rice (1892) 135 N. Y. 473, 16 L.R.A. 836, 31 N. E. 921.

III. Scope of discretion of apportioning body under various constitutional provisions.

Inequalities alone are not enough to make void an apportionment. The inequality must be unnecessary, and incompatible with a reasonable effort to conform to the requirements of the Constitution. Brophy v. Suffolk County Apportionment Comrs. (1916) 225 Mass. 124, 113 N. E. 1040.

Differences arising from necessity, and slight differences in the citizen population of senate districts, and the relative weight of slight differences in population in comparison with considerations of compactness or the reverse, upon which men of judgment and discretion may fairly differ, are matters belonging distinctly to the legislative, and not to the judicial, branch of the government. Sherrill v. O'Brien (1907) 188 N. Y. 185, 117 Am. St. Rep. 841, 81 N. E. 124; Re Dowling (1916) 219 N. Y. 44, 113 N. E. 545.

The discretion to be exercised by the board of supervisors in dividing the county into assembly districts of convenient and contiguous territory, keeping each town undivided, and giving each district as nearly as may be an equal number of inhabitants, must be an honest and fair discretion, arising out of the circumstances of the case, and reasonably affecting the exercise of the power of equal division. Baird v. Kings County (People ex rel. Baird v. Broom) (1893) 138 N. Y. 95, 20 L.R.A. 81, 33 N. E. 827.

The legislature has no power to disregard the constitutional standard of apportionment, because of the nature and character of the population and business interests. The Constitution will not permit one class of voters to be given more power in governmental affairs than is given to another class. State ex rel. Harte v. Moorhead (1916) 99 Neb. 527, 156 N. W. 1067.

The wealth and the nature and the character of the population and the business interests of the district cannot justify a disregard of the constitutional standard of population in apportioning election districts. State ex rel. Lamb v. Cunningham (1892) 83 Wis. 90, 17 L.R.A. 145, 35 Am. St. Rep. 27, 53 N. W. 35.

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Effect of conflict among constitutional requirements.

When it becomes impossible to comply with all the provisions of the Constitution, the board making the apportionment has some discretion. Re Livingston (1916) 96 Misc. 341, 160 N. Y. Supp. 462.

Where an exact equality of population and compactness of territory is not obtainable, in view of all the other requirements of the Constitution, the question whether such equality and compactness have been, so far as possible, attained, is for the legislature. People ex rel. Heffernan v. Carlock (1902) 198 Ill. 150, 65 N. E. 109.

The constitutional requirement that each district shall be as nearly equal in population as is practicable, and that when a district is to be composed of more than two counties it shall be as compact as it can reasonably be made, leaves to the legislature room for the exercise of a limited degree of discretion. State ex rel. Barrett v. Hitchcock (1911) 241 Mo. 433, 146 S. W. 40.

If, in complying with the other mandates of the Constitution, the legislature finds that it is compelled to ignore equality in population to some extent, its enactment will nevertheless be valid, because of the necessity of the case. State ex rel. Warson v. Howell (1916) 92 Wash. 540, 159 Pac. 777.

Mathematical exactness not required.

A constitutional requirement that representative districts shall be according to the number of inhabitants, though absolute in its terms, has been uniformly, and from imperious necessity, regarded as allowing the exercise of some discretion on the part of the legislature. Opinion of Justices (1842) 18 Me. 458.

A provision that representatives must be apportioned upon the basis of equality "as nearly as may be" does not mean mathematical accuracy of equality, but imports some flexibility in the division; especially where there are other inflexible conditions of the apportionment which must be observed, and which prevent exactness of equality. Atty. Gen. v. Suffolk County Apportionment Comrs. (1916) 224 Mass. 598, 113 N. E. 581.

A constitutional provision directing the legislature, after the taking of the state or Federal census, to "rearrange the senate districts according to the number of white inhabitants," does not require the state to be divided into senatorial districts with mathematical exactness, but does require the exercise on the part of the legislature of an honest and fair discretion in apportioning the district, so as to preserve, as near as may be, the equality of representation. Giddings v. Blacker (1892) 93 Mich. 1, 16 L.R.A. 402, 52 N. W. 944.

It is not required that equality of representation shall be mathematically exact; but the apportionment of representatives of the people in any governmental body must be according to the population represented, as near as may be. State ex rel. Harte v. Moorhead (1916) 99 Neb. 527, 156 N. W. 1067.

Discretion as to the apportionment is vested in the legislature by a constitutional provision that members of assembly shall be apportioned by it among the several counties of the state, "as nearly as may be according to the number of their respective inhabitants," which the courts have no power to review, unless it has been so abused as clearly to show an open and intended violation of the letter and spirit of the Constitution. People ex rel. Carter v. Rice (1892) 135 N. Y. 473, 16 L.R.A. 836, 31 N. E. 921.

Approximation a binding rule.

Where the discretion of the legislature as to the relative number of inhabitants in representative districts arises from necessity, it should cease where the necessity for discretion ends. Sherrill v. O'Brien (1907) 188 N. Y. 185, 117 Am. St. Rep. 841, 81 N. E. 124.

The obligation of observing a constitutional requirement as nearly as possible in an Apportionment Act becomes of binding force under the Constitution, when the exact requirement cannot be observed. Denney v. State (1896) 144 Ind. 503, 31 L.R.A. 726, 42 N. E. 929.

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When it is found that exact equality cannot be attained, where the integrity of the counties is preserved, approximation becomes a rule as binding upon the legislature as any other rule fixed by the Constitution. Parker v. Powell (1882) 133 Ind. 178, 18 L.R.A. 567, 32 N. E. 836, 33 N. E. 119.

In Ragland v. Anderson (1907) 125 Ky. 141, 128 Am. St. Rep. 242, 100 S. W. 865, it is said: "All that the Constitution requires is that equality in the representation of the state which an ordinary knowledge of its population and a sense of common justice would suggest. We have not been referred to a more accurate or better description of the equality required by the Constitution than that contained in the report of Daniel Webster, as chairman of a senatorial committee engaged in a duty similar to that involved in the act under discussion: 'The Constitution, therefore, must be understood, not as enjoining an absolute relative equality, because that would be demanding an impossibility, but as requiring Congress to make an apportionment of representatives among the several states, according to their respective numbers, as nearly as may be. That which cannot be done perfectly must be done in a manner as near perfection as can be. If exactness cannot, from the nature of things, be attained, then the nearest practicable approach to exactness ought to be made. Congress is not absolved from all rule, merely because the rule of perfect justice cannot be applied. In such a case approximation becomes a rule. It takes the place of the other rule, which would be preferable, but which is found inapplicable, and becomes itself an obligation of binding force. The nearest approximation to exact truth or exact right, when that exact truth or exact right cannot be reached, prevails in other cases, not as a matter of discretion, but as an intelligible and definite rule, dictated by justice, and conforming to the common sense of mankind—a rule of no less binding force in cases to which it is applicable, and no more to be departed from than any other rule.'"

Under a Constitution including the following mandatory provisions in regard to senate districts: 1. Shall at all times consist of contiguous territory. 2. No county shall be divided in the formation of a senate district, except to make two or more senate districts wholly in such county. 3. No town and no block in a city inclosed by streets or public ways shall be divided in the formation of senate districts. 4. Nor shall any district contain a greater excess in population over an adjoining district in the same county than the population of a town or block therein adjoining such district. 5. No county shall have four or more senators unless it shall have full ratio for each senator. 6. No county shall have more than one third of all the senators. 7. No two counties, or the territory thereof as now organized, which are adjoining counties, or which are separated only by public waters, shall have more than one half of all the senators, and which in addition directs: 1. Each senate district shall contain as nearly as may be an equal number of inhabitants, excluding aliens. 2. Be in as compact form as practicable. 3. Counties, towns, or blocks which, from their location, may be included in either of two districts shall be so placed as to make said districts most nearly equal in number of inhabitants,—the legislature, in dividing the state into senate districts, must make as close an approximation to exactness in number of inhabitants as reasonably possible in view of the other constitutional provisions, and such approximation is the limit of legislative discretion. Sherrill v. O'Brien (1907) 188 N. Y. 185, 117 Am. St. Rep. 841, 81 N. E. 124.

In State ex rel. Atty. Gen. v. Cunningham (1892) 81 Wis. 440, 15 L.R.A. 561, 51 N. W. 724, it is said that, while perfect exactness in the apportionment according to the number of inhabitants is neither required nor possible, there should be as close an approximation to exactness as possible, and this is the utmost limit for the exercise of legislative discretion.

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Scope of discretion under various constitutional provisions.

A constitutional provision that "the members of the legislature shall be apportioned to the several legislative districts of the state in proportion to the number of votes polled at the last general election for delegate to Congress, and thereafter to be apportioned as may be provided by law; provided each county shall be entitled to one representative,"—does not vest in the legislature uncontrolled expression as to the apportionment of representatives, so long as it shall provide that each county shall have one representative, but requires such an apportionment to be made as will give substantially a just and equal representation to the people of each county, based upon either the voting or entire population, or upon some other fair basis. Ballentine v. Willey (1893) 3 Idaho, 496, 95 Am. St. Rep. 17, 31 Pac. 994.

Assembly districts must be given an equal number of inhabitants, as nearly as may be, on the division of a county by the board of supervisors, under the Constitution, which provides for divisions in the district "of convenient and contiguous territory," when construed with the preceding provision that "the members of assembly shall be apportioned among the several counties of the state by the legislature, as nearly as may be according to the number of their respective inhabitants," especially in view of the long-established policy of the state in favor of direct representation of inhabitants, as distinguished from representation through corporations of a quasi political character. Baird v. Kings County (People ex rel. Baird v. Broom) (1893) 138 N. Y. 95, 20 L.R.A. 81, 33 N. E. 827.

A constitutional provision as to the apportionment of senators and members of assembly according to population, in districts bounded by county and township lines, and consisting of contiguous territory in as compact form as practicable, is mandatory and not subject to legislative discretion. State ex rel. Atty. Gen. v. Cunningham (Wis.) supra.

It is beyond the powers of the legislature to include the same county in two separate senatorial districts. Parker v. State (1882) 133 Ind. 178, 18 L.R.A. 567, 32 N. E. 836, 33 N. E. 119.

Counties fully represented cannot be used for the purpose of joining counties which are not otherwise contiguous. Ibid.

The constitutional provision requiring towns, which, from their location, may be included in either of two assembly districts, to be so placed as to make said districts most nearly equal in number of inhabitants, is shown not to be mandatory by another provision that no district shall contain a greater excess in population over an adjoining district in the same senate district than the population of a town therein adjoining such assembly district, and other provisions of the section to the effect that the districts shall be as nearly equal in number of inhabitants as may be, and that they shall be of convenient and contiguous territory, in as compact form as practicable. Smith v. St. Lawrence County (1896) 148 N. Y. 187, 42 N. E. 592, reversing (1895) 90 Hun, 568, 36 N. Y. Supp. 410.

The words, "which from their location," as used in a provision that "towns or blocks which, from their location, may be included in either of two districts, shall be so placed as to make said districts most nearly equal in number of inhabitants," disclose a manifest intent to vest in the apportioning body discretion to determine whether the location of a town is such as to justify placing it in a district that will more nearly secure numerical equality, or whether the demands of convenience, contiguity, and compactness require a reasonable departure from an equal division of the number of inhabitants between two districts. Ibid.

IV. Inequality of population as invalidating apportionment.

Every apportionment must stand upon its own particular facts. Sherrill v. O'Brien (1907) 188 N. Y. 185, 117 Am. St. Rep. 841, 81 N. E. 124.

In Baird v. Kings County (People ex rel. Baird v. Broom) (1893) 138 N. Y

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95, 20 L.R.A. 81, 33 N. E. 827, it was said by Peckham, J., in delivering the opinion of the court: "While it is impossible, in the nature of the case, to accurately describe and closely limit the amount of deviation from an equal representation that the practical working of the Constitution may in this respect permit, it is, on the other hand, sometimes quite possible to say of a particular example that it does or does not violate the constitutional mandate. We have no trouble whatever in detecting the difference between noon and midnight; but the exact line of separation between the dusk of the evening and the darkness of advancing night is not so easily drawn."

A deviation from equality of population in the division of a county into assembly districts, in order to be held unconstitutional, must be a grave; palpable, and unreasonable deviation, such that, when the facts are presented, argument will not be necessary to convince a fair man that very great and wholly unnecessary inequality has been intentionally provided for. Ibid.

Not every deviation from exact uniformity in the ratio between legal voters and representatives will justify resort to the courts, or warrant the conclusion that the Constitution has been ignored. The court will be slow to set aside an apportionment which appears by any exercise of sound discretion to have followed the requirements of the Constitution and to be an approximation to equality. But where it is manifest on its face, from a mere inspection of the apportionment, that the Constitution has been transgressed, then the division made by the commissioners cannot stand. When fair-minded men, from an examination of the apportionment and division, can entertain no reasonable doubt that there is a grave, unnecessary, and unreasonable inequality between different districts, the Constitution has been violated, and it is the duty of the court so to declare. Atty. Gen. v. Suffolk County Apportionment Comrs. (1916) 224 Mass. 598, 113 N. E. 581.

An apportionment act may be judicially declared void for a violation of a constitutional requirement of apportionment according to the number of inhabitants, when the disparity in the number of inhabitants in the districts created is so great that it cannot possibly be justified by the exercise of any judgment or discretion. State ex rel. Atty. Gen. v. Cunningham (1892) 81 Wis. 440, 15 L.R.A. 561, 51 N. W. 724.

An apportionment of representative districts cannot be overthrown merely because the representatives are not distributed with mathematical accuracy according to the population. Something must be left to the discretion of the legislature; and it may, without invalidating the apportionment, make one district of a larger population than another. It may rightfully consider the compactness of territory, the density of population, and also the probable changes of the future in their distribution. Prouty v. Stover (1873) 11 Kan. 235.

Where the inequalities of voting power between the several districts are not quite so great, and the means for avoiding them not quite so clear, as to leave fair-minded men in no reasonable doubt that there is a grave and unnecessary inequality between the different districts, the courts will deem the discretion of the body intrusted with the work of apportionment to have been fairly exercised. Brophy v. Suffolk County Apportionment Comrs. (1916) 225 Mass. 124, 113 N. E. 1040.

The courts cannot hold an apportionment act void merely because, by the simple process of taking a county from one district and adding it to another and adjoining district, there would be a nearer approach to equality of population and perfect compactness of territory, when it appears that the definite limitations fixed by the Constitution have been observed, and there has been an approach toward equality as determined by the ratio, and the district is in some degree compact. People ex rel. Heffernan v. Carlock (1902) 198 Ill. 150, 65 N. E. 109.

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Relative weight of various constitutional requirements.

The constitutional requirement that legislative apportionment shall be according to the number of inhabitants is no less binding than a provision therein that counties united in a district must be contiguous, or that no county for senatorial apportionment shall be divided. Denney v. State (1896) 144 Ind. 503, 31 L.R.A. 726, 42 N. E. 929.

A requirement that all districts, except those formed within counties having sufficient population to be divided into separate districts, must be bounded by county lines, takes precedence of the requirements of compactness of territory and equality in population. People ex rel. Woodyatt v. Thompson (1895) 155 Ill. 451, 40 N. E. 307. As remarked in People ex rel. Carter v. Rice (1892) 135 N. Y. 473, 16 L.R.A. 836, 31 N. E. 921: "The union of different counties in the state for the purpose of making up a senatorial district, which must consist of contiguous territory, and in regard to which counties cannot be divided, necessarily results in inequalities which can in no possible way be avoided."

The constitutional requirement of equality is modified by other provisions, forbidding the division of towns and requiring convenience and contiguity of territory in the formation of the districts. Re Baird (1894) 142 N. Y. 523, 37 N. E. 619.

In State ex rel. Lamb v. Cunningham (1892) 83 Wis. 90, 17 L.R.A. 145, 35 Am. St. Rep. 27, 53 N. W. 35, it is said that "compactness, being of lesser importance, may to some extent yield in aid of securing a nearer approach to equality of representation."

Percentage of disparity not sole basis of comparison.

In considering the validity of an apportionment, the court will not condemn it because of disparities measured in terms of percentages, without taking into consideration the ratio of voters or inhabitants to representatives, and the relative size of the territorial units usable without division. Brophy v. Suffolk County Apportionment Comrs. (1916) 225 Mass. 124, 113 N. E. 1040.

Trivial disparities.

The fact that a block containing only six inhabitants might have been taken from the larger and included in the smaller districts is too trivial and insignificant a matter upon which to invalidate an apportionment. Re Livingston (1916) 96 Misc. 341, 160 N. Y. Supp. 462.

Variance in surplus not represented.

The rule requiring an approximation to equality forbids the formation of districts containing large fractions unrepresented, where it is possible to avoid it, while other districts are largely over-represented. Parker v. State (1882) 133 Ind. 178, 18 L.R.A. 567, 32 N. E. 836, 33 N. E. 119.

Inclusion of county having right to separate representation.

Under a constitutional provision that "each county, with such territory as may be attached thereto, shall be entitled to a separate representative when it has attained a population equal to a moiety of the ratio of representation," a county which alone is entitled to a representative cannot be combined with other counties to form a district, except where a county having less than a moiety is entirely surrounded by counties, each of which has more than a moiety; in which case the law of legislative necessity makes it necessary, if the people of the lesser county are to be represented at all, to combine it with a county having a moiety. Stevens v. Secretary of State (1914) 181 Mich. 199, 148 N. W. 97.

The rights of counties which, having a citizen population in excess of the senatorial ratio, are each entitled to at least one senator, cannot be taken away by an exercise of discretion by the legislature; at least, unless the geographical position of some small county is such as to make it absolutely necessary that it be joined with some one of such counties. Sherrill v. O'Brien (1907) 188 N. Y. 185, 117 Am. St. Rep. 841, 81 N. E. 124.

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Apportionment of representatives among counties having surplus population.

When the several counties have been given the representation to which they are severally entitled by reason of their full ratios, then the largest excesses over such ratios should receive first consideration. Denney v. State (1896) 144 **Ind.** 503, 31 L.R.A. 726, 42 N. E. 929.

An apportionment which gives a county but one senator is not objectionable, although its population largely exceeds the representative ratio, where another county had a greater excess over the representative ratio, and accordingly had a superior claim to two senatorial districts. Payne v. O'Brien (1906) 114 App. Div. 890, 101 N. Y. Supp. 858, reversed on other grounds in (1907) 188 N. Y. 185, 117 Am. St. Rep. 841, 81 N. E. 124.

Creation of double districts.

Under a constitutional provision requiring equality in representation, no scheme for senatorial districts can be lawfully devised, in which a county having less than the unit of population for a senatorial district may legally be entitled to vote for two senators. Parker v. State (**Ind.**) supra.

Constitutional provisions requiring apportionment among counties according to the number of male inhabitants above twenty-one years of age, and that where more than one county shall constitute a district they must be contiguous, are violated by the creation of double districts in which two or more counties are grouped and given a voice in the election of more than one senator or representative, when neither of them has a voting population equal to the ratio for one senator or representative. Denney v. State (**Ind.**) supra.

Effect of unconstitutionality of acts creating new counties.

The requirement of the Constitution as to a fair apportionment cannot be secured by an act which was intended as a complete and fair apportionment of the whole estate, where, by reason of the unconstitutionality of an act purporting to create two counties in place of two other counties, by changing their common boundary, representation is provided for counties which do not exist, and no provision for representation is made for counties which do exist, thereby relegating the omitted counties to the apportionment allowed by a constitutional provision that each county shall be entitled to one representative; the effect being to give the people of certain counties representation on one basis, and the people of certain other counties representation on an entirely different basis. Ballentine v. Willey (1893) 3 **Idaho,** 496, 95 Am. St. Rep. 17, 31 Pac. 994.

But the unconstitutionality of the statute creating two new counties out of an old one does not invalidate an act apportioning representatives to several counties, and giving to each county one representative for a certain number of votes cast at the last preceding election, and one also for every major fraction of such number, where it does not appear that the old county as a whole would, by reason of its having a major fraction of the number used as the basis of such apportionment, have been entitled to a greater number of representatives than those allotted to the counties produced by its division. Heitman v. Gooding (1906) 12 **Idaho,** 581, 86 Pac. 785.

Applicability of requirement of equality to divisions within counties.

A constitutional requirement that assembly districts must be as nearly equal in population as other constitutional provisions will permit is just as applicable to two or more assembly districts in a single county as to an assembly district composed of two or more counties. State ex rel. Lamb v. Cunningham (1892) 83 **Wis.** 90, 17 L.R.A. 145, 35 Am. St. Rep. 27, 53 N. W. 35.

Instances in which requirement of equality has been held to have been violated.

In People ex rel. Woodyatt v. Thompson (1895) 155 **Ill.** 451, 40 N. E. 307, it was intimated, though not decided, that the legislature cannot arbitrarily form a district, containing simply the constitutional minimum of four fifths of the ratio of representa-

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tion, and another adjoining with one fifth or more above the ratio, when, by taking a county from the larger and adding it to the smaller district, greater equality in population and compactness of territory could have been secured.

An apportionment which gives, and is intended to give, to one political party or another, decidedly an unfair advantage in the election of members of the general assembly, where such disparity can be avoided, must for that reason be condemned. Brooks v. State (1904) 162 **Ind.** 568, 70 N. E. 980.

A constitutional requirement that the number of senators shall be apportioned among the several counties according to the number of male inhabitants above twenty-one years of age in each, that a senatorial district, where more than one county shall constitute a district, shall be composed of contiguous counties, and that no county, for senatorial apportionment, shall ever be divided, is not met by an apportionment which, for the purpose of creating a senatorial district, adds to four counties containing male inhabitants over the age of twenty-one years exceeding by 1,766 the senatorial unit of 13,886, another county, increasing the excess to 3,889, while a county contiguous to such added county is given a senator, although it lacks 2,599 inhabitants of the senatorial unit, and which contains other inequalities which cannot be explained on the ground that they are inevitable, or defended upon the pretense that they are approximately just. Ibid.

A constitutional inhibition against inequality of population in the apportionment of representative districts is clearly disregarded by an Apportionment Act in which twelve Democratic counties, the population of the largest of which was 12,137, and the smallest 7,407, were each given a representative, although some of such counties had a population of less than one half the unit of representation, and the rest had a little more than one half, while on the other hand there were twelve Republican districts, composed in large part of two and three counties each, the smallest of which had a population of 30,615, and the largest 53,263, which were given only one representative each, the first twelve districts having an aggregate population of 124,933, and the aggregate population of the second twelve districts being more than 466,451, so that a comparison of the district having the smallest voting population with that of the one having the largest voting population shows that a voter in the former exercises in the legislature of the state more than seven times the influence of a voter in the latter. Ragland v. Anderson (1907) 125 Ky. 141, 128 Am. St. Rep. 242, 100 S. W. 865.

An apportionment cannot be sustained where the result, in some instances, is to give the voter in one district more than three times the voting power of a voter in another district, and in other instances more than twice the voting power, and the inequality extends to a considerable number of districts. Atty. Gen. v. Suffolk County Apportionment Comrs. (1916) 224 **Mass.** 598, 113 N. E. 581.

A county having an excess of only about one fourth of the ratio is not equitably entitled to two or more senators, within the provision of the Constitution that "no county shall be divided, in the formation of senate districts, except such county shall be equitably entitled to two or more senators," where another district composed of eight counties, and containing nearly two and a half times the population of each district into which the former county is divided, receives but one senator. Giddings v. Blacker (1892) 93 **Mich.** 1, 16 L.R.A. 402, 52 N. W. 944.

The legislative discretion in making an apportionment will not be deemed to have been exercised where, 79,063 being the ratio of representation, one district contained 116,033, another 52,731, another 108,434, another 55,637, another 102,725, and another 55,744. Williams v. Secretary of State (1906) 145 **Mich.** 447, 108 N. W. 749.

An apportionment cannot be considered a just exercise of legislative discretion which, the ratio of representa-

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tion being 28,102, creates districts, one of which contains 23,789 persons, another 21,291, another 15,806, another 26,771, another 27,129, and another 41,475. Stevens v. Secretary of State (1914) 181 Mich. 199, 148 N. W. 97.

The limited discretion vested by the Constitution in the legislature, in apportioning the state into senatorial districts "as nearly equal in population as may be," is transcended by an apportionment which gives a city six senatorial districts, when, according to the representative ratio, an allowance of seven will still leave a margin of 8,995 persons. State ex rel. Barrett v. Hitchcock (1911) 241 Mo. 453, 146 S. W. 40.

The constitutional mandates as to compactness of territory and equality of population are shown to have been disregarded, where a comparison of the difference between the representative ratio and the population of the most compact district, with the difference in the least compact district, shows that the greatest variances in population are in the districts which are least compact; or, in other words, that compactness was not sacrificed in order to obtain equality in population, nor vice versa. Ibid.

A statute which provides that counties of more than 125,000 inhabitants shall be divided into five districts, and that all territory outside of a metropolitan city and more than 2 miles from the limits of such city shall comprise one of those districts, and have equal representation upon the county board with each of the other four districts, is unconstitutional, where the result is that, in the counties in which the act applies, the district so formed will contain less than one third of the population of each of the other districts, and will have equal power in the government of the county. State ex rel. Harte v. Moorhead (1916) 99 Neb. 527, 156 N. W. 1067.

A constitutional requirement that "the representation shall be apportioned according to population" is not met by an apportionment which, the unit of representation in the assembly being approximately 3,000, and the unit of representation in the senate being approximately 1,500, gives the county with a population of 703, one senator, and to other counties, with populations of 4,794, 6,437, and 4,843, respectively, only one senator each; and gives a county with a population of 703 the same representation in the senate and assembly as a county with a population of 2,446, while a county with a population of 1,997 has the same senatorial representation as the three largest counties above referred to, and one more member of assembly than a county with a population of 2,446. State ex rel. Winnie v. Stoddard (1900) 25 Nev. 452, 51 L.R.A. 229, 62 Pac. 237.

The requirement of equality, as qualified by the further constitutional provision for the division of counties into assembly districts "of convenient and contiguous territory," is not met by an apportionment into districts, varying in population between 31,000 and 102,000. Baird v. Kings County (People ex rel. Baird v. Broom) (1893) 138 N. Y. 95, 20 L.R.A. 81, 33 N. E. 827.

The constitutional requirement that assembly districts shall be as nearly equal in population as may be, but that no city block shall be divided in making the apportionment, is violated, where the difference between two adjoining assembly districts exceeds the population of several blocks, which could have been placed in either district. People ex rel. Gleason v. New York (1895) 14 Misc. 105, 35 N. Y. Supp. 259.

A difference of over 6,000 between two contiguous assembly districts in the same senatorial district is, where conditions admit of substantially equal apportionment of assembly districts as regards the population, evidence that the apportioning body has exceeded its discretion. Re Timmerman (1906) 51 Misc. 192, 100 N. Y. Supp. 57.

The requirements of the constitutional provision for division of counties into assembly districts, "as nearly equal in number of inhabitants, excluding aliens, as may be," and that no assembly district shall "contain a

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greater excess in the population over an adjoining district in the same senate district than the population of a town or block therein, adjoining such assembly district," and that "towns or blocks which, from their location, may be included in either of two districts, shall be so placed as to make said districts most nearly equal in number of inhabitants, excluding aliens," are not met by the creation of two assembly districts, containing respectively 90,481 and 89,656 inhabitants, the difference being greater than the population of any of the blocks on the boundary line between the two districts, and of a substantial character, and not so small as to be trivial. Moore v. New York (1916) 160 N. Y. Supp. 471.

The constitutional provision that "no town and no block in a city inclosed by streets or public ways shall be divided, in the formation of senate districts; nor shall any district contain a greater excess in population over an adjoining district in the same county than the population of a town or block therein, adjoining such district. Counties, towns, or blocks which, from their location, may be included in either of two districts, shall be so placed as to make such district most nearly equal in number of inhabitants," is mandatory; and is plainly violated where there are differences in population between the various districts of between 516 and 1,377, and there are blocks bordering upon the boundaries between others of such districts, containing a less number of inhabitants than one half of the difference between the population of such districts. Re Dowling (1916) 219 N. Y. 44, 113 N. E. 545, reversing (1916) 174 App. Div. 185, 160 N. Y. Supp. 362.

In Williams v. Woods (1914) — Tex. Civ. App. —, 162 S. W. 1031, the discretion vested in the apportioning body by a statute requiring the division of a newly created county into convenient election precincts was held to have been exceeded where the convenience of the voters was not consulted, and the division made resulted in a gross disparity in territory and population, the precincts being so divided that 120 voters would elect two of the commissioners, while the 500 voters in the other two precincts would only elect two commissioners, although the purpose of the division was to give to the Anglo-Saxon element of the population as nearly equal representation in the government of the county as was given to the Mexican.

Constitutional provisions requiring assembly and senate districts to be apportioned according to the number of inhabitants, and in as compact form as possible, must be deemed to have been disregarded by an apportionment producing an inequality so great that one assembly district has three times the population of another, and one senate district has more than double that of another, and creating in one instance a district entirely surrounded by another, where these inequalities are not shown to have been made necessary by any other provisions of the Constitution. State ex rel. Lamb v. Cunningham (1892) 83 Wis. 90, 17 L.R.A. 145, 35 Am. St. Rep. 27, 53 N. W. 35.

A constitutional requirement of apportionment according to the number of inhabitants, in creating assembly and senate districts, is violated by an apportionment act in which, with the average population of 51,117 for a senate district, the number of inhabitants in the respective districts created ranges from 37,000 to 68,000, and in the assembly districts, with an average of 16,868, ranges from 6,000 to 38,000; as such act is not an "apportionment," in any sense of the word, but is a direct and palpable violation of the Constitution, bearing upon its face the intrinsic evidence that no judgment or discretion was exercised in an attempt to comply with the Constitution. State ex rel. Atty. Gen. v. Cunningham (1892) 81 Wis. 440, 15 L.R.A. 561, 51 N. W. 724.

Instances in which requirement of equality has been held not to have been violated.

The constitutional provision that representation in both houses of the legislature shall be apportioned equal-

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ly, in proportion to the population of the state, is not violated by an act which, although not producing an entire uniformity in the population of the different districts, does not give rise to an inference that political considerations played any part in its enactment. State ex rel. Meighen v. Weatherill (1914) 125 Minn. 336, 147 N. W. 105.

A legislature cannot be charged with unfairness in distributing the remaining members of assembly among the counties, after all full ratios are provided for, because it takes into account the losses sustained by the most populous counties, by reason of the adoption of a certain ratio of representation, rather than of some other more favorable to them; nor because it regards increases of population shown by the census. People ex rel. Carter v. Rice (1892) 135 N. Y. 473, 16 L.R.A. 836, 31 N. E. 921.

No abuse of the discretion vested in the legislature as to the apportionment of members of assembly is shown, where each county has been given a member for every full ratio of representation which it contains, and the only inequalities alleged are in the distribution of the remaining members to counties having a smaller surplus over the ratio than other counties have; at least, where the reason for such action was not partisan, and the fair inference is that it was absolutely necessary, to secure the passage of the bill. Ibid.

But in Houghton County v. Blacker (1892) 92 Mich. 638, 16 L.R.A. 432, 52 N. W. 951, it is held that there can be no legislative discretion to give to a county of less population than another, greater representation, under a Constitution requiring representative districts to contain, "as nearly as may be," an equal number of inhabitants.

The division of a county, containing a million of people or more, into assembly districts, in such a way that one half of the members of assembly were elected by each of the two great political parties at an election following such division, cannot be so essentially and plainly vicious as to justify an appeal to the courts. Re Baird (1894) 142 N. Y. 523, 37 N. E. 619, affirming (1894) 75 Hun, 545, 27 N. Y. Supp. 535.

It cannot be said that the legislature did not have in view and apply the principle of approximate equality in population, notwithstanding inequalities of as much as 26,000 in population of the districts formed by the act, the ratio of representation being 75,000, where the Constitution also requires all districts, except those formed within counties having sufficient population to be divided into separate districts, to be bounded by county lines, and fixes four fifths of the ratio as the minimum number of inhabitants each district may contain, and provides that counties containing not less than the ratio and three fourths may be divided into separate districts, and the lowest number of inhabitants in any district exceeds the minimum by 2,000. People ex rel. Woodyatt v. Thompson (1895) 155 Ill. 451, 40 N. E. 307.

The constitutional right to equality of representation is not infringed by the creation of a district containing only 174 voters in excess of the ratio of 3,240, where there are seventy-three territorial units which cannot be subdivided, and which must be used in making the division and apportionment. McGlue v. Essex County (1916) 225 Mass. 59, 113 N. E. 742.

The constitutional requirement of equality of representation is not disregarded by an apportionment dividing a county into 27 districts, in 10 of which the variation from the representative unit is less than 300, in 5, more than 300 and less than 400, in 8, between 400 and 700, and, in the remaining 4, 790, 831, 868, and 1,024, respectively, and the more serious inequalities could have been avoided only by a combination, the effect of which would be to work almost as great a discrimination in favor of the new districts as that existing against the old. Brophy v. Suffolk County Apportionment Comrs. (1916) 225 Mass. 124, 113 N. E. 1040.

An apportionment giving to a county three districts is not unconstitutional, where, on the basis of a repre-

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sentative ratio of 96,862, a division of it into two districts would leave a surplus population of 89,798 unrepresented. State ex rel. Barrett v. Hitchcock (1911) 241 Mo. 453, 146 S. W. 40.

The constitutional requirement of equality of representation, as modified by provisions forbidding the division of towns, and requiring the convenience and contiguity of territory in the formation of the districts, cannot be said to have been violated by an apportionment which (the representative ratio being 54,877) so divides a county that eleven of the eighteen districts contain each a population ranging between 53,000 and 58,000, three of the remaining districts containing respectively 61,263, 60,808, 60,381, three others, respectively, 50,393, 49,197, 48,944, and the other district 58,550. Re Baird (1894) 142 N. Y. 523, 37 N. E. 619, affirming (1894) 75 Hun, 545, 27 N. Y. Supp. 535.

The discretion vested in county boards of supervisors in laying out assembly districts, to be as nearly equal in number of inhabitants as may be, and of convenience and contigous territory, in as compact form as practicable, is not abused by including towns in assembly districts with the rest of which they have, by reason of identity of interest and convenient means of communication, natural business and political affiliations, notwithstanding their transposition would reduce the inequality in population between the two districts from 716 to 144. Smith v. St. Lawrence County (1896) 148 N. Y. 187, 42 N. E. 592, reversing (1895) 90 Hun, 568, 36 N. Y. Supp. 40.

An apportionment uniting districts, which, in consequence of the change in the relative population of the original districts, have lost their right to separate representation in the senate, and are, under the Constitution, accordingly required to be attached each to some other district adjoining it, having the least population, is not invalid because, by combining them differently, an apportionment would be attained in which the fractions over a ratio would be less, and a less number of districts with a requisite fractional ratio for a senator would be deprived of separate representation, where the Constitution nowhere provides the order in which the districts shall be apportioned, the limit as to fractions, nor as to separate representation based on fractional ratios. State ex rel. Gallagher v. Campbell (1891) 48 Ohio St. 435, 27 N. E. 884.

An apportionment act cannot be declared unconstitutional on the ground of inequality of representation, where, although several districts accorded only one representative contain more than the unit of population necessary for one representative, none of them approaches the population which would entitle it to two representatives, and, in districts whose population is less than the number of units required to entitle them to the number of representatives granted them, in no instance is the deficiency equal to a unit, and in most of them the differences are comparatively insignificant; and, in the few instances where the surplus or deficiency was considerable, it is evident that some special reason induced the making of the differences, and not an intent on the part of the legislature to ignore the constitutional requirement. State ex rel. Warson v. Howell (1916) 92 Wash. 540, 159 Pac. 777.

V. Want of contiguity as invalidating apportionment.

The ordinary and plain meaning of the words, "contiguous territory," is not territory near by, in the neighborhood or locality of, but territory touching, adjoining, and connecting, as distinguished from territory separated by other territory. Sherrill v. O'Brien (1907) 188 N. Y. 185, 117 Am. St. Rep. 846, 81 N. E. 124.

But the constitutional requirement of contiguity is not violated by joining Richmond county on Staten Island, which, from its insular situation, constitutes an exception, of necessity, to such constitutional provision, with the county of Queens on Long Island, where, by reason of other constitutional provisions, it cannot be joined with the nearer counties of New York or Kings to make a senate district. Ibid.

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In the case last above cited it was also intimated that the constitutional requirement of contiguity would not be violated by the joining of Richmond county with any of the Hudson river counties, although noncontiguous; and it was accordingly held in Re Reynolds (1911) 202 N. Y. 420, 96 N. E. 87, 416, affirming (1908) 128 App. Div. 881, 115 N. Y. Supp. 1114, that, as to combine Richmond county with part of either of the only contiguous counties (New York and Kings), would violate the requirement of the Constitution that no county shall be divided, in the formation of a senate district, except to make two or more senate districts wholly in such county, the union of Richmond and Rockland counties complied as nearly with the letter of the Constitution as is physically possible.

"Convenient and contiguous territory," within the meaning of the constitutional provision as to the apportionment of election districts, does not mean contiguous, in contact by land when applied to counties which are insular or peninsular in character, and consequently Keweenaw and Isle Royal counties in Michigan may be declared as convenient and contiguous to other counties bordering on deep waters of the lake, as to Houghton county, which is most nearly proximate. Houghton County v. Blacker (1892) 92 Mich. 638, 16 L.R.A. 432, 52 N. W. 951.

VI. Lack of convenience or compactness of territory, as invalidating apportionment.

The constitutional requirement of compactness is an attempt to guard against the legislative evil commonly known as the gerrymander. People ex rel. Woodyatt v. Thompson (1895) 155 Ill. 451, 40 N. E. 307.

As used in the Constitution and applicable to mere territorial surface, the word "compact" means "closely united," and the provision that the district shall be formed of contiguous and compact territory means that the territorial divisions forming a district must not only touch each other, but must be closely united. Ibid.

In Sherrill v. O'Brien (1907) 188 N. Y. 185, 117 Am. St. Rep. 841, 81 N. E. 124, the meaning of the constitutional mandate, that representative districts shall "be in as compact form as practicable," is discussed by Werner, J., as follows: "The noun 'compactness' is defined in the Century Dictionary as 'the state or quality of being compact; firmness; close union of parts.' The noun 'form' is defined as 'external shape or configuration of a body; the figure as defined by lines and surfaces.' These two definitions clearly disclose the possibility of confounding 'form' and 'compactness,' in cases where there is reason for preserving the distinction between them. To the ordinary observer, a first glance at the map showing the thirteenth senatorial district would seem to suggest a plain absence of compactness, when in fact it is nothing more than irregularity in form. Close union of territory does not depend upon any particular shape. In the physical world the most compact body is the complete sphere, in which the center is at the same distance from every part of the surface. Next in order of compactness, perhaps, would be the perfect square, and then the parallelogram. For obvious reasons these arbitrary symbols cannot be applied to the demarcation of lands into political divisions. The rarity with which they are even approximated is shown by every geographical map ever made. It is to be observed, moreover, that the command as to compactness is qualified by the test of practicability. The senatorial districts shall 'be in as compact form as practicable.' In other words, they shall be as compact as feasible; as compact as may be, within the bounds of actual execution, as distinguished from theoretical discussion. Compactness, as applied to one situation, may have a clear meaning that would be wholly inapplicable to a different situation. It may be one thing as applied to the Adirondack region, and quite another as to a tenement-house district in New York city. I think it may also be fairly argued that the term 'compact,' as used in our Constitution, has reference not merely to territorial

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compression, but to density of population and such considerations as convenience of access and unity of interest, as well as those constitutional limitations inhibiting the division of certain city blocks, and enjoining the placing of others so as to produce the most approximate equality of population. When the matter is viewed in the light of these suggestions, it seems to me that a court cannot pass upon the compactness of a given district without critically going over the entire territory of which it forms a part, so as to be able to see what effect a different subdivision would have upon the whole. The most practical test of the question is to draw a rough sketch of an island of irregular shape and divide the interior into absolute squares, each of which theoretically contains an equal number of inhabitants, excluding aliens. The outer edge or fringe of the island would, in the nature of things, have to be divided into spaces of irregular shapes, having a greater or lesser area than the squares, and representing corresponding differences in population. By dividing the total population of the island by the number of senate districts to be erected, the ratio for each district would be obtained. It will readily be seen that, even under such an arbitrary arrangement, the senate districts would necessarily have to be of irregular shapes and different sizes, thus embracing varying numbers of the squares or irregular spaces."

It is not enough that some of the districts created may be subject to criticism with respect to compactness. Re Dowling (1916) 219 N. Y. 44, 113 N. E. 545.

The fact that a district is of irregular form does not necessarily establish that it has not been formed with reference to convenience, as required by the Constitution. Re Baird (1894) 142 N. Y. 523, 37 N. E. 619.

Where the constitutional provision for compactness is not unqualified, but is merely that the district shall be "as compact as practicable," this permits of a consideration in good faith of existing lines, topography, means of transportation, etc. Re Dowling (1916) 219 N. Y. 44, 113 N. E. 545, reversing (1916) 174 App. Div. 185, 160 N. Y. Supp. 362.

The constitutional requirement of compactness is not to be taken as requiring districts in the shape of squares and rectangles, where the fact that the Constitution also provides that the district shall be bounded by county lines, except where a county shall have sufficient population to be divided into separate districts, considered in connection with the irregularities in the size and boundaries of the counties, shows that such a division was not contemplated. People ex rel. Woodyatt v. Thompson (1895) 155 Ill. 451, 40 N. E. 307.

Modification of requirements of convenience or compactness by other constitutional requirements.

A provision requiring compactness in territory may, in application, be modified by the requirement of equality in population. People ex rel. Woodyatt v. Thompson (Ill.) supra.

In State ex rel. Lamb v. Cunningham (1892) 83 Wis. 90, 17 L.R.A. 145, 35 Am. St. Rep. 27, 53 N. W. 35, it is said that "compactness, being of lesser importance, may to some extent yield in aid of securing a nearer approach to equality of representation."

A requirement that all districts, except those formed within counties having sufficient population to be divided into separate districts, must be bounded by county lines, takes precedence of the requirement of compactness of territory. People ex rel. Woodyatt v. Thompson (1895) 155 Ill. 451, 40 N. E. 307.

If the matter of convenience cannot be given great weight because of other provisions, then the failure to make the district consist of convenient territory is not fatal to the validity of the apportionment; but, where it is apparent that the matter of convenience can be considered without disregarding any of the provisions, the language of the Constitution should be given effect. Re Livingston (1916) 96 Misc. 341, 160 N. Y. Supp. 462.

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Instances in which provisions as to compactness or convenience have been held to have been violated.

The requirement of compactness cannot be deemed to have been overridden by the requirement of equality of population, where a comparison of the difference between the representative ratio and the population of the most compact districts, with the difference in the least compact districts, shows that the greatest variances of population are in the districts which are least compact. State ex rel. Barrett v. Hitchcock (1911) 241 Mo. 453, 146 S. W. 40.

The provision as to compactness must be deemed to have been violated, where no other constitutional provision makes the shape of the district necessary. Re Livingston (1916) 96 Misc. 341, 150 N. Y. Supp. 462.

The constitutional provision of compactness is violated by the creation of a district entirely surrounded by another, where the laying out of the districts in such form is not shown to have been made necessary by any other provisions of the Constitution. State ex rel. Lamb v. Cunningham (1892) 83 Wis. 90, 17 L.R.A. 145, 35 Am. St. Rep. 27, 53 N. W. 35.

The constitutional requirement of compactness would seem to have been disregarded, by the creation of a senate district with boundaries of many sides and various angles, where a reference to the boundaries of the senate district in the county, as made by the constitutional convention, shows that the county can be divided into districts which are reasonably compact, each having comparatively few sides and angles. Sherrill v. O'Brien (1907) 188 N. Y. 185, 117 Am. St. Rep. 841, 81 N. E. 124.

The constitutional requirement, that assembly districts shall be "in as compact form as practicable," is violated by the creation of assembly districts lying wholly within a city, one of which commences on the westerly margin of the city, and runs thence along its westerly boundary in a southeasterly direction 1¾ miles, having an average width of ½ mile, then takes an abrupt turn to the north for 1½ miles, with an average width of ¼ of a mile, and, with some further turnings, runs westerly for ½ a mile, having an average width of ¼ of a mile, and then turns southeasterly for ¾ of a mile, having a width at some points of but two city blocks, then turns at right angles and in a northeasterly direction, for ¾ of a mile, being between 5 and 6 miles in length, and having thirty sides or faces, while another has thirty-one sides or faces, the lines of which divide five wards of the city, and run in a half circle about the northerly portion of the first-described district. Re Timmerman (1906) 51 Misc. 192, 100 N. Y. Supp. 57.

The constitutional mandate requiring assembly districts to be "of convenient and contiguous territory, in as compact form as practicable," is not complied with by the creation of an assembly district in a city, from the northeasterly section of which district there is no possible way of going by car line to the other portions of it without going through another assembly district, while one wishing to travel between certain points within the district would be obliged to go a distance of thirty-one blocks if he should keep within the confines of the district; although, if he should go directly from the one place to the other, he would have to go but a distance of five blocks. Re Livingston (1916) 96 Misc. 341, 160 N. Y. Supp. 462.

A constitutional requirement of compactness is violated by the creation of a district irregular in shape, having forty-seven boundaries or faces, but thirteen of which represent external boundaries of the territory in which it was created, and it appears that the district can be reapportioned so as to be truly compact. Ibid.

The constitutional requirement of compactness is not met by the laying out of an assembly district in a city having an end or tail consisting of six blocks, forming the appearance of a ladder, and one of the boundary lines of which departs from an otherwise straight line of division to run around another block, where, it

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does not appear that such irregularities are necessary in order to comply with some other provision of the Constitution, such as convenience, and it is shown that the districts can be laid out without such irregularities. Moore v. New York (1916) 160 N. Y. Supp. 471.

Instance in which requirement of compactness has been held not to have violated.

A constitutional requirement, that the representative district shall "be in as compact form as practicable," is not violated by the creation of a district, the counties in which consist of contiguous territory, and are situated along the chief lines of travel and commerce running through them, and are compact in interest as well as in means of intercommunication, although from a geographical standpoint there may be some want of compactness. Payne v. O'Brien (1906) 114 App. Div. 890, 101 N. Y. Supp. 858, reversed on other grounds in (1907) 188 N. Y. 185, 117 Am. St. Rep. 841, 81 N. E. 124. E. S. O.

MARGARET McDONALD, by Next Friend, Appt.,
v.
CITY OF SPRING VALLEY.

Illinois Supreme Court — October 21, 1918.

(285 Ill. 52, 120 N. E. 476.)

Appeal — constitutional question — waiver.

1. Submission of a cause to an appellate court having no jurisdiction of constitutional questions waives them so that they cannot be raised on further appeal.

[*See note on this question beginning on page* 1363.]

— sustaining demurrer — allegations taken as true.

2. Upon appeal from an order sustaining a demurrer to the declaration its allegations of fact must be taken as true.

Statute — construction — implied exception.

3. Statutes general in their terms are frequently construed as containing exceptions, when considered in connection with well-known rules of law, without the courts being subjected to the criticism of having entered the legislative field.

Negligence — child.

4. A child under seven years of age is incapable of conduct which will constitute contributory negligence.

— capacity for crime.

5. At common law an infant within seven years of age was conclusively presumed to be incapable of committing a crime, and between seven and fourteen the presumption continued, but might be overcome by proof.

Municipal corporations — notice of injury — infant.

6. A statute requiring notice to a municipal corporation of personal injuries caused by its negligence does not require such notice to be given by infants under seven years of age.

Constitutional law — due process — prosecution of claim by infant.

7. A child would be deprived of due process of law by requiring it to present its claim to the municipality as a condition to maintaining an action by it for personal injuries due to the negligence of the municipality.

Statute — construction — reasonableness.

8. The construction of a statute so as to make it appear that the legislature intended to require that to be done, in a few exceptional cases, which is utterly impossible of performance, is unreasonable.

Infant — appointment of agent.

9. A minor is incapable of appointing an agent or attorney.

Parent and child — parent as agent.

10. A parent, although the natural guardian of a child, is not its agent or attorney.

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APPEAL by plaintiff from a judgment of the Appellate Court, Second District, reversing a judgment of the Circuit Court for Bureau County in her favor in an action brought to recover damages for personal injuries, alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. J. L. Spaulding and C. N. Hollerich, for appellant:

A child of seven years does not have power to legally appoint an agent or give a power, warrant or letter of attorney.

22 Cyc. 514; Cole v. Pennoyer, 14 Ill. 158; Fuqua v. Sholem, 60 Ill. App. 140; Lowis v. Conrad Seipp Brewing Co. 63 Ill. App. 348; Ware v. Cartledge, 24 Ala. 622, 60 Am. Dec. 489; Robbins v. Mount, 4 Robt. 553; Holden v. Curry, 85 Wis. 504, 55 N. W. 965; Glass v. Glass, 76 Ala. 368; Tapley v. McGee, 6 Ind. 56; Turner v. Bondalier, 31 Mo. App. 582; Fuller v. Smith, 49 Vt. 253; Burns v. Smith, 29 Ind. App. 181, 94 Am. St. Rep. 268, 64 N. E. 94; Poston v. Williams, 99 Mo. App. 513, 73 S. W. 1099; Weidenhammer v. McAdams, 52 Ind. App. 98, 98 N. E. 883; State v. Field, 139 Mo. App. 20, 119 S. W. 499.

An attempt by an infant of the admitted age and incapacity of the plaintiff, in seeking to appoint an agent or attorney, would have been absolutely void.

22 Cyc. 514; Cole v. Pennoyer, 14 Ill. 158; Armitage v. Widoe, 36 Mich. 124; Fuqua v. Sholem, 60 Ill. App. 140; Waples v. Hastings, 3 Harr. (Del.) 403; Pyle v. Cravens, 4 Litt. (Ky.) 18; Wade v. Pulsifer, 54 Vt. 45; Trueblood v. Trueblood, 8 Ind. 195, 65 Am. Dec. 756; Semple v. Morrison, 7 T. B. Mon. 298; Kain v. Postley, 2 Edm. Sel. Cas. 132; Smoot v. Ryan, 187 Ala. 396, 65 So. 828.

Where the law requires that persons injured by the negligence of a city shall file a claim within a time certain, showing the nature and extent of the injuries, as a condition precedent to the right of recovery, if it be impossible for the claimant, owing to either physical or mental disability, to make the claim within the time prescribed, literal compliance as to the time limitation will not be required.

Born v. Spokane, 27 Wash. 719, 68 Pac. 386; Terrell v. Washington, 158 N. C. 281, 73 S. E. 888; Webster v. Beaver Dam, 84 Fed. 280; Ehrhardt v. Seattle, 33 Wash. 664, 74 Pac. 827; Morrison v. Toronto, 12 Ont. L. Rep. 333.

Plaintiff, an infant seven years of age, was, as a matter of law, in such a condition of physical and mental inability as to excuse noncompliance by her with the statute, requiring a written statement of her claim to be filed by herself, or her agent or attorney, with the city officers, within six months after the injury.

Murphy v. Ft. Edward, 213 N. Y. 397, 107 N. E. 716, Ann. Cas. 1916C, 1040, 9 N. C. C. A. 279.

On account of the physical and mental incapacity of the plaintiff, occasioned by her tender years, she was not required to strictly comply with the statutory provisions as to the time of giving a written statement, in order to fix her right of recovery.

Newland v. Marsh, 19 Ill. 384; People ex rel. Johnson v. Peacock, 98 Ill. 177; Condon v. Chicago, 249 Ill. 596, 94 N. E. 976; Sturges v. Chicago, 237 Ill. 51, 86 N. E. 683.

Messrs. M. P. Cornelius, J. E. Malone, Jr., and **Manton Maverick** for appellee.

Cooke, J., delivered the opinion of the court:

The appellant, Margaret McDonald, by Patrick McDonald, her next friend, brought her suit in trespass on the case against the city of Spring Valley, appellee, in the circuit court of Bureau county, charging appellee with negligence which resulted in the loss of the third finger of her left hand. Appellee filed a general and special demurrer to the declaration; the grounds for the special demurrer being that appellant did not comply with the requirements of the statute relative to the giving of notice to appellee of the injury complained of, and that under the facts alleged in the declaration she was not excused from complying with the statute, on account of her minority or her mental or physical disability. The court overruled the demurrer, and, appellee having elected to stand by its demurrer, a jury was called, and damages were assessed in the sum

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of $1,000, upon which verdict the court rendered judgment. On appeal to the appellate court for the second district, the judgment of the circuit court was reversed without remanding, and, a certificate of importance having been granted, the cause was brought to this court for further review by appeal.

The declaration alleges that appellee permitted a building to be erected and maintained in one of its streets as a place of amusement, in which appellant, through the negligence of appellee, received the injury complained of on June 24, 1916; that on March 14, 1917, appellant filed in the offices of the city attorney and city clerk of appellee a statement in writing signed by her, giving her name, the date and about the hour of the accident, the place and location where the accident occurred, and the address of the attending physician; that appellant on June 24, 1916, and on March 14, 1917, was a minor of the age of seven years; that on those dates, on account of her tender years, she did not know and was not informed by any one of the provisions of the statute concerning suits at law for personal injury against cities, villages, and towns; and that on account of her tender years and her physical and mental incapacity it was impossible for her to give to the city attorney or the city clerk, or to any one whomsoever, the notice required to be given by said statute, or to know, comprehend, understand, or comply with the terms and requirements of that statute.

The act referred to in the declaration is as follows: "Any person who is about to bring any action or suit at law in any court against any incorporated city, village or town for damages on account of any personal injury shall, within six months from the date of injury, or when the cause of action accrued, either by himself, agent or attorney, file in the office of the city attorney (if there is a city attorney, and also in the office of the city clerk) a statement in writing, signed by such person, his agent or attorney, giving the name of the person to whom such cause of action has accrued, the name and residence of the person injured, the date and about the hour of the accident, the place or location where such accident occurred and the name and address of the attending physician (if any)." Hurd's Stat. 1917, p. 1663.

It is the contention of appellant that the admitted facts set up in the declaration constitute a good and complete cause of action, and that under the law she was not required to do more than it was admitted she had done in order to entitle her to recover, for the reason that the laws of this state did not require her, under the admitted facts disclosed by the pleadings, to serve a notice within six months after the injury, to entitle her to recover. Appellant insists that, under a proper construction of this statute, one in her condition is excepted from its operation; and that because of her mental incapacity the statute does not apply to her and she is not required to give the statutory notice within six months after receiving the injury. The allegations of the declaration must be taken as true and it must be conceded, as is done by counsel for appellee, that appellant was mentally incapable of giving the notice required by the statute. It is the contention of appellee that the statute, being general in its terms, cannot be construed to make any exception, and that the legislature has the power, if it sees fit to do so, to make the statute applicable to all persons, without regard to their situation or mental condition.

Appeal—sustaining demurrer—allegations taken as true.

Statutes general in their terms are frequently construed to contain exceptions, when considered in connection with well-known rules of law, without the courts being subjected to the criticism of having entered the legislative field. This is done upon

Statute—construction—implied exception.

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the theory that statutes, though general in their terms, have been enacted with the full recognition of rules of law which have become well known and well established. From time immemorial the status of a minor of tender years has been recognized in law to be different from that of one of more mature years. The law recognizes that up to the age of seven years a child is incapable of such conduct as will constitute contributory negligence, and our courts have uniformly so stated the law in their instructions to juries. Chicago City R. Co. v. Tuohy, 196 Ill. 410, 58 L.R.A. 270, 63 N. E. 997; Illinois C. R. Co. v. Jernigan, 198 Ill. 297, 65 N. E. 88. At common law, an infant within seven years of age could not be convicted on a criminal charge, as he was conclusively presumed not to be capable of committing a crime, and between the ages of seven and fourteen he was still presumed to be incapable; but between those ages this presumption might be overcome by proof. These rules of law are based upon the well-known fact of the incapacity of children of tender years, and they are not held to the same accountability as are adults. The recognition, by the law, of the status of infants, and of their exemption up to a certain age from liability under the law, is so well known that it must be presumed that the legislature, in enacting such a statute as the one under consideration, did not intend, by the general language used, to include within its provisions a class of persons which the law has universally recognized to be utterly devoid of responsibility.

Negligence—child.

—capacity for crime.

Municipal corporations—notice of injury—infant.

We have repeatedly held that this act is constitutional. Appellant contends that such a construction as that contended for by appellee would render it unconstitutional. By submitting the case to the appellate court, all constitutional questions were waived, and appellant cannot now question the validity of the act. However, as the question presented is simply one of construction, it is not improper to say that if the construction insisted upon by appellee were adopted it would undoubtedly render the act unconstitutional, as depriving appellant of due process of law. The act is meant to apply only to those who are mentally and physically capable of comprehending and complying with its terms. We are aware, as appellee has pointed out, that in a number of other jurisdictions a strict construction has been given to similar statutes, and that it has been held in those jurisdictions that it is a matter for the legislature to determine whether there should be any exceptions to such legislation; but in the state of New York, where there is a similar statute, the New York court of appeals held that, where an infant five years of age was injured by the alleged negligence of a village, its right of action was not barred because it did not file the notice required within the time prescribed by the statute, under the rule that the law does not seek to compel one to do that which he cannot possibly perform, and that the failure of a father or mother to file the notice is not chargeable to the infant. Murphy v. Ft. Edward, 213 N. Y. 397, 107 N. E. 716, Ann. Cas. 1916C, 1040, 9 N. C. C. A. 279. In the state of Washington, a similar statute has been construed not to include cases where the person injured was rendered physically and mentally incapable of complying with the statute in the time required, by reason of the extent of his injuries. Born v. Spokane, 27 Wash. 719, 68 Pac. 386; Ehrhardt v. Seattle, 33 Wash. 664, 74 Pac. 827. Common experience tells us that the cases in which the

Appeal—constitutional question—waiver.

Constitutional law—due process—prosecution of claim by infant.

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exception to this statute would be applied are very few, and that in a great majority of cases there is not such disability as would make compliance with the statute impossible. It would be unreasonable to so construe this statute as to make it appear that the legislature intended, in these few cases, to require that to be done which is utterly impossible of performance. It cannot be controverted that a minor is incapable of appointing an agent or an attorney, and it cannot be successfully contended that the statute can be complied with by the filing of the required notice by the father, mother, or some friend of the child as next friend.

Statute—construction—reasonableness.

Infant—appointment of agent.

While the parent of a minor is its natural guardian, he cannot be said to be the agent or attorney for the child. A child with a meritorious cause of action, but incapable of initiating any proceeding for its enforcement, will not be left to the whim or mercy of some self-constituted next friend to enforce its rights.

Parent and child—parent as agent.

The declaration disclosed that appellant was mentally and physically incapable of giving the notice required by the statute, and she therefore did not come within the provisions of this statute as properly construed.

The judgment of the Appellate Court is reversed, and the judgment of the Circuit Court affirmed.

ANNOTATION.

Submission of cause to court which has no jurisdiction over a constitutional question as a waiver of such question.

It has been held many times in Illinois that submission to an appellate court of a case containing a constitutional question over which it has no jurisdiction, where the assignment of errors contains matters over which it has jurisdiction, is a waiver of the constitutional question. Indiana Millers' Mut. F. Ins. Co. v. People (1898) 170 Ill. 474, 48 N. E. 364; Case v. Sullivan (1906) 222 Ill. 56, 78 N. E. 37; Vermillion Special Drainage Dist. v. Shockey (1909) 238 Ill. 237, 87 N. E. 335; Pittsburg, C. C. & St. L. R. Co. v. Chicago (1909) 242 Ill. 178, 44 L.R.A. (N.S.) 358, 134 Am. St. Rep. 316, 89 N. E. 1022; Luken v. Lake Shore & M. S. R. Co. (1911) 248 Ill. 377, 140 Am. St. Rep. 220, 94 N. E. 175, 21 Ann. Cas. 82; People v. Viskniskki (1912) 255 Ill. 384, 99 N. E. 621; People v. Powers (1918) 283 Ill. 438, 119 N. E. 421; Spring Valley Coal Co. v. Greig (1906) 129 Ill. App. 386, affirmed in (1907) 226 Ill. 511, 80 N. E. 1042; McDonald v. Mark (1909) 147 Ill. App. 434; Koutnik v. Cody (1909) 148 Ill. App. 313; People v. Haushalter (1909) 149 Ill. App. 399; Grace v. Derinda (1909) 150 Ill. App. 384; People v. Cohen (1911) 163 Ill. App. 115; Chicago v. Brendecke (1912) 170 Ill. App. 25; Cowen v. Story & C. Piano Co. (1912) 170 Ill. App. 92; Kitterman v. People (1913) 181 Ill. App. 682; White v. Herhold (1913) 182 Ill. App. 477; Price v. Clover Leaf Coal Min. Co. (1914) 188 Ill. App. 27; French v. Cloverleaf Coal Min. Co. (1914) 190 Ill. App. 400; People v. Leoni (1916) 198 Ill. App. 376; McDONALD v. SPRING VALLEY (reported herewith) ante, 1359.

Therefore, such a question cannot be raised on further appeal. See the supreme court cases cited supra. This rule was also recognized in Robson v. Doyle (1901) 191 Ill. 566, 61 N. E. 435; Barnes v. Drainage Comrs. (1906) 221 Ill. 627, 77 N. E. 1124; R. Haas Electric & Mfg. Co. v. Springfield Amusement Park Co. (1908) 236 Ill. 452, 23 L.R.A. (N.S.) 620, 127 Am. St. Rep. 297, 86 N. E. 248; and in Rogers v. St. Louis-Carterville Coal Co. (1912) 254 Ill. 104, 98 N. E. 270. Probably the question was involved in People ex rel. Harvey v. Vaughan (1917) 282 Ill. 163, 118 N. E. 479, but it was not necessary to the decision.

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In Indiana Millers' Mut. F. Ins. Co. v. People (1898) 170 Ill. 474, 49 N. E. 364, the court said: "Our statute expressly provides that cases involving the validity of a statute shall be taken directly to the supreme court. 3 Starr & C. Anno. Stat. 2d ed. chap. 110, § 88, p. 3114. In this case, as we have already stated, the defendants elected to prosecute their appeal to the appellate court, and there assign errors upon the record as to the regularity of the proceeding below, which was decided adversely to them in that court, and they now bring the record to this court from the appellate court, and attempt to urge the unconstitutionality of the statute on which the action is based. This, we entertain no doubt, they cannot do. The appeal to the appellate court waived any question which could be brought to this court for review. . . . If the validity of the statute was involved in the trial court, and the defendants desired to insist upon its invalidity, their remedy by appeal was clearly pointed out by the statute, that is, a direct appeal to this court; and by choosing to go to the appellate court, and there submitting their case for review, they abandoned the contention that the law was unconstitutional. They were not entitled, by indirection, through the appellate court, to bring that issue before us, thus availing themselves of an appeal first to that court, and then to this. To hold otherwise would be to abrogate a plain and well-understood provision of the statute, by which alone the right to an appeal exists."

Chaplin v. Highway Comrs. (1888) 126 Ill. 264, 18 N. E. 765, is not, perhaps, entirely clear, but it may have been decided upon the theory that there were no errors assigned over which the appellate court had jurisdiction. It was there held that where the appellant insisted upon the invalidity of a statute, both in the appellate court and in the supreme court, that he had not waived the question, and that, as such insistence ousted the appellate court of jurisdiction, that court should have dismissed the appeal; and the supreme court remanded the case to the appellate court, with directions to dismiss the appeal.

B. B. B.

H. BENSDORF et al.
v.
JOSEPH UIHLEIN et al., Appts.

Tennessee Supreme Court—June 12, 1915.

(132 Tenn. 193, 177 S. W. 481.)

Adverse possession — use of public — effect.

1. One using a triangle at the intersection of two streets as a paved way of access to the entrance to his building on adjoining property is not prevented from acquiring title by adverse possession, by the fact that the public cross it as convenience suggests, in passing from one street on to the other.

[*See note on this question beginning on page* 1368.]

— absence of inclosure — effect.

2. Inclosure is not necessary to establish actual possession which will ripen into title by continuance of time where such inclosure is impracticable.

— when susceptible of inclosure.

3. Land is not susceptible of inclosure under the law of adverse possession if the inclosure would destroy the land for which purpose it was best suited.

— necessity of inclosure.

4. Title may be secured by adverse possession without inclosure, to a small triangle of property at the intersection of two streets which affords access to the buildings on the adjoining property of claimant, by paving the property and placing it to the use for which it is best adapted, the furnishing of such access.

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APPEAL by defendants from a decree of the Chancery Court for Shelby County in complainants' favor in a suit to recover possession of certain land. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. Gates & Martin, for appellants:

In an action of ejectment the plaintiff must show a legal title, a deraignment of title to himself by connected conveyances from the original grantee, or show his actual adverse possession under grant or color of title.

Langford v. Love, 3 Sneed, 311; Campbell v. Campbell, 3 Head, 325; Lafferty v. Whitesides, 1 Swan, 123; Crutsinger v. Catron, 10 Humph. 24; Hubbard v. Godfrey, 100 Tenn. 150, 47 S. W. 81; King v. Coleman, 98 Tenn. 570, 40 S. W. 1082; Garrett v. Belmont Land Co. 94 Tenn. 479, 29 S. W. 726; Evans v. Belmont Land Co. 92 Tenn. 348, 21 S. W. 670; Stinson v. Russell, 2 Overt, 40; Kimbrough v. Benton, 3 Humph. 129; Walker v. Fox, 85 Tenn. 164, 2 S. W. 98; Lowry v. Whitehead, 103 Tenn. 396, 53 S. W. 731.

The language of the deed of the New South Land Company to Wilson, "less the strip of ground conveyed by the New South Land Company to the East End Railway Company, by deed," etc., expressly subtracts that strip from the quantity of land conveyed.

Austin v. Willis, 90 Ala. 424, 8 So. 94; Wooddy v. Old Dominion Ins. Co. 31 Gratt. 362, 31 Am. Rep. 732; Loyd v. Oates, 143 Ala. 231, 111 Am. St. Rep. 39, 38 So. 1022; Cornwell v. Thurston, 59 Mo. 156.

A sale by one out of possession of land adversely held is void.

Kincaid v. Meadows, 3 Head, 192.

Actual inclosure of residence or land is not always absolutely necessary to constitute an adverse possession, where such inclosure is not practicable; it suffices that there is such use and occupation of the land as it is capable of from its situation, nature, and character.

West v. Lanier, 9 Humph. 771, 12 Mor. Min. Rep. 184; Ewing v. Burnet, 11 Pet. 52, 9 L. ed. 629; Lieberman v. Clark (Wheeler v. Clark) 114 Tenn. 134, 69 L.R.A. 732, 85 S. W. 258; Southern Iron & Coal Co. v. Schwoon 124 Tenn. 176, 135 S. W. 785; Coal & I. Co. v. Coppinger, 95 Tenn. 526, 32 S. W. 465; Garrett v. Belmont Land Co. 94 Tenn. 459, 29 S. W. 726; Copeland v. Murphey, 2 Coldw. 64.

The proof shows that the lot was valuable to defendants only as and for an approach or entrance to their store house, and that they prepared it for such, and maintained and kept it in repair so that it was suited for that purpose, which therefore constituted an actual possession in them.

West v. Lanier, supra; Cass v. Richardson, 2 Coldw. 28.

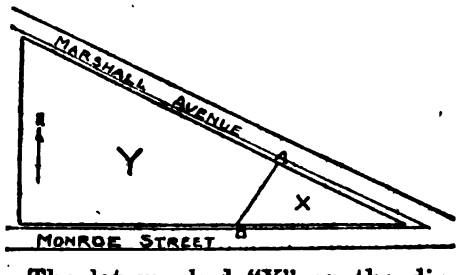
The defendants' prior user and possession of the property was actual, peaceable, and ripened into a peaceable occupancy, and was not the possession of a momentary trespasser or intruder.

13 Am. & Eng. Enc. Law, 2d ed. 750.

Mr. Thomas A. Evans for appellees.

Green, J., delivered the opinion of the court:

This is an ejectment suit brought to recover a triangular lot west of the point of intersection of Marshall avenue and Monroe street, in the city of Memphis. The land in controversy is indicated by the letter "X" on the diagram, and is an apex of a triangle formed at this crossing. The base of the triangle is 21½ feet. It runs along Marshall avenue 37½ feet, and along Monroe street 47½ feet. The diagram follows:



The lot marked "Y" on the diagram is occupied by a building owned by the defendants herein. This lot came into their possession some time prior to 1902.

Complainants assert what is probably a good paper title to the lot, marked "X" on the diagram, herein sued for. Defendants rely on adverse possession, and interpose a plea of the Statute of Limitations.

The lot "X" was formerly a part

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of the right of way of a suburban railway. The operation of this railroad was discontinued some years ago, and the tracks were taken up, and, so far as the railroad company is concerned, the particular lot of land in controversy has been abandoned for many years.

After the defendants had erected their building on lot "Y," and the railroad company had taken up the tracks over lot "X," there remained an unoccupied space between the line A B and the apex of the triangle at the intersection of Marshall avenue and Monroe street. Defendants' building had a front along the line A B, in which a door was placed. The lot immediately in front of this door, being unoccupied, and rough by reason of the tearing up of the tracks, got into bad condition, was muddy, and pools of water stood in it. The city authorities, supposing that lot "X" was a part of the property of the defendants, ordered them to put it in better condition. They demurred at first, on the plea that the lot was not their property, but finally agreed to take charge of it, and in the year 1902 covered the whole of this lot with a brick pavement. It was the idea of defendants, according to the testimony of their agent, that the paving of the apex of this triangle in front of the east entrance to their storehouse would make their property more accessible, and add to its value. The lot appeared to have been abandoned, and defendants thought that by taking possession of it they could finally acquire title thereto.

From 1902 until the filing of this bill on November 17, 1913, the defendants kept up this paving over the entire surface of the lot. They repaired the pavement from time to time, and finally took up the bricks and covered the lot with a granolithic pavement. Defendants all the while used this lot as an entrance to their storehouse, kept up the pavement, and otherwise asserted ownership and dominion over the same.

Upon the facts stated, it is insisted by defendants that they have had seven years' open and adverse possession of the triangle in suit, and that complainants' action is accordingly barred. We think this contention on the part of the defendants is well made.

Complainants rely on the fact that there was no inclosure of lot "X," and the statement of this court in Garrett v. Belmont Land Co. 94 Tenn. 459, 466, 29 S. W. 726, that "there must be actual inclosure, whenever the property is susceptible of such inclosure, in order to make out a case of adverse possession of town lots."

For support of this proposition the court cited Pullen v. Hopkins, 1 Lea, 741; Hicks v. Tredericks, 9 Lea, 492.

In the case of Garrett v. Belmont Land Co. supra, the court was dealing with vacant lots in the suburbs of Nashville. These lots were not suitable for business purposes, there were no buildings upon them, and, owing to their nature and location, there was no practical way in which adverse possession could have been indicated save by inclosure. The court only intended to say that inclosure of such lots as these was necessary to make out a case of adverse possession, and did not mean to say that there must be an inclosure of every city lot to establish adverse possession.

In the case of West v. Lanier, 9 Humph. 762, 12 Mor. Min. Rep. 184, this court said, after reviewing the authorities: "From these cases it will be seen that an inclosure or residence on land is not necessary, in order to constitute possession; but that such use and occupation of it as from its nature and character it is susceptible, under a claim of ownership, will be an actual possession."

In the case of Cass v. Richardson, 2 Coldw. 28, it was held that the erection and use of a wash place to wash iron was not sufficient to constitute actual possession, the court saying that, in general, a building

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or inclosure of some sort was necessary, but that exceptions existed where the land was unfitted for residence or cultivation; as, for example, an ore bank, a coal ravine, a sand pit, stone quarry, or a meadow below tidewater.

In the case of Coal & I. Co. v. Coppinger, 95 Tenn. 526, 32 S. W. 465, it was said that possession of land, to be actual, must be by inclosure, if practicable; otherwise, by that use of which the premises were susceptible.

The authority of the cases referred to is recognized in many other decisions of this court, and the law is well settled that inclosure is unnecessary to establish actual possession where such inclosure is impracticable; but possession may be established by such use and occupation as the land, from its situation, nature, and character, admits. Pullen v. Hopkins, 1 Lea. 741; Hicks v. Tredericks, 9 Lea, 491; Lieberman v. Clark (Wheeler v. Clark) 114 Tenn. 134, 69 L.R.A. 732, 85 S. W. 258; Green v. Cumberland Coal & Coke Co. 110 Tenn. 35, 72 S. W. 459; Southern Iron & Coal Co. v. Schwoon, 124 Tenn. 176, 135 S. W. 785.

Adverse possession—absence of inclosure—effect.

It is urged on behalf of complainants that the lot "X" is capable of inclosure. This in a sense is true. As a matter of course, a fence could be built around this triangle. Such lots, however, are not ordinarily inclosed, and, in fact, an inclosure would practically destroy the value of the lot for the very purpose for which it is best adapted.

We are not willing to give the construction to the word "susceptible," as used in our cases, which is insisted upon by the complainants. It is possible to inclose any property, but this court has never meant to say that "susceptibility" and "possibility" were convertible terms in defining adverse possession. It has never been intended to hold that inclosure was necessary, and that land was susceptible of inclosure if the inclosure would destroy the land for the purposes for which it was best suited. The meaning of our cases, as intimated in Coal & I. Co. v. Coppinger, supra, is that there should be an inclosure when practicable, when the land is practically susceptible to inclosure.

—when susceptible of inclosure.

The idea underlying the whole doctrine of adverse possession is that the possession should be maintained in an open and notorious manner, so as to warn the true owner that a hostile claim is being asserted to his land. We think the possession in this case was plain, open, and notorious, and amply sufficient to put the owner of this property on notice. The triangular space in litigation was entirely within the paving lines of the two intersecting streets. The space was 21½ by 37½ by 47½ feet. Covering so large a space as this with brick paving, and later with granolithic paving, was an unusual occurrence. Such a space as this inside of property lines would not ordinarily be paved, and the placing of the pavement thereupon unmistakably indicated that someone was claiming the land, improving it, and asserting dominion over it.

—necessity of inclosure.

The case is similar to one where a wharf is built over lands covered by water. The building and use of a wharf in this way is held to be a disseisin of the land under the wharf. 2 C. J. 72; Nichols v. Boston, 98 Mass. 39, 93 Am. Dec. 132.

It is urged, however, by the complainants, that the defendants have never had any exclusive possession of this land, but that their occupation thereof was in common with the occupation of the public, and for that reason their possession was not such as to constitute the basis of a title by adverse possession. For this proposition we are referred

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to 1 Cyc. 1024; Calloway v. Sanford, — Tenn. —, 35 S. W. 776; Boulo v. New Orleans, M. & T. R. Co. 55 Ala. 480; Tracy v. Norwich & W. R. Co. 39 Conn. 382.

These authorities and others collected in 2 C. J. 121, are to the effect that use and occupation of property in common with the public, and with others, will not constitute exclusive adverse possession.

We think the authorities, however, are not pertinent to this case. The use and occupation of this triangular corner made by the defendants, and the use and occupation thereof enjoyed by the public, were not common uses.

The triangle was used by the public merely as a passway. Persons turning around this corner of Monroe street and Marshall avenue crossed the lot.

Defendants, however, used the lot as an attractive, paved, and commodious entrance to their storehouse. No other person had a store fronting on this lot. No other person used the lot for the same purposes that defendants used it. No other person put the lot to the use to which it was best adapted.

The public and the defendants used the lot in an altogether different manner. There was nothing in common between the use of the defendants and the use of the public.

The use made of this lot by the public was under license, and a mere permissive use will not destroy the exclusiveness of an adverse claimant's possession. 2 C. J. 122; Woodruff v. Langford, — Iowa —, 115 N. W. 1020; Burrows v. Gallup, 32 Conn. 493, 87 Am. Dec. 186; Dodge v. Lavin, 34 R. I. 514, 84 Atl. 857.

—use of public —effect.

It is quite a common thing to truncate the apices of business houses at the intersection of city streets. Such architecture makes an attractive entrance, directly on the corner, equally accessible to both streets, and increases the value of the property. A triangular space is always left between the pavements proper and the truncated portion of the building, when this course is adopted. The triangular space is paved and the public passes over the exposed triangle in turning the corner. It would not do to hold that an owner who thus improves his property has his possession destroyed or impaired by the license or permission which he gives the public to turn street corners over his land. There is no sound basis upon which such an idea could rest. In these cases the keeping and maintaining of a pavement over land so located is a sufficient indication of possession. The use of such land as a store entrance, and the paving thereof, is the ordinary use to which lands similarly located are put by other owners. Such use is the primary use. The owner invites the public to pass as close to the door of his business house as possible. The value of the house depends upon its accessibility to the public; but the passage of the public over such an exposed triangle is by the owner's permission, and does not affect his possession.

The Chancellor's decree will be reversed, and the bill dismissed.

ANNOTATION.

Use of property by public as affecting acquisition of title by adverse possession.

In general.

It is generally held that any use of premises by the public which indicates a claim of common or public right will prevent the acquisition of title by adverse possesion of the premises by any person. In such a case the possession is not exclusive.

Alabama.—Boulo v. New Orleans, M. & T. R. Co. (1876) 55 Ala. 480.

Connecticut.—Tracy v. Norwich & W. R. Co. (1872) 39 Conn. 382.

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Maryland.—Gittings v. Moale (1864) 21 Md. 135.

Missouri.—Union Elevator Co. v. Kansas City Suburban Belt R. Co. (1896) 135 Mo. 353, 36 S. W. 1071.

Nebraska.—Opp v. Smith (1914) 96 Neb. 224, 147 N. W. 672.

New Mexico.—Johnston v. Albuquerque (1903) 12 N. M. 20, 72 Pac. 9.

Pennsylvania.—Green v. Simpson (1911) 49 Pa. Super. Ct. 334.

Virginia.—Austin v. Minor (1907) 107 Va. 101, 57 S. E. 609.

Washington.—Turner v. Ladd (1906) 42 Wash. 274.

Wisconsin.—Kelley v. Salvas (1911) 146 Wis. 543, 131 N. W. 436.

"Possession to be adverse must be exclusive of all others." Gittings v. Moale (1864) 21 Md. 135, supra.

"When the occupation as in common with the public generally, it is not such exclusive possession as will constitute the basis of a title by adverse possession." Johnston v. Albuquerque (1903) 12 N. M. 20, 72 Pac. 9, supra.

In Boulo v. New Orleans, M. & T. R. Co. (1876) 55 Ala. 480, it appeared that a lot of land on the shore of a river in the city of Mobile was used by the plaintiff, in common with the general public, as a mooring or landing place for smaller vessels. It was also used as a street by the public. No act of ownership was ever exercised over it by the plaintiff. It was held that no title was gained by the plaintiff's use as there was no exclusive appropriation to private use.

In Tracy v. Norwich & W. R. Co. (1872) 39 Conn. 382, it was held that the use of an island, which had formed by accretion, for fishing purposes, in common with the general public, was not such a possession as to give the plaintiff title by adverse possession. The possession was not exclusive, the public exercising the same right over the property as the plaintiff.

In Gittings v. Moale (Md.) supra, it was held that where land was used as a common, was uninclosed, and all persons passed and repassed over it at will, such use was not sufficient to enable a person so using it to acquire title by adverse possession.

In Union Elevator Co. v. Kansas City Suburban Belt R. Co. (1896) 135 Mo. 353, 36 S. W. 1071, it was held that the laying of railroad tracks on a public levee and maintaining them there for ten to fourteen years was not such an exclusive and adverse use as would give the railroad title by adverse possession to the land covered by the tracks.

The grazing of cattle over a large tract of uninclosed land, where cattle of other owners also grazed, was held in Opp v. Smith (1914) 96 Neb. 224, 147 N. W. 672, not to be such an exclusive possession as would give title by adverse possession.

In Johnston v. Albuquerque (N. M.) supra, it appeared that the plaintiff's predecessor had built a small house and stable on the land, and had built a wire fence which only partially inclosed the land, there being a gap of 600 feet when the fence was erected, and the entire fence was soon allowed to decay. The land was used as a common pasturage for cattle, and persons wishing to take dirt or other substances from the land did so at their pleasure. It was held that the possession shown was not sufficient to give title by adverse possession.

The laying of a sidewalk across an uninclosed lot, and the planting of trees along the walk, have been held not to be sufficient to entitle the person so doing to title to the strip of land covered by the sidewalk, where the sidewalk was used in common with the public in going from a public highway to a railroad station. It was held that the use was not exclusive of every other person, and that the only right gained thereby was a right of way over the land. Green v. Simpson (1911) 49 Pa. Super. Ct. 334.

In Austin v. Minor (1907) 107 Va. 101, 57 S. E. 609, it appeared that the property in dispute was a marsh, which was valuable only for hunting, fishing and trapping, and to a limited extent as a range for hogs. It also appeared that a great many people hunted and trapped thereon, including the defendant, who used and enjoyed the land for all purposes for which it could be used and enjoyed, far more

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than anyone else. It was held that such use of the land did not give title by adverse possession.

Where land had been only partially inclosed by a fence, which had long since been destroyed, and the property had for nearly twenty years been open to the commons and no more in the possession of the plaintiff and her predecessor in interest than in the possession of anyone else, it was held that title could not be acquired by adverse possession, as the possession was neither continuous nor exclusive. Turner v. Ladd (1906) 42 Wash. 274, 84 Pac. 866.

In Kelley v. Salvas (1911) 146 Wis. 543, 131 N. W. 436, it appeared that the owner of land on the bank of a river built a small dock and some boathouses on the submerged land immediately adjacent to his property. The land under water belonged to another person. The owner of the land under water brought ejectment against the defendant, the builder of the dock and boathouses. The defendant claimed title to the bed of the river opposite his land on the bank, out to the middle of the stream. The boundaries of the land so claimed were the sides of his lot on the north and south, extended east into the river until they met a line drawn through the thread of the stream. This line at the middle of the bed of the river was the eastern boundary of the claim. The dock and boathouses occupied only a small part of this space, the dock being only 4 feet 4 inches wide. People passed over the rest of the submerged land, in boats and canoes. It was held that the defendant had gained title by adverse possession to the extent of the land actually covered by his dock and boathouses and space to lay a boat alongside, but had performed no acts over the remaining submerged land which would give him title by adverse possession, as any person had the right to go over this submerged land in a boat, and the owner of that land would have no right to prevent him. The owner of the bank of the river would have the right to cross the bed of the river in a boat to get to the middle of the stream, but such use would not give him adverse possession of the submerged land.

Permissive use.

Permissive use of land by the public does not affect the acquisition of title by adverse possession, since such a use acknowledges the possession of the person holding the land, and is subordinate thereto. Webber v. Clark (1887) 74 Cal. 11, 15 Pac. 431; Burrows v. Gallup (1865) 32 Conn. 493, 87 Am. Dec. 186; Woodruff v. Langford (1908) — Iowa, —, 115 N. W. 1020; Dodge v. Lavin (1912) 34 R. I. 514, 84 Atl. 857. And see the reported case (BENSDORF v. UIHLEIN, ante, 1364).

In Webber v. Clarke (Cal.) supra, it was held that the fact that the public had a right of way for bringing cattle over the defendant's land did not destroy the defendant's right to the land, and was not inconsistent with his possession. It was held that the defendant had gained title to the land by adverse possession by grazing cattle over it for the statutory period.

In Burrows v. Gallup (1865) 32 Conn. 493, the court instructed the jury that in order to acquire title by adverse possession against the public, it would be necessary to exclude every member of the public from the land, which was claimed in this case to be a public landing place at a wharf. It was held that the instruction was erroneous, and that the correct rule was that it was necessary only to exclude the public from possession, and that mere casual entries on the land, which were made without any intention of asserting a right of entry and possession, were not sufficient to break the continuity of exclusive possession in another.

In Woodruff v. Langford (1908) — Iowa, —, 115 N. W. 1020, it appeared that the public had a right of way over the plaintiff's land. Gates were maintained by the plaintiff at both ends of this way and the use of the way was by permission of the plaintiff. It was held that this use by the public was not of such a character as to prevent the plaintiff's possession from being exclusive.

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In Dodge v. Lavin (1912) 34 R. I. 514, 84 Atl. 857, it was held that the use of a part of the land as a thoroughfare by the public did not affect the possession of a person holding the land by adverse possession. It was claimed that the possession was not exclusive, because of the passing and repassing over the property of persons by the implied permission of the owner. It was held that this did not prevent the possession from being exclusive, as these persons came on the land with the permission of the owner.

In the reported case (BENSDORF v. UIHLIEN, ante, 1364), it is held that the fact that the public with the permission of a store keeper used as a public walk a small triangular lot in front of the store did not prevent him from obtaining title thereto by adverse possession. B. F. D.

CHAMPE S. ANDREWS, Respt.,
v.
ASA BIRD GARDINER, Appt.

New York Court of Appeals—November 12, 1918.

(224 N. Y. 440, 121 N. E. 341.)

Libel — privilege — extent — application for pardon.

1. Counsel's privilege with respect to allegations in an application for pardon on behalf of a client is not absolute.

[*See note on this question beginning on page* 1376.]

— privilege of counsel in judicial proceedings.

2. Counsel are privileged in respect to statements, oral or written, made in judicial proceedings, and pertinent thereto.

— application for pardon — pertinent charges.

3. Charges attacking the character of an attorney who secured a conviction and is opposing an application for pardon, on the ground that he had conspired to secure the conviction for his own profit and reputation, and was unworthy of belief, are pertinent to an application for pardon.

— qualified and absolute privilege.

4. The difference between qualified and absolute privilege in libel is that malice destroys the one, but does not change the other.

— malice — liability.

5. One is liable in damages for maliciously defaming another in an application to the executive for a pardon for a client.

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of a Trial Term for New York County, Part VIII., in favor of plaintiff, in an action brought to recover damages for an alleged libel. *Reversed.*

The facts are stated in the opinion of the court.

Mr. **George Edwin Joseph**, for appellant:

The alleged libelous communication was privileged.

Woods v. Wiman, 122 N. Y. 445, 25 N. E. 919; Connellee v. Blanton, — Tex. Civ. App. —, 163 S. W. 404; Ormsby v. Douglass, 37 N. Y. 477; Lake v. King, 1 Wms. Saund. 131, 85 Eng. Reprint, 137; Bingham v. Gaynor, 203 N. Y. 50, 96 N. E. 84; Youmans v. Smith, 153 N. Y. 214, 47 N. E. 265.

The court submitted the case to the jury upon a wholly erroneous theory of law, in that the court assumed to find as matter of law that the statements contained in the alleged libelous communication were not relevant and not pertinent, although it expressly found that they were uttered upon a privileged occasion.

Hastings v. Lusk, 22 Wend. 410, 34 Am. Dec. 330; Klinck v. Colby, 46 N. Y. 427, 7 Am. Rep. 360; Morton v.

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Knipe, 128 App. Div. 94, 112 N. Y. Supp. 451; White v. Carroll, 42 N. Y. 161, 1 Am. Rep. 503; Marsh v. Ellsworth, 50 N. Y. 309; Hemmens v. Nelson, 138 N. Y. 518, 20 L.R.A. 440, 34 N. E. 342; Williams v. New York Herald Co. 165 App. Div. 529, 150 N. Y. Supp. 838; Andrews v. Gardiner, 165 App. Div. 597, 150 N. Y. Supp. 891, 168 App. Div. 632, 154 N. Y. Supp. 486.

Mr. Louis Sturcke, for respondent:

Libelous statements made by an attorney in the course of judicial or quasi judicial proceedings are privileged only if the statements themselves are relevant and pertinent to the issue.

18 Am. & Eng. Enc. Law, 1023; Ring v. Wheeler, 7 Cow. 725; White v. Carroll, 42 N. Y. 161, 1 Am. Rep. 503; Vigours v. Palmer, 1 Browne (Pa.) 40; Hastings v. Lusk, 22 Wend. 410, 34 Am. Dec. 330; Marsh v. Ellsworth, 50 N. Y. 309; Moore v. Manufacturers' Nat. Bank, 123 N. Y. 420, 11 L.R.A. 753, 25 N. E. 1048; Youmans v. Smith, 153 N. Y. 214, 47 N. E. 265; King v. McKissick, 126 Fed. 215; McLaughlin v. Cowley, 127 Mass. 316; Wright v. Lothrop, 149 Mass. 385, 21 N. E. 963; Barnett v. Loud, 226 Mass. 447, 115 N. E. 767; Kemper v. Fort, 219 Pa. 85, 13 L.R.A.(N.S.) 820, 123 Am. St. Rep. 623, 67 Atl. 991, 12 Ann. Cas. 1022.

The libelous statements which the court held to be unprivileged were not relevant and pertinent upon the issue before Governor Dix.

Sickles v. Kling, 60 App. Div. 515, 69 N. Y. Supp. 944; Youmans v. Smith, 153 N. Y. 214, 47 N. E. 265; Platner v. Platner, 78 N. Y. 90.

The defendant has no ground for complaint because the trial judge refused to treat the case as one of "qualified privilege." The rule with regard to relevancy and pertinency applies to both classes of cases, qualified and absolute privilege cases.

18 Am. & Eng. Enc. Law, 1023; Odgers, Libel & Slander, 4th ed. 215; Nevill v. Fine Arts & General Ins. Co. [1895] 2 Q. B. 156, 64 L. J. Q. B. N. S. 681, 14 Reports, 587, 72 L. T. N. S. 525, 59 J. P. 371; Robinett v. Ruby, 13 Md. 95; Moore v. Manufacturers' Nat. Bank, 123 N. Y. 420, 11 L.R.A. 753, 25 N. E. 1048.

Cardozo, J., delivered the opinion of the court:

The action is for libel. One Conrad, a doctor in the city of New York, was convicted of the crime of attempted abortion. The plaintiff, who was then the attorney for the County Medical Society, had much to do with the prosecution. He laid the trap in which Conrad was caught. A woman visited Conrad and pretended to need his services. She did this at the plaintiff's instance. She was acting as his ally and the ally of the police. Conrad was arrested in the act of examining her. He said that the purpose of the examination was innocent. A jury found that it was criminal. His conviction was affirmed; and he served a term in prison.

In 1905, the convict, then released, petitioned Governor Higgins for pardon. His aim was restoration to citizenship, that he might practise his profession. The County Medical Society filed a protest against the pardon. In this protest it charged that Conrad was guilty of many other like crimes. He was pictured as having practised a business of abortion for years, both in New York and in Atlantic City. The protest was signed by the society in its corporate name, by its president and other officers. It was signed also by the plaintiff in the name of his firm as counsel. The petition for clemency thus opposed was denied.

In 1911, Conrad renewed his application. His petition was addressed to Governor Dix, and was signed by the defendant, a member of the bar. The gist of his grievance was persecution by the plaintiff. The charge was that the plaintiff had inflamed the society through false complaints, and had trapped an innocent man into a false appearance of guilt. There was a bitter assault upon the plaintiff's character. It was said, in substance, that he had used his position as counsel for the society to manufacture cases and extort money from his victims. He was characterized as an unprincipled, blackmailing, depraved scoundrel. Attached to the petition is a second document, also signed by the defendant. In this he says:

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"The above was prepared for me and received my heartiest concurrence." Then follows a statement of his friendship for Conrad, and his faith in Conrad's innocence.

There is evidence that, before submitting this petition, the defendant went over it with his client. He asked why attack upon the plaintiff's character was necessary. The client said that it was necessary to break the force of the protest which had been filed in opposition to the previous petition. He said that this protest, though in form that of the society, was in fact the work of the plaintiff, that its charges were false, and that the governor ought to know the truth about their author. The defendant says that in submitting the petition to the governor he made an oral statement. He told the governor, he says, that he appeared as counsel for Conrad; that he had no personal knowledge of the truth of the petition; that pardon had been recommended by the trial judge and by many other worthy citizens; that the only opposition came from the County Medical Society; that the society, in submitting its protest to Governor Higgins, had relied upon the information furnished by the plaintiff; that the scandalous charges in the protest were false; and that those charges ought not to defeat a pardon if the man who made them was unworthy of belief. There was no general publication of the petition. It was handed to the governor, and to no one else.

This action for libel followed. There have been three trials. On the first trial the complaint was dismissed at the close of the plaintiff's case. The appellate division reversed, and ordered a new trial. The court held (165 App. Div. 595, 150 N. Y. Supp. 891) that on the record as it then stood some, if not all, of the charges against the plaintiff were, prima facie, irrelevant to the application for pardon, and therefore were not privileged. On that trial, there was no evidence of the earlier petition and protest. On the second trial the complaint was again dismissed at the close of plaintiff's case. The argument was that proof of the earlier petition and protest had changed the situation. The appellate division again reversed (168 App. Div. 629, 154 N. Y. Supp. 486). The court said that until there was some denial of the truth of the charges in the protest, there was no need to inquire into the character of the man who made them. On the third trial the defendant and Conrad were witnesses for the first time. The testimony supplies the denial that was lacking before, and explains the reasons that prompted the assault upon the plaintiff's character. The trial judge ruled, however, that the assault had no semblance of relevance to the proceeding before the governor; that there was, therefore, no privilege; that the plaintiff was entitled to damages; and that the only duty of the jury was to assess the amount.

The defamatory charges against the plaintiff were false. There is no blot upon his character. Indeed, there is no attempt at justification. The defense is not justification, but privilege. The defendant says that in presenting this petition to the governor he acted as counsel for a client. The rule is that counsel are privileged in respect of any statements, oral or written, made in judicial proceedings, and pertinent thereto. In England, the immunity is broader. There the privilege exists whether the statements are relevant or not. Munster v. Lamb, L. R. 11 Q. B. Div. 588, 52 L. J. Q. B. N. S. 726, 49 L. T. N. S. 252, 32 Week. Rep. 248, 47 J. P. 805, 7 Eng. Rul. Cas. 714; Royal Aquarium v. Parkinson [1892] 1 Q. B. 431, 61 L. J. Q. B. N. S. 409, 66 L. T. N. S. 513, 40 Week. Rep. 450, 56 J. P. 404; Barrett v. Kearns [1905] 1 K. B. 504, 74 L. J. K. B. N. S. 318, 53 Week. Rep. 354, 92 L. T. N. S. 255, 21 Times L. R. 212; Odgers, Libel & Slander, 233. With us, the condition is added that the privilege will be lost if the libel is irrelevant.

Libel—privilege of counsel in judicial proceedings.

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Youmans v. Smith, 153 N. Y. 214, 47 N. E. 265; Moore v. Manufacturers' Nat. Bank, 123 N. Y. 420, 426, 11 L.R.A. 753, 25 N. E. 1048; McLaughlin v. Cowley, 127 Mass. 316; Barnett v. Loud, 226 Mass. 447, 115 N. E. 767; Kemper v. Fort, 219 Pa. 85, 13 L.R.A.(N.S.) 820, 123 Am. St. Rep. 623, 67 Atl. 991, 12 Ann. Cas. 1022. But, while counsel keep within those bounds, their immunity is absolute. For the moment, we put aside the question whether there is any difference in that respect between statements in judicial proceedings and statements to the governor in a petition for clemency. We view the case provisionally, as if the statements had been made in court.

We think it was error to rule that the defamatory charges were not pertinent to the appeal for mercy. There is no room in such matters for any strict or narrow test. Much must be left to the discretion of the advocate. The privilege embraces anything that may possibly be pertinent. Youmans v. Smith, 153 N. Y. 214, 47 N. E. 265. We cannot say that the plaintiff's reputation was so plainly foreign to the issue that counsel should have refused to join a client in attacking it. The client took the ground that the plaintiff had planned the prosecution, had used it as a means of winning profit and reputation, and had blocked an earlier petition for pardon by overwhelming his victim under an avalanche of charges. Counsel was assured that those charges were false. If the governor believed them, pardon was almost certain to be refused. They revealed Conrad, not as an offender in one instance, but as a hardened criminal. The argument was that the governor should not believe them. They had been put forward, it was said, by the plaintiff, who was the head and front of the conspiracy; he had hoodwinked the society into adopting them; in fact, they were his work; and his character was such that he was unworthy of belief. Those statements may have been false, but they were not impertinent. Conley v. Key, 98 Ga. 115, 25 S. E. 914. To appreciate their pertinency, we may ask ourselves what the duty of counsel would have been, had they been true. The answer is not doubtful.

—application for pardon—pertinent charges.

The question remains whether the defendant's privilege is qualified or absolute. The difference is that malice destroys the one and does not change the other. Odgers, Libel & Slander, p. 227. If the statements had been made in court, there is no doubt, since they were pertinent, that the privilege would have been absolute. Sickles v. Kling, 60 App. Div. 515, 69 N. Y. Supp. 944. We assume that the privilege would be the same if the statements had been made before tribunals having attributes similar to those of courts. Royal Aquarium v. Parkinson [1892] 1 Q. B. 431, 61 L. J. Q. B. N. S. 409, 66 L. T. N. S. 513, 40 Week. Rep. 450, 56 J. P. 404; Dawkins v. Rokeby, L. R. 8 Q. B. 255, L. R. 7 H. L. 744, 45 L. J. Q. B. N. S. 8, 33 L. T. N. S. 196, 23 Week. Rep. 931, 9 Eng. Rul. Cas. 39; Barrett v. Kearns [1905] 1 K. B. 504, 74 L. J. K. B. N. S. 318, 53 Week. Rep. 354, 92 L. T. N. S. 255, 21 Times L. R. 212; Watson v. McEwan [1905] A. C. 480, 4 B. R. C. 934, 74 L. J. C. P. N. S. 151, 93 L. T. N. S. 489, 3 Ann. Cas. 124; Bottomley v. Brougham [1908] 1 K. B. 584, 77 L. J. K. B. N. S. 311, 99 L. T. N. S. 111, 24 Times L. R. 262, 52 Sol. Jo. 225; Rogers v. Thompson, 89 N. J. L. 639, 99 Atl. 389; Kemper v. Fort, 219 Pa. 85, 13 L.R.A.(N.S.) 820, 123 Am. St. Rep. 623, 67 Atl. 991, 12 Ann. Cas. 1022. There is no difference in respect of degree between the privilege of counsel and that of parties and witnesses. They are phases of the same immunity. Munster v. Lamb, L. R. 11 Q. B. Div. 588, 52 L. J. Q. B. N. S. 726, 49 L. T. N. S. 252, 32 Week. Rep. 248, 47 J. P. 805, 7 Eng.

—qualified and absolute privilege.

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Rul. Cas. 714; Revis v. Smith, 18 C. B. 126, 139 Eng. Reprint, 1314, 25 L. J. C. P. N. S. 195, 2 Jur. N. S. 614, 4 Week. Rep. 506; Garr v. Selden, 4 N. Y. 91; Kemper v. Fort, supra, at page 89 of 219 Pa., 13 L.R.A.(N.S.) 820, 123 Am. St. Rep. 623, 67 Atl. 991, 12 Ann. Cas. 1022; Laing v. Mitten, 185 Mass. 233, 235, 70 N. E. 128. "Neither party, witness, counsel, jury, nor judge, can be put to answer, civilly or criminally, for words spoken in office." Lord Mansfield in Rex v. Skinner, Lofft, 55, 98 Eng. Reprint, 529. The courts have refused, however, to apply the rule of absolute privilege to proceedings which, though official and public, are not in substance judicial. Proctor v. Webster, L. R. 16 Q. B. Div. 112, 114, 55 L. J. Q. B. N. S. 150, 53 L. T. N. S. 765; Royal Aquarium v. Parkinson [1892] 1 Q. B. 431, 61 L. J. Q. B. N. S. 409, 66 L. T. N. S. 513, 40 Week. Rep. 450, 56 J. P. 404; Barrett v. Kearns [1905] 1 K. B. 504, 74 L. J. K. B. N. S. 318, 92 L. T. N. S. 255, 21 Times L. R. 212; Blakeslee v. Carroll, 64 Conn. 223, 25 L.R.A. 106, 29 Atl. 473; Wright v. Lothrop, 149 Mass. 385, 390, 21 N. E. 963; Odgers, Libel & Slander, p. 233. In such cases the privilege is the qualified one that attaches to the honest assertion of a right or fulfilment of a duty. Bingham v. Gaynor, 203 N. Y. 27, 31, 32, 96 N. E. 84; Capital & Counties Bank v. Henty, L. R. 7 App. Cas. 741, 52 L. J. Q. B. N. S. 232, 47 L. T. N. S. 662, 31 Week. Rep. 157, 47 J. P. 214; Royal Aquarium v. Parkinson [1892] 1 Q. B. 431, 61 L. J. Q. B. N. S. 409, 66 L. T. N. S. 513, 40 Week. Rep. 450, 56 J. P. 404.

The question, therefore, is whether absolute privilege ought now to be extended to an application for a pardon. It was so extended by the court of civil appeals of Texas, in Connellee v. Blanton, — Tex. Civ. App. —, 163 S. W. 404; but we think erroneously. Such an application is not a proceeding in court, nor one before an officer having "attributes similar" to a court's. Royal Aquarium v. Parkinson [1892] 1 Q. B. 431, 61 L. J. Q. B. N. S. 409, 66 L. T. N. S. 513, 40 Week. Rep. 450, 56 J. P. 404. It is a petition for mere grace and mercy. It may be made by anyone, and without the convict's knowledge. It grows out of the action of the courts, but it seeks to reverse their action by an appeal to motives and arguments which are not those of jurisprudence. There are no clearly defined issues. There is often a most informal hearing. Sometimes there is argument by counsel. As often, the plea for mercy is made by wife or kin or friends. Whatever privilege belongs to counsel should belong also to them; the right to plead for clemency is not a monopoly of the bar. Even if counsel speaks, his words are not "spoken in office." Rex v. Skinner, supra. Nor are they subject to like restraints. At such a time, anything is pertinent that may move the mind to doubt or the heart to charity. It is not necessary that reason be convinced; it is enough that compassion is stirred. The range of possible inquiry gives warning that the privilege should be confined within the limits of good faith. Where the test of the pertinent is so vague, there must be some check upon calumny. While convict and counsel act in good faith, they are immune; the privilege is lost when they defame with malice. There is no license, under cover of such an occasion, to publish charges known to be false, or put forward for revenge. We are not dealing here with statements made by witnesses required to attend a hearing (Prison Law [Consol. Laws, chap. 43] §§ 261, 262, 265); there is a distinction between the testimony of witnesses and voluntary complaints (Wright v. Lothrop, 149 Mass. 385, 390, 21 N. E. 963). We do not go beyond the case before us. Our ruling is in harmony with the tendency of courts to restrict the scope of absolute privilege in libel. Blakeslee v. Carroll, supra, at page 235 of

—privilege—extent—application for pardon.

—malice—liability.

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64 Conn., 25 L.R.A. 106, 29 Atl. 473; Odgers, Libel & Slander, pp. 230, 231. It is in harmony with rulings made where petitions have been submitted to the governor or the legislature for relief against oppression or the redress of other wrongs (Wright v. Lothrop, supra, at page 390 of 149 Mass., 21 N. E. 963; Proctor v. Webster, L. R. 16 Q. B. Div. 112, 114, 55 L. J. Q. B. N. S. 150, 53 L. T. N. S. 765; Woods v. Wiman, 122 N. Y. 445, 25 N. E. 919; Cook v. Hill, 3 Sandf. 341; Maurice v. Worden, 54 Md. 233, 39 Am. Rep. 384); the oppression of a harsh or unjust judgment is not to be distinguished in this respect from any other abuse of power. The ruling gives just protection alike to suitor and to counsel, and charges them with liability only when the privilege is abused.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

Hiscock, Ch. J., and **Collin, Cuddeback, Pound**, and **Crane**, JJ., concur.

Andrews, J., not sitting.

ANNOTATION.

Libel and slander: privilege in application for pardon.

The courts are not agreed whether a statement made in an application for a pardon is absolutely or only qualifiedly privileged. That statements so made are only qualifiedly privileged is the holding in the reported case (ANDREWS V. GARDINER, ante, 1371).

The opposite view is taken in Connellee v. Blanton (1914) — Tex. Civ. App. — 163 S. W. 404, and a statement made in an application to the governor for a pardon held absolutely privileged. The court, after referring to a provision of the state Constitution that "the citizens shall have the right, in a peaceable manner, to assemble together for their common good, and to apply to those invested with the power of government for redress of grievances, or other purposes, by petition, address or remonstrance," states: "We are of the opinion that the right guaranteed to a citizen by the constitutional provision quoted above, 'to apply to those invested with the power of government for redress of grievances, or other purposes, by petition, address, or remonstrance,' is of equal dignity to the right to apply to a court of justice for relief; and that the same principle of public policy which supports the absolute privilege extended to judicial proceedings applies with equal force in favor of petitions to the governor of the state for the exercise of the pardoning power; a power superior to that of the court which rendered the judgment of conviction. If the judicial proceeding which culminated in the conviction were absolutely privileged, why should not the same immunity be extended to the petition to a higher power to annul that judgment, in part? Whatever may be the rule in other jurisdictions, we are of the opinion that under the authority of Runge v. Franklin (1889) 72 Tex. 585, 3 L.R.A. 417, 13 Am. St. Rep. 833, 10 S. W. 721, the application made by appellant to the governor, who was, by the Constitution, vested with authority to grant a pardon to George Parvin, was absolutely privileged, and that the court erred in overruling defendant's general demurrer to plaintiff's petition." The case of Runge v. Franklin, referred to, was an action for libel, based upon the contents of certain pleadings in court.

That a statement made in an application for a pardon is absolutely privileged is held also in Keenan v. McMurray (1904) 34 Pittsb. L. J. N. S. (Pa.) 223. In this case the application was being made to a board of pardons established by the state Constitution, and the court states that the board of pardons is a judicial body, and is, in fact, a court to which the reason for the privilege of parties and witnesses applies as strongly as in the case of the ordinary courts of justice.

W. A. E.

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BINGHAMTON PHARMACY et al., Plffs. in Certiorari,
v.
FIRST NATIONAL BANK.

Tennessee Supreme Court — May 22, 1915.

(131 Tenn. 711, 176 S. W. 1038.)

Bills and notes — note payable at bank — failure to present — effect as release.

1. Failure to present a note payable at bank for payment when it is due, at which time the maker has funds on deposit, does not relieve him from liability in case the bank fails leaving the note unpaid, notwithstanding the statute provides that where an instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon, where the statute also provides that presentment for payment is not necessary to charge the person primarily liable on the instrument.

[*See note on this question beginning on page* 1381.]

— distinction between drawer of check and maker of note.

2. The difference between the drawer of a check and the maker of a note is that the latter is primarily liable on the instrument, while the former is not.

CERTIORARI to the Court of Civil Appeals to review a judgment affirming a judgment of the Circuit Court for Shelby County, Division IV., in plaintiff's favor, in an action brought to recover the amount alleged to be due on a promissory note. *Petition denied.*

The facts are stated in the opinion of the court.

Mr. **Frank S. Elgin**, for plaintiffs in certiorari:

Where the instrument is payable at a bank it is equivalent to an order to the bank to pay the same, for the account of the principal debtor thereon.

Neg. Inst. Law, Acts 1899, § 87, p. 156; Carpenter v. National Shawmut Bank, 109 C. C. A. 55, 187 Fed. 4; Grissom v. Commercial Nat. Bank, 87 Tenn. 350, 3 L.R.A. 273, 10 Am. St. Rep. 669, 10 S. W. 774; Lazier v. Horman, 55 Iowa, 75, 39 Am. Rep. 167, 7 N. W. 457.

A note payable at a particular bank is equivalent to a check on said bank.

Commercial Nat. Bank v. Henninger, 105 Pa. 496; Ætna Nat. Bank v. Fourth Nat. Bank, 46 N. Y. 82, 7 Am. Rep. 314; Randolph, Com. Paper, § 1441; Dan. Neg. Inst. § 326a; 2 Morse, Banks & Bkg. § 557; Bolles, Bank & Depositor, § 403; Bedford Bank v. Ocoam, 125 Ind. 584, 9 L.R.A. 560, 21 Am. St. Rep. 258, 25 N. E. 713; Mayer v. Heidelbach, 123 N. Y. 332, 9 L.R.A. 550, 25 N. E. 416; Ætna Nat. Bank v. Fourth Nat. Bank, 46 N. Y. 82, 7 Am. Rep. 314; Mandeville v. Union Bank, 9 Cranch, 9, 3 L. ed. 639; Industrial Trust, Title & Sav. Co. v. Weakley, 103 Ala. 465, 49 Am. St. Rep. 45, 15 So. 854; Watt v. Gans, 114 Ala. 272, 62 Am. St. Rep. 99, 21 So. 1011; 3 Kent, Com. 14th ed. pp. 110, 111; Purcell v. Allemong, 22 Gratt. 744.

If the holder has been guilty of laches in not presenting in due time, it is incumbent upon him to show that the drawer has not been injured.

Planters' Bank v. Merritt, 7 Heisk. 194; Story, Promissory Notes, p. 195; Columbia Hardwood Lumber Co. v. Crittenden, 1 Tenn. C. C. A. 466; 2 Ball, Bkg. p. 608; Stevens v. Park, 73 Ill. 387; Little v. Phenix Bank, 2 Hill, 425.

Where the drawer establishes negligence or undue delay in the presentation of his check, and the failure of the drawee bank after the expiration of the period within which, with due diligence, the check would have been pre-

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sented, the presumption of injury arises casting upon the holder the burden of proving the drawer has suffered no loss or damage by the delay.

Watt v. Gans, 114 Ala. 272, 62 Am. St. Rep. 99, 21 So. 1011; Planters' Bank v. Merritt, 7 Heisk. 177; Purcell v. Allemong Sons, supra; Gough v. Staats, 13 Wend. 549.

Messrs. A. H. Murray and C. C. Gillespie, for defendant in certiorari:

Making a note payable at a named bank is not equivalent to making a check for the amount of the note.

Stansbury v. Embrey, 128 Tenn. 103, 47 L.R.A.(N.S.) 980, 158 S. W. 991; Gosling v. Griffin, 85 Tenn. 737, 3 S. W. 642; Grissom v. Commercial Nat. Bank, 87 Tenn. 350, 3 L.R.A. 273, 10 Am. St. Rep. 669, 10 S. W. 774.

Presentment and demand are not necessary to hold the maker of a promissory note.

M'Nairy v. Bell, 1 Yerg. 502, 24 Am. Dec. 454; Blair v. Bank of Tennessee, 11 Humph. 84; Mulherrin v. Hannum, 2 Yerg. 81; 7 Cyc. 963, 964.

"Overdrafts" were never within the intention of the drawers of this provision of the statute.

First Nat. Bank v. First Nat. Bank, 127 Tenn. 216, 154 S. W. 965.

The fact that the maker has money in the bank where the note is payable amounts only to a tender, and does not relieve him from liability on the note, although the money may have been lost by the subsequent failure of the bank.

Adams v. Hackensack Improv. Commission, 44 N. J. L. 638, 43 Am. Rep. 406; Grissom v. Commercial Nat. Bank, supra; First Nat. Bank v. Free, 67 Iowa, 11, 24 N. W. 566; Virginia-Carolina Chemical Co. v. Steen, 99 Miss. 504, 34 L.R.A.(N.S.) 734, 55 So. 47; Stansbury v. Embrey, supra.

Green, J., delivered the opinion of the court:

The defendants below, the Binghamton Pharmacy and Kilpatrick Brothers, W. A. Kilpatrick and L. H. Kilpatrick, executed a note payable to the order of "ourselves," which they indorsed in blank and discounted at the Chickasaw Bank & Trust Company. The note was due December 29, 1912, and was payable at the said Chickasaw Bank & Trust Company.

Prior to its maturity this note was rediscounted by the Chickasaw Bank & Trust Company at the First National Bank of Memphis. It was not presented for payment at the Chickasaw Bank & Trust Company when it matured. It is contended by the makers that on the day of its maturity, and for several days thereafter, there was a sufficient amount to their credit in the Chickasaw Bank & Trust Company to have paid the note.

As above stated, the note matured on December 29, 1912. On January 7, 1913, the Chickasaw Bank & Trust Company failed.

Later the First National Bank demanded payment of the note from its makers, which they declined, on the ground that they had sufficient funds on deposit in the failed bank to meet the note at its maturity, and it is insisted in behalf of the makers that they are discharged from liability on the note on account of the omission of the First National Bank to present it for payment at the Chickasaw Bank & Trust Company, where the note was made payable, when it fell due.

The lower courts rendered judgment in favor of the First National Bank, and the makers of the note have filed a petition for writ of certiorari.

The defense is based on § 87 of the Negotiable Instruments Act (chapter 94 of the Tennessee Acts of 1899) as follows: "Instrument Payable at Bank Equivalent to What.—Where the instrument is made payable at a bank, it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon."

It is contended that under the provisions of the section quoted it became the duty of the holder of this note to present it for payment at the bank, where it was payable, upon maturity, and that for neglect of this duty the holder must respond to the makers for the damage suffered by them in consequence of this neglect of duty.

The argument is that § 87 of the Act of 1899, making any instrument

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payable at a bank, the equivalent of an order on the bank, puts upon the holder of a note payable at a bank the same duties as rest upon the holder of an ordinary check. Quite a plausible brief is offered in support of this contention, to which we might assent, were it not for § 70 of the Act of 1899, which contains this language: "Presentment for payment is not necessary in order to charge the person primarily liable on the instrument; but if the instrument is, by its terms, payable at a special place and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part.

Bills and notes—distinction between drawer of check and maker of note.

The difference between the drawer of a check and the maker of a note is that the latter is primarily liable on the instrument, while the former is not. The maker of a note, "by the terms of the instrument, is absolutely required to pay the same." That is to say, he is primarily liable on the instrument. § 192. The drawer of a check or bill of exchange is not primarily liable, but he engages that if the instrument be dishonored he will pay the amount thereof to the holder or subsequent indorser, who may be compelled to pay it. § 61.

The provisions of § 70 therefore, which we have quoted above, do not apply to the drawer of a check or bill of exchange, while they do apply to the maker of a note.

By § 186 of the Acts of 1899, it is made the duty of the holder of a check to present the same for payment "within a reasonable time after its issue, or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay."

There is, therefore, an absolute duty resting upon the holder of a check to present the instrument for payment at the place where it is payable, within a reasonable time. If he breaches this duty, the drawer is discharged from liability to the extent he is damaged by the breach.

—note payable at bank—failure to present—effect as release.

As between him and the maker of a note, no such duty rests upon the holder of a note with respect to presentment. By the terms of the act (§ 70), presentment is not necessary to charge the person primarily liable on the instrument.

The obligation of the maker of a note is not a conditional promise to pay only at a specified place, but is a promise to pay generally, even though a place of payment is named.

It was held formerly by the court of King's bench in England, that an acceptance payable at a particular place was not a conditional contract, and the question twice arose in that court as to whether the acceptor of a bill, payable at a banker's, was released by the neglect of the holder to present the bill at the banker's, where the acceptor had funds at the maturity of the bill, the banker afterwards having failed. Speaking on this subject, Lord Ellenborough said: "Whether my neglect to call at a house where a man informs me that I may get money amounts to laches depends upon whether I am obliged to call there. This acceptance, though it might be an authority to the bankers to pay the bill, being payable at their house, is not in express terms an order upon them to pay, as was the case of Bishop v. Chitty, 2 Strange, 1195, 93 Eng. Reprint, 1123, where the language of the acceptance was immediately that of a check upon the bankers. I confess I am unable to see any laches in the defendant upon either ground." Sebag v. Abitbol, 4 Maule & S. 462, 105 Eng. Reprint, 905.

The same question came up in the later case in the court of King's bench, and the court there said: "The law did not oblige this plaintiff to present the bills at Marsh & Co's. We cannot therefore say that he has been guilty of laches because he omitted to do so." Turner v. Hayden, 4 Barn. & C. 1, 107 Eng. Reprint, 959.

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The holding of the court of King's bench in the two cases above referred to has been followed in a number of American cases. Adams v. Hackensack Improv. Commission, 44 N. J. L. 638, 43 Am. Rep. 406; Wood v. Merchants' Sav. Loan & T. Co. 41 Ill. 267, 567; Ward v. Smith, 7 Wall. 447, 19 L. ed. 207; Williamsport Gas Co. v. Pinkerton, 95 Pa. 62.

There was some confusion in the English cases by reason of the fact that the court of common pleas, and finally the House of Lords, in Rowe v. Young, 2 Brod. & B. 165, 129 Eng. Reprint, 921, held that an acceptance payable at a particular place was a conditional contract. Under such a holding, presentment at the appointed place was necessary to charge the maker. Afterwards, however, by chapter 78 of 1 and 2 Geo. IV., Parliament enacted that an acceptance payable at the house of a banker or other place should be deemed a general acceptance, unless the words, "and not otherwise or elsewhere," were added. See Grissom v. Commercial Nat. Bank, 87 Tenn. 350, 3 L.R.A. 273, 10 Am. St. Rep. 669, 10 S. W. 774.

We think the reasoning of Lord Ellenborough in Sebag v. Abitbol, supra, is conclusive of the rights of the parties hereto, in view of the status of these parties, as fixed by the Negotiable Instruments Law.

Presentment for payment is not necessary to charge the maker of a note. No duty to one primarily liable on a note is breached by a failure to present the instrument for payment. Such an omission is not laches, and affords the maker no ground for complaint. By the very terms of the statute, the holder of a note is relieved of any such obligation, in so far as the maker is concerned.

The duty of the holder of a note toward the maker cannot be assimilated to the duty of the holder of a check toward the drawer. In the first instance, the maker is primarily liable; in the latter, the drawer is only liable after dishonor. And again, while the statute excuses presentment of the instrument as to the maker of a note, presentment is required within a reasonable time in the case of a check, at the peril of discharging the drawer.

We think that § 87, declaring an instrument payable at a bank the equivalent of an order on the bank, was only intended to settle the vexed question of the bank's right, without specific authority, to pay such an instrument and charge same to the account of the principal debtor. Prior to the Act of 1899, in Tennessee and elsewhere, the fact that a note was made payable at a bank did not, without more, confer authority upon the bank to pay the note, when presented there at maturity by the holder, out of funds standing on deposit to the credit of the maker. A contrary rule obtained in many states. See discussion of the cases in Grissom v. Commercial Nat. Bank, supra.

Section 87 authorizes a bank, at which an instrument is made payable, to pay same for the account of the principal debtor. To that extent, all instruments payable at a bank are orders on the bank designated. The language used in this section, however, must not be so expanded as to destroy other provisions of the act.

Our attention has not been called to any decision of the question here determined in a jurisdiction where the Negotiable Instruments Law has been enacted. Prior to the compilation of this law, there were authorities to the contrary. These, however, were considered and rejected by this court in Grissom v. Commercial Nat. Bank, supra, in which case the court disapproved Lazier v. Horan, 55 Iowa, 75, 39 Am. Rep. 167, 7 N. W. 457, founded on Story, Promissory Notes, §§ 227, 228, and some other decisions. The conclusion we have reached accords with our own previous holdings, and we believe is a correct interpretation of the Negotiable Instruments Law.

The petition for certiorari will be denied.

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ANNOTATION.

Who must bear loss of funds from failure of bank, at which bill or note is payable, during delay in presenting it.

I. Introduction, 1381.
II. Theory that loss falls upon maker, 1381.
III. Theory that loss falls upon holder, 1384.

I. Introduction.

With the exception of instruments payable on demand, it is a rule almost uniformly followed in the American courts that presentment of a bill or note for payment at the place specified therein is not a condition precedent to an action thereon against the maker or acceptor. The English courts are divided on the question. The cases are agreed, however, that if the maker of the note or acceptor of the bill has for the purpose of payment, at the specified place, funds sufficient to make the payment, the failure to present the instrument may be shown. It is sometimes stated that the readiness to make payment amounts to tender, and it is required that the tender be kept good in order to entitle the maker or acceptor to the defense. It seems to be held quite uniformly that the maker or acceptor, who has made such a tender and kept the same good, cannot be charged with interest on the money thereafter, nor with costs or penalties. Whether the rule goes farther, and subjects the holder of the instrument to damages suffered by the maker, is a question upon which there has been some dispute; at least, in textbook and obiter statements. Parsons on Notes & Bills, vol. 1, p. 309, states that such a defense goes "only in reduction of damages, and in prevention of costs;" while Story states that the maker or acceptor may recover of the holder damages suffered because of the holder's failure to present. See infra, III. for complete statement of Story. The present discussion, as indicated in the title, is confined to the cases which pass upon the liability for loss, resulting from the failure of a bank.

II. Theory that loss falls upon maker.

With the exception of two decisions, one of which has been overruled, the cases which have actually decided the question hold that a loss resulting from the failure of the bank at which the instrument is payable, and in which the maker or acceptor has deposited funds at its maturity to pay it, does not fall upon the holder who has failed to present the instrument for payment.

Arkansas. — State Nat. Bank v. Hyatt (1905) 75 Ark. 170, 112 Am. St. Rep. 50, 86 S. W. 1002, 5 Ann. Cas. 296, overruling obiter statement in Pryor v. Wright (1853) 14 Ark. 189.

Illinois.—Wood v. Merchants' Sav. Loan & T. Co. (1866) 41 Ill. 267.

Indiana.—Glatt v. Fortman (1889) 120 Ind. 384, 22 N. E. 300.

Iowa.—Bank of Montreal v. Ingerson (1898) 105 Iowa, 349, 75 N. W. 351, overruling Lazier v. Horan (1880) 55 Iowa, 75, 39 Am. Rep. 167, 7 N. W. 457.

Missouri. — Powers v. Woolfolk (1908) 132 Mo. App. 354, 111 S. W. 1187,

Nebraska.—First Nat. Bank v. Chilson (1895) 45 Neb. 257, 63 N. W. 362; Chapman v. Wagner (1901) 1 Neb. (Unof.) 492, 96 N. W. 412.

New Jersey.—Adams v. Hackensack Improv. Commission (1882) 44 N. J. L. 638, 43 Am. Rep. 406 (case involved corporate bonds).

Pennsylvania. — Williamsport Gas Co. v. Pinkerton (1880) 95 Pa. 62 (interest coupons on corporate bonds).

Tennessee. — BINGHAMTON PHARMACY v. FIRST NAT. BANK (reported herewith) ante, 1377.

Wisconsin.—Bartel v. Brown (1899) 104 Wis. 493, 80 N. W. 801.

England.—Turner v. Hayden (1825) 4 Barn. & C. 1, 107 Eng. Reprint, 959, 6 Dowl. & R. 5, Ryan & M. 215.

The New Jersey court of errors and appeals, after extensively reviewing the authorities, concludes: "I think

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those cases which affirm the continuing liability of the maker, acceptor, or obligor on paper made payable at a banker's, where the debtor had provided funds for payment at maturity, which the holder might have received if he had demanded payment when due, and which were lost by the subsequent failure of the banker, were correctly decided." Adams v. Hackensack Improv. Commission (1882) 44 N. J. L. 638, 43 Am. Rep. 406.

At least, the holder of a draft cannot be charged with the loss from the failure of the bank in which the acceptor has funds sufficient to pay it, after the acceptor has been notified that the draft had been mislaid. Sebag v. Abitbol (1816) 4 Maule & S. 462, 105 Eng. Reprint, 905. Lord Ellenborough Ch. J., states, that after the acceptor was informed that the bill was not to be found, there was no occasion for him to keep a fund at the bank; that after such a notice he was at liberty to withdraw his fund; therefore, whatever loss happened to him by keeping it there must be his loss and not the loss of the holder. A similar opinion is expressed by Le Blanc, J., and Bagley, J. Lord Ellenborough further states that "laches is a neglect to do something which, by law, a man is obliged to do. Whether my neglect to call at a house where a man informs me that I may get the money amounts to laches depends upon whether I am obliged to call there." This language of Lord Ellenborough is cited with approval in the subsequent case of Turner v. Hayden (Eng.) supra, in which it was held that the holder of a bill of exchange was not liable for a loss resulting from the failure of a bank in which the acceptor had funds sufficient to meet it. The court states that the law "did not oblige this plaintiff to present the bills at Marsh & Company. We cannot, therefore, say that he has been guilty of laches because he omitted to do so." The court does not consider the fact that no notice that the bill had been mislaid or lost, or would not be presented for some other reason, appeared in the Turner Case.

That a loss resulting from a depreciation of notes deposited with a bank must fall on the maker, and not upon the holder, is stated in Ward v. Smith (1868) 7 Wall. (U. S.) 447, 19 L. ed. 207. The notes which were deposited with the bank as payment were, however, held not to be legal tender for the payment of the debt.

It is the theory of at least some of the foregoing cases that the holder of a bill or note, payable at a specified place, is under no duty to present the note for payment when payable, or within a reasonable time. Wood v. Merchants' Sav. Loan & T. Co. (1866) 41 Ill. 267; Williamsport Gas Co. v. Pinkerton (1880) 95 Pa. 62 (interest coupons of corporate bonds). Some cases refer to the general rule that presentment is not necessary to charge the maker or acceptor, and hold the maker or acceptor not released by failure to present at the specified place, under this general rule. Glatt v Fortman (1889) 120 Ind. 384, 22 N. E. 300 (statute prescribed this rule); Bank of Montreal v. Ingerson (1898) 105 Iowa, 349, 75 N. W. 351. See BINGHAMTON PHARMACY v. FIRST NAT. BANK (reported herewith) ante, 1377. The English Bills of Exchange Act of 1882 (§ 87) and the Canadian Bills of Exchange Act (Can. Rev. Stat. 1906 chap. 119, § 183), make presentation at the place specified in a note necessary. The Canadian act expressly provides that the failure to present it on the day it matures does not discharge the maker.

Only three of the above cases (Adams v. Hackensack Improv. Commission (N. J.) supra; Turner v. Hayden and Sebag v. Abitbol (Eng.) supra) approach the question from the viewpoint of the court in the reported case (BINGHAMTON PHARMACY v. FIRST NAT. BANK, ante, 1377), that is, whether, for the neglect of the alleged duty to present the instrument at the specified place, the holder must respond to the maker in damages suffered by him in consequence of this alleged neglect of duty. The other cases approach the question from the standpoint of whether or not there was a payment, and this in turn depends upon the question of agency. There being no

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duty on the part of the holder to present the instrument for payment, the question as to who must bear the loss depends upon whose agent the bank is.

The New Jersey court of errors and appeals, in Adams v. Hackensack Improv. Commission (N. J.) supra, after disapproving of the doctrine that there must be a presentment as a condition precedent to the maintenance of an action against the maker or acceptor, states that, this doctrine not governing, "the question becomes simply one of agency. As the custodian of the money wherewith to pay, whose agent is the banker?" The foregoing cases proceed uniformly upon the theory that the fact that the note was made payable at a particular bank does not, of itself, make the bank the agent of the payee or holder to receive payment; payment to the bank of the amount due on the note, when the bank does not have possession of the note or authority to collect it, does not discharge the maker. State Nat. Bank v. Hyatt (1905) 75 **Ark.** 170, 112 Am. St. Rep. 50, 86 S. W. 1002, 5 Ann. Cas. 296; Glatt v. Fortman (**Ind.**) supra; Bank of Montreal v. Ingerson (1898) 105 **Iowa**, 349, 75 N. W. 351; Bloomer v. Dau (1899) 122 **Mich.** 522, 81 N. W. 331; Powers v. Woolfolk (1908) 132 **Mo.** App. 354, 111 S. W. 1187; Adams v. Hackensack Improv. Commission (1882) 44 **N. J. L.** 638, 43 Am. Rep. 406; Bartel v. Brown (1899) 104 **Wis.** 493, 80 N. W. 801; Ward v. Smith (1868) 7 Wall. (U. S.) 447, 19 L. ed. 207 (loss due to depreciation of money deposited for payment). In First Nat. Bank v. Chilson (1895) 45 **Neb.** 257, 63 N. W. 362, the payment of money at a bank designated in a note for the payment thereof, where the note was not left at the bank for collection, or was not there produced, is held not to constitute payment, the court stating that the bank, under such circumstances, becomes the agent of the maker, and not of the holder. That the maker of a note, who has paid the same at a bank at which it is made payable, but which does not have possession of the note, cannot rely upon this as payment, where the bank is not the agent of the holder thereof, is held also in Bloomer v. Dau (1899) 122 **Mich.** 522, 81 N. W. 331. The fact that the note and mortgage were made payable at a bank does not establish the agency. That making a note payable at a certain bank does not constitute the bank the agent of the holder for the purpose of receiving payment has been held in other cases, in which, so far as appears, no loss occurred; at least, no question in regard thereto was involved in the case. Cheney v. Libby (1889) 134 **U. S.** 68, 33 L. ed. 818, 10 Sup. Ct. Rep. 498; St. Paul Nat. Bank v. Cannon (1891) 46 **Minn.** 95, 24 Am. St. Rep. 189, 48 N. W. 526; Hills v. Place (1872) 48 **N. Y.** 520, 8 Am. Rep. 568; Kelsay v. Taylor (1910) 56 **Or.** 13, 107 Pac. 609.

As expressed in other cases, the fact that a note is made payable at a bank does not amount to an agreement that the maker may make a deposit at the bank of the amount of the note, and thus discharge his obligation, so that the money is thereafter at the risk of the holder of the note. Wood v. Merchants' Sav. Loan & T. Co. (1866) 41 **Ill.** 267; Glatt v. Fortman (1889) 120 **Ind.** 384, 22 N. E. 300.

Such a provision in a note is a mere designation of the place where the note is to be paid, not of a person other than the holder to whom the money is to be paid. Wood v. Merchants' Sav. Loan & T. Co. (**Ill.**) supra; Bank of Montreal v. Ingerson (1898) 105 **Iowa**, 349, 75 N. W. 351.

It seems clear that if the holder of the note does, in fact, make the bank his agent to collect the note or bill, payment to the bank is a discharge of the maker or acceptor. In D. M. Osborn & Co. v. Baird (1878) 45 **Wis.** 189, 30 Am. Rep. 710, payment was made to a bank at which the note was made payable, and before the bank received the note. Afterwards, and two days before its maturity, the payee sent the note to the bank, and notified the holder that it might be paid at the bank at or before maturity. On the day following the receipt of the note, the bank failed. In holding that the loss must fall upon the payee of the note, the court states that it may well be inferred from statements in the notice

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to receive payment in advance, and consequently it was a good payment when made. The decision is further based upon the theory of ratification. It is to be observed at this point that the note is not, in general, concerned with cases where the bank had possession of the paper.

The question of agency arising in this connection is a much broader one than the question considered herein. The question whether payment to a bank at which a bill or note is made payable amounts to a discharge of the acceptor or maker arises in many cases, in which the question was one other than liability for a loss resulting from a failure of the bank. This note has been confined to the question of liability for loss upon failure of the bank, and does not consider the general one of payment.

It is the theory of at least one case that adheres to the rule which throws the loss on the maker, that merely making a bill or note payable at a bank does not authorize the bank to pay it out of funds the maker may have on deposit. Wood v. Merchants' Sav. Loan & T. Co. (Ill.) supra. But the rule is adhered to, even on the assumption that making a bill or note payable at a banker's is authority to the banker to apply the funds of the acceptor or maker on deposit, to the payment of the paper. Adams v. Hackensack Improv. Commission (1882) 44 N. J. L. 638, 43 Am. Rep. 406. And see the reported case (BINGHAMTON PHARMACY v. FIRST NAT. BANK, ante, 1377), decided under the provisions of the Negotiable Instruments Law, which makes such a provision in a note equivalent to an order to the bank to pay it.

It has even been held that the loss, through the failure of the bank, does not fall on the holder, even though he actually presented the note to the bank, had it certified "Good," and took it away without receiving payment. Wood v. Merchants' Sav. Loan & T. Co. (Ill.) supra.

III. Theory that loss falls upon holder.

As stated supra, all but two decisions hold that a loss from the failure of a bank at which a note or bill is made payable, and in which the maker or acceptor has at maturity deposited funds for its payment, falls upon the maker or acceptor. There is, however, a very considerable body of obiter to the effect that such a loss falls upon the holder who fails to present the instrument. The rule is stated by Story in his treatise on Promissory Notes, 7th ed. §§ 227, 228, that if the maker of a promissory note or the acceptor of a bill suffers any loss or injury by the want of a due presentment at the specified place, to the extent of that loss or injury he will be discharged as against the holder; and Story specifically states that if the bill or note is payable at a bank, "and the acceptor or maker had funds there at the time, which have been lost by the failure of the bank, then and in such case the acceptor or maker will be exonerated to the extent of the loss or injury so sustained."

While, as just stated, there are a considerable number of obiter statements in the cases, in accord with this doctrine as thus announced by Story, there is only one decision that has not been overruled that is in accord therewith, and that involved a note payable to commission merchants at their office, and by them assigned as collateral security to one who failed to present it when due, and thereafter, until the failure of the commission merchants. The court states the rule that the maker of the note has a right to prove, by way of defense, that on the day and at the place specified in the note, he had the necessary funds to make payment, and that if any loss occurred it should be the loss of the holder of the note, and not his; in other words, instead of requiring the plaintiff to prove that he made demand at the place specified, the maker is required to prove that he deposited the money according to the terms of the note, and that it was lost to the plaintiff on account of his failure to demand it at the proper place; and, in this case, the court instructed the jury to the effect that if the jury believed

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"the plaintiff did not demand payment of the note at the office of Wroton & Dowling [the place of payment] before their failure, and that plaintiff would have received the money if the note had been presented, and by their failure to do so the defendant lost his money, they should find for defendant, on account of laches." Under this instruction, the jury found in favor of the maker of the note, who was the defendant in the action, and a judgment rendered on the verdict was affirmed. Bank of Charleston Nat. Bkg. Asso. v. Zorn (1880) 14 S. C. 444, 37 Am. Rep. 733. The facts in this case detract somewhat from its force in support of the doctrine of Story, for there was a custom that such notes should be paid to the commission merchants by shipments of cotton, a custom which, it seems, was known to the holder of the note.

In accord with the rule as stated by Story, it is stated in some cases, dealing with the necessity of presentment as a condition precedent to the maintenance of an action on the note, that if it is shown that the maker or acceptor was ready with funds at the time and place fixed for payment, the omission or neglect of the payee or holder to present the paper for payment will entitle the maker to plead in defense of a subsequent action on the note any future damages and costs he may have suffered, without specifying what are proper elements of damages. Wild v. Van Valkenburgh (1857) 7 Cal. 166; Montgomery v. Tutt (1858) 11 Cal. 307, overruling Wild v. Van Valkenburgh on the necessity of presentment as a condition precedent to the maintenance of an action, but not upon the statement as to the point herein discussed. Eldred v. Hawes (1823) 4 Conn. 465; Greeley v. Whitehead (1895) 35 Fla. 523, 28 L.R.A. 286, 48 Am. St. Rep. 258, 17 So. 643; Reeve v. Pack (1859) 6 Mich. 240; Wolcott v. Van Santvoord (1819) 17 Johns. (N. Y.) 248, 8 Am. Dec. 396; see Armistead v. Armistead (1839) 10 Leigh (Va.) 512, infra. In Reeve v. Pack (1859) 6 Mich. 240, it is stated that, if any special loss has occurred to the maker of the note by the neglect of presentment and demand, his rights will be fully protected. Spencer, Chief Justice, in Wolcott v. Van Santvoord (1819) 17 Johns. (N. Y.) 248, states that if the maker can show that he was at the specified place, ready and willing to pay, the holder loses all claim to damages and costs, "and will, himself, be subject to them." Tucker, President, in Armistead v. Armistead (Va.) supra, after stating that the only consequence of the holder's neglect to present a note at the place therein specified for its payment is that, if the maker was ready at the time and place to make the payment, he may plead that matter in bar of damages in tort, continues: "A further consequence, indeed, might follow, if any loss had been sustained by occasion of his failure to present; but this must be set up as a matter of defense."

In some decisions the whole doctrine, as thus announced by Story, is approved, including that that the maker is relieved from loss suffered through the failure of a bank, in which he has, at the maturity of the instrument, deposited funds to meet it. Dougherty v. Western Bank (1813) 13 Ga. 287; McCalop v. Fluker (1857) 12 La. Ann. 551; Catalogne v. Alva (1858) 13 La. Ann. 98; Thiel v. Conrad (1869) 21 La. Ann. 214; Fitler v. Beckley (1841) 2 Watts & S. (Pa.) 458 (but see Williamsport Gas Co. v. Pinkerton (1880) 95 Pa. 62, supra). See Rowe v. Young (1820) 2 Brod. & B. 165, 129 Eng. Reprint, 921; Rhodes v. Gent (1821) 5 Barn. & Ald. 244, 106 Eng. Reprint, 1182, and Merchants' Bank v. Henderson (1895) 28 Ont. Rep. 360, infra. At least, this seems to have been the opinion in McCalop v. Fluker (1857) 12 La. Ann. 551, where, in answer to the objection that no notice of protest was served on anyone, the court states that no protest was necessary as regards the maker, "unless he could establish that the note would have been paid, if demand had been made at the place of payment, and by the neglect of plaintiff so to do, that his funds there deposited to meet the obligation had been lost." The court in Catalogne v. Alva (1858) 13 La. Ann. 98, states rather indefi-

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nitely that, although demand of payment at the place specified in the note is not necessary "the debtor has the right to show he had funds at the place of payment, and was injured by the neglect of the holder of the note to demand its payment at the place specified therein for payment." In Thiel v. Conrad (1869) 21 La. Ann. 214, it is stated that if the maker show "that he has sustained actual loss in consequence of nonpresentment, as, if the note be payable at a bank, and he deposit funds there to meet it, and they are lost by the failure of the bank, such loss might be pleaded in defense." In Fitler v. Beckley (1841) 2 Watts & S. (Pa.) 458, the judge rendering the opinion states: "I incline to the opinion . . . that if the maker or acceptor, where the money is payable at a bank, pays the money into the bank to the credit of the payee on such note or bill, and leaves it there, it will be a complete discharge, though the money should be lost by robbery of the bank, or otherwise; but this case does not call for an opinion of the court on this point." But see Williamsport Gas Co. v. Pinkerton (1880) 95 Pa. 62, supra.

In the leading case of Rowe v. Young (1820) 2 Brod. & B. 165, 129 Eng. Reprint, 921, the English House of Lords, in an action against the acceptor of a bill of exchange accepted payable at a particular place, decided that it must be alleged that the bill was presented at the specified place, and that averment proved. No question of loss was presented in the case. The House of Lords called upon the judges of the lower court to express their opinion, and Best, Judge, in expressing his opinion, says that the acceptor of a bill of exchange, payable at a specified place, must leave the amount of the bill at that place at maturity, and, continuing, states: "It has been asked at the bar, How long the acceptor is to leave the amount of the bill in the hands of his banker? I answer, that he is never to remove it. By his special acceptance, he has charged that money with the payment of the bill at his banker's; he has, therefore, no power over the amount left at his banker's to pay it; it belongs to the holder of the bill, who may take it when he pleases. Should he not call for it within the time allowed to the holder of a banker's check to present the check at the banker's, and should the banker fail, the holder of the bill must lose the money; he would lose his money, if he took a check for his bill, and did not present such check in due time." The court further states that an acceptance payable at the specified bank "is treated by all bankers as a draft on them, or order to pay the bill so accepted. A person who neglects to present such an acceptance on the day when it is due must, therefore, subject himself to the same consequences as one who keeps any other draft, or a banker's check, beyond the day after that on which it was delivered to him, when the banker fails." In the subsequent case of Rhodes v. Gent (1821) 5 Barn. & Ald. 244, 106 Eng. Reprint, 1182, Best, J., again states that, "if a bill be accepted, payable at a particular place, the acceptor undertakes to have the money there, and to leave it there till the bill is presented; and if he does so, and in consequence of that, by the failure of the banker, he receives an injury, I think he will be exonerated if the bill has not been presented in due time." And the comparison with a check is again made.

Armour, Ch. J., in Merchants' Bank v. Henderson (1895) 28 Ont. Rep. 360, was of the opinion that if the maker of a promissory note deposits the amount thereof, at maturity, in the bank at which the note is made payable, and a loss results from the subsequent failure of the bank before the note is presented for payment, the loss falls on the holder of the note, providing the amount has been kept in the bank. It is stated that, where a promissory note is made payable at a particular place, "it is the duty of the maker to have the funds necessary to answer the note at such particular place, and to keep them there until they are called for by the holder of the note." It was actually held in this case, however, that the loss fell upon the maker of the note, because he did not keep the

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amount of the note in the bank, and Street, Judge, states that the omission to present the note at its maturity raises only a question of costs, and not a defense to the action.

Some cases, in a more general way, state that if loss results from the failure of the holder of a note to make presentment for payment at the place where it is made payable, this is a matter of defense. Connerly v. Planters' & M. Ins. Co. (1880) 66 Ala. 432; Sims v. National Commercial Bank (1882) 73 Ala. 248; Sumner v. Ford (1840) 3 Ark. 389.

Under an acceptance which amounted practically to an order on the bankers to pay, it has been held that the loss must fall on the holder who fails to present the draft within a reasonable time after maturity. Bishop v. Chitty (1743) 2 Strange, 1195, 93 Eng. Reprint, 1123. This was an action in case by the indorsee of a bill of exchange, against the defendant as acceptor, who, on tender of the bill, wrote: "Messieurs Caswall & Mount, pay this bill when due for Thomas Chitty." The bill fell due January 2, and the bankers failed on the 19th of January. The 21st of January, the money was demanded of the acceptor. It was held in the case that the holder of the bill must stand the loss, for, as the Chief Justice states: "He might have refused to take such an acceptance, yet had now agreed to it; and it was, to all purposes, in the nature of a draft, which is always considered as actual payment, when a reasonable time to receive it in is elapsed."

W. A. E.

EDWIN M. BRADLEY, Appt.,
v.
VINCENT SOBOLEWSKY.

Connecticut Supreme Court of Errors — February 21, 1917.

(91 Conn. 492, 99 Atl. 1067.)

Gas — entry to examine apparatus — trespass — liability of patron.

1. An employee of a gas company whose contract with a consumer gives its agent the right of access at all reasonable times onto premises to which gas is supplied, to examine piping and apparatus, is a licensee, and not a trespasser, in entering the premises of a consumer to examine a gas range said to be out of repair, within a statute making the owner of a dog liable for injury done by it, except where the person injured was committing a trespass, although the corporation was mistaken as to the origin of the complaint and sent him to the wrong place.

[*See note on this question beginning on page* 1389.]

Evidence — ratification of signature — assumption.

2. Authorization or ratification by a property owner of the signature of his name, more than a year prior to the time in controversy, to an application for gas, which is required by the rules of the company in order to secure service, and which, under the rules, binds the owner to comply with the rules and regulations of the company, will be assumed.

Pleading — failure to raise question — waiver.

3. Failure to insist that denial of a defense of trespass in an action to recover damages for injuries by a dog bite did not lay a foundation for proof of license to enter the premises waives the right to make such claim.

APPEAL by plaintiff from a judgment of the City Court of New Haven in favor of defendant in an action brought to recover damages for injuries sustained by being bitten by a dog belonging to defendant. *Reversed.*

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Statement by **Beach, J.**:

The plaintiff, who was in the employ of the New Haven Gas Light Company, was instructed by it to call at the defendant's house to examine a gas range, concerning which it was supposed that a complaint had been made. He opened the front gate and entered the premises, following a path which led to the rear door. While on the path, he was attacked and bitten by the defendant's dog, without provocation on the plaintiff's part. It afterward appeared that the gas company had made a mistake in sending the plaintiff to the defendant's house, and that the complaint, in response to which he was sent there, came from another customer. Section 5 of chapter 121 of the Public Acts of 1911 (p. 1379) provides, in substance, that the owner or keeper of a dog shall be liable for any injury done by it to person or property, except where the injured person is, at the time of the injury, committing a trespass or other tort; and the only question on this appeal is whether the plaintiff was committing a trespass when he was bitten by the defendant's dog.

Mr. Eliot Watrous, for appellant:

The plaintiff was lawfully on defendant's premises, by virtue of a license from the defendant.

Shepard v. Milwaukee Gaslight Co. 6 Wis. 539, 70 Am. Dec. 479; State ex rel. Weise v. Sedalia Gaslight Co. 34 Mo. App. 501; Hitchcock v. Essex & H Gas Co. 70 N. J. L. 492, 57 Atl. 135; affirmed in 71 N. J. L. 565, 61 Atl. 397; Kelley v. Killourey, 81 Conn. 320, 129 Am. St. Rep. 220, 70 Atl. 1031, 15 Ann. Cas. 163; Riley v. Harris, 177 Mass. 163, 58 N. E. 584, 9 Am. Neg. Rep. 47; Dillehay v. Hickey, 24 Ky. L. Rep. 1220, 71 S. W. 1; Shultz v. Griffith, 103 Iowa, 150, 40 L.R.A. 117, 72 N. W. 445; Sarch v. Blackburn, 4 Car. & P. 297, Moody & M. 505; Kelly v. Tilton, 2 Abb. App. Dec. 495, 1 Am. Neg. Cas. 198.

Messrs. **Fitzgerald & Walsh**, for appellee:

Plaintiff had no right or permission to enter upon the land of the defendant. An entry on another's land without leave is prima facie a trespass, and requires to be justified.

Champion v. Hartshorne, 9 Conn. 568; Munson v. Mallory, 36 Conn. 172, 4 Am. Rep. 52; Bateman v. Goodyear, 12 Conn. 580; Sutton v. Lockwood, 40 Conn. 318; Wilmot v. McPadden, 79 Conn. 375, 19 L.R.A.(N.S.) 1101, 65 Atl. 157; Hobart v. Hagget, 12 Me. 67, 28 Am. Dec. 159; Mishler Lumber Co. v. Craig, 112 Mo. App. 454, 87 S. W. 41; Quillen v. Betts, 1 Penn. (Del.) 53, 39 Atl. 595; Chase v. Clearfield Lumber Co. 209 Pa. 422, 58 Atl. 813; Puorto v. Chieppa, 78 Conn. 405, 62 Atl. 664.

Mr. **George W. R. Hughes** also for appellee.

Beach, J., delivered the opinion of the court:

The regulations of the New Haven Gas Light Company required that the defendant, as a condition precedent to obtaining a supply of gas, should sign a written application containing an agreement to be bound by the rules and regulations of the company. The defendant's name was signed by his daughter to such an application and agreement more than a year before the injury complained of, and, in the absence of any finding to the contrary, it must be assumed that the defendant either authorized or ratified the daughter's act, without which he could not have obtained a supply of gas.

Evidence—ratification of signature—assumption.

One of the gas company's rules provides that it shall, at all reasonable times, by its authorized agents, have the right of access into premises to which gas is supplied, for the purpose of examining its gas piping and apparatus, etc. We think it is clear that the plaintiff was, at the time of the injury, acting as the agent of the gas company, authorized to examine gas apparatus on the defendant's premises. It is true that the authority afterward appeared to have been given to him as the result of a mistake; but the mistake was made by the company in directing the plaintiff to the wrong place, and not by the plaintiff in going to a place to which he was not authorized to go. In going

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to the defendant's premises, he went precisely where the gas company told him to go, and for a purpose for which the defendant had agreed that the authorized agent of the company might come.

The defendant's application, under the rules of the gas company, gave the company's agent a right of access, not merely to answer complaints by the defendant, but at all reasonable times. In this case the occasion for sending the plaintiff to the defendant's premises was a reasonable one, and so was the hour at which he was sent. It must be assumed that the gas company's instructions to the plaintiff were given in good faith, and that its agent, who was charged with the business of acting on complaints of customers, believed that the defendant's gas range was out of order. Under these circumstances the gas company would have failed to perform its duty if it had not sent a man to the defendant's premises within a reasonable time. We conclude that the plaintiff was upon the defendant's premises by virtue of an express license.

Gas—entry to examine apparatus—trespass.

The defendant claims that plaintiff's denial of its defense of trespass did not lay any foundation for proof of license. On the other hand, the record does not show that the defendant objected to the proof of license; and if § 160 of the rules under the Practice Act (Practice Book 1908, p. 250) applies to this case, as to which we express no opinion, it is evidently a rule for the benefit of the party whose pleading is denied, for the purpose of protecting him against possible surprise at the trial. Whether actually surprised or not, he may insist on the rule at the trial, or waive it, and in this case it was not insisted on, so far as the record shows.

Pleading—failure to raise question—waiver.

There is error and a new trial is ordered.

In this opinion the other Judges concur.

ANNOTATION.

Duty and liability of patrons towards employees of public service corporations entering premises.

While there are few cases involving the duty of the owner of premises toward one who goes thereon in connection with his duties as an employee of a public service corporation which is engaged in some service upon the premises, they agree that such employee is neither a trespasser nor a bare licensee.

Thus, in Rink v. Lowry (1906) 38 Ind. App. 132, 77 N. E. 967, an action by an employee of a telephone company against the owner of a building for an injury received through the improper operation of an elevator while he was engaged in repairing a telephone battery in the well of the elevator, the court said that the telephone company owned the telephone and all the appurtenances thereof, and it was understood that the telephone company was to keep it in repair, and for that purpose and to that extent the owner gave it the privilege of entering its premises whenever any such repairs were needed, and, that, the telephone company having received a request from the owner of the building to repair a telephone, there was evidence that the telephone employee engaged in the work of repairing the battery upon its invitation, and that the work was being done for the mutual benefit of the owner of the building and the telephone company, and therefore the former owed the employee protection.

And in Anderson v. Northern P. R. Co. (1906) 34 Mont. 181, 85 Pac. 884, an action by a brakeman on a rail-

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road, who was injured by a low bridge, located upon the grounds of a smelting company, while engaged in taking cars from the company's concentrator, the court approved an instruction that if the employees of the railway company, including plaintiff, were taking out the cars from the concentrator at the invitation, express or implied, of the smelting company, then the smelting company did owe to such employees a duty, any violation of which would render that company liable, saying: "That this is a correct rule of law and applicable to the facts of this case can hardly be questioned."

In the reported case (BRADLEY v. SOBOLEWSKY, ante, 1387), although the employee went upon the wrong premises by mistake, he was held to be there by express license, by virtue of the contract between the owner and the public service corporation.

See also Arens v. Chicago Junction R. Co. (1911) 159 Ill. App. 427, where it was held that the car inspector for one railroad company, while inspecting cars in the yard of another company in the regular course of business, pursuant to an understanding between the two roads, was not a mere licensee, but was there by the invitation of the company owning the yards, and therefore such company owed him a duty to exercise ordinary care.

See also Finnegan v. Fall River Gas Works Co. (1893) 159 Mass. 311, 34 N. E. 523, in which a direction of a verdict for defendant was held erroneous in an action by the administrator of an employee of a municipal water board, who was overcome and killed by an accumulation of gas in the cellar of defendant's premises, where he went in the performance of his duty of reading the water meter, there being sufficient evidence to warrant the jury in finding that the injury might have been prevented by the exercise of proper care on the part of defendant. Also, see the similar case of Washington Gaslight Co. v. Eckloff (1894) 4 App. D. C. 174, where a water-meter reader employed by the municipality was injured by an explosion of gas on the premises of defendant, where he went in performance of his duties, and it was held that the court properly refused to direct a verdict for defendant.

R. L. S.

CHARLES A. PREST
v.
INHABITANTS OF THE TOWN OF FARMINGTON.

Maine Supreme Judicial Court — September 11, 1918.

(— Me. —, 104 Atl. 521.)

Fraud — remedy — indebitatus assumpsit.

1. One who agrees to do work for a specified sum under a fraudulent representation can recover in an action of indebitatus, only according to the terms of the contract, although, when he discovers the fraud, he may repudiate the contract and sue for deceit.

[*See note on this question beginning on page* 1396.]

— expressions of opinion.

2. Where the whole subject of the conditions to which a contract applies rests in the opinion of the parties, and cannot reasonably be understood otherwise, false expressions on either hand do not generally constitute fraud in law.

Contract — construction — extras.

3. One who contracts to lay a sewer, the character and location of which are known to him, for the amount of an appropriation which had been made for that purpose, cannot hold the municipality liable for extras which consist merely in performing the work undertaken.

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Fraud — assumpsit or trover.

4. One induced by fraud to extend credit for the purchase price of goods cannot, upon discovering the fraud, sue in assumpsit before the credit has expired, although he may treat the contract as void and sue in trover.

Contract — implied promise.

5. No promise is implied by law where parties have made a contract for themselves, covering the whole subject-matter.

— duty to pay damages for tort.

6. The duty to pay damages for a tort does not imply a promise to pay them, upon which assumpsit can be maintained.

Fraud — recovery for extra labor.

7. One induced by fraud to enter into a construction contract cannot, in a suit on the contract, recover extra compensation for labor required to complete the work, of which he was ignorant because of the fraud.

— repudiation of contract — recovery for work done.

8. One induced by fraud to enter into a construction contract with a municipal corporation may, upon discovering the fraud, repudiate the contract and recover the fair value of the work done and materials furnished.

Municipal corporation — liability for fraud of agent.

9. A municipal corporation may be charged with responsibility for misrepresentations which have been made by its agent, to induce a person to enter into a contract with it.

Action — assumpsit — when lies.

10. Assumpsit does not lie to recover damages for fraudulent representation, inducing one to enter upon a construction contract for an inadequate compensation.

Contract — promise to pay — directions to do work.

11. A promise by selectmen to pay for filling an old well, discovered on the line of a sewer which one had undertaken to construct, may be found from the fact that they directed him to do the work.

— construction — extra work.

12. One contracting with a municipal corporation for the construction of a sewer cannot recover extra compensation for digging the trench through a hole along the original course of the sewer, simply because he encounters materials which make the excavation more difficult than he anticipated.

— change of route.

13. One contracting to construct a sewer for a municipal corporation cannot recover extra compensation for change of course, made for his own convenience, to avoid difficult excavation along the original route, which he did not anticipate when he made the contract.

— construction — extra work.

14. One who contracts to lay a sewer to a certain street is entitled to extra compensation for laying it a certain distance into that street to connect with a sewer already there, although he had contracted to connect with existing sewers, if the exact location of the terminal in that street was not known.

Appeal — assumption as to finding of jury.

15. The appellate court may, in an action to recover compensation for extra work in a construction contract, assume that the jury allowed for an entire item which was reasonable.

Interest — extras in construction contract.

16. A claim for extras in a construction contract carries interest from the time of completion of the work.

MOTION by defendants to set aside a verdict in plaintiff's favor on a trial before the Supreme Judicial Court for Sagadahoc County of an action brought to recover a balance alleged to be due under certain contracts between plaintiff and defendants, and for extra labor and materials on each piece of work. *Motion sustained on condition.*

The facts are stated in the opinion of the court.

Messrs. **Frank W. Butler** and **Sumner P. Mills** for defendants.

Messrs. **McGillicuddy & Morey** for plaintiff.

Morrill, J., delivered the opinion of the court:

This action is brought to recover a balance of $2,241.61, alleged to be

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due the plaintiff under three independent contracts between plaintiff and defendants, and for extra labor and materials on each piece of work. The aggregate of the contract prices was $4,425; this is agreed to by both parties. The plaintiff gives credit for items aggregating $4,383.70; the defendants claim credit for items aggregating $4,457.20, and it is admitted that the latter amount is correct. In the account annexed to the writ the amounts claimed for extra work and materials on each job are stated in lump sums. It appears, however, from reading the record, that a bill of particulars was prepared and used at the trial before the jury; but it was not made part of the record, and no copy has come to the possession of the court. The jury found a general verdict for $1,347.88, which the defendants now move to set aside, insisting, as stated in their brief statement filed under the general issue, "that no further liability was incurred by them, in regard to either piece of work, than the contract price." The contracts were not reduced to writing. It is, therefore, necessary, in passing upon the contentions of the parties, to ascertain from the evidence what were the actual terms of the contracts for each piece of work.

1. The Sewer Contract.—At the annual town meeting in March, 1913, the inhabitants of the town of Farmington appropriated $3,500 for the construction of certain lines of sewers. In July of that year the plaintiff came to Farmington "to look up the job—to learn what they wanted done." At that interview the selectmen told him "something about what they had to do, just about the same knowledge that I had before I went there," as the plaintiff says in his testimony. At that time, the selectmen and the road commissioner showed him over the proposed line. At that visit of the plaintiff to Farmington, or a short time later (the exact date does not appear), the plaintiff made a contract with the defendants to construct an 8-inch, 10-inch, and 12-inch sewer in Front street and Broadway, and from a point at Main street and Broadway southerly to the Exchange Hotel; also to construct a 6-inch sewer from an existing 8-inch sewer in High street extension, along the north and west side of the Old Tannery brook to Perham street. The contract price was to be $3,500, the amount appropriated by the town for that work. Both parties agree that such a contract was made. The part relating to the extension southerly in Main street was modified by mutual agreement. No claim for extra work and materials is made on account thereof, and that charged does not enter into this case. When the first interview was had the lines of the sewers had not been surveyed, and Mr. Prest agreed to obtain an engineer and to throw in his time in assisting the engineer. He accordingly engaged Mr. Pierce, of the Sanders Engineering Company, to run out the lines. At some time a contract for the work was drafted, but never signed. In offering this paper in evidence plaintiff's counsel said: "This paper I offer, not for the purpose of a contract, because they never agreed. There are some things left out, but as far as establishing the course, it is in here, and there is an admission that the parties were together. That makes the courses admissible. Upon that point there is no disagreement. I offer it for that purpose and no other."

It is to be noticed that counsel said "they never agreed," yet he brings his action to recover an amount due upon a contract price of $3,500. What, then, were the terms of the contract upon which plaintiff now sues? What were the specifications of that contract, which determine the line between work under the contract and alleged extra work?

If the unsigned contract is evidence only of the courses of the proposed sewers, for which purpose only it was offered, there is no evidence whatever of any details or

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specifications of the contract as made, save only in the particular that the contractor was to connect up existing sewers with the new lines. It does not appear what agreement, if any, the parties arrived at as to the grades, depth, depth of covering, location of manholes, or exact location of intercepted sewers—no specification of location of the sewer as to the water pipes which were known to be in the ground. The conclusion is irresistible that after looking over the ground, with the knowledge which he had when he first came to Farmington, Mr. Prest agreed to construct the proposed sewers for the amount of the appropriation. In fact, he substantially says as much.

On page 55 of the record he testifies:

Q. When did you make your trade with them?

A. I don't remember the date.

Q. Now, what was your trade? What trade did you finally make with the selectmen?

A. Well, I agreed to lay those two sewer lines for $3,500.

This is likewise the version of the selectmen. Mr. Prest's actions are consistent therewith; he offered to procure for the town an engineer to run the lines, and to give his own time as an assistant; he thus had the opportunity to make all tests and to obtain all knowledge of the location, which would enable him to do the work properly and profitably to himself. He now brings suit to recover under the account annexed the contract price. In addition to the item for the contract price, he claims in the account annexed the following items:

To extra on 8-inch, 10-inch and 12-inch line, Front and Broadway street to High street	$336.95
Plus 15 per cent profit on $336.95	50.50

An examination of this claim, as tabulated in the brief of plaintiff's counsel, shows that it is all for labor of men and teams along and within the limits of lines of sewers covered by the special contract. Recovery is claimed upon the ground that certain representations as to the character of the excavation were made to him by the selectmen, that these representations were material and were false, and that in this form of action he is entitled to recover for the extra cost occasioned thereby. It may well be doubted whether the alleged misrepresentations, if made, were anything more than honest expressions of opinion, or honest statements of fact, not purporting to be of knowledge. Holbrook v. Connor, 60 Me. 578, 11 Am. Rep. 212; Gordon v. Parmelee, 2 Allen, 212. "Where the whole subject, in fact, rests in the opinion of the parties, and cannot reasonably be understood otherwise, false expressions on either hand do not generally constitute fraud in law." Thompson v. Phœnix Ins. Co. 75 Me. 55, 61, 46 Am. Rep. 357. It may well be claimed that the plaintiff did not rely, and had no right to rely, upon the alleged misrepresentations, because they related to facts of which he had equal or better means of knowledge than the selectmen had, under the circumstances of this case. Patten v. Field, 108 Me. 299, 81 Atl. 77; Savage v. Stevens, 126 Mass. 207. See cases cited in Long v. Athol, 196 Mass. 503, 504, 17 L.R.A.(N.S.) 96, 82 N. E. 665.

Fraud—expressions of opinion.

However that may be, and we express no opinion in relation thereto, upon the plaintiff's claim he cannot recover in this form of action.

Contract—construction—extras.

Where a party agrees to do work at a specified sum under a fraudulent representation, he can only recover in an action of indebitatus assumpsit according to the terms of the contract, although, when he discovered the fraud, he might have repudiated the contract and sued for deceit. Selway v. Fogg, 5 Mees. & W. 83, 151 Eng. Reprint, 36, 8 L. J. Exch. N. S. 199.

Fraud—remedy—indebitatus assumpsit.

So, when a party purchases goods on credit, fraudulently intending at

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the time of the contract not to pay for them, and the vendor brings assumpsit for the goods sold before the time of credit has expired, the action cannot be maintained, although the vendor might have treated the contract as void, and have sued the vendee immediately in trover to recover the value of the goods. By bringing the action in assumpsit, the plaintiff affirmed the contract. Ferguson v. Carrington, 9 Barn. & C. 59, 109 Eng. Reprint, 22, 3 Car. & P. 457, 7 L. J. K. B. 139.

—assumpsit or trover.

Where the parties have made a contract for themselves, covering the whole subject-matter, no promise is implied by law. Phelps v. Sheldon, 13 Pick. 52, 23 Am. Dec. 659; Whiting v. Sullivan, 7 Mass. 107; Holden Steam Mill Co. v. Westervelt, 67 Me. 446, 449.

Contract—implied promise.

The duty to pay damages for a tort does not imply a promise to pay them, upon which assumpsit can be maintained. Cooper v. Cooper, 147 Mass. 370, 9 Am. St. Rep. 721, 17 N. E. 892.

—duty to pay damages for tort.

The evidence fails to show any attitude or action on the part of the selectmen, recognizing, or undertaking to pay, the charges for so-called extra work on the sewers, except in relation to an old well and an extension in Perham street, of which we shall speak later. The items appear to have been kept by the plaintiff, as showing his loss on account of the alleged misrepresentation. The right of action arises not on a failure to keep and perform a promise, but upon a false representation. Why, then, should an action of assumpsit be brought? See Noyes v. Loring, 55 Me. 408, 411.

Fraud—recovery for extra labor.

Mr. Prest discovered the true character of the excavation at an early stage of the work, and, if his present contention is true, he might then have repudiated the contract and recovered the fair value of the work done and materials furnished. Selway v. Fogg, supra; Long v. Athol, 196 Mass. 497, 17 L.R.A. (N.S.) 96, 82 N. E. 665. And it has been held that a municipality may be charged with responsibility for misrepresentations which have been made by its agent, to induce a person to enter into a contract with it. Sharp v. New York, 40 Barb. 256.

—repudiation of contract—recovery for work done.

Municipal corporation—liability for fraud of agent.

But an action in indebitatus assumpsit upon an account annexed, to recover damages arising from false representations as to the subject-matter of a contract, which has not been repudiated, is beyond the "furthest venture" noted in Tukey v. Gerry, 63 Me. 151, 153. See Brown v. Starbird, 98 Me. 292, 56 Atl. 902; Gilmore v. Bradford, 82 Me. 547, 20 Atl. 92.

Action—assumpsit—when lies.

Included in this charge of $336.95 are certain items amounting to $28.59 for labor and materials in filling up an old well, or reservoir, which was found in the line of the sewer on Broadway. There is some evidence that the selectmen directed the plaintiff to fill this well, and, in the absence of any testimony on the point from the selectmen, we think that the jury would have been warranted in finding a promise to pay for that work.

Contract—promise to pay—directions to do work.

Also, in addition to the item for the contract price, the plaintiff claims in the account annexed, the following items:

To extra work on sewer through the hill from station 4 to station 9, B line, and extra around the hill, station 9, C line, to station 9, B line, and to Perham street, 200 feet of 6-inch pipe	$1,062.63
To 15 per cent profit on the $1,062.63	159.30

Reference to the tabulation in the brief of plaintiff's counsel shows

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that this item of $1,062.63 is made up of three parts:

(a) Charges for labor of men and for material on 6-inch sewer line through clay hill, August 5 to August 15, 1913, $568.75.

This work was unquestionably a part of the work which was to be done under the contract for $3,500. The line of sewer through the clay hill from station 4 to station 9, B line, was on the course first laid out by Mr. Pierce. The plaintiff bases his claim for this item upon the alleged misrepresentations before considered. It must be rejected.

—construction—extra work.

(b) Charges for labor of men and for material on 6-inch sewer line around the hill, station 9, C line, to station 9, B line, August 18 to August 26, 1913, $272.80.

The plaintiff claims that the original line through the hill, called line B, was changed by order of the selectmen to the line around the hill, called line C, and he gives this item of $272.80 as the cost of laying the sewer for the additional distance. Mr. Prest says that the course of the sewer was changed by the selectmen, on account of the depth, and the consequent difficulty and expense of repair if the sewer should become obstructed. This contention rests on his testimony alone; it is contradicted by three selectmen, and is not supported by the foreman, Mr. Lowery, or the engineer on the work, Mr. Fish. The claim is highly improbable, in that the depth of the sewer on the original B line was known to the selectmen when the work was first laid out. Without discussing it in detail, we may say that the evidence falls far short of sustaining the reason given by plaintiff for the change, and overwhelmingly preponderates against any liability on the part of the town for the additional expense. The difficulty of the digging furnishes the far more probable reason for the change of course. We think that the jury were not justified in including this amount of $272.80 in their verdict, if they did include it.

—change of route.

(c) Charges for constructing the 6-inch sewer within and along Perham street, a distance of 200 feet, $221.08.

The jury was warranted in allowing this item. The northerly end of the 6-inch sewer was given to Mr. Prest as at Perham street. It is true that he was to connect up all the sewers in the Tannery brook section; but it appears, by the testimony of Mr. Titcomb, that none of the selectmen knew the exact location of the sewers. To connect with the sewer on Perham street, it was necessary to lay the 6-inch pipe for a distance of 200 feet on the street. We think that Mr. Prest should have compensation for that work; the witnesses agree that $1 per lineal foot was a fair price, and the charge does not greatly exceed that estimate.

—construction—extra work.

2. The Pier Point on Center Bridge.—There was a sharp conflict of testimony as to this piece of work. Mr. Prest claims that the selectmen agreed to pay him $500 to put in a concrete pier point after his own design, and that later Mr. Marble, the selectman who had the oversight of this particular piece of work, directed him to enlarge the structure, substantially increasing the amount of labor and material. Mr. Marble claims that the pier point was to be constructed of specified dimensions; that Mr. Prest began to build a smaller pier than he had agreed to build, and, upon complaint being made, voluntarily extended the point upstream. Upon this controverted issue the jury would have been warranted in finding for Mr. Prest; but, while they might so find, there seems to be no reliable basis for estimating the amount of extra work and material, because neither the jury nor the court had any definite knowledge of the size of the pier point which Mr.

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v. FARMINGTON (reported herewith) ante, 1390) (misrepresentation as to character of excavation); Long v. Athol (1907) 196 Mass. 503, 17 L.R.A. (N.S.) 96, 82 N. E. 665 (mistake as to amount of excavation necessary in construction of a sewer).

And, in securing rescission, as a part of the relief granted, if the contractor or employee has partly performed the contract, he will be allowed to recover reasonable compensation to the extent of such performance. PREST v. FARMINGTON (reported herewith); Long v. Athol (Mass.) supra.

The general rule of law, which excuses the party defrauded in a contract from the necessity of rescinding the same, where he has so far performed it before ascertaining the facts that it is not practical to cease performance, applies to cases of the character under consideration. Thus, it has been held that an action may be maintained for damages, for fraud and deceit in misrepresenting the number of logs to be driven to a certain point, under a contract to drive the same for a lump sum, although the contractor continued performance after ascertaining the fraud; it not then being practical to abandon the logs. Sell v. Mississippi River Logging Co. (1894) 88 Wis. 581, 60 N. W. 1065.

In Busch v. Wilcox (1890) 82 Mich. 315, 46 N. W. 940, a logging contract was entered into, based upon an estimate of the employees of defendant as to the quantity of material to be logged, and the character of the land where the work was to be done, and the length of the haul to water, condition of the roads, etc. It was held that where this estimate was erroneous in substantial respects, to the knowledge of the defendant, the contractor was entitled to recover damages therefor, in an action for deceit, notwithstanding he had partially performed the contract with knowledge of the fraud.

A case on this point hard to reconcile with the foregoing rules is Baltimore & O. R. Co. v. Jolly Bros. (1904) 71 Ohio St. 92, 72 N. E. 888. In that case, a contract to excavate on a large scale was secured through misrepresentations as to the character of the soil; the facts were ascertained by the contractor after having performed a substantial portion of the work; he then gave notice to the engineer of the employer that he would not complete performance under the contract. Upon the promise of this representative of the company that, if he would continue performance, an additional amount would be allowed him so as to save him harmless from the false representations, he continued performance, and only abandoned the contract after the employer repeatedly failed to pay such additional amount. It was held that the engineer of the employer was without authority to make the promise to pay an additional sum, and that hence the continued performance by the employee or contractor constituted a waiver of the right to rescind, or to recover more than the contract price. It may be questioned, perhaps, whether there was not a fallacy in holding that continued performance, under the circumstances, constituted a waiver. In the first place, the contract was no longer executory; it was, in part, executed. Then, again, continued performance was secured through the assumed authority of the employer's representative. Conceding that, in agreeing to make additional compensation, the employer's representative was acting beyond the scope of his authority, and this was known to the employee, nevertheless it does not follow that, where continued performance was secured by reason of this agreement, it was open to the employer to take advantage of such performance, by asserting that it amounted to a waiver of the fraud. The conduct of the parties in this regard clearly negatived any intention of waiving the fraud, or of continuing performance according to the terms of the original contract.

It has been held that where misrepresentations as to the nature of strata through which a railway was to be constructed are not shown to have been fraudulently made, the contractors are not entitled to a rescission of the contract on the ground of mistake, where, by completing the contract

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with full knowledge of the facts, they had rendered impossible restitutio in integra. Glasgow & S. W. R. Co. v. Boyd [1915] A. C. (**Eng.**) 526, 84 L. J. P. C. N. S. 157, [1915] S. C. 20, 52 Scot. L. R. 205.

In Saratoga & S. R. Co. v. Row (1840) 24 Wend. (**N. Y.**) 74, 35 Am. Dec. 598, it was assumed that a contract to transport coke was procured by misrepresentation as to its distance from the water, and it was held that, where the carrier knew of the misrepresentations before he entered into the contract, he was not entitled to perform it and then hold the consignee for more than the contract price; and the latter, upon tendering the amount due under the contract for transportation, was entitled to maintain replevin to recover the coke.

In Nounnan v. Sutter County Land Co. (1889) 81 **Cal.** 1, 6 L.R.A. 219, 22 Pac. 515, complaint was made of misrepresentations as to the quantity and character of material to be moved in constructing a levee, and it was held that, conceding the fraud, recovery could not be had, on the ground that the contractor had not protected himself by inserting in the contract provisions extending the time for the performance of the contract, if it turned out that there was more material to be moved than estimated, and also for additional pay, if the material was found to be of a character harder to move than represented by the owner. It was also held that, by continuing to perform the contract with knowledge of the character of the material, the contractor waived his right to complain of the fraudulent representations with reference thereto.

A case frequently misinterpreted on this point is Selway v. Fogg (1839) 5 Mees. & W. 83, 151 **Eng.** Reprint, 36, 8 L. J. Exch. N. S. 199. This case involved a contract to carry away rubbish, which was secured through misrepresentation as to the quantity; the contractor learned of the fraud before he had performed any part of the contract; instead of then repudiating the contract, and bringing an action for damages for deceit, he elected to perform it, and then brought an action, based on the contract, in indebitatus assumpsit for work and labor performed. It was held that in an action based on the contract the measure of recovery was the amount fixed by the contract. In so holding, it was also remarked that upon discovering the fraud, unless the defrauded party meant to proceed according to the terms of the contract, he should immediately repudiate it, and seek compensation for his loss in an action for deceit; and, "not doing this, but continuing the work, he is bound by the express terms of the contract. If he fails to recover on that, he cannot recover at all." It is to be observed with reference to this case, as well as the reported case (PREST v. FARMINGTON, ante, 1390), that the action was upon the contract, and not, as in Sell v. Mississippi River Logging Co. (**Wis.**) supra, an action ex delicto for damages for the fraud. A. G. S.

FANNIE L. TURNER
v.
NORTH CAROLINA PUBLIC SERVICE COMPANY et al., Appts.

North Carolina Supreme Court — November 7, 1917.

(174 N. C. 522, 93 S. E. 998.)

Highway — freight railway — additional burden.

1. An electric railway does not become an additional burden on a city street so as to entitle the abutting owners to compensation, by the fact

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that it is given authority to distribute cars of freight between factories and the railway station.

[*See note on this question beginning on page* 1404.]

— purpose of street.

2. The streets of a city are laid out for the accommodation of passengers and traffic between any two points in said city.

— additional servitude — street car line.

3. The laying out of a street car line is not an additional servitude on a public street.

— steam railway.

4. A steam railway passing through a city is an additional burden on the city streets, because it carries through passengers and freight.

Eminent domain — compensation for laying out highway.

5. An abutting owner is not entitled to compensation for laying out a street which is an absolute necessity for his use of his own property.

APPEAL by defendants from a judgment of the Superior Court for Guilford County in favor of plaintiff in an action brought to recover damages for improper use by defendants of certain streets, for the purpose of maintaining and operating a railway in alleged violation of plaintiff's property rights. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. **Roberson, Barnhardt, & Smith, Peacock & Dalton,** and **Brooks, Sapp, & Kelly,** for appellants:

The building of the tracks along Russell street was not an additional servitude, for which plaintiff, as an abutting property owner, is entitled to additional compensation.

Taylor v. Portsmouth, K. & Y. Street R. Co. 91 Me. 193, 64 Am. St. Rep. 216, 39 Atl. 560; Percy v. Lewiston, A. & W. Street R. Co. 113 Me. 106, 93 Atl. 43; White v. Blanchard Bros. Granite Co. 178 Mass. 363, 59 N. E. 1025; Montgomery v. Santa Ana Westminster R. Co. 104 Cal. 186, 25 L.R.A. 655, 43 Am. St. Rep. 89, 37 Pac. 786; Lewis, Em. Dom. 3d ed. § 166; Kipp v. Davis-Daly Copper Co. 41 Mont. 509, 36 L.R.A. (N.S.) 666, 110 Pac. 237, 21 Ann. Cas. 1372; Mordhurst v. Ft. Wayne & S. W. Traction Co. 163 Ind. 268, 66 L.R.A. 105, 106 Am. St. Rep. 222, 71 N. E. 642, 2 Ann. Cas. 967; State v. Rice, 158 N. C. 639, 39 L.R.A.(N.S.) 266, 74 S. E. 582; Detroit City R. Co. v. Mills, 85 Mich. 634, 48 N. W. 1007; Morris & E. R. Co. v. Newark, 10 N. J. Eq. 352; Hester v. Durham Traction Co. 138 N. C. 291, 1 L.R.A.(N.S.) 981, 50 S. E. 711; La Crosse City R. Co. v. Higbee, 107 Wis. 389, 51 L.R.A. 929, 83 N. W. 701; Griffin v. Southern R. Co. 150 N. C. 312, 64 S. E. 16; Rosenthal v. Goldsboro, 149 N. C. 131, 20 L.R.A.(N.S.) 809, 62 S. E. 905, 16 Ann. Cas. 639; Tate v. Greensboro, 114 N. C. 392, 24 L.R.A. 671, 19 S. E. 767.

Messrs. **W. P. Ragan, W. P. Bynum,** and **King & Kimball,** for appellee:

Defendants are without power to lay, operate, and maintain a commercial railway along West Russell and Main streets, as against plaintiff, abutting owner, without first making compensation or otherwise acquiring, as against her, the right to do so.

Kirkpatrick v. Piedmont Traction Co. 170 N. C. 477, 87 S. E. 232; 1 Lewis, Em. Dom. p. 287, § 115; Shields v. Norfolk & C. R. Co. 129 N. C. 1, 39 S. E. 582; Merrick v. Intramontaine R. Co. 118 N. C. 1081, 24 S. E. 667; Dill. Mun. Corp. 5th ed. § 1234; Athens Terminal Co. v. Athens Foundry & Mach. Works, 129 Ga. 393, 58 S. E. 891; Daly v. Georgia Southern R. Co. 80 Ga. 793, 12 Am. St. Rep. 286, 7 S. E. 146; Pennsylvania R. Co. v. Angel, 41 N. J. Eq. 316, 56 Am. Rep. 1, 7 Atl. 432; High, Inj. § 635; Theobald v. Louisville, N. O. & T. R. Co. 66 Miss. 279, 4 L.R.A. 735, 14 Am. St. Rep. 564, 6 So. 230; Elizabethtown, L. & B. R. Co. v. Combs, 10 Bush, 382, 19 Am. Rep. 67; White v. Northwestern North Carolina R. Co. 113 N. C. 610, 22 L.R.A. 627, 37 Am. St. Rep. 639, 18 S. E. 330; Wilder v. Aurora, D. & R. Electric Traction Co. 216 Ill. 493, 75 N. E. 194; Elliott, Roads & Streets, 3d ed. §§ 885, 1087; Brown v. Asheville Electric Co. 138 N. C. 533, 69 L.R.A. 631, 107 Am. St. Rep. 554, 51 S. E. 62; Minneapolis, St. P. R. & D. Electric Traction Co. v. Searle, 127 C. C. A. 89, 208 Fed. 122; Phillips v. Postal Teleg.

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Cable Co. 130 N. C. 514, 89 Am. St. Rep. 868, 41 S. E. 1022; Staton v. Atlantic Coast Line R. Co. 147 N. C. 428, 17 L.R.A.(N.S.) 949, 61 S. E. 455; 3 Abbott, Mun. Corp. § 843; Butler v. Penn Tobacco Co. 152 N. C. 416, 136 Am. St. Rep. 831, 68 S. E. 12; State ex rel. North Carolina Corp. Commission v. Southern R. Co. 153 N. C. 559, 69 S. E. 621; Beaufort County v. Bonner, 153 N. C. 66, 68 S. E. 970; Story v. New York Elev. R. Co. 90 N. Y. 122, 43 Am. Rep. 146; McCullock v. North Carolina R. Co. 146 N. C. 316, 59 S. E. 882.

Clark, Ch. J., delivered the opinion of the court:

This case was before the court. 170 N. C. 172, P.U.R.1916A, 798, 86 S. E. 1033. The plaintiff sought to enjoin the defendants from building a street railway; but, the restraining order having been dissolved and the work having been completed prior to the hearing of the appeal, the court declined to pass upon the questions involved, further than to hold that the city authorities were authorized to grant, upon reasonable terms, franchises for public utilities, and as to the contention that the "construction of this track, or the running of freight cars upon it, is additional servitude for which the plaintiff, the abutting owner, claims additional compensation," remitted the case to have that question and the damages, if any, determined at the final hearing.

Upon the undisputed evidence in the case, the station of the defendant Carolina & Yadkin Railroad Company and its freight yards were located within the city limits of High Point, and the lines of the North Carolina Public Service Company, including the one complained of, are situated exclusively within the city limits; and the freight cars hauled along the streets were never more than two at a time, and they were carried exclusively between said freight yard and various factories within the limits of the city; said freight exclusively originating in or consigned to these factories within the city of High Point. The plaintiff contends that this is an additional servitude, for which she, as an abutting owner, is entitled to compensation. If so, every other abutting owner along the lines of these tracks is entitled also to compensation.

The streets of a city are laid out for the accommodation of passengers and traffic between any two points in said city. It is well settled therefore that the laying out of a street car line is not an additional servitude, but comes within the very object for which the streets exist. Indeed, they very much lighten the servitude by carrying passengers and freight from point to point within the city by electric or horse power on their rails, which is much less an encumbrance and interference with the use of the streets by others than would be the former method of lines of busses for passengers and horses, wagons, and drays for freight. It has therefore always been held by us that a street car line is not an additional servitude, but a relief. This method of transportation of passengers and goods from point to point in the city is not only a lesser interference with the use of the streets than the former method, but it is more sanitary, and there is much less danger of those crossing the street being run down than by horses attached to drays and other vehicles, which otherwise would be required in great and increasing numbers.

Highway—purpose of street.

—additional servitude—street car line.

A steam railway passing through a city is an additional burden, not only by reason of the additional danger of fire set out from sparks from the engine, but because it carries through passengers and freight and is not limited, like this defendant, to moving, from a point in the city where the freight and passengers have already arrived, the passengers and freight to another point in the city.

—steam railway.

High Point is one of the most pro-

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gressive and rapidly growing towns in the state. It is said that it is the second city in the Union in the quantity of furniture manufactured. To require the defendant public service company to pay for additional servitude to every abutting owner on the streets along which its lines are operated would make the continued existence and operation of the company impossible. In this case alone the jury has allowed $2,500 damages. If the company was required, in the face of such burdens, to cease business, it would be a great detriment to all dwellers in the city, by increasing vastly the number of drays, wagons, and other vehicles drawn by horses and by the cost of breaking bulk, in unloading the cars at the railway station, and placing the contents in such drays and wagons. The cost of this alone would be a very heavy handicap against the manufacturers of the city and a heavy ban upon the progress and prosperity of the city.

Before the invention of the electric motor system, in many cities, to save the great expense of breaking bulk at the railway station, horses were attached and the freight cars were drawn over wooden, and later over iron, rails, to and from the factories where they were loaded or unloaded. The use of electric motors for that purpose is speedier and more sanitary, and tends far less to block the streets.

In Percy v. Lewiston, A. & W. Street R. Co. 113 Me. 106, 93 Atl. 43, the court said: "The doctrine that the grant of power to construct and operate a street railroad along a highway imposes no additional servitude for which the abutting owner is entitled to additional compensation is not denied by the plaintiff. . . . But it is suggested in argument that the rule is, or ought to be, different, when a street railroad company is authorized to transport freight in freight cars, especially in the freight cars of a steam railroad company. We do not think so. The reasons given in the Briggs Case, 79 Me. 363, 1 Am. St. Rep. 316, 10 Atl. 47, and the Taylor Case, 91 Me. 193, 64 Am. St. Rep. 216, 39 Atl. 560, why the changed methods of transportation of passengers do not result in an additional servitude, apply with equal force to changed methods in transporting property. The right of public travel includes the right to transport property in drays and wagons. To transport it in cars is but another and more modern way of transporting it. . . . So that we think the right to haul freight in cars, if the right exists, imposes no additional servitude upon the land in a street over which the railroad runs, and affords no reason for saying that the legislative grant of the right is unconstitutional, as impinging upon the constitutional provision which forbids the taking of private property for public uses without just compensation."

To same purport, White v. Blanchard Bros. Granite Co. 178 Mass. 363, 59 N. E. 1025, which says that: "A highway is created for the use of the public, not only in view of its necessities and requirements as they exist, but also in view of the constantly changing modes and conditions of travel and transportation, brought about by improved methods and required by the increase of population and the expansion in the volume of traffic due to the ever-increasing needs of society. . . . For these changing public uses the owner must be presumed to have received compensation when the highway was created." [Kipp v. Davis-Daly Copper Co. 41 Mont. 517, 36 L.R.A. (N.S.) 666, 110 Pac. 237, 21 Ann. Cas. 1372.]

Here the case is more strongly against the plaintiff, for streets are laid out when the town is built, for the easy movement of persons and goods from one part of the town to the other. An abutting owner is not entitled to any compensation for laying out the street which is an absolute necessity for his use of his own lot. It is a benefit, and not a burden.

Eminent domain—compensation for laying out highway.

In Montgomery v. Santa Ana

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Westminster R. Co. 104 Cal. 186, 25 L.R.A. 655, 43 Am. St. Rep. 89, 37 Pac. 786, the court held that "a railroad for transportation of passengers and freight on a street does not impose a new burden of servitude upon the owner of the soil," and adds that it cannot see "why the transportation of freight by modern and improved methods is not equally entitled to encouragement as the transportation of passengers." The court further observed: "The Appian Way, commenced 312 B. C., which has provoked the admiration of the world, was entitled to commendation for its roadway 16 feet in width, constructed for the transportation of burdens, while the paths of 8 feet on each side of it for foot passengers, and upon which the Roman legions were wont to march, were unpaved."

The court denied that the transportation of freight from one point to another within the city added an additional burden on the abutting owner. It cannot be, says the court, that "an interminable string of heavy drays may thunder through the streets from early morning until set of sun, a menace to all who frequent the thoroughfare, and an inconvenience to all dwellers thereon, but that the cars of a railway which move usually but a few times in a day, and with infinitely less annoyance to the public, upon tracks so adjusted to the service as to occasion little or no inconvenience, cannot be tolerated," adding that all methods for the transportation of passengers and freight made necessary by modern developments must have been contemplated when the street was opened, and even methods not yet discovered, and hence such user imposes no new burden upon the owner of the abutting land.

Lewis, Em. Dom. (3d ed.) § 166, says that the operation of express cars on the street railway tracks is a legitimate use of the streets, and adds: "When we direct our attention to the moving freight car, taking the place of twenty drays, twenty pairs of horses, and twenty drivers, the advantages of such a use of the streets seem obvious. It is presumably more economical. It saves wear and tear of the street, diminishes the accumulation of dirt and filth, relieves congestion, and diminishes the noise and confusion. The movement of the freight car would no more interfere with abutting property than the movement of a passenger car. To the extent that the freight car is a substitute for traffic teams on the street, it thus tends to make the street quieter, cleaner, freer, and more sanitary. And, since the street exists as much for the movement of freight as for the movement of persons, there seems to be no reason why the street freight car should not be put upon the same basis as the street passenger car, in so far as it concerns the mere movement of the car on the tracks, and in so far as it carries freight which would otherwise be carried in vehicles on the streets."

In Kipp v. Davis-Daly Copper Co. supra, the court goes very fully into this matter, and holds "the rights of the abutting owner bear exactly the same relation to the inconveniences which are incident to the tracks installed for the movement of passenger cars and the movements of cars thereon, as they do to the inconveniences which arise from the conveyance of freight by the same means," and says that the freight cars do not obstruct access to the property of the abutting owner any more than the movement of passenger cars or the hauling of the same freight in drays and wagons. To the same purport, Mordhurst v. Ft. Wayne & S. W. Traction Co. 163 Ind. 268, 66 L.R.A. 105, 106 Am. St. Rep. 222, 71 N. E. 642, 2 Ann. Cas. 967.

The city of High Point has obtained from the legislature express authority to permit the defendant company to haul freight over its lines within the city limits, and by its ordinance has directly conferred this power upon the defendant, which is now exercising it. In State v. Rice, 158 N. C. 639, 39 L.R.A.

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(N.S.) 266, 74 S. E. 583, the court says: "Even if this court were of opinion that the ordinance is not sound public policy and might work hardship, we could not declare it invalid. . . . An appeal in such case must be to the lawmaking power."

The enterprising city of High Point has taken every step needful to establish competition and improve service in the handling of freight originating within its limits. The Southern Railroad Company runs its double-track railway through the heart of the city, and at one time enjoyed a monopoly of all incoming and outgoing freight. The city, acting through the vote of its citizens, has made possible the use of its streets in carrying freight and cars rather than in drays, thus avoiding the expense of breaking bulk and establishing effective competition, and by using, in this way, the station of a competing railway, it has destroyed the freight monopoly heretofore existing. It has been well said: "The law of the public streets of a city is declared to be motion. Any use of a street, though a new one, which does not materially abridge or obstruct the right of passage and repassage, of ingress and egress, and to light and air, of the abutting owner, gives no cause of action." [36 L.R.A.(N.S.) 680, note.]

In Morris & E. R. Co. v. Newark, 10 N. J. Eq. 352, it is said: "The easement of the highway is in the public, although the fee is technically in the adjacent owner. It is the easement only which is appropriated, and no right or title of the owner is interfered with."

In our own courts, in Hester v. Durham Traction Co. 138 N. C. 291, 1 L.R.A.(N.S.) 981, 50 S. E. 712, it is said: "The authorities with singular uniformity concur that it is now well settled that the use of the streets in cities or villages for a street railway is one of the ordinary purposes for which such streets and highways may be used, and does not impose an additional burden or servitude so as to entitle the abutting property owner, as a matter of right, to compensation before such use can be made. . . . This rule is generally recognized, irrespective of the question whether in the original laying out of the street a mere easement was taken, leaving the fee simple in the abutting property."

Citation to this effect could be indefinitely prolonged. Kirkpatrick v. Piedmont Traction Co. 170 N. C. 477, 87 S. E. 232, is relied upon by the plaintiff. That case held that a street railway is not an additional burden, but that an ordinary steam railroad in the streets of a town is such, and that where a railway, though operated by electricity, engages in hauling freight over its line in trains of several freight cars, baggage and mail cars, such as is used by a steam railroad, with incidental noises and inconveniences which would attend the operation of the steam railway, it would be an additional servitude. In that case the defendant's line of railroad, though operated by electricity, ran from Gastonia to Charlotte, carrying freight trains and passenger trains between those two points and intermediate points. Such trains consisted of several cars, and were used in the streets of the city, not for the purposes for which such streets were laid out, for moving freight and persons from one part of the city to another, but were used for the transportation of freight and passengers on a through line. This increased vastly the volume of business, and used the streets for a purpose not intended, and, of course, was an additional servitude.

That case is no authority against the use of the streets of High Point, under an act of the legislature and by authority of an ordinance, which facilitates the movement of freight from the railroad station in the town limits, to the doors of the factories in the city, or from the factories to the railroad station, saving the expense of breaking bulk and minimizing the pressure upon the streets

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by eliminating the drays, trucks, wagons, and horses, which otherwise would have been necessary. By economizing in the costs of manufacture, this aids the town to compete with other centers in the same line of business. The resulting economy in the pressure of traffic upon the use of the streets cannot be any additional servitude or burden upon the abutting owners along the streets.

Highway—freight railway—additional burden.

When two or more common carriers unite in transporting an article as a through line, they are quoad hoc partners, and either can be sued for any loss or damage. Rocky Mountain Mills v. Wilmington & W. R. Co. 119 N. C. 693, 56 Am. St. Rep. 682, 25 S. E. 854. But this does not apply to damages or burdens to right of way under rights of eminent domain, for each company is responsible for its own right of way only.

We need not discuss the other assignments of error, for we think that upon the evidence the court should have sustained the motion to nonsuit the plaintiff.

Reversed.

Walker, J., not sitting.

Petition for rehearing denied.

ANNOTATION.

Carrying freight on electric railway in street or highway as an additional servitude.

In this annotation, all cases involving electric railways are included, provided that the decision turned upon the carrying of freight. Cases involving steam railways are excluded. Theoretically, the motive power employed is not a distinguishing feature in determining whether or not there is an additional servitude imposed upon a street or highway. But as a matter of fact, practically all steam railways possess certain characteristics not possessed by the early electric roads, which tend to make them an additional servitude upon the fee in the street or highway through which they are constructed. See statement about steam railways in the opinion in the reported case (TURNER v. NORTH CAROLINA PUB. SERVICE CO. ante, 1398). As the electric roads developed to meet the needs of greater numbers of people, they took on more and more the characteristics of the steam railway. One of these characteristics is the hauling of freight. No cases are included herein unless the decision may be fairly said to turn upon the effect of carrying freight. One or two cases in which it appeared that the cars were moved by horses have been included, since there seems to be no practical distinction between those railways over which the cars are drawn by horses and those over which electricity hauls the cars.

On different theories, and perhaps under varying circumstances, electric railways that haul freight have been held to impose an additional servitude upon the street or highway upon which constructed.

Connecticut.—Cadwell v. Connecticut Co. (1912) 85 Conn. 401, 40 L.R.A. (N.S.) 253, 83 Atl. 215, 444, Ann. Cas. 1913C, 401.

Illinois.—Wilder v. Aurora, D. & R. Electric Traction Co. (1905) 216 Ill. 493, 75 N. E. 194; Spalding v. Macomb & W. I. R. Co. (1907) 225 Ill. 585, 80 N. E. 327; Aurora v. Elgin, A. & S. Traction Co. (1907) 227 Ill. 485, 118 Am. St. Rep. 284, 81 N. E. 544; Goddard v. Chicago, M. & St. P. R. Co. (1902) 104 Ill. App. 533, affirmed in (1903) 202 Ill. 452, 66 N. E. 1119; Rockford & Interurban R. Co. v. Keyt (1904) 117 Ill. App. 32.

Minnesota.—Carli v. Stillwater Street R. & Transfer Co. (1881) 28 Minn. 373, 41 Am. Rep. 290, 10 N. W. 205.

North Carolina.—Kirkpatrick v. Piedmont Traction Co. (1915) 170 N. C. 477, 87 S. E. 232.

Ohio.—Schaaf v. Cleveland, M. & S.

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R. Co. (1902) 66 Ohio St. 215, 64 N. E. 145.

Texas.—Aycock v. San Antonio Brewing Asso. (1901) 26 Tex. Civ. App. 341, 63 S. W. 953; Rische v. Texas Transp. Co. (1901) 27 Tex. Civ. App. 33, 66 S. W. 324.

Wisconsin.—Chicago & N. W. R. Co. v. Milwaukee, R. & K. Electric R. Co. (1897) 95 Wis. 561, 37 L.R.A. 856, 60 Am. St. Rep. 136, 70 N. W. 678; Linden Land Co. v. Milwaukee Electric R. & Light Co. (1900) 107 Wis. 493, 83 N. W. 851 (admission arguendo).

On the other hand, courts have frequently reached the conclusion that the freight-carrying electric railway involved does not impose an added servitude upon the street or highway. Albany v. United States Fidelity & G. Co. (1918) — Cal. App. —, 176 Pac. 705; Mordhurst v. Ft. Wayne & S. W. Traction Co. (1904) 163 Ind. 268, 66 L.R.A. 105, 106 Am. St. Rep. 222, 71 N. E. 642, 2 Ann. Cas. 967; Kinsey v. Union Traction Co. (1907) 169 Ind. 564, 81 N. E. 922; Cleveland, C. C. & St. L. R. Co. v. Feight (1908) 41 Ind. App. 416, 84 N. E. 15; Taylor v. Portsmouth, K. & Y. Street R. Co. (1898) 91 Me. 193, 64 Am. St. Rep. 216, 39 Atl. 560; Percy v. Lewiston, A. & W. Street R. Co. (1915) 113 Me. 106, 93 Atl. 43; White v. Blanchard Bros. Granite Co. (1901) 178 Mass. 363, 59 N. E. 1025; Kipp v. Davis-Daly Copper Co. (1910) 41 Mont. 509, 36 L.R.A.(N.S.) 666, 110 Pac. 237, 21 Ann. Cas. 1372; TURNER v. NORTH CAROLINA PUB. SERVICE CO. (reported herewith) ante, 1398.

As already intimated, the subject of the annotation constitutes but a single phase of the broader question of what constitutes an additional servitude upon a street or highway in respect to transportation. It will be observed that the court, in TURNER v. NORTH CAROLINA PUB. SERVICE CO. lays emphasis upon the fact that the street railway company operated wholly within the city limits, so far as its freight business was involved, at least. In distinguishing the case under consideration from one of its earlier decisions, it clearly implies that an additional servitude would have been created if the company had been bringing freight from places outside the city. Many other elements, some of which may not be connected with the handling of freight, often enter into the consideration of the broader question. So, the court, in Cadwell v. Connecticut Co. (1912) 85 Conn. 401, 40 L.R.A.(N.S.) 253, 83 Atl. 215, Ann. Cas. 1913C, 401, after pointing out that a few courts have made the handling of freight the determinative factor, and that other courts have drawn a distinction between urban and interurban service, without regard to handling freight, said: "We are satisfied that the question for solution is one which cannot, by reason of its nature, be resolved in any of the ways indicated. It is one which may present itself under too many widely differing aspects to be resolved, in respect to all which may arise, by any such artificial process as the application of a simple test which regards a single fact or incident only, and ignores all others. The several tests indicated possess the merit of simplicity, but no one of them is founded in a sound logic, avoids practical difficulties, or escapes what may be harsh results to the public, and results defeating the very purpose of a public way. The practical difficulties attending their application are apparent. We are satisfied that there can be no short cut to a reasonable and just conclusion under the varying conditions which may arise, and one which shall serve the best interests of the public, including abutting owners themselves. Such a conclusion is one which can be reached only by a study of the conditions which are present in a given case, or in given classes of cases, and by bringing to bear upon these conditions those pertinent considerations which are best calculated to disclose whether the new use is in aid of the highway use, or an essentially different and independent use. We have no occasion here to attempt an exhaustive recital of those considerations. We have already had occasion to notice a number of them, and, sufficiently for present purposes, called attention to the objective point of inquiry, the general direction of it, and the

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salient suggestive facts to be looked at. The fact that this is the only method by which satisfactory results can be arrived at is emphasized by a study of the cases which have sought to adopt more direct methods. Dillon and other writers, realizing the difficulties which must beset an attempt to adopt shorter and simpler processes, have asserted, and we think correctly, that, after all, each situation must be dealt with upon its own merits. 3 Dill. Mun. Corp. 5th ed. p. 2032, note; Nichols, Em. Dom. § 100. This is substantially the attitude which certain courts have taken. White v. Blanchard Bros. Granite Co. (1901) 178 **Mass.** 366, 59 N. E. 1025; Mordhurst v. Ft. Wayne & S. W. Traction Co. (1904) 163 **Ind.** 268, 66 L.R.A. 105, 106 Am. St. Rep. 222, 71 N. E. 642, 2 Ann. Cas. 967; Schaaf v. Cleveland, M. & S. R. Co. (1902) 66 **Ohio** St. 215, 64 N. E. 145."

There are some cases in which the court seems to take the same position as that assumed in the Cadwell Case (**Conn.**) supra, though some of them do not make their position quite so clear. Among such cases, holding that the facts and circumstances were such that the railway imposed an added servitude upon the street or highway, are: Cadwell v. Connecticut Co. (1912) 85 **Conn.** 401, 40 L.R.A.(N.S.) 253, 83 Atl. 215, 444, Ann. Cas. 1913C, 401; Carli v. Stillwater Street R. & Transfer Co. (1881) 28 **Minn.** 373, 41 Am. Rep. 290, 10 N. W. 205; Kirkpatrick v. Piedmont Traction Co. (1915) 170 **N. C.** 477, 87 S. E. 232; Schaaf v. Cleveland, M. & S. R. Co. (1902) 66 **Ohio** St. 215, 64 N. E. 145; Chicago & N. W. R. Co. v. Milwaukee, R. & K. Electric R. Co. (1897) 95 **Wis.** 561, 27 L.R.A. 856, 60 Am. St. Rep. 136, 70 N. W. 678.

And the facts and circumstances or the laws were such, in the following cases, that no additional servitude was held to be placed upon the street or highway: Kipp v. Davis-Daly Copper Co. (1910) 41 **Mont.** 509, 36 L.R.A. (N.S.) 666, 110 Pac. 237, 21 Ann. Cas. 1372; White v. Blanchard Bros. Granite Co. (1901) 178 **Mass.** 363, 59 N. E. 1025.

Upon the theory already stated, it has been held that an additional servitude upon the fee is imposed—

—by the running upon an interurban electric railway constructed in a public street, of cars designed to carry property only, which run from terminals to terminals, without stopping to receive or discharge contents, and discharging such contents at the two termini only, Cadwell v. Connecticut Co. (1912) 85 **Conn.** 401, 40 L.R.A. (N.S.) 253, 83 Atl. 215, Ann. Cas. 1913C, 401;

—by a track, the principal if not the only purpose of which is to transfer freight cars by horse power between two railroad lines that terminate in different parts of the city, being built partly upon an alley and partly upon property acquired for the purpose by condemnation and purchase, it not being proposed to receive or unload freight at different points along the street or alley, Carli v. Stillwater Street R. & Transfer Co. (1881) 28 **Minn.** 373, 41 Am. Rep. 290, 10 N. W. 205;

—by an interurban railway over which both passenger and freight cars are hauled by electricity, the freight cars being similar to cars used on ordinary steam railways and being transferred to other lines, and the freight cars of other lines being transferred to that of defendant, Kirkpatrick v. Piedmont Traction Co. (1915) 170 **N. C.** 477, 87 S. E. 232;

—by the construction and operation of an interurban electric railroad, laid with "T" rails, entirely on the side of a public highway next to the abutting improved farms owned and occupied by the plaintiffs, and entirely between their lands and the traveled part of the highway, the company having authority to run an unlimited number of cars and trains for the carrying of passengers, and the transportation of freight, express matter, and government mail, Schaaf v. Cleveland, M. & S. R. Co. (1902) 66 **Ohio** St. 215, 64 N. E. 145;

—by an electric railway in a village street, which forms part of a connecting line between cities for transporting merchandise, personal baggage,

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mail, and express matter, as well as passengers, Chicago & N. W. R. Co. v. Milwaukee, R. & K. Electric R. Co. (1897) 95 Wis. 561, 37 L.R.A. 856, 60 Am. St. Rep. 136, 70 N. W. 678.

In Schaaf v. Cleveland, M. & S. R. Co. (Ohio) supra, the court said: "In our opinion, the construction and operation of the railroad, as authorized and proposed, must necessarily constitute a serious obstruction to the plaintiffs' use of the public highway as a means of access to their farms, and an additional burden on the highway not contemplated in its originally intended uses. The whole burden of the railway, with all of its authorized appurtenances, is thrown entirely upon the side of the public road next to the plaintiffs' lands, and between them and the traveled part of the roadway. The nature of that burden is not different, in any material respect, from that imposed by the construction and operation of a steam railroad. The difference, if any, is merely in the degree of the burden, and not in its character; and can scarcely be less in any degree. It may become more onerous and injurious. As shown by the findings of the court, the railroad is to be built and maintained on the 'extreme westerly side and edge' of the traveled way of the public road, that is, between the traveled roadway and the plaintiffs' lands, and the tracks are to be laid with the ordinary 'T' rails which project some distance above the ties—the same kind of rails usually employed in the construction of steam railroads through the country. While public crossings and extensions of farm lanes are required to be planked to a certain extent, it often becomes convenient and necessary to drive onto and off the traveled roadway, elsewhere, with loaded and empty vehicles, to which this railway will present the same obstructions, and cause the same hindrance, delay, and annoyance that attend the crossing of steam railroads. Then, this railroad company is authorized to construct and use, on the same side of the public road, between its traveled way and the plaintiffs' lands, 'all suitable and convenient sidetracks, switches, turnouts, turntables, stations, and appliances,' without limit to their extent, other than as the company may deem them convenient and suitable. And, in addition to this, the company is given authority to erect and maintain on the same side of the public roadway, and next to the plaintiffs' lands, all poles, which are of large dimensions, and all wires and other appliances, necessary to enable it to operate an electric plant for supplying light, power, and heat to consumers, for profit. Besides, this company is authorized not only to carry passengers, but also to transport over the road 'baggage, packages, boxed and barreled freight, farm produce, express matter, and United States mail,' and, though it is required to run cars over its road at least three times each way daily, it is not limited as to the number of cars, or trains, for freight or passengers, or both combined, or the size or make-up of the trains. All things considered, it is reasonably certain from the facts found that the practical operation of such a road, within its capacity, must necessarily produce annoyance and inconvenience to the plaintiffs, and interfere with their property rights as abutting owners, of the same general character that result from the operation of steam railroads, and become an additional burden on the public highway, and taking of the plaintiffs' property, in the same sense." And this case was cited and followed in Chambers v. Cleveland & S. W. Traction Co. (1904) 5 Ohio C. C. N. S. 298, 27 Ohio C. C. 193, by applying the same principle to a case in which the company had laid an extra switch beside its tracks. In Akron & C. F. Rapid Transit Co. v. Erie R. Co. (1905) 28 Ohio C. C. 36, the Schaaf Case is distinguished on the ground that the holding relates to country highways, and not to railways upon city streets.

In Carli v. Stillwater Street R. & Transfer Co. (1881) 28 Minn. 373, 41 Am. Rep. 290, 10 N. W. 205, supra, the court said: "It is evident from all the facts that this road is not located on the street because its business is to be derived from the street, and that its purposes would certain-

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ly be equally well fulfilled if it was on property of which the defendant should have the exclusive use. On the other hand, the public travel on the alley derives no aid or advantage from its location there, but is and must be more or less impeded thereby. The public would be in every respect as well served if the road were on private property remote from the street, its whole distance. In a word, the road is not on the alley, instead of other lands, because it is of any advantage, either to the defendant or to the public, that it should be there, except for economical reasons to the defendant. The construction of the track on the street cannot, therefore, be said to be in aid of the public travel for which streets are created, any more than it would be if it was part of a continuous line of railroad running through the city of Stillwater. If the use would be a new one in the latter instance, it is a new one for the same reasons in the present case, and the abutting owner is entitled to compensation upon the same principles. The fact that the cars are moved by animal power instead of steam is not a controlling consideration, and the control reserved by the city council over the manner of construction and mode of operation of the railroad is no different from that ordinarily exercised by municipal corporations, or which they have the power to exercise by legislative authority, over ordinary railroads, constructed through or into cities, and across or upon the public streets thereof."

But an additional servitude is not imposed upon the street by the construction thereon of a narrow-gauge railroad, operated exclusively within the limits of the city by power other than steam directly applied, to carry ore from a mine, and supplies to it, as well as such other freight as may be offered by the public, the construction of the road to conform to reasonable regulations, prescribed by the city in granting the permit. Kipp v. Davis-Daly Copper Co. (1910) 41 Mont. 509, 36 L.R.A.(N.S.) 666, 110 Pac. 237, 21 Ann. Cas. 1372.

In White v. Blanchard Bros. Granite Co. (1901) 178 Mass. 363, 59 N. E. 1025, it was held that a railroad built for the hauling of stone from a private quarry on cars drawn by horses, over a public highway, by permission of the city authorities who had power to act and who had prescribed proper regulations, did not impose an additional servitude upon the fee of an abutting owner, who owns the fee to the middle of the highway, so as to entitle him to damages.

In Linden Land Co. v. Milwaukee Electric R. & Light Co. (1900) 107 Wis. 493, 83 N. W. 851, the court said: "It is claimed that § 1862, Stat. 1898, under which the defendant corporation is incorporated, is unconstitutional, because it attempts to authorize the formation of street railway corporations vested with the power to carry freight as well as passengers, thus making it a commercial railroad, and also authorizes municipal corporations to grant the use of streets to such railway companies for the carriage of freight and passengers, nowhere provides for the payment of compensation to the abutting owners. It may be admitted, for the purposes of the case, that a railway authorized to carry freight as well as passengers becomes a commercial railroad instead of a street railroad, and that such a railroad, when laid in a street, becomes an additional burden on the fee, and cannot be laid without the consent of, or compensation made to, the adjoining property owners. Chicago & N. W. R. Co. v. Milwaukee, R. & K. Electric R. Co. (1897) 95 Wis. 561, 37 L.R.A. 856, 60 Am. St. Rep. 136, 70 N. W. 678. But this hardly meets the question. It is true that our statutes contain no provisions authorizing such companies to condemn private property in the streets of cities or villages, although such condemnation may be had outside of cities and villages. Stat. 1898, § 1863a. It is not quite clear how this deficiency in the law affects the corporate character of the defendant corporation. It may render it im-

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possible for it to lay or operate a track for the transportation of freight, without actually purchasing the right from private owners to cross their lands, but the legislature certainly had power to authorize the formation of just such corporations; and if it neglected to provide the corporation, when formed, with a means essential to its successful operation, the result would seem to be a very unfortunate one for the corporation, and perhaps one fatal to its business success, but not fatal to its corporate character. If such a corporation attempted to condemn, it could be successfully defeated by the fact that it was given no such power; and, if it attempted to lay tracks without condemning, it would be stopped with the proposition that it was taking private property without compensation."

But, as already indicated, some courts have at times seemed to make the fact of carrying freight the chief factor in determining whether or not the road imposes an additional servitude upon the street or highway, over which it is constructed.

So, it has been held that an electric railway, if it is constructed for the purpose of hauling freight, is a commercial railway, and as such it imposes a greater servitude upon the streets through which it is constructed. Wilder v. Aurora, D. & R. Electric Traction Co. (1905) 216 Ill. 493, 75 N. E. 194; Spalding v. Macomb & W. I. R. Co. (1907) 225 Ill. 585, 80 N. E. 327; Aycock v. San Antonio Brewing Asso. (1901) 26 Tex. Civ. App. 341, 63 S. W. 953; Rische v. Texas Transp. Co. (1901) 27 Tex. Civ. App. 33, 66 S. W. 324. Of course, in cases in a jurisdiction where it is held that all street railways impose an additional servitude upon the street, the question here annotated cannot arise as a distinctive question.

This position is well stated by the court in Rische v. Texas Transp. Co. 27 Tex. Civ. App. 33, 66 S. W. 324, where it is said: "The question then arises, What is a street railway, and can the railway of appellee be placed in that class? It was first held that street cars drawn by horses, and used for the transportation of passengers from one part of a city to another, did not constitute an additional servitude on the streets. They were distinguished from steam railways in the rails and construction of the track, the speed at which they run, the noise and vibration produced, the smoke and steam emitted, the danger of frightening horses, the danger to life, and the size and weight of cars and locomotives. When the steam motor and electric cars were invented, all the reasons given why horse railways were not an additional servitude to streets were ignored, except that they must be carriers of passengers, and not of freight, from one point to another in a city. In one instance, at least, this last reason has been discarded, and it has been held that the streets can be used by railways, whatever be the motive power, and for the carriage of both freight and passengers. Montgomery v. Santa Ana Westminster R. Co. (1894) 104 Cal. 186, 25 L.R.A. 654, 43 Am. St. Rep. 89, 37 Pac. 786. The weight of authority, however, is that a street passenger railroad, laid on the surface or established grade of a street, is a legitimate use, while all other railroads are not. Lewis, Em. Dom. § 115i; Elliott, Railroads, §§ 6, 557; Funk v. St. Paul City R. Co. (1895) 61 Minn. 435, 29 L.R.A. 208, 52 Am. St. Rep. 608, 63 N. W. 1099, 16 Am. Neg. Cas. 326. There has been no direct adjudication of this matter in this state, but there are several cases where damages have been allowed, which have resulted from the construction of railroads along streets, and this could have been done only on the theory that they were an additional servitude to the street. Gulf, C. & S. F. R. Co. v. Eddins (1884) 60 Tex. 656; Gulf, C. & S. F. R. Co. v. Bock (1885) 63 Tex. 245; Texas & S. R. Co. v. Meadows (Trinity & S. R. Co. v. Meadows) (1889) 73 Tex. 32, 3 L.R.A. 565, 11 S. W. 145; Gulf, C. & S. F. R. Co. v. Fuller (1885) 63 Tex. 467; Ft. Worth & R. G. R. Co. v. Jennings (1890) 76 Tex. 373, 8 L.R.A. 180, 13 S. W. 270. The railroads in question, in the cases cited, were steam railroads, but, as we have shown, this would

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not distinguish them from street railways, which may be operated by any motive power, and the decisions must be justified on the ground that the roads were the carriers of freight, which is all that distinguishes the commercial railway from the street railway."

In Birmingham Belt R. Co. v. Lockwood (1907) 150 Ala. 610, 43 So. 819, the court said: "Whatever may have been the rights of the defendant, or its predecessors, under the first grant of a right of way for a street railroad, it is clear that by the subsequent grants its powers were enlarged, and additional tracks and heavier rails put down for the express purpose of doing a freight business, and the act of the legislature shows that the primary purpose was to do a freight business, leaving it to the option of the company to do a passenger business also, if it so desired. It may be added that when the additional powers were conferred, under which the additional tracks were added and heavier rails were laid for the express purpose of doing a freight business, that was a new taking of the right of way, which entitled the then owner of the lot to compensation for such damages as would result to the land by reason of the additional servitude, and such compensation could have been enforced by injunction at any time before acquiescence operated as a bar. Thornton v. Sheffield & B. R. Co. (1887) 84 Ala. 114, 5 Am. St. Rep. 337, 4 So. 197; Cowan v. Southern R. Co. (1897) 118 Ala. 560, 23 So. 754." But it was also held that one who acquired property abutting on the street, after the railroad was hauling freight, could not recover for an additional servitude on the ground that the amount of freight hauled had greatly increased. The court held that the right to carry freight carried with it the right to do as much freight business as the road was capable of doing. Steam seems to have been the power used on this street railway, and the case is here cited only to illustrate how the question of hauling freight is viewed by some courts.

A traction company that departs from the purpose for which it was chartered, and goes to hauling freight, is liable to an abutting owner on a street upon which it constructs a switch, which it and another company use solely for freight purposes, the handling of freight on its road imposing a greater servitude upon the fee. Rockford & Interurban R. Co. v. Keyt (1904) 117 Ill. App. 32.

In Spalding v. Macomb & W. I. R. Co. (1907) 225 Ill. 585, 80 N. E. 327, the court said: "The charter of this railroad, and the ordinance permitting it to be constructed in Johnson street, provide that the road is not to be operated by steam. We understand that defendant in error contends that it is a street railroad. Street railroads are generally understood to be only such as are constructed and operated in the streets of a city for the purpose of conveying passengers, with ordinary hand luggage, from one point to another along the line thereof. Whether the road be a street railroad or not will depend upon the character of its traffic. The bill alleges that this road is carrying not only passengers with ordinary hand luggage, but practically freight of all kinds, from one point to another on the street, and from town to town along the entire line of the road. Under these allegations of the bill, admitted to be true by the demurrer, defendant in error cannot be held to be a street railway."

And Goddard v. Chicago, M. & St. P. R. Co. (1902) 104 Ill. App. 583, affirmed in (1904) 202 Ill. 452, 66 N. E. 1119, was decided upon this same principle.

In Wilder v. Aurora, D. & R. Electric Traction Co. (1905) 216 Ill. 493, 75 N. E. 194, the court said: "In the case at bar, the ordinance of November 7, 1904, as well as the previous ordinance of May 27, 1902, contains the following provision: 'The said tracks and railways shall be used for no other purpose than to transport passengers and their ordinary baggage, United States mail, express, milk; and the cars and carriages for that purpose shall be of the style and class ordinarily used on such railways in other cities. No freight shall be carried by

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said grantee, its successors or assigns, excepting such as is used in the construction of their road within the limits of the city of Aurora.' Thus, the road to be constructed by appellee is authorized to carry not only passengers and their ordinary baggage, and United States mail and express matter, but also milk. It cannot be said that a railway, which is authorized to carry one kind of freight is not a commercial road within the meaning of the definitions above quoted. The fact that a road is limited to the carriage of one kind of freight does not make it any the less a commercial railroad, which is defined to be one which carries both freight and passengers. Again, the ordinance authorizes the appellee corporation to do such excavating and grading as it may deem necessary for the proper laying of its tracks, thereby failing to confine the laying of its tracks to the surface of the street. It is also authorized by the ordinance to connect its tracks with the tracks of any railway company owning or operating tracks in the city of Aurora, for the purpose of forming the loop referred to in the ordinance. The ordinance also provides that the authority granted to appellee is to be used for the public purposes of a railway connecting with the interurban tracks, when laid, of the Aurora, De Kalb, & Rockford Electric Traction Company. In our opinion, the railroad to be constructed under appellee's charter, and under the ordinances authorizing it to lay its tracks in the streets of Aurora, is what is called a commercial railroad, and is not a street railroad within the definite and fixed meaning of the latter term. Being a commercial railroad, it constitutes a new and additional servitude upon the fee of the property owner to the center of the street." And this case is cited with approval in Aurora v. Elgin, A. & S. Traction Co. (1907) 227 Ill. 485, 118 Am. St. Rep. 284, 81 N. E. 544.

The fact that an interurban electric railway carries freight was given, in Diebold v. Kentucky Traction Co. (1903) 117 Ky. 146, 63 L.R.A. 637, 111 Am. St. Rep. 230, 77 S. W. 674, 4 Ann. Cas. 445, as one of the reasons for holding that it was a "trunk railway," as distinguished from a street railway, within the meaning of a statute that excepted trunk railways from the class of railways that were compelled to obtain a franchise from the city. The question of extra servitude upon the streets was not raised.

But there are other cases in which it is held that street railways that carry freight do not impose an additional burden upon the streets. (In these cases the traffic was local, and nothing is said to indicate that the holding would be different if the road had been interurban.) Taylor v. Portsmouth, K. & Y. Street R. Co. (1898) 91 Me. 193, 64 Am. St. Rep. 216, 39 Atl. 560; Percy v. Lewiston, A. & W. Street R. Co. (1915) 113 Me. 106, 93 Atl. 43; White v. Blanchard Bros. Granite Co. (1901) 178 Mass. 363, 59 N. E. 1025.

In Taylor v. Portsmouth, K. & Y. Street R. Co. (Me.) supra, the court said: "No matter whether the way be used by the lone traveler on foot or on his wheel, by the two-horse chaise or four-wheeled carriage, by the dray, cart, or coach, or by cars that may be permitted to run in the street, whether propelled by beast, steam, electricity, or any other agency that may be discovered, suitable for the purpose. No matter whether the vehicle carries passengers or freight, or passes intelligence along its contrivance,—all these are public uses, and, so long as they do not infringe the laws that regulate the use of highways, they cannot be prohibited either by the individual or public prosecutor. Ways must be 'safe and convenient.' When they are not, by reason of any encumbrance or permitted use, then ample remedy may be had by public action, and such encumbrance or use may be removed or prohibited. The servitude complained of in this cause, therefore, is a public servitude and lawful, so long as it does not infringe the laws of the state regulating the use of ways. It gains no hold upon the soil of itself, but is allowed a share of the public use. Should that use be extinguished, its rights would be extinguished also. It must exist or fall with the servitude

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of the public, otherwise the doctrines of this opinion would be illogical. If it gained any vested right in the soil that the public could not extinguish, then, manifestly, it has created an additional servitude, and taken land without compensation to the owner."

And some courts hold that even interurban electric railways, although they carry freight, do not impose an additional servitude upon the fee that the abutting owner has in the streets upon which the railway is constructed. Mordhurst v. Ft. Wayne & S. W. Traction Co. (1904) 163 Ind. 268, 66 L.R.A. 105, 106 Am. St. Rep. 222, 71 N. E. 642, 2 Ann. Cas. 967; Kinsey v. Union Traction Co. (1907) 169 Ind. 564, 81 N. E. 922; Cleveland, C. C. & St. L. R. Co. v. Feight (1908) 41 Ind. App. 416, 84 N. E. 15.

In Montgomery v. Santa Ana Westminster R. Co. (1894) 104 Cal. 186, 25 L.R.A. 654, 43 Am. St. Rep. 89, 37 Pac. 786, the court seems to be of the opinion that hauling freight and passengers from a neighboring village, by rail, through the streets of a city, by a steam railway, does not create an additional servitude by reason of which an abutting owner can maintain an action of ejectment against the company. The court said: "The use of a public street, however, by an ordinary railway, for the transportation of freight and passengers, it has been said by the highest authority, imposes a new burden upon the street, not contemplated in its dedication, and therefore the user cannot be indulged, without compensation to the abutting owner of property upon such public street. We are at a loss for any good reason for this distinction, or to see why the transportation of freight by modern and improved methods is not equally entitled to encouragement with the transportation of passengers. The essential wants of the citizen demand the former equally with the latter. If there is any difference in the burden imposed upon the street, it is in degree and not in kind. The great highways of England were constructed not so much for the convenience of passengers, as for the transportation of freight. In the infancy of commerce, when trade and traffic by land was insignificant in volume, when the sumpter horse, which answered to our modern pack mule, answered all the purposes of transportation for goods, footpaths, bridle paths, and lanes, served all needed purposes; but, with the growth of inland commerce and the need of greater facilities for the interchange of commodities, the use of wheeled vehicles, and, as a means thereto, the highway as we know it, became a necessity. The Appian way, commenced 312 B. C., which has provoked the admiration of the world, was entitled to commendation for its roadway 16 feet in width, constructed for the transportation of burdens, while the paths of 8 feet on each side of it, for foot passengers, and upon which the Roman legions were wont to march, were unpaved. In the construction of modern highways, urban and suburban, the great difficulty and the prominent object has been to build and adapt them by grade, width, and structure of roadbed, to the carriage of freight. Yet we are told, in effect, that so far as modern methods are concerned, so far as ease, speed, and economy are involved, improvements are to be limited to the transportation of passengers; that cars with wheels adjusted to move upon fixed tracks, when applied to the transportation of passengers, are within the contemplated objects in view in opening the road or street, and therefore add nothing material to the burden of the servitude of the abutting landowner, while a precisely similar structure, adapted to the transportation of freight, adds an additional burden of a different character to the servitude, and cannot be tolerated without compensation to the abutting owner. An interminable string of heavy drays may thunder through the street from early morning until set of sun, a menace to all who frequent the thoroughfare, and an inconvenience to all dwellers thereon; but the cars of a railway, which move usually but a few times a day, and with infinitely less annoyance to the public, upon tracks so adjusted to the surface as to occasion little or no inconvenience, cannot be tolerated.

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We fail to appreciate the philosophy of the distinction. On the contrary, we affirm that when a public street in a city is dedicated to the general use of the public, it involves its use, subject to municipal control and limitations, for all the uses and purposes of the public as a street, including such methods for the transportation of passengers and freight as modern science and improvements may have rendered necessary, and that the application of these methods, and indeed of those yet to be discovered, must have been contemplated when the street was opened and the right of way obtained, whether by dedication, purchase, or condemnation proceedings, and hence that such a user imposes no new burden or servitude upon the owner of the abutting land. The object of the user being within the conceded rights of the public, the methods of its accomplishment are subject to legislative control; and subject, also, to an action for damages by any abutting owner, whether or not he may be vested with the fee to the center of the street, whose right of ingress and egress, or his right to light and air, shall be interfered with."

Although this case involved the question of additional servitude imposed on a street by a steam railway, and not by an electric railway, it is cited here for illustrative purposes. Cases involving steam railways are not generally cited in the note.

It should also be noted that the language quoted above is in fact dictum, since the action was in ejectment to recover possession of the particular strip of land, and the court held that "the action of ejectment is a possessory action, in which the plaintiff must show himself entitled to the present possession, and that he has been deprived thereof. Anything which deprives a plaintiff of his present right of possession will deprive him of the remedy of ejectment." The holding, as set out in the language quoted here, was, therefore, not necessary to support the final conclusion reached.

And the Montgomery Case is quoted with approval by the court in Albany v. United States Fidelity & G. Co. (1918) — Cal. App. —, 176 Pac. 705, where it is held that no additional servitude is placed upon a city street by the construction of a railway to carry freight as well as passengers.

In Kinsey v. Union Traction Co. (1907) 169 Ind. 563, 81 N. E. 922, it was held "that interurban cars of suitable size, construction, and finish, for the carriage of both passengers, and express and light package freight, with permission of the city authorities, may be run singly into the city of Indianapolis, upon the tracks of the local company, laid according to the law regulating street railroad tracks in city streets, to a point within the city, and over the tracks first designated by the board of public works and common council, at a reasonable rate of speed, not exceeding that allowed by law or ordinance to the cars of the local company, and in conformity to such city regulations as the authorities may from time to time impose upon street cars operated in the streets of the city, and with the sanction and under regulation of the city authorities, temporarily, and in times of emergency created by special occasion, such a reasonable and limited number more than one as shall be required to meet the transient wants of the public for passenger carriage, provided such increased number, in size and manner of operation, is in substantial conformity to the authorized custom of the local company on like occasions, and does not materially increase the burden of the highway easement, nor unduly interfere with other proper and legitimate uses of the street." J. W. M.

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J. CONWAY CHICHESTER, Admr., etc., of Louisa Peden, Deceased,
v.
WILLIAM H. PEDEN, Plff. in Err.

Virginia Supreme Court of Appeals — June 14, 1917.

(121 Va. 147, 92 S. E. 984.)

Evidence — privileged communications — statement to tax official.

1. A person's own statement of his own taxable property to the proper official is not a privileged communication at common law.

[*See note on this question beginning on page* 1421.]

— statutory provision — extension.

2. A statutory provision that answers concerning taxable property, required under oath, shall not be disclosed, cannot be extended by the court to cover information voluntarily given by a taxpayer to the examiner of records as to the title to notes, the ownership of which the examiner, in accordance with his official duty, was undertaking to fix.

ERROR to the Corporation Court of Fredericksburg to review a judgment in favor of plaintiff in an action brought to recover possession of certain negotiable notes. *Affirmed.*

Statement by Sims, J.:

This is an action to recover the possession of certain negotiable notes, by the defendant in error (hereinafter designated "plaintiff") against the plaintiff in error (hereinafter designated "defendant"). The case resulted in a verdict and judgment for the plaintiff in the court below.

The question at issue before the trial court was whether the choses in action sued for were the property of the plaintiff's intestate or of her son, the defendant, and it was material to ascertain whether the latter came into the possession and ownership of them before the death of his mother.

Upon that issue the court below, over the objection of the defendant, permitted the examiner of records of defendant's circuit and the commissioner of the revenue of defendant's city to testify as to certain statements made to them by the defendant, to the effect that the notes in question were not his property on the 1st of February preceding his mother's death, and did not come into his possession, or become his property, until after the death of his mother, which occurred the latter part of such February.

The statements referred to were made by the defendant to said tax officials on the subject of the listing of said choses in action for taxation.

The statements aforesaid were not given by the defendant under oath. They were not given before the local board of review; they were not given in a list or in interrogatories in writing of and with respect to bonds, notes, and other evidence of debt, signed and sworn to, required by law to be furnished by taxpayers to commissioners of the revenue (Acts 1915, p. 98), nor in any answer under oath required by or before the local board of review (Acts 1915, p. 158).

The statements aforesaid made by defendant to the examiner of records were made about the month of September of the year in question, under the following circumstances, as testified to by the examiner:

. . . I got some information somewhere that there was a suit pending in which it was claimed that Mr. Peden was the owner of $3,000 deed of trust notes that came

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from his mother. I understood that the claim was that they had become his property prior to February, 1915. I asked Mr. Peden with reference to that, and he stated that the notes were not his on the 1st of February; that they did not become his property until his mother's death, which was sometime the latter part of February. I was surprised at that, and asked him again, and told him I wanted to be certain about it; that, if they were his mother's notes, I would report them in my fiduciary report, and if they were his, they would be charged to him; that that would be the only difference; and he repeated his statement that they were not his on the 1st of February, 1915. . . .

Was Mr. Peden answering any interrogatory at that time?

No, sir; Mr. Peden did not give in any written interrogatory last year of intangible personal property to the commissioner of revenue. The law requires the commissioner of revenue to turn over all the interrogatories which he receives to me, after a certain time. He turned over the interrogatories to me, and among them I found an income report, but no report of intangible property from Mr. Peden.

By Mr. Butzner: There was no contest over Mr. Peden's return before the board of review as to intangibles? . . .

None at all.

The statements aforesaid made by defendant to the commissioner of revenue were made on October 2d of the year in question, and, as per testimony of the latter, were as follows:

"Mr. Peden came into my office on this day, October 2d, and handed me a list of bonds for entry. I looked at them, and told him that this sheet handed me by the examiner of records was completed, and I did not know exactly what to do with the bonds, and would have to get authority, direction, as to where they would be placed, if at all, in this record, from the fact that Mr. Peden, as he told me, came into possession of these bonds after the 1st day of February, 1915. I looked at them and took no note of them other than the addition of the bonds for the entire amount, which was $3,000. There were two sheets on which these bonds were listed. . . .

"I had no authority to take them at all, after the 1st day of February, and I told him if they came in his possession after the 1st day of February I had no authority to tax them, but he said he wished them listed for taxation under his name. . . .

"My impression is that Mr. Peden said that they were in his mother's possession, somewhere in the house, if I mistake not, in a trunk, and after her death he took possession of them, and wanted to list them for taxation."

The sheets of paper referred to by the last-named witness were not the list required by statute above referred to, and were not under oath.

The statute on the subject of the lists or interrogatories above referred to (Acts 1915, p. 98), so far as material, is as follows:

"Sec. 8. Classification under Schedule C shall be as follows:

"First. Bonds, notes and other evidences of debt," etc.

"The commissioner shall require each person . . . residing in his . . . city . . . to make out and deliver to said commissioner a list in detail . . . of all bonds, notes and other evidences of debt owing to such person in excess of one hundred dollars. . . . This list . . . shall be signed and sworn to by the taxpayer. . . . "

At the time the communications in question were made to him, the duty of the examiner of records with respect to the assessment of choses in action for taxation, so far as material, as provided by said statute (Acts 1915, p. 157), was as follows: " . . . It shall be the duty of said examiners . . . to assist the said local boards of review in the examination of . . . the returns of taxpayers of all such in-

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tangible personal property . . . to examine the returns aforesaid and the records, both state and Federal, with a view to ascertaining and reporting for taxation the values to be extended by said commissioners of the revenue on all intangible personal property . . . liable to taxation under the laws of this state. As soon as such examinations and valuations are made by the examiner of record, he shall make report thereof to the said local board of review. . . . "

It is also provided in this statute that each examiner of records shall receive a commission upon "valuations added as a result of his investigations, and examinations, of the returns of intangible personal property . . . of taxpayers, not returned by them."

At the time of the trial in the court below, "the answers required under oath" consisted of those of the taxpayer in the list, or interrogatories required by law as above stated, and such answers as he might give under oath upon being summoned by the local board of review before it when there interrogated. The examiner of records had the statutory power to have the taxpayer brought before the local board of review for examination, and there to examine the taxpayer under oath. The statute on this subject (Acts 1915, p. 158) is as follows: "The local board of review shall have authority to summon taxpayers or their agents, or any other person having information on the subject before them, and require them to answer under oath all questions. . . . Upon the request of the examiner of records, the said local board of review, or its chairman, shall summon any such taxpayer before it to answer on oath such question as may be propounded by said board or examiner of records."

At the time that this case was tried in the court below, the statutory enactment embodying the policy of this state on the subject of what statements of taxpayers should be privileged was contained in said Acts of Assembly 1915, p. 158, and was as follows: "The answers required under oath of the person, firm, corporation, agents or witnesses, shall not be disclosed unless called for by a court of record, or by said state advisory board, or any local board of review."

Subsequently to the trial of this case in the court below, the said statute embodying the policy of this state on the subject of privileged statements of taxpayers was changed and enlarged in its scope (Acts 1916, p. 420), and is as follows: "The information procured by local boards of review and examiners of records under this act shall be regarded as confidential, except for the purpose of assessments, and shall not be disclosed except to the state tax board or to some other local board of review or to officers charged with the assessment and collection of taxes, or to a court of record upon its order."

The latter statute was not in force when the court below admitted the testimony in question.

Messrs. **R. E. Byrd, F. M. Chichester, and G. B. Wallace**, for plaintiff in error:

Information given by a taxpayer to agents of the boards of review acting officially, as to taxable intangibles, is protected by statute.

Hennessy v. Wright, L. R. 21 Q. B. Div. 509, 57 L. J. Q. B. N. S. 530, 59 L. T. N. S. 323, 53 J. P. 52, 9 Eng. Rul. Cas. 570; Cole v. Andrews, 74 Minn. 93, 76 N. W. 962; Thompson v. German Valley Co. 22 N. J. Eq. 111; State v. Hoben, 36 Utah, 186, 102 Pac. 1000; King v. United States, 50 C. C. A. 647, 112 Fed. 988; Kessler v. Best, 121 Fed. 439; Re Lamberton, 124 Fed. 446; Re Huttman, 70 Fed. 699; Wigmore, Ev. § 2374; Re Joseph Hargreaves [1900] 1 Ch. 347, 69 L. J. Ch. N. S. 183, 48 Week. Rep. 241, 82 L. T. N. S. 132, 16 Times L. R. 155, 7 Manson, 354; Bowman v. Montcalm Circuit Judge, 129 Mich. 608, 89 N. W. 334; Re Reid, 155 Fed. 933; Stegall v. Thurman, 175 Fed. 813; Boske v. Comingore, 177 U. S. 459, 44 L. ed. 846, 20 Sup. Ct. Rep. 701; State v. Brown, 2 Marv. (Del.) 380, 36 Atl. 458; Worth-

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ington v. Scribner, 109 Mass. 487, 12 Am. Rep. 736.

Messrs. C. O'Connor Goolrick and William W. Butzner, for defendant in error:

The letter of the law, as it stood at the time of the trial, did not render the testimony of either the examiner of records or the commissioner of revenue incompetent.

Saville v. Virginia R. & Power Co. 114 Va. 444, 76 S. E. 954.

The information given by Peden to Cardwell and Bowering does not fall under the head of "a privileged communication," unless made so by the statute.

4 Wigmore, Ev. § 2374, p. 3334.

Sims, J., delivered the opinion of the court:

It is admitted in argument that, if the Statute of 1916 last above quoted had been in force at the time of the trial of this case in the court below, the testimony admitted over the objection of the defendant would have been privileged and inadmissible, without order of court first obtained in a proper proceeding therefor, dispensing with its privileged character. Such statute not being then in force, however, the question we have to determine is: 1. Were the communications in question privileged (a) at common law, or (b) under the Statute of 1915 above quoted?

Counsel for defendant contend that such testimony is privileged at common law and under said Statute of 1915.

It is clear that the communications in question do not come within the express provisions of the Statute of 1915; but it is contended that they come within their spirit and meaning, within the consideration of public policy underlying and sought to be enforced by such statute. As this seems to be a question of first impression in this state, a consideration of the subject on principle and in the light of the authorities, developing to some extent the fundamental distinctions thereby made, would seem to be desirable.

We will consider first the following authorities, most of them cited and relied on by counsel for defendant:

Hennessy v. Wright, L. R. 21 Q. B. Div. 509, 57 L. J. Q. B. N. S. 530, 59 L. T. N. S. 323, 53 J. P. 52, 9 Eng. Rul. Cas. 570, was an action of libel by the governor of a colony against the defendant, because of a statement made by the latter in a newspaper. On application for discovery by defendant, the plaintiff objected to producing certain documents on the ground that he held them in his capacity as governor, and that the secretary of state for the colonies had directed the governor not to produce or disclose such documents, and to object to their production on the ground of the interest of the state and the public service.

The court in its opinion considered two classes of state documents privileged from discovery:

(1) Where the publication of state documents may involve danger to the nation in the direction of involving it in war.

(2) Where the publication of such documents may be injurious to servants of the Crown as individuals, which would end all freedom of official communication, etc.

Of the latter class the privileged communications of client to solicitor, and of an informer to a revenue officer, are mentioned.

As to state documents, what is the public policy, it is said, may turn to some extent on acts of Parliament on the subject.

Discovery was denied on the ground that the case fell within the first class above named.

Cole v. Andrews, 74 Minn. 93, 76 N. W. 962, was an action for malicious prosecution. Held, defendant's communications to the county attorney, in the official capacity of the latter, for the purpose of having a prosecution of plaintiff for a public offense, were not privileged; that the relationship of attorney and client did not exist between defendant and the county attorney. Neither were the communications privileged under § 5662 of the Gen. Stat. 1894 of the state, providing

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that "a public officer cannot be examined as to communications made to him in official confidence, when the public interest would suffer by the disclosure."

The court in its opinion said: "In the first place, the communications to the county attorney were not made in confidence. Further, the defendant testified fully as to all the facts, first before the grand jury, and next on the trial of the indictment, and the prosecution has terminated. And, lastly, the defendant has voluntarily disclosed in his answer in this case that he did communicate the facts to the county attorney, and he set up that fact as a defense. How the public interest would now suffer, or how it would be any breach of confidence towards the defendant to permit the county attorney to disclose what those communications were, is not apparent to us."

Thompson v. German Valley R. Co. 22 N. J. Eq. 111, was a case of subpœna duces tecum to compel a governor of New Jersey to appear and testify before an examiner of court, and to bring with him an engrossed copy of an act of assembly. The process was directed to the governor in his individual name, and not as governor. Held, he should have attended as a witness, but was entitled to withhold any paper or document in his possession, or any part of it, if in his opinion his official duty required him to do so. These were the rules adopted by Chief Justice Marshall in the trial of Aaron Burr. 1 Burr's Trial, 182, 2 Burr's Trial, 535, 536.

State v. Hoben, 36 Utah, 186, 102 Pac. 1000, was a case of prosecution for rape. Prosecutrix made certain communications to the district attorney. Held, such communications came within the provision of subdivision 2 of § 3414, Comp. Laws 1907, which is as follows: "(2) An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him . . . in the course of professional employment." The court did not decide whether it came within subdivision 5 of such section, which was as follows: "A public officer cannot be examined as to the communications made to him in official confidence, where the public interests would suffer by the disclosure," but further held that the privilege of the prosecutrix under subsection 2 was waived by her first testifying to what she stated to the district attorney. The court said as to subsection 5 being applicable: ". . . That subdivision relates especially to matters pertaining to the affairs of the state or nation, or concerning state secrets and communications by informers to public officials. The evidence is excluded because it would prejudice the interests of the public, and because public safety is best subserved by keeping out such evidence. Jones, Ev. 2d ed. § 762; 2 Elliott, Ev. § 639; 4 Wigmore, Ev. § 2367. It is indeed very doubtful if it was made to appear in what particular 'the public interest would suffer by the disclosure.'"

To the same effect, without statute, as above holding as to subsection 2, State v. Brown, 2 Marv. (Del.) 380, 36 Atl. 463.

King v. United States, 50 C. C. A. 647, 112 Fed. 988, was a case of trial on indictment of an officer of the United States for receiving a bribe from a contractor. The latter, a witness for the government, was asked on cross-examination several questions as to whether the Department of Justice had promised him immunity from prosecution if he would testify against the accused, etc. The rule laid down by Roscoe, Crim. Ev. Sharswood's ed. 185, that "where a communication takes place between a counsel or an attorney and his client, or between government or some of its agents, such communication is privileged on the ground that, should it be suffered to be disclosed, the due administration of justice and government could not proceed; such administration requiring the observance of inviolable secrecy,"—was relied on by counsel for the government, and they also

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cited Stephen's Dig. Ev. 7 Am. & Eng. Enc. Law, 102, and 1 Greenl. Ev. 15th ed. § 250.

The court said that this objection rested on the ground that the questions were not permissible, "because they were directed towards the ascertainment of a state secret, which is privileged on grounds of public policy. . . . In this case we do not think there is any necessity to approve or dispute the proposition cited from Roscoe, nor to determine how far the public policy which shuts the mouths of witnesses in regard to those secrets can be safely applied, when it conflicts with the constitutional right of every person tried in the courts of the United States to have a fair and impartial trial."

The court then held that "the conversations of government detectives and other agents with witnesses, with the purpose and effect of inducing and influencing the evidence of such witnesses, do not rise to the dignity of state secrets, and when a witness so induced or influenced appears on the stand and testifies, he may be cross-examined as to any and all inducements made to him on the part of anyone in connection with his evidence. . . . "

Kessler v. Best (C. C.) 121 Fed. 439, held merely that documents which are part of the archives of a foreign consulate are privileged, and a witness cannot be compelled to disclose their contents.

Re Lamberton (D. C.) 124 Fed. 446, holds that a collector or a deputy collector of internal revenue cannot be compelled to disclose, as a witness before the court or the grand jury, the names of persons in whose places of business special tax stamps are posted or the places in which the same are posted, his information on the subject having been obtained in his official capacity, and primarily from the records of his office, copies of which he is forbidden to furnish by the lawful regulations of the Treasury Department. In such cases there has been, in effect, an express statutory declaration of public policy.

Re Huttman (D. C.) 70 Fed. 699, held (per syllabus):

"Regulations made by the commissioner [of internal revenue] pursuant to the statutory authority, with the approval of the Secretary of the Treasury, in respect to the assessment and collection of internal revenue, have the force of statutes. . . .

"A deputy collector . . . cannot be compelled to testify in a criminal proceeding in a state court as to statements made to him by an applicant for a special retail liquor dealer's tax stamp, which statements were made for the purpose of being reduced to writing and embodied in the records of the internal revenue office. To divulge such statements would be to divulge the contents of the records themselves, which is forbidden by the internal revenue regulations."

To the same effect, Stegall v. Thurman (D. C.) 175 Fed. 813; Boske v. Comingore, 177 U. S. 459, 44 L. ed. 846, 20 Sup. Ct. Rep. 701.

In Re Joseph Hargreaves (English Court of Appeals, Ch. Div.) [1900] 1 Ch. 347, 69 L. J. Ch. N. S. 183, 48 Week. Rep. 241, 82 L. T. N. S. 132, 16 Times L. R. 155, 7 Manson, 354. The question was upon the propriety of the refusal of the court below to grant an order under § 115 of the Companies Act 1862, to compel the surveyor of taxes to attend before the liquidator of the company for examination as a witness, and to produce balance sheets which had been given him by the company for the purpose of his assessment of income tax against it. The act left the matter of granting such an order discretionary with the court. There was a certificate by the board of inland revenue that, in their opinion, the production of the documents referred to "would be prejudicial to the public interest and service." The court of appeals declined to interfere with the action of the court below, refusing to grant the order in question.

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In Bowman v. Montcalm Circuit Judge, 129 Mich. 608, 89 N. W. 334, it was held that tax lists which property owners are required to furnish the assessor cannot be used for any other purpose than that *limited by statute* (Comp. Laws, § 3846), which provides that no such lists "shall be used for any other purpose except the making of an assessment for taxes as herein provided, or for enforcing the provisions of this act." (Italics supplied.)

To same effect, Re Reid (D. C. E. D. Mich.) 155 Fed. 933.

In Worthington v. Scribner, 109 Mass. 487, 12 Am. Rep. 736, the question was whether the defendants, in an action of tort for conspiring to injure and damage plaintiff by preventing his importation of books, by representations to the Treasury Department of the United States that plaintiff intended to import books without payment of the lawful duty thereon, etc., could be compelled to testify they gave such information. Held, defendants cannot be compelled to give testimony on such subjects. Mr. Justice Gray, in delivering the opinion of the court, said: "It is the duty of every citizen to communicate to his government any information which he has of the commission of an offense against its laws. To encourage him in performing this duty without fear of consequences, the law holds such information to be among the secrets of state, and leaves the question how far and under what circumstances the names of the informers and the channel of communication shall be suffered to be known, to the absolute discretion of the government, to be exercised according to its views of what the interests of the public require. Courts of justice, therefore, will not compel or allow the discovery of such information, either by the subordinate officer to whom it is given, by the informer himself, or by any other person, without the permission of the government. The evidence is excluded, not for the protection of the witness or of the party in the particular case, but upon general grounds of public policy, because of the confidential nature of such communications."

The learned judge then proceeds to give a résumé of the English authorities on the subject of information given to revenue officers, touching matters falling within the discharge of their duties, going to the extent of clothing with secrecy the name of the informer, as well as all information given by him, unless waived by the state. The same is held with respect to information given military courts, boards of custom, the President of the United States by a military officer, governors of states, unless waived by the representatives of government. Such waiver, in prosecutions by the government, can be made by the official or other person being introduced as a witness for the government, or by the President or governor, etc., voluntarily testifying.

Judge Gray then says: "The reasons and authorities already stated conclusively show that the communications in question are privileged in the latter sense [i. e., in such sense that courts of justice will not permit or compel their disclosure without the assent of government], and cannot be disclosed without the permission of the Secretary of the Treasury."

The privileged character of communication between husband and wife and of client to attorney are also referred to by counsel, as illustrations of the public policy underlying the said Statute of 1915. The latter communications fall within a different class from the communication with which we are concerned in the instant case. The former are private in their nature and are privileged because they fulfil certain fundamental conditions prescribed at common law. The communications in question, in the case before us, would, in their nature, concern the public, and would be privileged at common law only in the event that they fell within the category

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of state secrets and official documents. See authorities above cited, and 4 Wigmore, Ev. pp. 3185–3270 and 3320–3346. The able and exhaustive treatment of the subject by the learned author of the last-named work renders it unnecessary for us to discuss it further in detail here.

Evidence—privileged communications—statement to tax official.

In brief, the summary of the law, as applicable to the case before us is this: ". . . A person's own statement of his own taxable property . . . to the proper official" is not a privileged communication at common law. 4 Wigmore, Ev. § 2374, subsec. 4, p. 3334.

The state may make such communications privileged by "express statute;" otherwise, they are not privileged. Id.

Cogent reasons are urged by the learned writer last cited why the doctrine touching privileged communications should not be extended, where "matters of fact in the possession of officials concerning solely the internal affairs of public business . . . material to be ascertained upon an issue in a court of justice" are in q
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ANNOTATION.

Evidence: privilege of communications to tax

I. Generally, 1421.
II. Informers, 1422.
III. United States Internal Revenue Department, 1422.
IV. Under particular statutes, 1423.
V. Secondary evidence, 1424.

I. Generally.

The public interest requires that in some cases state documents and information acquired by public officers should not be made public. How far this doctrine applies to matters of revenue it is not easy to say. It can well be defended in the case of informers. It has further been said that the interests of those compelled to furnish information as to their private business would often be seriously affected, if the disclosures so made were not properly guarded.
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sage from Wigmore on Evidence, particularly referred to in the opinion in the reported case (CHICHESTER v. PEDEN, ante, 1414), occurs in a discussion of the privilege for communications by informers, and reads as follows: "The privilege applies only to communications concerning *third persons' misdoings*. For example, a person's own statement of his own *taxable property*, or his own *unfinished inventions*, to the proper official, may be protected by some express statute (based, to be sure, on an analogous principle), but not as an informer's disclosure, under this rule." 4 Wigmore, Ev. § 2374, subsec. 4, p. 3334.

II. Informers.

It has been said that in courts of justice, "for reasons of public policy, persons are not to be asked the names of those from whom they receive information as to the frauds on the revenue." Home v. Bentinck (1820) 2 Brod. & B. 130, 129 Eng. Reprint, 907, 4 J. B. Moore, 563, 22 Revised Rep. 748 (a case without the scope of this note); and informers in revenue cases have been protected: Atty. Gen. v. Briant (1846) 15 Mees. & W. 169, 153 Eng. Reprint, 808, 15 L. J. Exch. N. S. 265; Black v. Holmes (1822) 1 Fox & S. (Ir.) 28; Rex v. Akers (1790) 6 Esp. (Eng.) 125, note; Worthington v. Scribner (1872) 109 Mass. 487, 12 Am. Rep. 736.

Thus, a witness for the Crown, on an information for penalty under the Excise Acts, could not be asked whether he gave the information. Atty. Gen. v. Briant (Eng.) supra. So a letter to the commissioners of customs, accusing a person of smuggling, is privileged, and not admissible in an action of libel. Black v. Holmes (1822) 1 Fox & S. (Ir.) 28 supra. So in Rex v. Akers (1790) 6 Esp. (Eng.) 125, note, supra, an information for obstructing a customhouse officer in the performance of his duty, the court declined to permit the defendant's counsel to inquire the name of the person who gave the information. Worthington v. Scribner (Mass.) supra, is sufficiently set out in the reported case (CHICHESTER v. PEDEN, ante, 1414).

III. United States Internal Revenue Department.

Regulations of the Treasury Department, prohibiting a collector of internal revenue from producing records in his office, or copies thereof, in a state court, are within the power conferred upon the Secretary of the Treasury by U. S. Rev. Stat. § 161, Comp. Stat. 1916, § 235; and therefore an attempt of a state court to punish him for obeying such regulations will be in violation of his rights under the Constitution and laws of the United States, against which he will be protected by the Federal courts. Boske v. Comingore (1900) 177 U. S. 459, 44 L. ed. 846, 20 Sup. Ct. Rep. 701. Where the court said, inter alia: "Reasons of public policy may well have suggested the necessity, in the interest of the government, of not allowing access to the records in the offices of collectors of internal revenue, except as might be directed by the Secretary of the Treasury. The interests of persons compelled, under the Revenue Laws, to furnish information as to their private business affairs, would often be seriously affected, if the disclosures so made were not properly guarded."

The doctrine of this case is sustained in Re Huttman (1895) 70 Fed. 701; Re Weeks (1897) 82 Fed. 729; Re Lamberton (1903) 124 Fed. 446; Stegall v. Thurman (1910) 175 Fed. 813. The Huttman and Lamberton Cases are sufficiently set out in the reported case (CHICHESTER v. PEDEN, ante, 1414).

In Re Weeks (1897) 82 Fed. 729, supra, it was held that a deputy collector of internal revenue was not required to answer a question in a state court, as to whether one there accused of selling intoxicating liquor had ever paid him any money for the purpose of obtaining a retail liquor dealer's special tax stamp.

In Stegall v. Thurman (Fed.) supra, it was held that a United States storekeeper and gauger could not be compelled to answer questions before a

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state grand jury as to information concerning a distillery, obtained by him in his official capacity.

The Boske Case disposes of the underlying theory of the decision in Re Hirsch (1896) 74 Fed. 928, where it was held that a deputy United States internal revenue collector must, on subpœna from a state court, produce a paper in his office, signed by a person stating his intention to sell intoxicating liquor, notwithstanding any alleged instructions to the contrary by the commissioner of internal revenue, and that such a paper is not privileged. This case arose before the general instructions in force at the time of Boske v. Comingore (1900) 177 U. S. 459, 44 L. ed. 846, 20 Sup. Ct. Rep. 701, supra, and, while somewhat obscurely reported as to instructions that were in force, it is construed (in Re Valecia Condensed Milk Co. (1917) 153 C. C. A. 236, 240 Fed. 310) as holding that "the two letters of the commissioner of internal revenue to revenue collectors of other revenue districts, instructing them to refuse production of any such papers, did not amount to a regulation, and that there was in fact no regulation of the department, preventing the production of such papers." The Hirsch Case was affirmed (1898) in 31 C. C. A. 350, 57 U. S. App. 165, 87 Fed. 1005.

In D'Amico v. State (1917) 6 Boyce (Del.) 598, 102 Atl. 78, on a state prosecution for an unlawful sale of liquor, it was held that the United States Treasury Department rule, prohibiting disclosures by internal revenue officers, was made for the protection of the Treasury Department; that it cannot be invoked by defendants in criminal cases, and that, if the officer does not claim the privilege, his testimony is admissible.

For the question of secondary evidence, see infra, V.

IV. Under particular statutes.

Re Joseph Hargreaves [1900] 1 Ch. (Eng.) 347, 69 L. J. Ch. N. S. 183, 48 Week. Rep. 241, 82 L. T. N. S. 132, 16 Times L. R. 155, 7 Manson, 354, is sufficiently dealt with in the reported case (CHICHESTER v. PEDEN, ante, 1414).

It has been held that a statutory prohibition of the disclosure of a taxpayer's sworn inventory, except in prosecutions under the statute, does not apply to the testimony of a witness in a civil suit, who assisted the taxpayer in making up her inventory, and saw its contents, with her permission, before it was taken up by the tax officers (Witters v. Sowles (1887) 32 Fed. 130); and that a statutory prohibition of the disclosure of sworn answers does not apply to unsworn statements (CHICHESTER v. PEDEN [reported herewith]; see also Pease v. Jennings (Mich.) infra).

Sworn inventories of taxpayers which, by state statute, are not allowed to be made public except on prosecutions under the statute, cannot be called for in a civil suit in a Federal court. Witters v. Sowles (Fed.) supra.

A state statute prohibiting officials from permitting any state income tax return from being seen or examined by any person, "except as provided by law," prevents a Federal court, in bankruptcy, from requiring a state officer to produce the return of a bankrupt; the words quoted being construed as relating to the administration of the state Income Tax Law. Re Valecia Condensed Milk Co. (1917) 153 C. C. A. 236, 240 Fed. 310.

In Bowman v. Montcalm Circuit Judge (1902) 129 Mich. 608, 89 N. W. 334, it was held that under a statute, providing that no tax statement by property owners, contemplated by the act, shall be used for any other purpose, except the making of an assessment, or for enforcing the provisions of the act, a taxpayer may not bring all such lists before the court to show that the property therein shown was undervalued, as the statute was not designed to enable strangers to use such statements "as evidence, upon which they might resist the purpose of the act, and thereby avoid assessments against them in cases similar to the present."

And in Williams v. Brown (1904) 137 Mich. 569, 100 N. W. 786, it was held that it was error, after a witness had testified to the value of property

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sold by him, to place in his hands his tax statement, and require him to testify what value he had therein placed upon the property. The court said: "The purpose of the statute evidently is to make such statements privileged, except for the use specified in the statute. The language of the statute is emphatic and unambiguous. It prohibits their use for any other purpose than the making of an assessment, and enforcing the provisions of the law."

So, it was held under such statute that the Federal court, in bankruptcy, could not compel an assessor to produce the bankrupt's tax list, although the bankrupt did not object. Re Reid (1906) 155 Fed. 933.

But in Pease v. Jennings (1914) 180 Mich. 682, 146 N. W. 260, where the statement was not the sworn statement of the taxpayer, but a statement made by the supervisor, it was held proper to require the supervisor to state what answers the taxpayer made to him when the supervisor called at his house to make out the statement, and that the prohibitory provision of the statute did not apply in such case.

A statute prohibiting officers from making a disclosure of tax lists, "except by order of court," does not prevent the court from permitting an adversary to show, by the filed statement of a taxpayer, that he had not listed a certain claim, as an admission that he had no such claim. Thaden v. Bagan (1917) — Minn. —, 165 N. W. 864, holding also that, as the public interest would not suffer from such a disclosure, the disclosure was not prohibited by the further statute, providing that "a public officer shall not be allowed to disclose communications made to him in official confidence, when the public interest would suffer by the disclosure."

V. Secondary evidence.

In Meyer v. Home Ins. Co. (1906) 127 Wis. 293, 106 N. W. 1087, it was held that a witness was properly prevented from testifying as to an entry of property he had read in the internal revenue books, where, under "the rules of the department, the collectors are prohibited from giving out such records or copies thereof, or producing such records or copies in state courts, except that, where copies of documents or records are desired on behalf of parties to a suit, such copies shall be furnished only on a rule of the court upon the secretary of the treasury requesting the same;" as, the records themselves not being admissible, secondary evidence of their contents could not be admitted.

On the other hand, it has been held in Kansas that, since an internal revenue officer cannot be compelled to produce records or give copies thereof, a copy of such a record, sworn to by a third person, was admissible as showing that one on trial for violating the prohibitory law had paid a special tax as a retail liquor dealer. State v. Nippert (1906) 74 Kan. 371, 86 Pac. 478; State v. Schaeffer (1906) 74 Kan. 390, 86 Pac. 477.

See also Witters v. Sowles (1887) 32 Fed. 130, supra, IV., where it does not appear whether the question was raised. B. B. B.

ROBERT P. COOMBS
v.
WILLIAM L. WEST.

Maine Supreme Judicial Court — December 21, 1916.

(115 Me. 489, 99 Atl. 445.)

Boundaries — call for tree — center or edge.

1. In determining the corner of a grant described in a deed as a certain distance from a tree, the measurement must be from the center of the tree.

[*See note on this question beginning on page* 1428.]

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Trial — construction of deed — court.

2. The courts must construe a deed in which there is no ambiguity.

REPORT by the Supreme Judicial Court for Waldo County, on an agreed statement of facts, for determination by the law court of the question of right to recover a certain strip of land under a writ of entry. *Judgment for defendant.*

The facts are stated in the opinion of the court.

Mr. Robert F. Dunton, for plaintiff:

There is nothing in the deed showing or tending to show that the measurement began at the center of the tree; consequently it must be presumed that the parties began their measurement at the circumference, otherwise the terminus of the line would not be "4 rods easterly of the tree."

Dodd v. Witt, 139 Mass. 63, 52 Am. Rep. 700, 29 N. E. 475; Haight v. Hamor, 83 Me. 453, 22 Atl. 369; Bradley v. Rice, 13 Me. 198, 29 Am. Dec. 501; Bradford v. Cressey, 45 Me. 9.

Where a deed is of doubtful meaning, or the language used is ambiguous, the construction given by the parties themselves, as elucidated by their conduct or admissions, will be deemed the true one, unless the contrary be shown.

13 Cyc. 608; Bradford v. Cressey, 45 Me. 9; Dakin v. Savage, 172 Mass. 23, 51 N. E. 186; Stone v. Clark, 1 Met. 378, 35 Am. Dec. 370.

Mr. Arthur Ritchie, for defendant:

Where the boundary line is simply by an object, whether natural or artificial, the name of which is used in ordinary speech as defining a boundary, and which does not in its description or nature include the earth as far down as the grantor owns, and yet which has width, as in the case of a river, wall, fence, or tree, then the center of the thing so running over or standing on the line is the boundary of the lot granted.

Boston v. Richardson, 13 Allen, 146.

Plaintiff cannot recover because the description in the declaration in his writ is at variance with the description in the deed.

Center Bridge Co. v. Wheeler & H. Co. 86 Conn. 585, 86 Atl. 11; Bangor House v. Brown, 33 Me. 309; Ames v. Hilton, 70 Me. 36.

Haley, J., delivered the opinion of the court:

This is a writ of entry to recover a strip of land about 2 feet in width on the northerly side of Franklin street in Belfast, and 2 feet and 8 inches in width at the northerly line of the adjoining lots of plaintiff and defendant, and is reported to this court on an agreed statement of facts.

On the 13th day of September, 1898, one Isaac M. Boardman conveyed to Charles E. White, by deed duly recorded, the land comprising the adjoining lots of the plaintiff and defendant. The land was conveyed as one lot. On the 26th day of October, 1898, Charles E. White conveyed, by warranty deed, to M. L. Mitchell, so much of that lot as lies easterly of the following described line, to wit: "Beginning at a point in the northerly line of Franklin street, so-called, 4 rods easterly of the tree standing in the southwesterly corner of the premises conveyed to said White by said deed from Boardman, and extending thence parallel with the line of Congress street, so-called, to the northerly line of said premises."

April 28, 1908, Mitchell conveyed the premises to defendant West. February 9th, 1909, Charles E. White conveyed to Robert B. Coombs, the plaintiff, land now owned by him described in the deed as follows: "A certain lot or parcel of land with the buildings thereon situated at the junction of Franklin and Congress streets in said Belfast, and bounded and described as follows, to wit: 'Bounded northerly by land of Mrs. Lefia Cottrell, easterly by land of W. L. West, southerly by Franklin street and westerly by Congress street, being the same premises conveyed to me by Isaac M. Boardman, by his warranty deed dated September 13, 1898, and recorded in Waldo county registry of

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deeds in book 204, page 170, except so much thereof as was conveyed by me to Martin L. Mitchell, by deed recorded in said registry.'"

It is agreed that if, under the construction placed upon the deeds by the court, the measurements commenced at the center of the elm tree judgment is to be rendered for the defendant; otherwise for plaintiff.

In Boston v. Richardson, 13 Allen, 154, the court states: "The general rule of construction may be thus stated: Whenever land is described as bounded by other land, or by a building or structure, the name of which, according to its legal and ordinary meaning, includes the title in the land of which it has been made a part, as a house, a mill, a wharf, or the like, the side of the land or structure referred to as a boundary is the limit of the grant; but when the boundary line is simply by an object, whether natural or artificial, the name of which is used in ordinary speech as defining a boundary, and not as describing a title in fee, and which does not, in its description or nature, include the earth as far down as the grantor owns, and yet which has width, as in case of a way, a river, a ditch, a wall, a fence, a tree, or a stake and stone, then the center of the thing so running over or standing on the land is the boundary of the lot granted." In Bradford v. Cressey, 45 Me. 13, the court states: "And it is undoubtedly true that, where a grant is bounded upon a non-navigable fresh-water stream, a highway, a ditch or party wall, or the like, such stream, way, ditch, or wall are to be deemed monuments located equally upon the land granted and the adjoining land, and, in all such cases, the grant extends to the center of such monument. It is, however, competent for the grantor to limit his grant as he may choose. He may exclude or include the entire monument, and run his line on either side, or to the center thereof, at his pleasure, by the use of apt words to indicate his intention so to do." In Schneider v. Jacob, 86 Ky. 101, 5 S. W. 350, in speaking of a street as a monument, the court said: "The street in such a case is regarded as a single line; and as a single line it becomes a boundary of the lot. It is as a tree or rock which is called for as a boundary. . . . The terminus of the line is ordinarily the center of the tree or rock unless the vendor's title to the property conveyed extends only to the edge of the tree or rock; and in the same manner the street is a monumental boundary." In Jacob v. Woolfolk, 90 Ky. 426, 9 L.R.A. 551, 14 S. W. 415, the court quotes from the Schneider Case, and further says: "As seen, the street or alley is to be regarded as a single line, and the conveyance is to be treated as being the center thereof, the same as if a tree or rock had been called for. In other words, the center of the street or alley is one of the lines called for in the deed; and as long as the deed stands unattacked for fraud or mistake, it is to be conclusively presumed that it speaks the intention of the parties. Of course, the parties may agree in the deed that the edge of the street is to be the dividing line. So, also, may they agree as to the tree or rock." In Warner v. Southworth, 6 Conn. 471, the plaintiff owned the lot described in his declaration, and the land adjoining thereto on the south that was owned by the defendant at the time of the acts complained of. The plaintiff threw up a bank and sank a ditch across the land for his own accommodation, and for a division between the north and south lots. This ditch he made about 6 feet wide, throwing the earth out on the north side of it. Afterwards he sold the south lot to Edward A. Leet, bounded it north on the ditch, and the same land the defendant owned at the time complained of. The evidence showed that the defendant, at the time of the trespass complained of, dug out the earth more than 4 feet from the center of the ditch, and filled up the same on the south side of it to a height not ex-

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ceeding the height of the defendant's land adjoining. The judge charged the jury that, "by the conveyance, the defendant owned the land to the center of the ditch, that where no division had been made, as in the case, the ditch was the common fence of both proprietors, and each had a right to repair it when decayed, for the common benefit of both lots, in a reasonable manner, according to the rules of good husbandry, but not to dig more than 4 feet from the center line, throwing and laying the bank on his own land."

The first objection to the charge was that by the conveyance the north line of the defendant was not the center of the ditch. The court said, "To this it is answered that where a conveyance is made bounded on a river not navigable the grantee holds to the center of the river [citing cases]. There is no doubt that had this been a river such is the law, and if it be considered as a common fence, as I supposed it to be, the law is the same. Doubtless, had the boundary line been a stone wall 6 feet in width at the bottom, the grant would have extended to the center of it. This grant, by analogy, should be so construed. The charge, then, upon this point is correct."

"When walls, fences, trees, and the like are referred to as monuments, if they are of considerable thickness or width, the boundary line is always in the center of the monument, as has been seen to be the case with streams and highways." Tiedeman, Real Prop. § 838.

At the time of giving the deed to Martin L. Mitchell, of the premises now owned by the defendant West, the tree mentioned was at the southwesterly corner of land conveyed to Charles E. White by Isaac Boardman, a part of which Charles E. White conveyed to Mitchell. It was on the boundary line, a monument at the southwest corner of the land conveyed by Boardman, and, in selecting it as a monument from which to run the line of the land conveyed to the defendant, West, the grantor, used the same language that he would have used if he had been conveying the lot, or part of the lot, that adjoined the tree at the southwest corner. It was referred to as 4 rods easterly of the tree standing at the southwest corner. That language in a deed would have conveyed to the center of the tree, if the tree was standing at the southwest corner, and the parties used the description of it the same as they would if they had been making a deed of the other half of the lot, not from the outer edge of the tree, but from the center of the tree. "A monument is a fixed place on the earth, a reference in a deed to a tree as a boundary or monument carries to the center of the tree, and, as the years go by, the tree increases in size, the monument remains the same." Otherwise, the monument would change with time. As the tree grew, if the monument was then outside of the tree, the lot would narrow up, and if lots were sold upon both sides of the tree, in the course of time there would be a strip of land upon which the tree stood that, although not owned by the grantor after the giving of his deeds, would appear to be his by the lapse of time and the action of nature.

Boundaries—call for tree—center or edge.

There being no ambiguity in the deed of White to Mitchell, under whom the defendant claims, it is the duty of the court to construe it, and it is the opinion of the court that it was the intention of the parties, and the legal construction of the language used, that the parties to the deed referred to the tree standing at the southwest corner of the White property as a monument, the same as they would have referred to it as a monument if they had been deeding the land at the southwest corner of the lot, and that the monument referred to by the deed, viz., the tree, was of

Trial—construction of deed—court.

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considerable thickness or width, the point of the monument from which the measurement should begin is the center of the tree standing at the southwest corner of the lot conveyed to White by Boardman. Therefore the mandate must be judgment for defendant.

ANNOTATION.

Conveyance with reference to tree, or similar monument, as giving title to center thereof.

The reported case (COOMBS v. WEST, ante, 1424) lays down the rule that where, in a conveyance of real estate, reference is made to a tree as a boundary or monument, it carries title to the center of the tree.

In Stewart v. Patrick (1877) 68 N. Y. 450, the foregoing rule was recognized, but was held to be inapplicable because of a practical construction of the conveyance in question by the parties. In that case the first reference, in any of the deeds under which plaintiff claimed title, to a tree as limiting the boundary, was in a deed of 1841, by the words, "at or near a tree;" but in all of the mesne conveyances thereafter down to plaintiff, including his immediate grant, the description was made to commence "at the button-ball tree, so-called." For many years the division fence of the property occupied by plaintiff and his predecessors in title had been attached to the northerly side of the tree. It was held that the deed should "be interpreted in conformity with the practical effect given it by the parties," and the division line be therefore deemed to start from the outer surface of the tree on the northerly side. With respect to the general rule the court said: "The description of the survey as beginning 'at' the tree does not necessarily fix the point at the center of the tree. That may be, in the absence of other circumstances to qualify the description, the legal effect of it."

In a number of cases in which a boundary by a street or stream was involved, the court has laid down, by way of dictum, the broad rule that a conveyance referring to a tree or similar monument as marking the boundary gives title to the center of the designated monument. Freeman v. Bellegarde (1895) 108 Cal. 179, 49 Am. St. Rep. 76, 41 Pac. 289; Schneider v. Jacob (1887) 86 Ky. 101, 5 S. W. 350 (quoted in the reported case COOMBS v. WEST); Jacob v. Woolfolk (1890) 90 Ky. 426, 9 L.R.A. 551, 14 S. W. 415 (quoted in the reported case COOMBS v. WEST); Bradford v. Cressey (1858) 45 Me. 9 (quoted in the reported case COOMBS v. WEST); Boston v. Richardson (1866) 13 Allen (Mass.) 146; Sleeper v. Laconia (1880) 60 N. H. 201, 49 Am. Rep. 311; Schwalm v. Beardsley (1907) 106 Va. 407, 56 S. E. 135.

"In the absence of any qualifying term, the designation in a conveyance of any physical object or monument as a boundary implies the middle or central point of such boundary; as, for example, if the boundary be a road or highway, or a stream, the thread of the road or stream will be intended; if a rock, a heap of stones, or a tree be the boundary, the central point of such tree or rock or heap of stones will be intended." Freeman v. Bellegarde (1895) 108 Cal. 179, 49 Am. St. Rep. 76, 41 Pac. 289.

"When the boundary line is simply by an object, whether natural or artificial, the name of which is used in ordinary speech as defining a boundary, and not as describing a title in fee, and which does not, in its description or nature, include the earth as far down as the grantor owns, and yet has width, as in the case of a way, a river, a ditch, a wall, a fence, a tree, or a stake and stones, then the center of the thing so running over or standing on the land is the boundary of the lot granted." Boston v. Richardson (1866) 13 Allen (Mass.) 146. See to the same effect Schwalm v. Beardsley (Va.) supra.

In Warner v. Southworth (1827) 6

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Conn. 471, it appeared that a ditch 6 feet wide was designated as a boundary. The court said: "Doubtless, had the boundary line been a stone wall 6 feet in width at the bottom, the grant would have extended to the center of it. This grant, by analogy, should be so construed."

In Radtke v. Rothschild Water Power Co. (1914) 158 Wis. 271, 148 N. W. 866, the rule laid down in the cases just quoted was recognized, but was held to be inapplicable to a conveyance of lands "south and west of a bluff." H. D. M.

ETTA MERITHEW
v.
SIMEON ELLIS.

Maine Supreme Judicial Court — November 24, 1917.

(116 Me. 468, 102 Atl. 301.)

Fraudulent conveyance — consideration of support — execution sale.

1. A creditor who delays proceedings to enforce his claim against one who has conveyed his real estate to a relative in consideration of support, until support has been furnished to the value of the property conveyed, cannot secure a title to the property by an execution sale under attachment proceedings.

[*See note on this question beginning on page* 1438.]

— conveyance for support — voluntary.

2. A conveyance of all one's property in consideration of future support is purely voluntary and, prima facie, voidable as to existing creditors.

Parent and child — contract for support — emancipation.

3. A contract for support by a parent with his minor child who is earning wages, for services rendered to strangers, creates an emancipation of the child.

REPORT by the Supreme Judicial Court for Waldo County for determination by the Law Court of an action brought to recover possession of certain real estate. *Case remanded.*

The facts are stated in the opinion of the court.

Mr. Eugene C. Upton and Miss Aurelia E. Hanson for plaintiff.

Mr. Robert F. Dunton, for defendant:

The judgment of John M. Ames & Son against Henrietta H. Reed, on which the real estate was sold, is conclusive in this suit.

Sidensparker v. Sidensparker, 52 Me. 481, 83 Am. Dec. 527; Manson v. Peaks, 103 Me. 430, 125 Am. St. Rep. 311, 69 Atl. 690.

The deed from Henrietta H. Reed to her minor daughter, Flora B. Reed, in consideration of an agreement of the daughter to care for her during her life, was purely voluntary and prima facie void as to existing creditors.

20 Cyc. 532; French v. Holmes, 67 Me. 186; Laughton v. Harden, 68 Me. 208.

The conveyance being fraudulent and void as to creditors, the title is regarded as remaining in the fraudulent grantor, and the judgment creditor by a levy acquires such seisin as enables him to maintain a real action against the fraudulent grantor or grantee.

Marston v. Marston, 54 Me. 476.

An agreement for future support is not sufficient consideration to uphold a conveyance or transfer by a debtor, when to do so will operate to the prejudice of existing creditors. Such a conveyance is prima facie fraudulent as against existing creditors, and voidable by them.

20 Cyc. 493; Spear v Spear, 97 Me.

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498, 54 Atl. 1106; Graves v. Blondell, 70 Me. 190; Webster v. Withey, 25 Me. 326; Rollins v. Mooers, 25 Me. 192.

The record of a sheriff's deed under a sale on execution levied on the land of a debtor after he has conveyed it in fraud of the creditor is notice of the fraud to a subsequent purchaser for value.

20 Cyc. 649; Stivers v. Horne, 62 Mo. 473; Baxter v. Sewell, 3 Md. 334; McGregor v. White, 15 Tex. Civ. App. 299, 39 S. W. 1024.

Cornish, Ch. J., delivered the opinion of the court:

Real action. Plea nul disseisin with brief statement claiming compensation for improvements. On report.

The real estate in question was conveyed to Henrietta H. Reed on April 18, 1888. After its purchase Mrs. Reed procured credit at the store of John M. Ames & Son of Stockton Springs, the last item of the account being dated March 15, 1889, and on that date the balance due was $33.66.

On June 6, 1889, while this balance was still unpaid, Mrs. Reed, a widow, conveyed the premises, consisting of a small house and lot, to her daughter Flora B. Reed, then fifteen years old, the consideration being the oral agreement of the daughter to care for her mother during her life. The debt from Mrs. Reed to Ames & Son remaining unpaid, they brought suit against her on December 22, 1894, and attached her real estate. Judgment was rendered for the plaintiff in this suit at the January term, 1896, and after seizure on execution the property in question was sold at sheriff's sale on February 26, 1896, to the judgment creditors, Ames & Son, and a sheriff's deed was duly executed and delivered to them.

The plaintiff's title is derived from Flora B. Reed, by deed dated November 2, 1901; the defendant's from Ames & Son under the sheriff's deed, through various mesne conveyances.

After her purchase of the property in 1888, Mrs. Reed continued to occupy the premises until her eviction by the sheriff in September, 1902, during the alleged ownership of one Devereux, a grantee in the defendant's chain of title, and she paid all taxes assessed thereon, according to the plaintiff's testimony. Flora B. Reed remained on the premises until November 2, 1901, when she conveyed to her sister, the plaintiff, who agreed to continue the support of the mother during the remainder of her life. After the eviction in September, Mrs. Reed, however, went to Belfast to again live with her daughter Flora, and remained with her until her death, March 3, 1903.

The issue here is between the plaintiff, the source of whose title is the deed of June 6, 1889, the consideration of which was admittedly an agreement for future support of the grantor by the grantee, and the defendant, the source of whose title is the sheriff's deed, based on a judgment in behalf of an existing creditor of the grantor, whose debt was unpaid when the conveyance in consideration of future support was given.

The defendant attacks the deed of June 6, 1889, from the mother to her minor daughter, relying upon the familiar principle that a conveyance of all one's property in consideration of future support is purely voluntary and prima facie voidable as to existing creditors. Such is the law. Webster v. Withey, 25 Me. 326; Rollins v. Mooers, 25 Me. 192; Egery v. Johnson, 70 Me. 258; Graves v. Blondell, 70 Me. 190; Spear v. Spear, 97 Me. 498, 54 Atl. 1106.

Fraudulent conveyance—conveyance for support—voluntary.

But another rule is of equal force, that if, in the performance of such an agreement, the support has been actually furnished in good faith, so that the consideration has been subsequently paid, the conveyance will be upheld. "Such a conveyance will not be set aside at the instance of creditors, after support has been furnished in

—consideration of support—execution sale.

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reliance on it, which in value exceeds that of the property conveyed." 12 R. C. L. 547; Kelsey v. Kelley, 63 Vt. 41, 13 L.R.A. 640, 22 Atl. 597, 20 Cyc. 493; Harris v. Brink, 100 Iowa, 366, 62 Am. St. Rep. 578, 69 N. W. 684; Walker v. Cady, 106 Mich. 21, 63 N. W. 1005; Long Branch Bkg. Co. v. Dennis, 56 N. J. Eq. 549, 39 Atl. 689. These cited cases are all in equity, but there is no logical reason why the justice of the principle should not be applied in an action at law when the facts warrant it. The case at bar affords a striking illustration of its efficacy. At the time when, in March, 1889, Mrs. Reed owed Ames & Son a small balance of $33.66, she was the owner of this little home, bought with her pension money, and worth, as is admitted by the defendant's counsel in argument, about $100. She had no other property. She was in ill health, and had previously been helped by the town. She had two daughters, Flora, aged then fifteen, and Etta, aged twenty-two. Flora was at work among the villagers and earning money on her own account. Under these circumstances the mother gave the property to the younger daughter, in consideration of the oral agreement to care for her during the rest of her life. There is no claim of any actual fraud on the part of either mother or daughter. That deed was immediately placed on record, and therefore Ames & Son had constructive notice of the transaction. Had they then taken steps to set the conveyance aside as fraudulent, they would have been within their legal rights. But they sat by and allowed the daughter to pay the consideration which she had agreed to pay. For twelve years, that is, from the time when she was fifteen up to the time she was twenty-seven years of age, she did care for and support her mother, and then on November 2, 1901, she conveyed the property to her older sister, who in turn agreed to carry out the same contract. During all this time they remained in undisturbed possession.

For almost six years Ames & Son allowed the daughter to perform her agreement before they brought suit on their claim, and it was not until September, 1902, thirteen years after the deed was given, that the mother was evicted and possession taken by a predecessor of the defendant in title.

That the daughter contributed to the support of the mother at an expense far greater than the value of the property, before Ames & Son made any move to enforce their rights, is apparent from the evidence. The value of the property was only $100, and certainly she contributed greatly in excess of $20 per year for the five years after she received her deed. At the time the creditors began proceedings full consideration had therefore been paid, and the conveyance was no longer voidable. On what principle of law should the creditors be allowed to step in and appropriate property that had been paid for in full? What preferential rights had they under these circumstances? As the court said in Kelsey v. Kelley, 63 Vt. 41, 13 L.R.A. 640, 22 Atl. 597, before cited: "The defendants, until they had furnished the full support, were like a purchaser bona fide in every respect, except he had not fully paid the contract price of the property purchased. . . . But although he does not pay full value at the time of the purchase, if such payment is made in full before he is made aware of the infirmity of his purchase, he is fully protected."

Here thirteen years elapsed before the daughter was made aware of even the alleged infirmity of her purchase. Six of these years had been during her minority, and seven after attaining her majority.

The fact that Flora was a minor at the time of the conveyance and agreement does not destroy her rights. Obviously, she had been emancipated by her mother. As defined by our court, emancipation "must be

Parent and child—contract for support—emancipation.

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by consent, express or implied, of the parent if living, and is an entire surrender of all right to the care, custody and earnings of the child, as well as a renunciation of parental duties." Lowell v. Newport, 66 Me. 78. It "occurs . . . by the voluntary act of the parent in surrendering the rights and renouncing the duties of his position, or, in some way, conducting in relation thereto in a manner which is inconsistent with any further performance of them." Monroe v. Jackson, 55 Me. 59; Carthage v. Canton, 97 Me. 473, 476, 54 Atl. 1104.

Here the daughter was working and earning on her own account, and the mother dealt with her as with a stranger. She did not claim her services because of the filial relationship, but contracted for them under the agreement entered into between them, and that agreement necessarily implied emancipation. It provided that the daughter should support the mother. This she could not do if her mother was still to claim and take her earnings. This principle has been well stated in these words: "Since, however, a father may emancipate his minor child, it has been held that if he does so and enters into a bona fide contract with the child to pay for services performed by the child under such contract, such services are a sufficient consideration to support a conveyance by the father to the child, as against the father's creditors." 20 Cyc. 532.

For these reasons it is the opinion of the court that the plaintiff should prevail. The conveyance from mother to daughter, with value fully paid at the time of attack by creditors, must stand.

The defendant sets up a claim for improvements made by himself and his predecessors, but the evidence is so meager and unsatisfactory on this branch of the case that it is impossible to form an intelligent judgment on this important point. The case will therefore be remanded to nisi prius, in order that a determination of that question alone may be made, as provided by Rev. Stat. 1916, chap. 109, §§ 20, 24, 25, and 26.

In this way exact justice will be done to all the parties in interest.

Case remanded to Nisi Prius for further proceedings in accordance with opinion.

NOTE.

The rule as stated in the reported case (MERITHEW v. ELLIS, ante, 1429), that a conveyance of all of one's property in consideration of future support is purely fraudulent and prima facie voidable as to existing creditors, is sustained by the great weight of authority, as is shown in subdivision II. of the annotation, covering the general subject, "Conveyance in consideration of future support as fraudulent against creditors," post, 1438.

The further position taken in the reported case that if, in the performance of such an agreement, the support has been actually furnished in good faith, so that the consideration has been subsequently paid, the conveyance will be upheld, is also sustained by the weight of authority, as is shown in subdivision III. of the annotation above referred to.

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LUDLOW SAVINGS BANK & TRUST COMPANY
v.
CHARLES H. KNIGHT et al.

Vermont Supreme Court — October 12, 1917.

(— Vt. —, 102 Atl. 51.)

Fraudulent conveyance — conveyance for support.

1. A conveyance of property in consideration of support to be furnished, which leaves insufficient assets to satisfy the claims of creditors, is fraudulent as to them.

[*See note on this question beginning on page* 1438.]

Garnishment — real estate.

2. Real estate is not within a statute permitting the summoning as trustee of one who has in his possession "goods, effects, or credits" of a debtor, which are held by title void as against creditors.

Fraudulent conveyance — conveyance without consideration.

3. A conveyance without consideration is fraudulent in law as to existing creditors for whom no ample provision has been made, and the good faith of the grantee is immaterial.

— conveyance for consideration.

4. To make a conveyance for a valuable consideration fraudulent as against creditors there must be a fraudulent intent on the part of both the grantor and grantee.

— leaving paltry sum for creditors.

5. A conveyance which leaves a paltry and insufficient sum in the hands of a grantor to satisfy his existing creditors is as much void, as to them, as one which leaves nothing for the creditors.

— assignment of notes — liability of trustees.

6. Persons who, having taken an assignment of notes in consideration of support to be furnished the assignor, convert them into cash and new notes running to themselves, are liable to account as trustees, to existing creditors, of the assignor for the proceeds so obtained.

— accounting — money expended for support.

7. In determining the amount for which one who has received a grant from a debtor, in consideration for future support for him, must account to the grantor's creditors, money expended for support cannot be considered if it is covered by the income which has been received from the property.

EXCEPTIONS by defendants to rulings of the Rutland County Court made during the trial of an action brought to recover the amount of a mortgage note, alleged to be due and unpaid, which resulted in a judgment for plaintiff. *Affirmed.*

The facts are stated in the opinion of the court.

Mr. Marvelle C. Webber, for defendants:

The Stuarts, summoned as trustees, did not hold goods, effects, or credits of the defendant by a conveyance or title void as to the creditors of the defendant; and they should not have been adjudged trustees.

Lynch v. Murray, 86 Vt. 1, 83 Atl. 746; Fair Haven Marble & Marbleized Slate Co. v. Owens, 69 Vt. 246, 37 Atl. 749; Wilson v. Spear, 68 Vt. 145, 34 Atl. 429; Root v. Reynolds, 32 Vt. 139; Leach v. Francis, 41 Vt. 670; Nichols v. Nichols, 61 Vt. 426, 18 Atl. 153; Stevens v. Kirk, 37 Vt. 204; Crane v. Stickles, 15 Vt. 252; Jones v. Spear, 21 Vt. 426.

The Stuarts cannot, in any event, be held trustees for the Leslie note and mortgage.

National Union Bank v. Brainerd, 65 Vt. 291, 26 Atl. 723; Baxter v. Currier, 13 Vt. 615; Stevens v. Kirk, 37 Vt. 204.

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Messrs. William W. Stickney, John G. Sargent, and Homer L. Skeels, for plaintiff:

The conveyance of the property of the debtor and an appropriation of the avails for his future support, thereby placing the property of the debtor (which, before the conveyance, was subject to be taken by his creditors) beyond the reach of his creditors, is fraudulent in law.

Crane v. Stickles, 15 Vt. 252; Briggs v. Beach, 18 Vt. 115; Jones v. Spear, 21 Vt. 426; Worthington v. Jones, 23 Vt. 549; Church v. Chapin, 35 Vt. 223; Stanley v. Robbins, 86 Vt. 432; Prout v. Vaughn, 52 Vt. 451; Woodward v. Wyman, 53 Vt. 645; Pease v. Shirlock, 63 Vt. 622, 22 Atl. 661; Foster v. Foster, 56 Vt. 540.

The trustees were properly held chargeable for the Leslie note secured by mortgage.

Smith v. Wiley, 41 Vt. 19; Woodward v. Wyman, 53 Vt. 645; Hunter v. Case, 20 Vt. 195.

Haselton, J., delivered the opinion of the court:

The Stuarts were adjudged chargeable as trustees in this suit, and bring exceptions.

Our statute provides that if a person summoned as a trustee has in his possession goods, effects, or credits of the defendant, which he holds by a conveyance or title void as to the creditors of the defendant, he may be adjudged a trustee on account thereof, although the defendant could not have maintained an action therefor. Pub. Stat. § 1723. July 22, 1915, the principal defendant, Charles H. Knight, conveyed to the trustees certain real estate, and personal property connected therewith, for the consideration of his life support by the trustees, and on the same day he assigned to the trustees a note held by him against one Leslie and his wife, the makers thereof. The conveyance was of property amounting in value to about $3,000. There is some discussion as to the amount of property reserved, as the commissioner's report finds, upon sufficient and admissible evidence, that the property reserved was a second mortgage of little or no real value at the time of the conveyance, and some hotel furniture then subject to attachments, and afterwards sold on execution for $149.70, to satisfy a judgment in one of the then pending suits. The commissioner finds that Knight had no valuable equity in the personal property reserved. The debt which was the basis of this suit was due and owing prior to the claimed fraudulent conveyance, and at that time amounted to upwards of $1,400.

It is not claimed that, in any event, the trustees can be held chargeable on account of the real estate that Knight conveyed to them, for real estate is not included in the enumeration of "goods, effects, or credits." Pub. Stat. § 1723; Prout v. Vaughn, 52 Vt. 451, 459; Smith v. Hyde, 36 Vt. 303, 307. The first question of importance that we encounter is whether the persons, here summoned as trustees, hold goods, effects, or credits of the defendant, by virtue of a conveyance or title void as to his creditors.

Garnishment—real estate.

It is well settled that a voluntary conveyance, that is, a conveyance without valuable consideration, is fraudulent in law as to existing creditors for whom no ample provision has been made, and the good faith of the grantee is, in such case, immaterial. On the other hand, speaking generally, to make a conveyance for a valuable consideration fraudulent, there must be a fraudulent intent both on the part of the grantor and the grantee. Root v. Reynolds, 32 Vt. 139; Leach v. Francis, 41 Vt. 670; Nichols v. Nichols, 61 Vt. 426, 18 Atl. 153; Lynch v. Murray, 86 Vt. 1, 83 Atl. 746. But the matter of the conveyance by one, of his property, for self-support, stands on a separate and distinct ground. In Knowlton's Bigelow on Fraudulent Conveyances (1911), it is said that the courts are not agreed as to the

Fraudulent conveyance—conveyance without consideration.

—conveyance for consideration.

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effect of conveyances with an undertaking by the grantee to support the grantor, but that in various states such an undertaking does not make "the valuable, or rather the valuable and bona fide, consideration" required to cut off claims of the grantor's creditors. One of the cases referred to is our case of Church v. Chapin, 35 Vt. 223. In that case Judge Peck said: "The agreement for support for life is not of such a character as will sustain the deed, if the creditors are thereby deprived of the means of collecting their debts. It is true that, as between the parties to the deed, it is a valuable consideration, and in this respect a deed founded on it differs from a gift; but as to creditors it is not different from a deed of gift. It has long been settled that a party cannot, either by gift, or in consideration of an agreement for support for life, convey his property without reserving what is amply sufficient for the payment of his then existing debts."

This is the doctrine of Crane v. Stickles, 15 Vt. 252, for though in that case there was a sale of all one's property in consideration of support, there is, in law, no difference between a sale which leaves nothing for creditors, and a sale which leaves a paltry and insufficient amount for existing creditors. Woodward v. Wyman, 53 Vt. 645, 647. There appears to be some confusion in our cases, as is noted in Wilson v. Spear, 68 Vt. 145, 34 Atl. 429; but the doctrine clearly enunciated by Judge Peck in Church v. Chapin, above referred to, is undoubtedly the law of this state. And, in general, a transfer of property in consideration of future support is invalid as to creditors, unless the grantor retains property ample for the payment of his debts. 12 R. C. L. 546; Davidson v. Burke, 143 Ill. 139, 36 Am. St. Rep. 367, 32 N. E. 514; Annis v. Bonar, 86 Ill. 128; Rice v. Cunningham, 116 Mass. 466. Though the consideration is valuable, it is wanting in good faith as to creditors, and the character of the transaction is such as to put the grantee or vendee upon inquiry. Bigelow, Fraud. Conv. 548.

—leaving paltry sum for creditors.

—conveyance for support.

But the trustees contend in argument that they cannot be held chargeable on account of the note turned out to them by the defendant; that, treating the assignment of the note as void as to the creditor bank, its remedy, so far as the note is concerned, is against the Leslies, the makers of the note, who, and not the Stuarts, are indebted to the principal defendant thereon. But the trustees, the Stuarts, realized on the note turned out to them, by surrendering it and taking therefor, in part money, and in part a well-secured note, running to themselves. To such a situation the case of Smith v. Wiley, 41 Vt. 19, is applicable. The argument for the trustees there was substantially that made for the trustees here. But there Judge Barrett, who tried the case in county court, held the trustees liable both for money received and notes taken as their own, and this court, in an opinion by Chief Justice Pierpoint, affirmed the judgment, saying, after a reference to the commissioner's report: "The fact being established that the trustee has taken these notes, and appropriated them to himself, and converted them to his own use, he must stand in respect to them and the principal debtor, in the same position that he would if he had actually received the money upon them."

—assignment of notes—liability of trustees.

We are satisfied with this decision, and it applies here.

In converting to their own use the notes turned out to them by Knight, the trustees held the proceeds of the transaction, to answer the claims of the existing creditors, disenthralled of the provisions as to times of payment in the original notes, or in the notes which they chose to take in accomplishing the conversion.

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It appears that the trustees had paid out about $150 for the maintenance of Knight during a period of some months, but it also appears that they had received more than that amount in rentals from the real estate conveyed to them in consideration of Knight's support; and so there is no occasion for considering such expenditures as affecting the amount for which the trustees are chargeable under Pub. Stat. § 1723. The trustees excepted to the findings of the commissioner as to the value of the property reserved by Knight, on the ground that the findings were not warranted by the facts reported, nor by the evidence which is referred to. But it is enough to say in this regard that the exception is ill-grounded. Some evidence bearing on these findings was received under objection and exception, but so far as any such exception is relied on, it is clear that the evidence was of inferential value, in connection with other evidence.

—accounting— money expended for support.

Judgment affirmed.

NOTE.

The holding in the reported case (LUDLOW SAV. BANK & T. CO. v. KNIGHT, ante, 1433) that a conveyance of property in consideration of support to be furnished, which leaves insufficient assets to satisfy the claims of creditors, is fraudulent as to them, is sustained by the great weight of authority, as is shown in subdivision II. of the annotation, covering the general subject, "Conveyance in consideration of future support as fraudulent against creditors," post, 1438.

The effect of the good faith of the grantee, and his lack of knowledge of the intention of the grantor to hinder, delay, or defraud creditors, is considered in subdivision VII. of the annotation above referred to.

J. G. CHERRY COMPANY, Appt.,
v.
CHARLES A. HELM et al.

Nebraska Supreme Court — September 20, 1915.

(98 Neb. 626, 154 N. W. 205.)

Creditors' bill — conveyance for support as fraudulent.

Property conveyed by a debtor in consideration of an agreement for his future support may be subjected to the payment of a judgment, where there is no other means of enforcing payment, to the extent that the value of the property exceeds the amount of support actually furnished by the grantee in good faith.

[*See note on this question beginning on page* 1438.]

Headnote by MORRISSEY, Ch. J.

APPEAL by plaintiff from a judgment of the District Court for York County in defendants' favor in an action brought to subject certain real estate to the payment of a judgment, recovered by plaintiff against defendant Helm. *Reversed.*

The facts are stated in the opinion of the court.

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Mr. George W. France, for appellant:

Transactions of this kind between relatives, whereby creditors are deprived of their just dues, will be scrutinized very closely, and it must be clearly made to appear that such transactions were entered into in good faith, and the consideration actually paid without intent to hinder, delay, or defraud creditors.

Aultman v. Obermeyer, 6 Neb. 265; Fisher v. Herron, 22 Neb. 183, 34 N. W. 365; Bartlett v. Cheesbrough, 23 Neb. 767, 37 N. W. 652; Plummer v. Rummel, 26 Neb. 142, 42 N. W. 336; Steinkraus v. Korth, 44 Neb. 777, 62 N. W. 1110.

In regard to transactions between relatives, of the nature and effect as to creditors of the party whose conveyance is attacked, it devolves on the party who asserts and relies thereon to establish the bona fides of the transaction in all particulars and elements, inclusive of the indebtedness.

Seitz v. Mitchell, 94 U. S. 583, 24 L. ed. 179; First Nat. Bank v. Bartlett, 8 Neb. 329, 1 N. W. 145; Carson v. Stevens, 40 Neb. 112, 42 Am. St. Rep. 661, 58 N. W. 845; Heffley v. Hunger, 54 Neb. 776, 75 N. W. 53; Lusk v. Riggs, 65 Neb. 258, 91 N. W. 243; Seeley v. Ritchey, 76 Neb. 427, 107 N. W. 769, 110 N. W. 1105.

The consideration, in transfers between relatives, where creditors are hindered, delayed, or defrauded, must be paid.

Bartlett v. Cheesbrough, 23 Neb. 767, 37 N. W. 652; Plummer v. Rummel, 26 Neb. 142, 42 N. W. 336; Melick v. Varney, 41 Neb. 105, 59 N. W. 521; Heffley v. Hunger, 54 Neb. 776, 75 N. W. 53.

Mr. W. L. Kirkpatrick, for appellees:

There can be no doubt but that the title conveyed is as good and indefeasible as one conveyed upon any other good and sufficient consideration.

Gardner v. Lightfoot, 71 Iowa, 577, 32 N. W. 510; Walker v. Walker, 104 Iowa, 505, 73 N. W. 1073; Baxter v. Avery, 5 Neb. (Unof.) 316, 98 N. W. 667; Valparaiso State Bank v. Schwartz, 92 Neb. 575, 42 L.R.A.(N.S.) 1213, 138 N. W. 757, Ann. Cas. 1914B, 935.

Morrissey, Ch. J., delivered the opinion of the court:

November 3, 1910, defendant Helm and his invalid wife came from South Dakota, and took up their residence at York, Nebraska, with defendant Lawson, their foster son. Helm bought a 5-acre tract of land adjoining the property of Lawson, and commenced the erection of a house, with the intention of residing therein, but Mrs. Helm died April 14, 1911, while they were still living in the Lawson home. In the early winter Helm fell, sustaining severe injuries, and was confined to his bed for a considerable time. Lawson and his wife nursed and cared for Mr. and Mrs. Helm as they would for natural parents, and, after the death of his wife, Helm proposed to Lawson that he deed Lawson the property heretofore mentioned, as compensation for the service rendered in caring for himself and his deceased wife, and the further consideration of an oral agreement, whereby Lawson agreed to maintain and support Helm and give him a suitable home during Helm's lifetime. The property is claimed by plaintiff to be worth $6,500, and is admitted in the answer of Lawson to be worth $5,000. It is undisputed that Helm had no children except this foster son; that he was then advanced in years, and somewhat crippled by reason of the fall he had received during the winter; and that he had no other property, except the real estate herein involved. The deed to the premises was made and recorded June 27, 1911.

Before coming to live with his foster son Helm had been employed by the plaintiff, and there was an unsettled account between them. Plaintiff sent this account to an attorney at York, who received it July 8, 1911, and immediately took steps to make the collection. Helm denied that he was indebted to plaintiff, and refused to pay. The attorney then called on Lawson, but payment was not made, and July 20, 1911, suit was instituted, which resulted in judgment in favor of plaintiff for $437, and costs taxed at $20.90. Execution was issued and returned nulla bona, and this action

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was brought in the district court for York county, to set aside the deed of conveyance and subject the real estate to the payment of this judgment. There is no dispute as to the facts. While it is alleged that the deed was made for the purpose of defrauding creditors of Charles A. Helm, yet we think the proof fails to show any fraudulent intent on the part of either Helm or Lawson. However, the direct effect of the transfer was to prevent the plaintiff from collecting its judgment, and, to that extent, it may be said to be a constructive fraud. Helm was indebted to Lawson for the care and support given himself and wife, but the exact amount is not shown. There is enough testimony in the record on this point, however, to indicate that the amount does not exceed one fourth the value of the property conveyed, and, if this judgment is made a lien against the property, Lawson will still be left an equity worth much more than the amount actually due from Helm. The greater part of the consideration for this conveyance consisted of an agreement for future support of the grantor. The weight of authority is to the effect that it is the legal duty of a debtor to pay his debts before he can convey property to provide for his future support, and that existing creditors may avail themselves of property conveyed for future support when the debtor has no other property out of which payment can be enforced. Harris v. Brink, 100 Iowa, 366, 62 Am. St. Rep. 578, 69 N. W. 684; Walker v. Cady, 106 Mich. 21, 63 N. W. 1005; Henry v. Hinman, 25 Minn. 199; Gaar v. Hart, 77 Iowa, 597, 42 N. W. 451.

Creditors' bill—conveyance for support as fraudulent.

Applying this rule to the facts of this case, it is apparent that plaintiff is entitled to have this property subjected to the payment of its judgment, and the cause is reversed and remanded, with directions to enter a decree establishing the judgment in suit as a first lien on the real estate.

Barnes, Fawcett, and Hamer, JJ., not sitting.

ANNOTATION.

Conveyance in consideration of future support as fraudulent against creditors.

I. Introductory, 1438.
II. Generally, 1438.
III. Support actually furnished, 1443.
IV. Support as part consideration, 1444.
V. Full consideration in addition to support, 1447.
VI. Effect of solvency of grantor, 1449.
VII. Effect of good faith of grantee, 1451.
VIII. Who may attack conveyance:
a. Subsequent creditors, 1452.
b. Estoppel, 1453.

I. Introductory.

This note is confined to a discussion of the validity as against creditors, of a conveyance made in consideration of an agreement to support the grantor. It does not include a consideration of conveyances in trust for the benefit of the grantor, or which reserve some beneficial use of the property.

Those phases of the question which are common to all conveyances in fraud of creditors, such as the necessity that the creditor shall reduce his claim to judgment, the rights of a purchaser from a fraudulent grantee, and the like, are also excluded.

II. Generally.

The courts are entirely in accord as to the substance of the general rule respecting the validity as to creditors, of a conveyance in consideration of the future support of the grantor, but differ somewhat as to the form of its statement. In some cases it is said, generally, that such a conveyance is void as to creditors. See, for example, Stokes v. Jones (1851) 18 Ala. 734; Annis v. Bonar (1877) 86 Ill. 128. In

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other cases the conveyance is said to be "prima facie" or "presumptively" void. See Sidensparker v. Sidensparker (1864) 52 Me. 481, 83 Am. Dec. 527; Slater v. Dudley (1886) 18 Pick. (Mass.) 373; Tupper v. Thompson (1880) 26 Minn. 385, 4 N. W. 621; Bumpas v. Dotson (1846) 7 Humph. (Tenn.) 310, 46 Am. Dec. 81. But, while it is not always thus expressed in the decisions, it seems that the statement that the invalidity is presumptive only means merely that the conveyance may be sustained, by showing that the grantor retained property sufficient to pay his debts existing at the time of the conveyance. See infra, VI. Thus, in Hanna v. Charleston Nat. Bank (1904) 55 W. Va. 185, 46 S. E. 920, it was said that a conveyance in consideration of future support is "prima facie void, as a matter of law," and that "this can only be overcome by the grantee showing that the grantor reserved a sufficient amount of property to pay all his existing debts." See to the same effect, Spear v. Spear (1903) 97 Me. 498, 54 Atl. 1106.

It may, therefore, be stated as the general rule that if a person conveys property wholly, or in substantial part, in consideration of an agreement to support him in the future, and by the conveyance renders himself unable to pay his debts, the conveyance is invalid as to existing creditors. The rule rests on the theory that a conveyance whereby a debtor puts his property beyond the reach of his creditors, on an agreement, in effect, that the whole or a part of its value shall be devoted to his use, is constructively fraudulent, and such a conveyance is, therefore, invalid as a matter of law, irrespective of the existence of an actual fraudulent intent.

Alabama.—Stokes v. Jones (1851) 18 Ala. 734; Sandlin v. Robbins (1878) 62 Ala. 477.

California.—Baxter v. Baxter (1912) 19 Cal. App. 238, 125 Pac. 359.

Colorado.—Fahey v. Fahey (1908) 43 Colo. 354, 18 L.R.A.(N.S.) 1147, 127 Am. St. Rep. 118, 96 Pac. 251.

Illinois.—Truitt v. Griffin (1871) 61 Ill. 26; Annis v. Bonar (1877) 86 Ill. 128; Lawson v. Funk (1884) 108 Ill. 502; Harting v. Jockers (1891) 136 Ill. 627, 29 Am. St. Rep. 341, 27 N. E. 188; Davidson v. Burke (1892) 143 Ill. 139, 36 Am. St. Rep. 367, 32 N. E. 514; Parker v. Cain (1888) 28 Ill. App. 598; Vanston v. Davidson (1891) 41 Ill. App. 646.

Indiana.—Tyner v. Somerville (1848) 1 Ind. 175; Spiers v. Whitesell (1901) 27 Ind. App. 204, 61 N. E. 28.

Iowa.—Graham v. Rooney (1876) 42 Iowa, 567; Harris v. Brink (1896) 100 Iowa, 366, 62 Am. St. Rep. 578, 69 N. W. 684; Seekel v. Winch (1899) 108 Iowa, 102, 78 N. W. 821; Mallow v. Walker (1901) 115 Iowa, 238, 91 Am. St. Rep. 158, 88 N. W. 452; Coleman v. Gammon (1900) — Iowa, —, 83 N. W. 898.

Kansas.—Farlin v. Sook (1883) 30 Kan. 401, 46 Am. Rep. 100, 1 Pac. 123.

Kentucky.—Marshall v. Strange (1888) 10 Ky. L. Rep. 410, 9 S. W. 250; Morton v. Young (1917) 173 Ky. 301, 190 S. W. 1090; Walker v. Williamson (1917) 177 Ky. 599, 198 S. W. 10; Dalton v. Howell (1918) 180 Ky. 479, 203 S. W. 194.

Louisiana.—Duval v. Andrey (1846) 1 La. Ann. 243.

Maine.—Rollins v. Mooers (1845) 25 Me. 192; Webster v. Withey (1845) 25 Me. 326; Sidensparker v. Sidensparker (1864) 52 Me. 481, 83 Am. Dec. 527; Graves v. Blondell (1879) 70 Me. 190; Egery v. Johnson (1879) 70 Me. 258; Spear v. Spear (1903) 97 Me. 498, 54 Atl. 1106; MERITHEW v. ELLIS (reported herewith) ante, 1429.

Maryland.—Wilmer v. Placide (1917) 131 Md. 399, 102 Atl. 541.

Massachusetts.—Gunn v. Butler (1836) 18 Pick. 248; Rolfe v. Clarke (1916) 224 Mass. 407, 113 N. E. 182.

Michigan.—Rynearson v. Turner (1883) 52 Mich. 7, 17 N. W. 219.

Minnesota.—Henry v. Hinman (1878) 25 Minn. 199; Tupper v. Thompson (1880) 26 Minn. 385, 4 N. W. 621; McCord v. Knowlton (1900) 79 Minn. 299, 82 N. W. 589.

Missouri.—Bank of Versailles v. Guthrey (1895) 127 Mo. 189, 48 Am. St. Rep. 621, 29 S. W. 1004; Walther v. Null (1911) 233 Mo. 104, 134 S. W. 998; Massey v. McCoy (1899) 79 Mo. App.

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169; Kegan v. Haslett (1908) 128 Mo. App. 286, 107 S. W. 17.

Nebraska.—J. G. CHERRY CO. v. HELM (reported herewith) ante, 1436.

New Hampshire.—Smith v. Smith (1841) 11 N. H. 460; Morrison v. Morrison (1869) 49 N. H. 69.

New York.—Robinson v. Stewart (1854) 10 N. Y. 189; Stearns v. Gage (1879) 79 N. Y. 102; Nugent v. Foley (1912) 137 N. Y. Supp. 705; Lovejoy v. Chapin (1909) 115 N. Y. Supp. 947; Todd v. Monell (1879) 19 Hun, 362.

North Carolina.—Cansler v. Cobb (1877) 77 N. C. 30.

North Dakota.—International Harvester Co. v. Hecker (1917) 36 N. D. 95, 161 N. W. 1007.

Oklahoma.—Shelby v. Ziegler (1908) 22 Okla. 799, 98 Pac. 989.

Ohio.—Krider v. Koons (1891) 13 Ohio C. D. 110.

Oregon.—Jolly v. Kyle (1895) 27 Or. 95, 39 Pac. 999.

Pennsylvania.—Hennon v. McClane (1878) 88 Pa. 219; Houseman v. Grossman (1896) 177 Pa. 453, 35 Atl. 736; Shakely v. Guthrie (1896) 2 Pa. Super. Ct. 414; Geiger v. Welsh (1829) 1 Rawle, 349.

Vermont.—Crane v. Stickles (1843) 15 Vt. 252; Jones v. Spear (1849) 21 Vt. 426; Church v. Chapin (1862) 35 Vt. 223; Woodward v. Wyman (1881) 53 Vt. 645; Pease v. Shirlock (1891) 63 Vt. 622, 22 Atl. 661; LUDLOW SAV. BANK & T. Co. v. KNIGHT (reported herewith) ante, 1433.

West Virginia.—Hanna v. Charleston Nat. Bank (1904) 55 W. Va. 185, 46 S. E. 920; Flaherty v. Stephenson (1904) 56 W. Va. 192, 49 S. E. 131; Metz v. Patton (1908) 63 W. Va. 439, 60 S. E. 399; Shurtleff v. Right (1909) 66 W. Va. 582, 135 Am. St. Rep. 1041, 66 S. E. 719.

Wisconsin.—Faber v. Matz (1893) 86 Wis. 370, 57 N. W. 39; Stapleton v. Brannan (1899) 102 Wis. 26, 78 N. W. 181.

England.—Cornish v. Clark (1872) L. R. 14 Eq. 184, 42 L. J. Ch. N. S. 14, 26 L. T. N. S. 494, 20 Week. Rep. 897; Re Pearson (1876) L. R. 3 Ch. Div. 807, 35 L. T. N. S. 68, 25 Week. Rep. 126. Compare Gale v. Williamson (1841) 8 Mees. & W. 404, 151 Eng. Reprint, 1096, 10 L. J. Exch. N. S. 446.

Canada.—Ouelette v. Albert (1913) 42 N. B. 254; Kearney v. Jack (1912) 41 N. B. 293; McNeil v. McPhee (1898) 31 N. S. 140; Conrad v. Corkum (1902) 35 N. S. 288, 5 B. R. C. 271.

A fraudulent intention to hinder and delay creditors is presumed as a matter of law, from a conveyance by an insolvent debtor of property which is liable for his debts in consideration of an agreement to support the grantor. Fahey v. Fahey (1908) 43 Colo. 354, 18 L.R.A.(N.S.) 1147, 127 Am. St. Rep. 118, 96 Pac. 251.

In Harting v. Jockers (1891) 136 Ill. 627, 29 Am. St. Rep. 341, 27 N. E. 188, the court said: "An agreement for future support is a valuable consideration; but, being in effect a transfer of property to the use of the grantor, it will be insufficient to uphold the conveyance, when to do so will operate to the prejudice of existing creditors. It is wholly immaterial that no actual fraud is shown to have been intended, for the result would be the same, that is, to give the debtor the beneficial enjoyment of that which rightfully belongs to the creditor; and the transaction is, therefore, wanting in the good faith necessary to the validity of the contract. If the act done will necessarily have the effect of hindering and delaying creditors, the law presumes that it was done with that fraudulent purpose and intent."

In Annis v. Bonar (1877) 86 Ill. 128, it was said: "The mere fact that a party is indebted does not operate to deny him the right of securing a future support for himself and family or, for that matter, for any member of his family, or for a stranger, by transferring property therefor, provided that he retains other property of sufficient amount for the payment of his debts. But he cannot defraud creditors by taking everything from which they can enforce payment of their debts, and transferring it to anticipate his own future wants, or those of others."

In Harris v. Brink (1896) 100 Iowa, 366, 62 Am. St. Rep. 578, 69 N. W. 684, the court said: "It appears to be well

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settled that, where the consideration for a conveyance is an agreement for the future support of the grantor, the transaction is fraudulent in law as to the creditors, to the extent which the value of the property is in excess of the support furnished. The authorities proceed upon the theory that it is the legal duty of a debtor to pay his debts, rather than to provide for his future support, and that existing creditors may avail themselves of property conveyed for future support for the payment of their claims, when the debtor has no other property out of which payment can be enforced."

In Bank of Versailles v. Guthrey (1895) 127 Mo. 189, 48 Am. St. Rep. 621, 29 S. W. 1004, it was said: "With respect to property which may be subjected to the payment of the debts of a debtor, we fully agree to the rule announced in Wait, Fraud. Conv. & Creditors' Bills, 2d ed. § 211; Crane v. Stickles (1843) 15 Vt. 252; Stanley v. Robbins (1863) 36 Vt. 432; Woodward v. Wyman (1881) 53 Vt. 647;—that is, that he cannot convey his property, which is subject to the payment of his debts, in consideration of an obligation for support for life, or any considerable length of time, unless he retain whatever is necessary to satisfy his creditors, as the law will not allow any person, having means, to make provision for himself and family during life at the expense of his creditors. To do so would be to encourage fraud, by permitting a debtor, possessed of an unlimited amount of property, to place it beyond the reach of his creditors, by conveying it, for and in consideration of the support of himself and wife or any member of his family, for and during the life of any one or all of them."

In Young v. Heermans (1876) 66 N. Y. 374, it was said: "A deed is not per se fraudulent, even against existing creditors, merely because it is voluntary. The want of a consideration is only a circumstance, from which, with other circumstances, fraudulent intent may be inferred. Still less is it per se fraudulent and void as against subsequent creditors. There must be circumstances showing actual fraud to impeach the conveyance, and facts proved to show that actual fraud was contemplated. . . . Upon proof of an existing indebtedness, the fact that the grant was of all the property of the debtor in trust for himself and for his use would be conclusive evidence of fraud, and it could not be overcome by any proof of innocent intention."

In Kearney v. Jack (1912) 41 N. B. 293, the court said: "It has been many times decided that where a debtor, by a voluntary conveyance, devests himself of so much of his property that there is not left to him sufficient to satisfy his debts, outstanding at the date of the conveyance, the court will imply a fraudulent intent on the part of the debtor, and set aside the conveyance, and will do this regardless of what may have been the actual intent of the debtor, and even despite the fact that it appear the debtor really acted bona fide, and without any actually dishonest or fraudulent intent." But in Doe ex dem. Keith v. Corey (1890) 29 N. B. 287, it was held that where the consideration of a conveyance of all the grantor's property was his support and maintenance, and the conveyance was made bona fide, with no intent to defeat or delay creditors, it was valid, although it might prevent the payment of creditors. It appeared, however, that the indebtedness of the grantor, at the time of the conveyance, was less than $100.

It has been held that the rule that a conveyance in consideration of future support is void as a matter of law, irrespective of the intent of the parties, is not affected by a statute declaring that fraudulent intent "shall be deemed a question of fact, and not of law." Coleman v. Burr (1883) 93 N. Y. 17, 45 Am. Rep. 160, wherein, after quoting the statute, the court said: "The claim is made that here there is no finding by the referee of a fraudulent intent; but that, on the contrary, he has found the whole transaction to be fair and honest. He has, however, found facts from which the inference of fraud is inevitable; and, although he has characterized the transactions as honest and fair,

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that does not make them innocent, nor change their essential character in the eye of the law. Mr. Burr must be deemed to have intended the natural and inevitable consequence of his acts, and that was to hinder, delay, and defraud his creditors."

Where a conveyance in consideration of future support is revocable at the instance of the grantor, and in the exercise of his power of revocation he directs the grantee to convey it to a creditor, that conveyance is valid, since it is in effect made by the grantor, who has the right to prefer a creditor. Kegan v. Haslett (1908) 128 Mo. App. 286, 107 S. W. 17.

In McCord v. Knowlton (1900) 79 Minn. 299, 82 N. W. 589, it was held that, where a conveyance and an agreement by the grantee to support the grantor are executed contemporaneously, it will be presumed that one is the consideration for the other, so that the conveyance is presumptively fraudulent as to creditors.

In Wooten v. Clark (1851) 23 Miss. 75, it was said that a conveyance by an insolvent debtor, in consideration of future support, will be regarded with "great suspicion." See to the same effect, Henderson v. Downing, 24 Miss. 106; Hunt v. Knox (1857) 34 Miss. 655.

In a number of cases the invalidity of a conveyance in consideration of the future support of the grantee has been put on the ground that it created a secret trust for the benefit of the grantor, though, as appears from the cases heretofore cited, the secrecy of the consideration is not essential to the application of the general rule.

United States.—Lukins v. Aird (1868) 6 Wall. 78, 18 L. ed. 750, see also Rose's Notes to this case.

Connecticut.—Pettibone v. Stevens (1842) 15 Conn. 19, 38 Am. Dec. 57.

Illinois.—Power v. Alston (1879) 93 Ill. 587; Moore v. Wood (1881) 100 Ill. 451; Gordon v. Reynolds (1885) 114 Ill. 118, 28 N. E. 455; Mitchell v. Sawyer (1886) 115 Ill. 650, 5 N. E. 109.

Iowa.—Macomber v. Peck (1874) 39 Iowa, 351; Graham v. Rooney (1876) 42 Iowa, 567; Strong v. Lawrence (1882) 58 Iowa, 55, 12 N. W. 74.

Maine.—Sidensparker v. Sidensparker (1864) 52 Me. 481, 83 Am. Dec. 527.

Massachusetts.—Rice v. Cunningham (1875) 116 Mass. 466.

New Hampshire.—Coolidge v. Melvin (1861) 42 N. H. 510.

North Carolina.—Clement v. Cozart (1891) 109 N. C. 173, 13 S. E. 892.

North Dakota.—Newell v. Wagness (1890) 1 N. D. 62, 44 N. W. 1014.

Thus, it was said in Lukins v. Aird (U. S.) supra: "The law will not permit a debtor in failing circumstances to sell his land, convey it by deed without reservations, and yet secretly reserve to himself the right to possess and occupy it for a limited time, for his own benefit. Such a transfer may be upon a valuable consideration, but it lacks the element of good faith; for, while it professes to be an absolute conveyance on its face, there is a concealed agreement between the parties to it, inconsistent with its terms, securing a benefit to the grantor, at the expense of those he owes. A trust thus secretly created, whether so intended or not, is a fraud on creditors, because it places beyond their reach a valuable right—the right of possession—and gives to the debtor the beneficial enjoyment of what rightfully belongs to his creditors."

Since a homestead is not subject to the demands of creditors, a conveyance of the grantor's homestead, in consideration of future support, is valid. Farrand v. Caton (1889) 69 Mich. 235, 37 N. W. 199; Muenks v. Bunch (1886) 90 Mo. 500, 3 S. W. 63; Bank of Versailles v. Guthrey (1895) 127 Mo. 189, 48 Am. St. Rep. 621, 29 S. W. 1004.

It has been held that a conveyance, in consideration of the support of one or more members of the family of the grantor, stands on the same footing, with respect to the rule under consideration, as a conveyance for his own support. Annis v. Bonar (1877) 86 Ill. 128; Clowe v. Seavey (1913) 208 N. Y. 496, 47 L.R.A.(N.S.) 284, 102 N. E. 521; Jackson ex dem. Cary v. Parker (1828) 9 Cow. (N. Y.) 73; Jones v. Spear (1849) 21 Vt. 426. Thus, in Brown v. Moore (1899) 21

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Ky. L. Rep. 664, 52 S. W. 944, it was held that a conveyance by a son to his sister, in consideration of the future support of his parents, was invalid as against his creditors, the son being under no legal obligation to support the parents. But in Worthy v. Brady (1884) 91 N. C. 265, it was held that, where the condition of a conveyance by a father to his son is that the grantee shall support his invalid brother, the conveyance is not for the benefit of the grantor, and cannot be attacked by creditors.

III. Support actually furnished.

By the weight of authority, if the parties to a conveyance, made in consideration of the future support of the grantor, act in good faith, and support is actually furnished thereunder, the conveyance will be sustained as to creditors, to the extent of the value of the support thus furnished.

California.—Baxter v. Baxter (1912) 19 Cal. App. 238, 125 Pac. 359.

Indiana.—Willis v. Thompson (1884) 98 Ind. 62; Hayes v. Montgomery (1889) 118 Ind. 91, 20 N. E. 646.

Iowa.—Harris v. Brink (1896) 100 Iowa, 366, 62 Am. St. Rep. 578, 69 N. W. 684.

Kentucky.—Walker v. Williamson (1917) 177 Ky. 599, 198 S. W. 10; Hawkins v. Moffitt (1849) 10 B. Mon. 81; Gregory v. Lamb (1897) 101 Ky. 727, 42 S. W. 339.

Maine.—MERITHEW v. ELLIS (reported herewith) ante, 1429.

Michigan.—Walker v. Cady (1895) 106 Mich. 21, 63 N. W. 1005.

Nebraska.—J. G. CHERRY CO. v. HELM (reported herewith) ante, 1436,

New Jersey.—Long Branch Bkg. Co. v. Dennis (1897) 56 N. J. Eq. 549, 39 Atl. 689.

Vermont.—Kelsey v. Kelsey (1890) 63 Vt. 41, 13 L.R.A. 640, 22 Atl. 597.

In Baxter v. Baxter (Cal.) supra, it was said that property conveyed in consideration of future support was subject to the claims of creditors, "in so far, at least, as the value of the property exceeded the value of the support theretofore given." In Long Branch Bkg. Co. v. Dennis (1897) 56 N. J. Eq. 549, 39 Atl. 689, it was held that a deed in consideration of future support should, as against creditors, be given the effect of a mortgage to secure the value of the support actually furnished. In Walker v. Williamson (1917) 177 Ky. 599, 198 S. W. 10, it was held that the grantor was entitled to a preference over other creditors, to the extent of the support furnished by him.

On this principle, if the support furnished is equal to the value of the property, the conveyance is as valid as though the same value had been paid at the time of delivering the deed. Kelsey v. Kelsey (1890) 63 Vt. 41, 13 L.R.A. 640, 22 Atl. 597, wherein the court said: "If now, after the defendants have fully supported the intestate and his wife, at an expense greater than the money received, the orator can compel a return of the money received sufficient to pay the creditors represented by the orator, these defendants are left with a debt of an equal amount, also provable against the estate represented by the orator, why should the creditors represented by the orator receive payment more than the defendants? The defendants have been guilty of no wrong in supporting their father and mother, nor was it any more a wrong for them to receive payment for such support than for the creditors represented by the orator to receive payment for their debts. These creditors did not know of the existence of the property received by the defendants for the support, and did nothing on the strength of its existence. On the other hand, the defendants knew of it, and furnished the support for it. If they had furnished the support before receiving payment therefor, and then received the same property which they did receive, no one would claim that the orator could recover the property back, to pay the creditors represented by him. If the creditors represented by the orator had intervened before the defendants had furnished the support, they would have had the better right to the property, and the defendants have sustained no damage. Their intervention would have released the defendants from the contract to furnish

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further support. The consideration for this contract further to support would have been taken away. The defendants, until they had furnished the full support, were like a purchaser bona fide in every respect, except he had not fully paid the contract price of the property purchased, where he must be a bona fide purchaser for value, to be protected in his purchase; if otherwise a bona fide purchaser, he is protected only to the extent he has paid value."

So in MERITHEW v. ELLIS (reported herewith) ante, 1429, it appeared that a mother conveyed to her daughter her entire property, consisting of a house worth $100, and the deed was recorded. The daughter supported her mother thereafter for five years. In an action to set aside the conveyance, it was held that, full compensation having been paid, the daughter was entitled to protection as a bona fide purchaser.

The grantee is not entitled to credit for support furnished to the grantor, where it appears that the income of the property conveyed exceeded the value of the support. LUDLOW SAV. BANK & T. CO. v. KNIGHT (reported herewith) ante, 1433. So, in Harris v. Brink (1896) 100 Iowa, 366, 62 Am. St. Rep. 578, 69 N. W. 684, it was said that, in determining the excess of the value of the property over the support furnished, the grantee should be charged with the value of the use and occupation of the property.

In at least two jurisdictions a conveyance in consideration of future support is not validated by the fact that support equal to the value of the property is actually furnished. Massey v. McCoy (1899) 79 Mo. App. 169; Cansler v. Cobb (1877) 77 N. C. 30. In the case last cited it was said: "The proposition that a man who owes more than he can pay can provide a support for himself for the balance of his life, by conveying his land in consideration that the grantee will furnish such support, and thus defy his creditors, will not bear a statement. The peculiar circumstances of this case, the grantor a helpless old man, the grantee his daughter, who alone can nurse him, and that she performed the services with faithfulness, do not take the case out of the operation of the principle, although it makes the application more difficult in practice, by reason of the sympathy which it is calculated to excite."

In Massey v. McCoy (Mo.) supra, it appeared that an aged woman transferred property worth about $1,000 in consideration of future support. The grantee supported her for six years, during three of which she was bedridden. It was held that notwithstanding the fact that support had been furnished, equal in value to the property, the conveyance should be set aside as in fraud of creditors.

IV. Support as part consideration.

By the weight of authority, a conveyance partly in consideration of the future support of the grantor, and partly in consideration of a cash payment, the satisfaction of a debt of the grantor, or the like, is wholly void, if the agreement for support represents a substantial part of the consideration.

Georgia.—Park v. Battey (1887) 80 Ga. 353, 5 S. E. 492.

Illinois.—Moore v. Wood (1881) 100 Ill. 451; Lawson v. Funk (1884) 108 Ill. 502; Vanston v. Davidson (1891) 41 Ill. App. 646; Eichler v. Hoeft (1911) 163 Ill. App. 166.

Iowa.—Graham v. Rooney (1876) 42 Iowa, 567.

Maine.—Sidensparker v. Sidensparker (1864) 52 Me. 481, 83 Am. Dec. 527; Graves v. Blondell (1879) 70 Me. 190; Egery v. Johnson (1879) 70 Me. 258.

Maryland.—Wilmer v. Placide (1917) 131 Md. 399, 102 Atl. 541.

New Hampshire.—Smith v. Smith (1841) 11 N. H. 460; Morrison v. Morrison (1869) 49 N. H. 69.

New York.—Robinson v. Stuart (1854) 10 N. Y. 189; Stearns v. Gage (1879) 79 N. Y. 102; Kain v. Larkin (1896) 4 App. Div. 209, 38 N. Y. Supp. 546; Townsend v. Bumpus (1898) 29 App. Div. 122, 51 N. Y. Supp. 513; Nugent v. Foley (1912) 137 N. Y. Supp. 705.

Pennsylvania.—Miner v. Warner

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(1854) 2 Grant, Cas. 448; Johnston v. Harvy (1830) 2 Penr. & W. 82, 21 Am. Dec. 426; Downing v. Gault (1898) 8 Pa. Super. Ct. 52.

Vermont.—Church v. Chapin (1862) 35 Vt. 223.

West Virginia.—Hanna v. Charleston Nat. Bank (1904) 55 W. Va. 185, 46 S. E. 920.

"The law . . . does not stop to inquire what part of the consideration was in money or property, and what in future support, with the view of adjusting the respective equities of the creditors and purchaser, but treats the conveyance as void in toto." Lawson v. Funk (1884) 108 Ill. 502.

In Sidensparker v. Sidensparker (1864) 52 Me. 481, 83 Am. Dec. 527, the court said: "Instead of entering upon the task of determining what part of the consideration was paid in money, or other property, and what part was agreed to be paid in future support of the grantor, and of holding the grantee responsible to the grantor's creditors for the latter sum, the law treats the conveyance as a nullity, as between the grantee and the grantor's creditors, and holds the property liable for their claims."

In Downing v. Gault (1898) 8 Pa. Super. Ct. 52, the court held to be "exactly correct" the following instruction: "If you find this property was, in value, in excess of $100, and that in consideration of $100 and the future maintenance of the mother, the mother sold it to the daughter, the daughter agreeing to pay $100 and agreeing to maintain the mother, we should say that would be a fraud in law."

It is immaterial that the consideration comprises a present sum of money paid, in addition to the agreement for support, if the money alone is palpably inadequate. Egery v. Johnson (1879) 70 Me. 258.

In Wilmer v. Placide (1917) 131 Md. 399, 102 Atl. 541, a conveyance of property producing an income of $900 per year, in consideration of future support and the satisfaction of a debt of about $400, was set aside.

In Smith v. Smith (1841) 11 N. H. 460, a conveyance in satisfaction of a debt of half the value of the property, and in further consideration of an agreement to support the grantor, was held to be void as against creditors.

In Morrison v. Morrison (1869) 49 N. H. 69, it appeared that property worth about $3,000 was conveyed, in consideration of the payment of obligations amounting to about $2,000, and the future support of the grantor. The court said that, as the support of the grantor was a "substantial part" of the consideration, the conveyance "must be regarded as fraudulent and void, as against creditors."

In Stearns v. Gage (1879) 79 N. Y. 102, the court held to be void a conveyance of property worth $10,000 by a father to his son, in consideration of the satisfaction of a debt of $1,500, the giving of a note for $500, and the future support of the grantor.

In Kain v. Larkin (1896) 4 App. Div. 209, 38 N. Y. Supp. 546, the court set aside a conveyance by a father to his daughter, made partly in consideration of past services of the daughter, and partly in consideration of future support.

An agreement, by way of additional consideration, to pay the grantor's debts after his death, will not validate a conveyance made on an agreement to support the grantor. Nugent v. Foley (1912) 137 N. Y. Supp. 705.

In Johnston v. Harvy (1830) 2 Penr. & W. (Pa.) 82, 21 Am. Dec. 426, a conveyance by a father to his son, in consideration of the payment of all judgments against the grantor and the support of the grantor for life, was held to be void as against creditors.

In Church v. Chapin (1862) 35 Vt. 223, a conveyance was set aside, it appearing that property was conveyed for a consideration amounting to one half the value of the property, and an agreement to support the grantor.

In Graham v. Rooney (1876) 42 Iowa, 567, the court held to be invalid a conveyance by a father to his son, on consideration that the son should remain on the farm, educate the younger children, and support his parents.

In Park v. Battey (1887) 80 Ga. 353, 5 S. E. 492, a conveyance by a husband

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of all his property to his wife, in consideration of love and affection, the payment of certain debts by her, and an agreement to support the grantor for life, was held to be fraudulent as to creditors.

In Barrow v. Bailey (1853) 5 Fla. 9, the fact that a conveyance by a person in failing circumstances was made partly in consideration of an annuity to be paid to the grantor was referred to as a badge of fraud, and considered with other circumstances in deciding that the conveyance was void as to creditors.

In Robinson v. Stewart (1854) 10 N. Y. 189, it was held that, on the setting aside of the conveyance, the grantee was entitled to participate pro rata as a creditor with respect to debts of the grantor paid by him, and the value of his services rendered in part consideration.

But in some jurisdictions it is held that, where the parties have acted in actual good faith in making a conveyance partly in consideration of the future support of the grantor, the grantee is accountable to creditors only for the excess of the value of the property over the consideration actually paid. Strong v. Lawrence (1882) 58 Iowa, 55, 12 N. W. 74; Harris v. Brink (1896) 100 Iowa, 366, 62 Am. St. Rep. 578, 69 N. W. 684; Farlin v. Sook (1883) 30 Kan. 401, 46 Am. Rep. 100, 1 Pac. 123; Hawkins v. Moffitt (1849) 10 B. Mon. (Ky.) 81; Rynearson v. Turner (1883) 52 Mich. 7, 17 N. W. 219. In the case last cited, it was said: "We are inclined to credit substantially the defendant's theory, that George W. Lynn, who had been working for his father for some years, was anxious to set up for himself, and wished to have his pay for his past services to enable him to purchase a smaller farm. The claim is that it was proposed that he should take this, and give a mortgage to his mother for $1,200, and pay off debts of about $800, cancel his own claim, and support his parents. The evidence is not satisfactory upon all these points, but it is, we think, beyond question that a very considerable part of the consideration, in order to make up the full value of the property, would consist of the agreement to support Lynn and wife. As against his creditors, no such provision could be sustained. It would be a provision for the direct benefit of the grantor. It is difficult to believe the arrangement was not made with some idea, on George's part, that the scheme was for the purpose of defeating the recovery on this suretyship obligation. But, be this as it may, William Lynn could not make such an arrangement lawfully, and the whole matter appears to have been left at loose ends, without any such action as could place George in the position of a bona fide purchaser, who had paid the consideration in full. It is evident that the amount left open was considerably larger than would suffice to pay this debt, and we think George must account for it."

Where the grantee takes the conveyance in good faith, and a substantial part of the consideration is a past indebtedness, the conveyance is not void; but the creditors may treat the agreement to support as a debt to the grantee, and hold the grantee to the extent of its value, which is measured by the difference between the value of the land and the consideration actually paid. Farlin v. Sook (1883) 30 Kan. 401, 46 Am. Rep. 100, 1 Pac. 123.

In Strong v. Lawrence (Iowa) supra, it was held that a conveyance, partly in consideration of future support, will be regarded as voluntary, to the extent of the difference between the value of the property and the consideration actually paid.

In Hawkins v. Moffitt (1849) 10 B. Mon. (Ky.) 81, it appeared that a debtor conveyed property worth about $1,200 in consideration of $500, and support for ten years. It was held that, in the absence of fraud on the part of the grantee, he was liable only for the excess of value over the cash consideration and the support actually furnished.

In Marshall v. Strange (1888) 10 Ky. L. Rep. 410, 9 S. W. 250, a son to whom his father had transferred certain notes, in consideration of future support and the payment of certain debts, and who had collected them after the father's death, was held to be

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an executor de son tort, and, as such, not protected in paying certain debts in full, leaving others unpaid.

V. Full consideration in addition to support.

Where the grantee pays a full and adequate consideration for a conveyance, the transaction is not rendered invalid as to creditors of the grantor by the fact that the grantee, in addition to the consideration paid, agrees to support the grantor.

Illinois.—Truitt v. Griffin (1871) 61 Ill. 26; Moore v. Wood (1881) 100 Ill. 451.

Indiana.—Scott v. Davis (1889) 117 Ind. 232, 20 N. E. 139.

Kentucky.—Easum v. Pirtle (1884) 81 Ky. 561.

Massachusetts.—Gunn v. Butler (1836) 18 Pick. 248; Slater v. Dudley (1836) 18 Pick. 373.

Michigan.—Howard v. Rynearson (1883) 50 Mich. 307, 15 N. W. 486.

New York.—Vial v. Mathewson (1884) 34 Hun, 70; Bent v. Bent (1888) 19 N. Y. S. R. 30, 3 N. Y. Supp. 750; Snyder v. Snyder (1909) 115 N. Y. Supp. 993.

Oregon.—Jolly v. Kyle (1895) 27 Or. 95, 39 Pac. 999.

Virginia.—Henderson v. Hunton (1875) 26 Gratt. 926.

Wisconsin.—Torrey Cedar Co. v. Eul (1897) 95 Wis. 615, 70 N. W. 823.

In Scott v. Davis (1889) 117 Ind. 232, 20 N. E. 139, it was said: "A conveyance is not fraudulent because the purchaser, in addition to the consideration paid in money, and notes to third person, agrees to support his father and mother during their lifetime; nor does such an agreement constitute a secret trust, invalidating the conveyance, in cases where it is otherwise supported by an adequate consideration, and the grantee is not guilty of fraud."

In Easum v. Pirtle (1884) 81 Ky. 561, it was held that where a son paid the fair and full value for a conveyance of land from his father, and covenanted to support him and his mother during their lives, the conveyance was not fraudulent as against the father's creditors. The court said: "We must assume from the record that the conveyance was made in good faith, and is neither actually nor constructively fraudulent, unless the additional consideration expressed in the bond, that the son would support and maintain his father and mother during their natural lives, makes it fraudulent as to antecedent creditors. The deed was not voluntary if the appellant paid the actual cash value of the property, although he may have also agreed to support the father and mother as long as they lived. It seemed that they owned no other estate, and the natural obligation on the son to provide for his parents, and his desire to secure his debt, no doubt caused the insertion of the covenant in the deed, by which the support of the grantee and his wife formed part of the consideration. Fifteen hundred dollars, it is alleged and proved, was the full and fair value of the land, and, if so, the creditor has not been injured, and no presumptive or constructive fraud can well exist where the purchaser buys in good faith, and pays the full value of the property. If the amount paid was less than the value of the property, or the intention to defraud was shown, there could be no doubt as to the right of the creditors to subject the property to the payment of his debt. In every case where the deed or bond has been held to be actually or constructively fraudulent, the rights of the creditor have been, in some manner, affected by it. In what particular can the creditor say he has been injured in this case? A sale has been made in good faith and for the full value of the property, and the consideration paid. Suppose the obligation to support the parents had been omitted from the deed, will it then be insisted, when the full value of the property has been paid in money, a purchase made in good faith, that the deed is never-theless constructively fraudulent?"

In Slater v. Dudley (1836) 18 Pick. (Mass.) 373, it appeared that a father conveyed his farm to a son, the latter paying full value, and also agreeing to support the father; and the court held the deed because the full value

was paid, regardless of the obligation to support.

In Howard v. Rynearson (1883) 50 Mich. 307, 15 N. W. 486, it appeared that a father conveyed to his daughter property not exceeding in value the amount of his indebtedness to her, and also in consideration of her agreement to support him and her mother. The court, in upholding the conveyance against creditors of the father, said: "The value of the property conveyed was under a thousand dollars. The father with his wife, both of whom were very old people, was at the time living with and dependent upon the defendant. She was an unmarried woman, and supported herself by her labor. The father had for a long time owed her $200 for money borrowed, and the accruing interest on this debt had increased it to perhaps half the value of the land. This debt and the services she had performed for her parents, together with her agreement to support them afterwards, were the consideration for the conveyance. On the face of the transaction, no fraud is apparent."

In Henderson v. Hunton (1875) 26 Gratt. (Va.) 926, it appeared that property worth about $2,100 was conveyed, in consideration of the satisfaction of debts amounting to $2,000, and the future support of the grantor. Refusing to set aside the conveyance the court said: "The amount actually paid, and not controverted in the court below, falls but little short of the value of the property. If we regard Henderson as a bona fide purchaser, he, is, of course, entitled to all the rights appertaining to that position. A small excess of the value of the property over the amount of the purchase money will not justify the interference of the courts."

In Torrey Cedar Co. v. Eul (1897) 95 Wis. 615, 70 N. W. 823, it appeared that a father, who was heavily indebted, conveyed a piece of property encumbered by a mortgage to his children, in satisfaction of debts owed to him, and they agreed to support him. In sustaining the conveyance the court said: "There was left, therefore, an equity of redemption amounting to $300 in the nonexempt land, which the appellant could reach in case the conveyance was fraudulent. The court below was of opinion that the children paid a full and adequate consideration for this equity of redemption, and that the fact that the children also agreed to support their father in consideration of the transfer of the exempt homestead, and this small and problematical equity of redemption, did not render the conveyance void as to creditors. In this conclusion we agree."

Where a conveyance was in consideration of defending the grantor against certain litigation, and supporting him for life, and the grantee expended an amount equal to the value of the property in defense of the litigation, the conveyance was sustained, as against creditors. Truitt v. Griffin (1871) 61 Ill. 26.

In Slater v. Dudley (1836) 18 Pick. (Mass.) 373, it was held that, while a condition in a deed for the support and maintenance of the grantor and his wife was prima facie evidence of fraud, it was nevertheless open to explanation. The court said: "The evidence is not reported, but it is understood that the full value of the estate was paid, and, if so, the agreement to support the grantor and his wife, although it might appear to be a suspicious circumstance, was gratuitous, but not conclusive evidence of fraud."

The agreement for support presumptively represents an equivalent value in the property conveyed, and the burden is on the grantor to rebut that presumption. Moore v. Wood (1881) 100 Ill. 451, wherein the evidence adduced in rebuttal of the presumption was held to be insufficient.

In Hanna v. Charleston Nat. Bank (1904) 55 W. Va. 185, 46 S. E. 920, the foregoing rule was recognized, but the fact that, by the terms of the deed, the future support was made a part of the consideration, was apparently considered to be conclusive against its application.

An agreement to pay the grantor's debts out of his property, after his death, is not a sufficient consideration to deprive a conveyance in consideration of future support, of its volun-

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tary character. Gunn v. Butler (1886) 18 Pick. (Mass.) 248.

VI. Effect of solvency of grantor.

Where, at the time of making a conveyance in consideration of future support, the grantor reserves property which is sufficient to satisfy his existing debts, and which is of such a nature as to be subject to the demands of his creditors, the conveyance is valid, although, for reasons subsequently arising, the creditors later find themselves unable to satisfy their claims from the property reserved.

California. — Baxter v. Baxter (1912) 19 Cal. App. 238, 125 Pac. 359.

Connecticut. — Graves v. Atwood (1885) 52 Conn. 512, 52 Am. Rep. 610.

Georgia.—Park v. Battey (1887) 80 Ga. 353, 5 S. E. 492.

Illinois.—Annis v. Bonar (1877) 86 Ill. 128; Gudgel v. Kitterman (1883) 108 Ill. 50; Harting v. Jockers (1891) 136 Ill. 627, 29 Am. St. Rep. 341, 27 N. E. 188.

Maine.—Usher v. Hazeltine (1829) 5 Me. 471, 17 Am. Dec. 253; Hapgood v. Fisher (1852) 34 Me. 407, 56 Am Dec. 663; Spear v. Spear (1903) 97 Me. 498, 54 Atl. 1106.

North Carolina.—Worthy v. Brady (1884) 91 N. C. 265.

Pennsylvania. — Miner v. Warner (1854) 2 Grant, Cas. 448.

Vermont.—Church v. Chapin (1862) 35 Vt. 223.

In Harting v. Jockers (1891) 136 Ill. 627, 29 Am. St. Rep. 341, 27 N. E. 188, the court said: "If one, finding himself aged, and possibly decrepit, seeks, by contract for his future support, to secure the necessaries and comforts which his declining years and strength demand, he may lawfully use his property for such purposes, and his transfer for that purpose will be upheld, unless the natural consequence of the act is to hinder, delay, or defraud his creditors. If, upon making provision, he retains sufficient property within his control to satisfy all just obligations, no one is injured, and his creditors may, as before the transfer, satisfy their claims by enforcing the same against his property. In all such cases the voluntary conveyance or provision for future support must be such as a prudent and just man would make, having due regard to his financial condition and circumstances, and retaining ample property to meet, without hazard, every just obligation. Where this is done, there is no intent to injure or delay creditors, and no presumption of fraud can arise. It is not necessary that actual insolvency should be proved. It will be sufficient to avoid the conveyance or transfer if there be not ample property retained, or if the withdrawal of the amount used by the debtor in making such provision for his future support will materially lessen his ability to pay his debts."

In Church v. Chapin (Vt.) supra, it was said, with reference to what constitutes a sufficient reservation of property: "The debtor is bound to reserve property ample for the payment of his debts. Whether the property reserved is what will be deemed ample for this purpose does not depend entirely on the amount and value, as the real end to be accomplished is, that the deed or conveyance shall not deprive creditors of the means of collecting their debts. Hence, the nature and situation of the property is to be regarded as well as the amount and value, in view of the facilities the creditors have left for the collection of their debts." In that case the reservation by the grantor of bills receivable, amounting to more than the total of his debts, was held to be insufficient, some of the bills receivable being worthless, and others not subject to process.

In Harting v. Jockers (Ill.) supra, it appeared that a person, on conveying his property in consideration of future support, retained certain notes, amounting to more than his indebtedness. The makers of the notes were then solvent. The year following they became insolvent. Holding that the conveyance was not fraudulent, the court said: "It is true that, during the following year, the Egelhoffs became insolvent, and the debt to Heuster was wholly lost. The subsequent result is competent to be considered, but only as tending to illus-

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trate the condition of affairs at the time of the transaction complained of; and, upon consideration of all the facts proved, we are not prepared to say that the circuit court was not justified in holding that Heuster, in making the transfer in his then condition and circumstances, retained ample property for the payment of his debts, so that the presumption of fraud, arising from the transfer of his property for his own use and future means of support, was overcome and rebutted."

The retention by the grantor of money on deposit in a savings bank, adequate to pay his debts, is sufficient to render valid a conveyance in consideration of future support. Graves v. Atwood (1885) 52 Conn. 512, 52 Am. Rep. 610, wherein the court said: "Although, by the deed, the grantor devested himself of all ownership of real estate, he still had a credit in a savings bank in this state larger than the aggregate of his indebtedness. A large part of the wealth of the nation is in the form of the obligations of individuals, corporations, cities, states, and the United States, of corporate shares and of credits in savings banks and banks of discount and deposit; wealth which, as compared with land, is, in a sense, invisible and intangible. As a matter of fact it is not found, and as a matter of law we cannot say, that property in any one of these forms is less visible or tangible than in either of the others, nor that in any one of them is it to that degree invisible or intangible that it is to be disregarded in determining the question whether the owner has ability to pay his debts, or that it is secreted, in a sense offensive to the law concerning fraudulent conveyances."

If the grantee seeks to sustain a conveyance in consideration of an agreement to support the grantor, on the ground that the grantor reserved property sufficient to satisfy his existing debts, the burden is on him to establish that fact. Harting v. Jockers (1891) 136 Ill. 627, 29 Am. St. Rep. 341, 27 N. E. 188; Strong v. Lawrence (1882) 58 Iowa, 55, 12 N. W. 74; Seeke[illegible] v. Winch (1899) 108 Iowa, 102, 78 N. W. 821; Metz v. Patton (1908) 63 W. Va. 439, 60 S. E. 399.

"Where it is found that a debtor is insolvent at the time judgment is rendered, and is unable to respond to the amount recovered, his insolvency will be considered as extending back beyond a voluntary conveyance of his property, made during his indebtedness, unless the contrary is shown." Strong v. Lawrence (1882) 58 Iowa, 55, 12 N. W. 74.

In Metz v. Patton (W. Va.) supra, the court said: "Since defendant showed, by the introduction of the record in the attachment suit, that he stood as creditor of grantor at the time of the conveyance, the duty devolved on the plaintiff to purge the title of the stigma thereby cast upon it. This she did not do, and her title stands as void, so far as the rights of such creditor and purchaser are concerned. Plaintiff's deed being void at law, and title remaining in her grantor so far as the rights of his creditors were concerned, the levy on the lot, as grantor's property, of the attachment issued against him, was regular and effective. The validity of such proceedings and defendant's purchase thereunder have not been overthrown, as it was plaintiff's opportunity to do in the trial of this case. It was incumbent on her to show that the deed to her was, in fact, not void, because grantor either had no debts, or else reserved sufficient property to satisfy his debts; that, therefore, title passed by the deed to her; and that the levy of the attachment could not have affected title to the lot."

Proof that the grantor was insolvent three months after the conveyance is prima facie evidence of insolvency when the conveyance was made. Vanston v. Davidson (1891) 41 Ill. App. 646.

In any event, the grantee is entitled to the residue of the property after the satisfaction of the debts of the grantor. Mallow v. Walker (1901) 115 Iowa, 238, 91 Am. St. Rep. 158, 88 N. W. 452; Rolfe v. Clarke (1916) 224 Mass. 497, 113 N. E. 182.

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VII. Effect of good faith of grantee.

While the good faith of the grantee has been referred to as essential to his right to claim the benefits of a partial payment of the consideration (see supra III. and IV.), the fact that the grantee acts in good faith, and has no knowledge of any indebtedness of the grantor, or of any intent on his part to hinder and delay his creditors, does not affect the right of creditors to set aside a conveyance made in consideration of the future support of the grantor. Sandlin v. Robbins (1878) 62 Ala. 477; Walker v. Williamson (1917) 177 Ky. 599, 198 S. W. 10; Egery v. Johnson (1879) 70 Me. 258; Spear v. Spear (1903) 97 Me. 498, 54 Atl. 1106; Clowe v. Seavey (1913) 208 N. Y. 496, 47 L.R.A.(N.S.) 284, 102 N. E. 521; LUDLOW SAV. BANK & T. CO. v. KNIGHT (reported herewith) ante, 1433; Hanna v. Charleston Nat. Bank (1904) 55 W. Va. 185, 46 S. E. 920.

Thus, in Clowe v. Seavey (N. Y.) supra, the court said: "It is of no consequence that the transferee had no intent to hinder, delay, or defraud the creditors of the transferrer. A person cannot successfully put his property beyond the reach of his creditors by a transfer which secures it to himself and his children, even though the transferee may have the best of motives and be ignorant of his fraudulent intent."

In Hanna v. Charleston Nat. Bank (W. Va.) supra, it was said: "Nor does the bona fides of Mrs. Hanna's conduct or claim affect the matter. She having accepted a deed which the law presumes void on its face as to existing creditors, she can only preserve it from their demands by paying them, or showing that her father retained sufficient property to satisfy them. This renders it unnecessary to consider the instructions either of the plaintiff or the defendant. As the deed is, in law, prima facie fraudulent, neither the good nor bad intent of Mrs. Hanna in accepting the same, nor the bona fides of her debt, nor the question of unlawful preference, can change the legal status thereof. She must show that her father retained sufficient property to pay the debt involved, or she must pay it, or allow the property levied on to be sold for its satisfaction."

The grantee is, as a matter of law, charged with knowledge that the conveyance is fraudulent as to existing creditors, and is bound to ascertain whether there are any creditors. Baxter v. Baxter (1912) 19 Cal. App. 238, 125 Pac. 359.

If the purchaser is not a mere volunteer, but pays a consideration, it must be shown that he had notice of the grantor's intention to defraud his creditors. Scott v. Davis (1889) 117 Ind. 232, 20 N. E. 139. But in Spiers v. Whitesell (1901) 27 Ind. App. 204, 61 N. E. 28, the court applied to a conveyance in consideration of future support, the rule that notice to the grantee, before the full payment of the purchase money, charges him with knowledge of the grantor's fraudulent intent.

If the grantee acted in good faith, he is not liable to the creditor for rents and profits received by him. Flaherty v. Stephenson (1904) 56 W. Va. 192, 49 S. E. 131, wherein the court said: "Should there be any personal decree against the grantee in such deed, as a participator in the fraud of the grantor? While the conveyance is void as to existing debts, it is good between the parties, and until it is avoided, it is valid, and the grantee is entitled to the benefit thereof, as fully as the grantor would have been, had the deed not been made. Hence, the grantee is entitled to the rents and profits of the life estate until they are sequestrated by a court of chancery, and they are not liable in his hands to the creditors of the grantor, and no personal decree can be had against him by reason thereof until such sequestration takes place. The grantee is not guilty of fraud in receiving the same, but they are legally his property until the creditors have subjected the life estate to the payment of the life tenant's debts. It would be, therefore, improper to render a personal decree against the grantee for any such rents and profits, prior to their sequestration."

In several cases the courts, while

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not laying down any rule as to the necessity of notice to the grantee of the grantor's intent, have discussed the existence of such notice, on the apparent assumption that it was necessary.

In Wilmer v. Placide (1917) 131 Md. 399, 102 Atl. 541, wherein it appeared that the grantee was the sister of the grantor, and lived as a member of the same household, and the indebtedness of the grantor had produced prolonged litigation prior to the conveyance, it was inferred that the grantee had knowledge of the grantor's circumstances, and his purpose in making the conveyance.

In Rolfe v. Clarke (1916) 224 Mass. 407, 113 N. E. 182, it was found that, at the time of taking the conveyance, the grantee "knew, in general, the nature and extent" of the grantor's property, but did not know of the specified debt owed by him, to the person seeking to set aside the conveyance. It was held that, in view of the close relationship between the grantor and that grantee, it would be inferred that the latter was apprised of the fact that the grantor owed debts which the conveyance rendered him incapable of paying.

In Cansler v. Cobb (1877) 77 N. C. 30, it was held that the evidence showed that, while the grantee had no intent to defraud the creditors of the grantor, he knew that the conveyance left the grantor without means to pay his debts.

Though the grantee did not know, at the time of the conveyance, that a covenant for the support of the grantor was contained in the deed, if, after learning of its existence, he accepts it and enters on its performance, he is in no better position than if he had accepted the deed with full knowledge. Townsend v. Bumpus (1898) 29 App. Div. 122, 51 N. Y. Supp. 513.

VIII. Who may attack conveyance.

a. Subsequent creditors.

It is held in some jurisdictions that a conveyance in consideration of the future support of the grantor may be set aside, at the instance of those persons, only, who were creditors of the grantor at the time of the conveyance. Sandlin v. Robbins (1878) 62 Ala. 477; Baxter v. Baxter (1912) 19 Cal. App. 238, 125 Pac. 359; Pelham v. Aldrich (1857) 8 Gray (Mass.) 515, 69 Am. Dec. 266; Smith v. Smith (1841) 11 N. H. 460; Hennon v. McClane (1878) 88 Pa. 219; Buchanan v. Plark (1856) 28 Vt. 799; Gorman v. Urquhart (1899) 2 N. B. Eq. Rep. 42.

In Shontz v. Broan (1856) 27 Pa. 123, it was said that it would require a strong case of actual fraud to avoid a conveyance, given in consideration of the grantor's future support, where the only debt shown was one created after the transfer.

In other jurisdictions it is held that a conveyance in consideration of an agreement to support the grantor is fraudulent as to subsequent, as well as existing, creditors. Gordon v. Reynolds (1885) 114 Ill. 118, 28 N. E. 455; Sidensparker v. Sidensparker (1864) 52 Me. 481, 83 Am. Dec. 527; Young v. Hermans (1876) 66 N. Y. 374; McLean v. Button (1854) 19 Barb. (N. Y.) 450; Ware v. Gardner (1869) L. R. 7 Eq. (Eng.) 317, 38 L. J. Ch. N. S. 348, 20 L. T. N. S. 79, 17 Week. Rep. 439. Compare Gudgel v. Kittermán (1883) 108 Ill. 50; Usher v. Hazeltine (1829) 5 Me. 471, 17 Am. Dec. 253; Webster v. Withey (1845) 25 Me. 326.

In Young v. Hermans (1876) 66 N. Y. 374, it was said: "If a voluntary conveyance is made immediately before engaging in some hazardous business or enterprise, or obligations are incurred so soon after the conveyance as to warrant a presumption that actual fraud was intended, or other circumstances lead to the same inference, a deed will be adjudged fraudulent and void, as well against the subsequent, as existing, creditors."

In Sidensparker v. Sidensparker (1864) 52 Me. 481, 83 Am. Dec. 527, it was said that the fraud on creditors "is a continuing one," rendering the conveyance void as against subsequent creditors.

In Gordon v. Reynolds (1885) 114 Ill. 118, 28 N. E. 455, the court, in defining the distinction between precedent and subsequent creditors said: "The distinction as to the rights of precedent and subsequent creditors

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seems to be this: if the grantor reserves no future use or benefit in the property, then the sale can be attacked only by a pre-existing creditor; but where the conveyance is merely colorable, and a secret trust and confidence exist for the benefit of the grantor, then the sale is void, both as to precedent and subsequent creditors."

In Gudgel v. Kitterman (1883) 108 Ill. 50, it appeared that a father made a conveyance to two sons, in consideration of future support, and placed the deed in escrow. Ten years later the deed was taken from escrow and destroyed, and separate conveyances made to the sons according to a division agreed on by them. It was held that the later conveyances related back to the date of the original conveyance, and could not be attacked by a creditor whose claim accrued thereafter.

b. Estoppel.

In several cases it has been urged that a creditor was, by acquiescence in a conveyance made in consideration of an agreement to support the grantor, estopped to attack it.

In Spear v. Spear (1903) 97 Me. 498, 54 Atl. 1106, it was recognized as the rule that a creditor is not entitled to attack as fraudulent a conveyance which he advised, but the evidence was held to be insufficient to invoke that rule.

In Graves v. Blondell (1879) 70 Me. 190, it was held that the fact that the creditor knew of the proposed conveyance, and assented to it, does not estop him to attack it, unless the grantee was, by the assent, induced to take the conveyance.

In Massey v. McCoy (1899) 79 Mo. App. 169, it was held that the creditor was not estopped because of the fact that, as attorney for the grantor, he prepared the conveyance, it not appearing that he knew that no present consideration was paid.

The failure of a creditor who has knowledge of the transfer, to notify the grantee that he is a creditor, does not estop him to attack the conveyance. Baxter v. Baxter (1912) 19 Cal. App. 238, 125 Pac. 359.

In Hisle v. Rudasill (1893) 89 Va. 519, 16 S. E. 673, it was held that a conveyance in consideration of future support was valid as against a prior creditor whose claim was unknown to the grantee, and who made no effort to enforce it until twenty years had elapsed after the conveyance was made. W. A. S.

BROOKS-SCANLON COMPANY, Appt.,
v.
E. H. CHILDS.

Mississippi Supreme Court (Division A) — February 26, 1917.

(113 Miss. 246, 74 So. 147.)

Adverse possession — parol color of title — effect.

Title cannot be secured by adverse possession under parol color of title to land not actually possessed and occupied, as against a stranger to the title of claimant's grantor.

[*See note on this question beginning on page* 1457.]

APPEAL by defendant from a judgment of the Circuit Court for Marion County in favor of plaintiff in an action brought to recover damages for an alleged trespass on land claimed by him under parol color of title. *Reversed.*

The facts are stated in the opinion of the court.

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Messrs. Dale & Rawls and Griffith & Wallace for appellant.

Messrs. Mounger & Ford for appellee.

Sykes, J., delivered the opinion of the court:

The appellee, E. H. Childs, filed suit in the circuit court of Marion county against the appellant, Brooks-Scanlon Lumber Company, in an action of trespass. The declaration alleged that the plaintiff was in possession and was the owner of certain lands therein described, and that the defendant, without the consent and over the protest of plaintiff, burned 124 panels of plaintiff's fence, of the value of 25 cents per panel, and boxed for turpentine purposes the trees on about 100 acres of plaintiff's land. The defendant pleaded the general issue, and gave notice thereunder that it would prove that the title to the land was not in the plaintiff, but was in the defendant. The testimony in the case failed to show that the fence of plaintiff was burned by any of the agents or employees of the defendant. The principal contention in the case is whether or not the appellee is the owner of the lands which were boxed for turpentine purposes by the appellant. The testimony showed that the lands involved in this controversy were swamp and overflowed lands, the title to which was granted the state by the United States under the act of Congress approved September 28, 1850. The state granted this land to Dave Stock in 1883, and by successive conveyances this record title is now vested in the appellant. The testimony of the appellee showed that under a void patent the state of Mississippi granted this land to the Pearl River Improvement & Navigation Company in 1871. Also appellee introduced a forfeited tax patent from the state to Samuel Huggins, dated May 2, 1881, which patent was void, because the state had not at that time parted with its title to this land as swamp and overflowed land. Huggins sold this land (section 35) to C. W. Tynes in 1889. Tynes sold the land by parol in about the year 1890, to one Corley. Corley built a cabin, a crib, and a smokehouse on the land, and cleared up about 14 acres of it, and inclosed the field with a fence. He lived there about two years, and then sold the same by parol to appellee. It seems that each party, in making a parol sale of this land, would turn over to his vendee the void deeds obtained from the state of Mississippi and the deed from Huggins to Tynes. The appellee went into possession of the land, and cultivated the 14 acres that had been cleared. He has had actual possession of this cleared land since 1892, and is claiming a constructive possession of the lands involved in this controversy (which controversy does not involve the 14 acres of cultivated land) by virtue of his alleged parol color of title. The testimony of appellee does not positively show just how many acres he bought from Corley, but from an examination of his entire testimony it is evident that he means that he bought all of the land claimed by his vendor. From a reference to the void patent and deed turned over to appellee, it is clear that his vendor, if he claimed any other land except that actually cultivated, claimed the entire section 35. However, counsel for appellee limit this claim in their brief to the 120 acres of land described in the declaration. The cultivated land is not a part of the land involved in this suit. There is no claim whatever that plaintiff had actual possession of the lands in suit. His claim is based solely upon a constructive possession under parol color of title. Neither Huggins, Tynes, nor Corley ever had title to this land. If the parol color of title of appellee were valid as such, then he has a good title by virtue of this possession since 1892. The appellant asserts a hostile and different title to that of appellee. In a great many states it is held that there is no such thing as a parol color of title. In fact the great

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weight of authority sustains this view of the question.

"As heretofore shown, the weight of authority is to the effect that a written instrument is necessary to give color of title, and where this view prevails a vendee or donee in possession under a parol gift or purchase holds without color of title, although his vendor may have what would be color of title in him if he were in possession of the premises. But in jurisdictions where a written instrument is unnecessary, a person holding under a parol purchase or gift is considered as holding under color of title." 2 C. J. § 393, p. 196.

See also § 326, p. 170, id.

"The authorities do not agree as to the necessity of having 'color' of title evidenced by a writing. In many states a writing is considered to be indispensable, either as a matter of general law or because of statutory requirements. In some jurisdictions, however, it is recognized that color of title may exist in the absence of a writing. Thus, it has been asserted that one may be in possession under color of title, although he entered by virtue of a parol contract of sale. So, color of title may be acquired by descent cast upon heirs by the death of the ancestor, even though the ancestor was originally a trespasser, and in possession under claim of right only. Where the ancestor was never in possession, however, a conveyance to the ancestor cannot avail his heirs as color of title upon their taking possession after his death, and an exhaustive examination of the cases discloses that, outside of the acquisition of color of title by 'descent cast' as above mentioned, the statements to the effect that a writing is unnecessary have resulted from the unwarranted intermingling of the terms 'color' and 'claim' of title, which has been spoken of heretofore. That one may acquire a good title to land by the open and notorious possession thereof for the required time, as his own, is beyond question. Such occupancy, however, is clearly one under 'claim' of right, and not under 'color' of title, and, of course, will be effective where the original entry was under an oral contract of sale, or under a parol gift, or under any other parol agreement. But it will be observed that the efficacy of the acquired title does not depend on the fact that the entry was had under the oral gift or agreement, but, rather, that it was maintained under a claim of right. It would, in such case, have been just as effective even if its origin had been tortious." 1 R. C. L. § 21, p. 708.

See also § 23, p. 711, id.; 88 Am. St. Rep. 701, note; 15 L.R.A.(N.S.) 1215, note.

In this state this court has recognized parol color of title of a vendee, as against his vendor and those claiming under him. In the case at bar, the appellant does not claim under the vendor of the appellee, but is a stranger to the title claimed by appellee. We decline to apply the doctrine of parol color of title to any other parties, except the vendor and those claiming under him. When a vendor puts his vendee in possession of land under a parol sale, he knows the limit and the claim of the vendee to this land. As to him, it is unnecessary that there should be a visible, actual occupation of the entire tract, because of his actual knowledge of the claim of ownership. But to an entire stranger this reason does not apply. The stranger is bound by the actual adverse possession for the required number of years. This visible possession puts him upon inquiry as to its duration. If the vendee in possession has a deed to the land, whether void or voidable, then this deed shows the limits of his claim, and a vendor would therefore be put on notice of that claim. However, where a vendee has no deed, if he be in possession of a small tract of land of only 15 or 20 acres, and could be allowed to say, "I am claiming 160 or 640 acres, because of a parol purchase from John Smith," the door would be thrown wide open to fraudulent and false claim under alleged

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parol color of title. In the previous decisions of this court between vendee and vendor, or those claiming under the vendor, the court has realized that this doctrine should be carefully limited, as is shown by the following quotation from Niles v. Davis, 60 Miss. 750: "While there are many cases in which the doctrine that a parol sale or gift of lands is sufficient to give color of title to the vendee or donee, we have been unable to discover any case in which the question whether the parol sale or gift extends the boundaries of the tenant's possession to those of the whole tract, though only a part be actually occupied; but we think that as against the parol vendor or donor, the law will impute possession in the vendee or donee to all the lands comprised in the verbal contract or gift. A mere trespasser in possession of land is restricted to so much, only, as is actually occupied by him, because no one can tell what are the limits of his claim otherwise than by the evidence afforded by his occupancy; while one in possession, claiming under a written instrument, gives to the world notice of the extent of his claim. But one who claims under a parol sale, and to whom possession of the land has been yielded by the vendor, certainly as against the vendor, gives notice, by the mere occupancy of a part of the land purchased, of his claim to the whole. Such occupancy is evidence of a claim under the contract, and the contract, though void by the Statute of Frauds, embraces the whole body of land. The delivery of possession by the vendor is an admission by him that the vendee enters, claiming as owner to the extent of the right which would have been conferred if the sale had been evidenced by a formal deed. It is not a question of the validity of the title, but of the character and extent of the possession, and of this the vendor has notice, not by the character of the occupancy, as being visible and notorious, but by the very contract to which he is a party. Possession, to give title under the Statute of Limitations, is required to be visible, notorious, hostile, and continued, to the end that all others having a claim to the property may have notice of the claim of the occupant, and, having notice, they must contest his right within the time fixed by law, or the presumption will be conclusive that they have yielded to the title asserted by the occupant."

In referring to this case the same able jurist who wrote the opinion above quoted from says: "In Niles v. Davis, supra, it was held that a parol vendee entering under his purchase was, as against his vendor and those claiming under him, in possession of the whole land, though only a portion should be actually occupied. This rule, though announced in that case for the first time in this state, had been silently recognized in Davis v. Bowmar, 55 Miss. 671, and has been distinctly formulated and applied in other states." Davis v. Davis, 68 Miss. 478, 10 So. 70.

In all of the cases in this state in which the doctrine of parol color of title has been upheld, the suits were between the vendor or those claiming under him and the vendee. It is also worthy of remark that in those cases the vendor had a good title to the lands in controversy. In this case neither the vendor of appellee nor those under whom he claimed ever had any title to this land. So far as the lands in controversy are concerned, there was no actual possession attempted to be exercised over them by appellee. He had no color of title to them, and therefore has had no constructive possession of them. The lower court submitted the case on instructions to the jury. This was error. The peremptory instruction asked by the defendant should have been given.

Adverse possession—parol color of title—effect.

Reversed, and judgment here for appellant.

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ANNOTATION.

Writing as essential to color of title in adverse occupant of land.

I. Introductory, 1457.
II. Necessity of writing generally:
a. Majority rule, 1457.
b. Minority rule, 1460.
c. Statute requiring writing, 1461.
III. Possession under oral gift or sale:
a. Generally, 1463.
b. As against donor or vendor, 1465.
IV. Possession under descent cast, 1466.

I. Introductory.

This note is confined to a discussion of the question whether a writing is essential to color of title. It does not deal with the necessity of color of title as an element of adverse possession, or with the nature or form of writing which is required.

Much miscitation of authorities on the sufficiency of oral color of title has resulted from a failure to distinguish between "claim of title" and "color of title." Claim of title is, of course, essential to impart to possession the element of hostility. Except where required by statute, color of title is not required to constitute adverse possession; but in the absence of color of title the possession extends only to the limits of the visible actual occupancy, while actual possession of part of a tract, with color of title to the whole, extends the possession to the limits fixed by the color of title. See Hamilton v. Wright (1870) 30 Iowa, 480, and see 1 R. C. L. title, Adverse Possession, pp. 706 et seq., quoted in the reported case (BROOKS-SCANLON CO. v. CHILDS, ante, 1453).

In Crowder v. Doe (1909) 162 Ala. 151, 136 Am. St. Rep. 17, 50 So. 230, the court stated the distinction as follows: " 'Color of title' and 'claim of title' are often confounded; the terms being used as if synonymous, whereas, in fact, they are very different things. 'Claim of title' is where one enters and occupies land, with the intent to hold it as his own against the world, irrespective of any shadow or color or right or title as a foundation for his claim. 'Color of title' is the semblance or appearance of title, but which, in reality, is not. They are distinct from, but supplementary to, each other. Color of title, without claim, is of little effect. Claim of title, without color, may ripen into title to the land actually occupied, while, with it, it may ripen into title, not only to the land actually occupied, but to all described in the color of title, if that actually occupied be a part thereof."

So, in Hitt v. Carr (1915) 62 Ind. App. 80, 109 N. E. 456, it was said: "The terms, 'color of title,' and 'claim of title,' have been somewhat confused in many decisions, and by some text-writers. Color of title is that which has the semblance or appearance of title, either legal or equitable, but which is in fact no title. Claim of title exists where one enters upon and occupies land, with the intent to hold it as his own against the world, irrespective of any foundation for such claim. Claim of title without color of title may ripen into title to the land actually occupied by such claimant; but, with color of title, his title may be perfected to the whole tract indicated by the instrument or state of facts which give color of title, though he be in actual possession of only a part of such tract."

By virtue of the distinction just pointed out, the many cases holding that title may be acquired by adverse possession, by one entering as a trespasser, or under an oral gift or sale, to the extent of his actual possession, are considered as outside the scope of the present discussion.

II. Necessity of writing generally.

a. Majority rule.

By the weight of authority, some writing which purports to give title to the premises is essential to give color of title to an adverse occupant; and oral transactions, however effective they may be as between the parties, do not constitute color of title.

United States.—Deffeback v. Hawke

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(1885) 115 U. S. 392, 29 L. ed. 423, 6 Sup. Ct. Rep. 95 (compensation to occupying claimant); United States v. Casterlin (1908) 164 Fed. 437 (occupation preventing sale of government mineral lands).

Alabama.—Bell v. Denson (1876) 56 Ala. 444; Tennessee Coal, Iron & R. Co. v. Linn (1898) 123 Ala. 112, 82 Am. St. Rep. 108, 26 So. 245; Howell v. Henry (1908) 157 Ala. 43, 47 So. 132.

Arkansas.—King v. Campbell (1909) 89 Ark. 450, 116 S. W. 899.

Georgia.—Watson v. Tindal (1858) 24 Ga. 494, 71 Am. Dec. 142; Cook v. Long (1859) 27 Ga. 280; Baird v. Evans (1877) 58 Ga. 350; Hobby v. Alford (1884) 73 Ga. 791.

Maryland. — Walsh v. McIntire (1888) 68 Md. 402, 13 Atl. 348.

Missouri.—Allen v. Mansfield (1891) 108 Mo. 343, 18 S. W. 901; Shaffer v. Detie (1905) 191 Mo. 377, 90 S. W. 131; Joplin Brewing Co. v. Payne (1906) 197 Mo. 422, 114 Am. St. Rep. 770, 94 S. W. 896; McGrath v. Mitchell (1894) 56 Mo. App. 626. See discussion of this jurisdiction infra, this subdivision.

New Mexico.—Armijo v. Armijo (1887) 4 N. M. 57, 13 Pac. 92.

North Carolina.—Doe ex dem. Tate v. Southard (1824) 10 N. C. (3 Hawks) 119, 14 Am. Dec. 578; Williams v. Scott (1898) 122 N. C. 545, 29 S. E. 877; Barrett v. Brewer (1910) 153 N. C. 547, 42 L.R.A.(N.S.) 403, 69 S. E. 614.

South Carolina.—Golson v. Hook (1849) 4 Strobh. L. 23. Compare M'Elwee v. Martin (1834) 2 Hill, L. 496.

Tennessee.—Slatton v. Tennessee Coal, Iron & R. Co. (1902) 109 Tenn. 415, 75 S. W. 926.

Virginia.—Baber v. Baber (1917) 121 Va. 740, 94 S. E. 209. Compare dictum in Creekmur v. Creekmur (1881) 75 Va. 430.

"Whatever the law may be elsewhere, there can be no such thing in North Carolina as color of title, without some paper writing attempting to convey title." Williams v. Scott (1898) 122 N. C. 545, 29 S. E. 877, disapproving Neal v. Nelson (1895) 117 N. C. 393, 53 Am. St. Rep. 590, 23 S. E. 428.

In Slatton v. Tennessee Coal, Iron & R. Co. (1902) 109 Tenn. 415, 75 S. W. 926, it was said: "It is well settled that possession without a deed defining the land is only notice to the boundaries actually inclosed. It is also held that a disseisor holds constructive possession of the whole tract only when his entry was under color of title by specific boundaries to the whole tract. The first requisite of such color of title as will give constructive possession to the claimant is, therefore, some definite description, showing the extent of the claim; which, as to the part constructively possessed, may be said to perform the same office as acts of ownership upon the parts in actual possession. Without the paper title, the possession is limited by the pedis possessio."

In Armijo v. Armijo (1887) 4 N. M. 57, 13 Pac. 92, the nature of the right claimed to be color of title does not appear, but the court said: "Color is not every pretense or claim of title, but consists in a writing or conveyance of some kind, purporting to convey the land under which the claim of title is asserted. What constitutes color of title is a question of law for the court, and not of fact for the jury, except under proper instructions from the court. Color of title, strictly speaking, cannot rest in parol. There must be a document of some sort."

In Baber v. Baber, 121 Va. 740, 94 S. E. 209, the court said: "It is now well settled in this state that color of title must be by deed or will, or other writing, which purports or contracts to pass title, legal or equitable, and which contains sufficient terms to designate the land in question with such certainty that the boundaries thereof can be ascertained therefrom, by the application thereto of the general rules governing the location of land conveyed by a deed."

In Bell v. Denson (1876) 56 Ala. 444, it was said: "When the possession is without written color of title . . . it is adverse only to the extent of actual occupancy."

In Deffeback v. Hawke (1885) 115

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U. S. 392, 29 L. ed. 423, 6 Sup. Ct. Rep. 95, the court, construing a statute providing that an occupying claimant, "under color of title," should be compensated for his improvements, said: "There can be no color of title in an occupant who does not hold under any instrument, proceeding, or law, purporting to transfer to him the title or to give to him the right of possession."

In **Missouri**, there was some conflict in the earlier decisions. In several cases there were dicta to the effect that a writing is essential to color of title. St. Louis v. Gorman (1860) 29 Mo. 593, 77 Am. Dec. 586; Fugate v. Pierce (1872) 49 Mo. 441; Crispen v. Hannavan (1872) 50 Mo. 536. In Rannels v. Rannels (1873) 52 Mo. 108, the court held that a writing was not necessary. In Long v. Higginbotham (1874) 56 Mo. 245, the court apparently ignored the holding in Rannels v. Rannels, repeating the dictum in Fugate v. Pierce (1872) 49 Mo. 441, supra, that "there must be a deed purporting to convey the whole, or some proceeding or instrument giving color and defining boundaries." Two later decisions followed Rannels v. Rannels, supra. Cooper v. Ord (1875) 60 Mo. 420; Hughes v. Israel (1881) 73 Mo. 538. In Allen v. Mansfield (1891) 108 Mo. 343, 18 S. W. 901, it was held that to constitute color of title "there must be some documentary evidence," the court disapproving of the rule laid down in Rannels v. Rannels, but pointing out that in that case there was actual possession of the entire tract in question, making color of title unnecessary. In McGrath v. Mitchell (1894) 56 Mo. App. 626, the court followed Allen v. Mansfield, supra. In Shaffer v. Detie (1905) 191 Mo. 377, 90 S. W. 131, the court said, by way of dictum, that "our later decisions, defining color of title, incline to the view that it has its root in some document dealing with the title, however erroneous or imperfect." In Joplin Brewing Co. v. Payne (1906) 197 Mo. 422, 114 Am. St. Rep. 770, 94 S. W. 896, it was said, obiter: "Any instrument in writing which purports to convey a certain tract of land, describing the same, is color of title."

In a considerable number of cases, wherein it appeared that adverse possession was under a writing, the court, in discussing its sufficiency as color of title, has defined that term in such a manner as to exclude the idea that color of title can rest in parol.

United States.—Oliver v. Pullam (1885) 24 Fed. 127.

Alabama.—Lamar v. Minter (1848) 13 Ala. 31; Saltmarsh v. Crommelin (1854) 24 Ala. 347.

Arkansas.—Trotter v. Neal (1887) 50 Ark. 340, 7 S. W. 384.

Georgia.—English v. Doe (1849) 7 Ga. 387; Beverly v. Burke (1851) 9 Ga. 440, 54 Am. Dec. 351; Walls v. Smith (1855) 19 Ga. 8; Acme Brewing Co. v. Central R. & Bkg. Co. (1902) 115 Ga. 494, 42 S. E. 8.

Iowa.—Lindt v. Uihlein (1902) 116 Iowa, 48, 89 N. W. 214.

Michigan.—Vier v. Detroit (1897) 111 Mich. 646, 70 N. W. 139.

Minnesota.—Seigneuret v. Fahey (1880) 27 Minn. 60, 6 N. W. 403.

New York.—Thompson v. Burhans (1879) 79 N. Y. 93; Kent v. Harcourt (1860) 33 Barb. 491.

North Carolina.—Doe ex dem. Dobson v. Murphy (1836) 18 N. C. (1 Dev. & B. L.) 586; Keener v. Goodson (1883) 89 N. C. 273; Ellington v. Ellington (1889) 103 N. C. 54, 9 S. E. 208; Bond v. Beverly (1910) 152 N. C. 56, 67 S. E. 55.

Oklahoma.—Woodruff v. Wallace (1895) 3 Okla. 355, 41 Pac. 357.

Vermont.—Hodges v. Eddy (1865) 38 Vt. 327; Aldrich v. Griffith (1894) 66 Vt. 390, 29 Atl. 376.

West Virginia.—Cooey v. Porter (1883) 22 W. Va. 120; Core v. Faupel (1884) 24 W. Va. 247; Swann v. Thayer (1892) 36 W. Va. 46, 14 S. E. 423; Randolph v. Casey (1897) 43 W. Va. 289, 27 S. E. 231; Stover v. Stover (1906) 60 W. Va. 285, 54 S. E. 350; Lewis v. Yates (1907) 62 W. Va. 575, 59 S. E. 1073.

"The phrase, 'color of title,' signifies some written document which appears to be a title to land, but is not a good title." Oliver v. Pullam (1885) 24 Fed. 127.

"We consider everyone as holding under color of title who enters, bona

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fide, under and by virtue of a paper title." Saltmarsh v. Crommelin (1854) 24 Ala. 347.

"Color of title is anything in writing, connected with the title, which serves to define the extent of the claim." Walls v. Smith (1855) 19 Ga. 8. See to the same effect, Field v. Boynton (1862) 33 Ga. 239; Burdell v. Blain (1880) 66 Ga. 169; Veal v. Robinson (1883) 70 Ga. 809; Lee v. O'Quin (1898) 103 Ga. 355, 30 S. E. 356; Tumlin v. Perry (1899) 108 Ga. 520, 34 S. E. 171; Connell v. Culpepper (1900) 111 Ga. 805, 35 S. E. 667; Street v. Collier (1903) 118 Ga. 470, 45 S. E. 294; Moore v. Mobley (1905) 123 Ga. 424, 51 S. E. 351.

"What is meant by color of title? It may be defined to be a writing, upon its face professing to pass title, but which does not do it." Beverly v. Burke (1851) 9 Ga. 440, 54 Am. Dec. 351. See to the same effect, Gittens v. Lowry (1854) 15 Ga. 336; White v. Rowland (1881) 67 Ga. 546, 44 Am. Rep. 731; Williams v. Tison (1896) 99 Ga. 792, 26 S. E. 766.

In Clements v. Hays (1884) 76 Ala. 280, involving the extent of an adverse holding, the court said: "We may observe, in advance, that there is no room in this case for the application of the principle that, where one is in actual possession of a portion of a given tract of land, he will sometimes be held in law to be in possession of the remainder. This rule never applies, unless the occupant holds under deed, or other color of title, and there is no antagonistic or adverse possession. The deed, or other paper title, is important to define the extent, or boundaries, of his claim and possession."

"Unless he had some writing purporting to connect him with the title, he was not holding under color of title." Acme Brewing Co. v. Central R. & Bkg. Co. (1902) 115 Ga. 494, 42 S. E. 8.

In Lindt v. Uihlein (1902) 116 Iowa, 48, 89 N. W. 214, involving possession under a void deed, it was said that color of title involves "the idea of some deed of conveyance, or some paper or document, in which the holder may reasonably rely, as vesting in him the real ownership of the property."

"Constructive possession is based upon a written title, which may be valid or invalid." Thompson v. Burhans (1879) 79 N. Y. 93.

"Nor is it necessary, except in cases of constructive occupancy, that the claim should be founded upon any written instrument whatever." Kent v. Harcourt (1860) 33 Barb. (N. Y.) 491.

"The term, 'color of title,' as it is used in the cases on this subject, means a deed or survey of the land, placed upon the public records of land titles, whereby notice is given to the true owner, and to all the world, that the occupant claims the title." Hodges v. Eddy (1865) 38 Vt. 327.

"To give color of title it is not necessary that the claim should be under an instrument requisite to convey land. It is enough that the claim of title be under an instrument in writing, and defining the extent of the claim." Aldrich v. Griffith (1894) 66 Vt. 390, 29 Atl. 376.

"A deed or writing which purports to convey described land and pass a title gives color of title." Swann v. Thayer (1892) 36 W. Va. 46, 14 S. E. 423. See to the same effect, Randolph v. Casey (1897) 43 W. Va. 289, 27 S. E. 231.

In Alabama and Mississippi, there are decisions which have been cited frequently as holding that a writing is not necessary to color of title. As limited and explained by later decisions, however, these cases hold only that a parol gift or sale gives color of title to the donee or vendee, as against the donor or vendor, or persons in privity with him, but not as against strangers. They are accordingly discussed infra, in subdivision III., Possession under oral gift or sale.

b. Minority rule.

In a few jurisdictions it is held that a writing is not essential to color of title, and that possession under any oral transaction, by virtue of which the occupant claims ownership, is under color of title. Bell v. Longworth (1855) 6 Ind. 273; Hitt v. Carr (1915)

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62 Ind. App. 80, 109 N. E. 456; Taylor v. Buckner (1819) 2 A. K. Marsh. (Ky.) 18, 12 Am. Dec. 354; Boyce v. Blake (1834) 2 Dana (Ky.) 127; M'Call v. Neely (1834) 3 Watts (Pa.) 69; Green v. Kellum (1854) 23 Pa. 254, 62 Am. Dec. 332.

In M'Call v. Neely (1834) 3 Watts (Pa.) 69, it appeared that the occupant entered without any writing, apparently as a mere squatter, occupied a part of the tract, and paid taxes and exercised ownership of the whole. Holding that, as a possessor under color of title, he gained title to the entire tract, the court said: "The definition of a colorable title, or, as it is more frequently expressed, 'color of title,' has never, that I know of, been attempted. The words do not necessarily import the accompaniment of the usual documentary evidences; for, though one entering by a title depending on a void deed would certainly be in by color of title, it would be strange if another, entering under an erroneous belief that he is the legitimate heir of the person last seised, should be deemed otherwise; and it would be stranger still if his alienee were deemed to have more color of title than he had himself. To give color of title, therefore, would seem not to require the aid of a written conveyance, or a recovery by process and judgment, for the latter would require it to be the better title. I would say that an entry is by color of title when it is made under a bona fide, and not pretended, claim to a title existing in another." See to the same effect, Green v. Kellum (1854) 23 Pa. 254, 62 Am. Dec. 332.

In Bell v. Hartley (1842) 4 Watts & S. (Pa.) 32, it was held that a person in possession, without written evidence of title, took by adverse possession to the limits of boundaries surveyed and marked by him.

In Bell v. Longworth (1855) 6 Ind. 273, in holding that a possession under an assignment of the rights of an entryman on public lands was under color of title, the court laid down the broad rule that any possession, "under and pursuant to a state of facts which, of themselves, show the character and extent of his entry and claim," is under color of title. See also Van Cleave v. Milliken (1859) 13 Ind. 105, wherein the nature of the color of title held by the occupant does not appear, but the court quoted with approval Bell v. Longworth, supra.

In Wilson v. Campbell (1889) 119 Ind. 286, 21 N. E. 893, the court without referring to "color of title," held that possession under a parol sale gave title to the entire tract.

In Hitt v. Carr (1915) 62 Ind. App. 80, 109 N. E. 456, holding that possession under a void deed is under color of title, the court cited Bell v. Longworth, Van Cleave v. Milliken, and Wilson v. Campbell, to the proposition that "there may be color of title without an instrument in writing, purporting to convey the land to the one asserting title by adverse possession."

In Taylor v. Buckner (1819) 2 A. K. Marsh. (Ky.) 18, 12 Am. Dec. 354, it appeared that a person entered on a tract of land, claiming under the patentee, but without any written evidence of title. It was held that his occupancy gave him title by adverse possession to the entire tract.

In Boyce v. Blake (1834) 2 Dana (Ky.) 127, a person taking by oral purchase a tract of land adjoining that on which he lived was held to be in constructive occupancy thereof, as against a third person.

In South Dakota, it was said, obiter, in Wood v. Conrad (1891) 2 S. D. 334, 50 N. W. 95, that "color of title is defined to be an apparent title, founded upon a written instrument." But in Pendo v. Beakey (1902) 15 S. D. 344, 89 N. W. 655, it was held that, "where neither party claims any higher or better title than actual possession, a defendant in such actual possession under a bona fide claim of title, within the meaning of our statute relating to improvements, to the extent of his actual occupancy, or actual possession, holds under color of title."

c. Statute requiring writing.

In several jurisdictions there are statutes which so define color of title as to require, unmistakably, some instrument in writing.

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In California, the statute (Code Civ. Proc. § 322) provides as follows: "When it appears that the occupant, or those under whom he claims, entered into the possession of the property under claim of title, exclusive of other right, founding such claim upon a written instrument, as being a conveyance of the property in question, . . . and that there has been a continued occupation and possession of the property included in such instrument, . . . or of some part of the property, under such claim, for five years, the property so included is deemed to have been held adversely." See Wilson v. Atkinson (1888) 77 Cal. 485, 11 Am. St. Rep. 299, 20 Pac. 66; Standard Quicksilver Co. v. Habishaw (1901) 132 Cal. 115, 64 Pac. 113. "Color of title is defined to be an apparent title, founded upon a written instrument, such as a deed, levy of execution, decree of court or the like." Packard v. Moss (1885) 68 Cal. 123, 8 Pac. 818.

The Colorado statute provides that a person who shall, "under claim and color of title," occupy lands adversely for five years, shall become the owner thereof, "to the extent and according to the purport of his or her proper title." In Knight v. Lawrence (1894) 19 Colo. 425, 36 Pac. 242, it was said that the foregoing statute was borrowed from that of Illinois (discussed infra, in this subdivision), and that the substitution of the phrase, "proper title," for the phrase, "paper title," in the Illinois act, was a clerical error. Construing the act as a whole, the court held that the error was obvious, and might be corrected, and the statute read as though the term, "paper title," was used. It was accordingly held that a writing was essential to color of title. In Knight v. Lawrence, supra, the court disapproved of the dictum in Lebanon Min. Co. v. Rogers (1884) 8 Colo. 34, 5 Pac. 661, wherein it was said that color of title may exist without a writing. In Lower Latham Ditch Co. v. Louden Irrig. Canal Co. (1900) 27 Colo. 267, 83 Am. St. Rep. 80, 60 Pac. 629, it was said that "color of title, under the statute, must be based upon a paper title." See to the same effect, De Foresta v. Gast (1894) 20 Colo. 307, 38 Pac. 244. In Latta v. Clifford (1891) 47 Fed. 614, it was said with respect to the same statute: "The court interprets 'proper' title to mean 'paper' title. The word 'proper,' in the statute, is manifestly a mistake. By such error the word 'proper' is used for the word 'paper.' The statute was later amended by substituting the word 'paper' for 'proper.' See Sayre v. Sage (1910) 47 Colo. 559, 108 Pac. 160.

The Florida statute requires that adverse possession shall be founded "upon a written instrument, as being a conveyance of the premises in question." See Doyle v. Wade (1887) 23 Fla. 90, 11 Am. St. Rep. 334, 1 So. 516, wherein it was held that the instrument must purport to be a conveyance of all the premises in question.

In Illinois, a statute provides that every person in the actual possession of land "under claim and color of title" shall, at the end of seven years' occupancy, be held to be the owner thereof, "to the extent and according to the purport of his or her paper title." See Woodward v. Blanchard (1855) 16 Ill. 424, holding that, under the statute, a writing is essential to color of title. See to the same effect, McClellan v. Kellogg (1856) 17 Ill. 498; Dickenson v. Breedon (1863) 30 Ill. 279; Shackleford v. Bailey (1864) 35 Ill. 387; Brooks v. Bruyn (1864) 35 Ill. 392; Cook v. Norton (1867) 43 Ill. 391; Morrison v. Norman (1868) 47 Ill. 477; Rigor v. Frye (1872) 62 Ill. 507; Fagan v. Rosier (1873) 68 Ill. 87. "Under this section of the statute, the color of title required must be a 'paper title,' and cannot exist, in whole or in part, in parol." Converse v. Calumet River R. Co. (1902) 195 Ill. 204, 62 N. E. 887. A parol partition does not constitute color of title. Sontag v. Bigelow (1892) 142 Ill. 143, 16 L.R.A. 326, 31 N. E. 674. In Bride v. Watt (1860) 23 Ill. 507, the court said: "One of the difficulties in giving a construction to this act is in ascertaining the sense in which the legislature has employed the term, 'color of title,' as

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the basis upon which the statute can operate to produce a bar to a recovery. We are, however, aided to a limited extent, in ascertaining that intention, from the latter portion of the enacting clause of the section itself, which, by its terms, confines it to paper title. That clause excludes all verbal agreements and equitable titles, not supported by paper or written title." In Wright v. Mattison (1855) 18 How. (U. S.) 50, 15 L. ed. 280, the Illinois statute was discussed, and Woodward v. Blanchard, supra, quoted, but no decision within the scope of this note was made.

The **Louisiana** statute (Code, §§ 3478, 3479) requires, as a condition to the acquisition of title by prescription in ten years, "a title which shall be legal, and sufficient to describe the property." See Beer v. Leonard (1888) 40 La. Ann. 845, 5 So. 257, wherein it was held that the title so required "must be in writing."

In **Texas**, an early statute defined color of title as a claim based on a "consecutive chain of transfer." Under that act, a chain of consecutive written transfers is required. Finch v. Trent (1893) 3 Tex. Civ. App. 568, 22 S. W. 132, 24 S. W. 679; Craddock v. Burleson (1899) 21 Tex. Civ. App. 250, 52 S. W. 644. See also Stout v. Taul (1888) 71 Tex. 438, 9 S. W. 329, wherein the decision was to the same effect, but the statute was not referred to. In Finch v. Trent, supra, referring to an amendment by which "claim of transfer" was substituted for "chain of transfer," the court held that the phrases were interchangeable, saying: "In arriving at this conclusion, we are not unmindful of the distinction taken between 'color of title' and 'claim of title,' by the supreme court of Iowa, in the case of Hamilton v. Wright (1870) 30 **Iowa**, 480, wherein it was held that the latter, and not the former, might exist by parol; but we think no such distinction was intended to be introduced, in view of the other language employed in the statute, by the substitution of 'claim' for 'chain;' nor have we overlooked that line of decisions, holding, in the absence of a statutory definition, that color of title need not be based upon a legal or paper title, but may rest in parol; or, as otherwise expressed, that a state of facts not evidenced by a deed or other writing may operate as color of title." In Hodges v. Robbins (1900) 23 Tex. Civ. App. 57, 56 S. W. 565, the decision was under a statute, providing that no adverse possession shall extend beyond 160 acres, unless there is a written muniment of title duly registered, and defining the boundaries.

The **Wisconsin** statute provides "that whenever it shall appear that the occupant, or those under whom he claims, entered into possession of any premises under claim of title exclusive of any other right, founding such claim upon some written instrument as being a conveyance of the premises in question, and that there has been a continued occupation and possession of the premises included in such instrument, or some part thereof, under such claim, for ten years, the premises so included shall be deemed to have been held adversely, and the right of the real owner to such lands shall be barred." Under that act a writing is of course essential. See North v. Hammer (1874) 34 Wis. 425; Furlong v. Garrett (1878) 44 Wis. 111; Hatch v. Lusignan (1903) 117 Wis. 428, 94 N. W. 332.

III. Possession under oral gift or sale.

a. Generally.

In connection with the discussion contained in this subdivision, attention is directed to the distinction heretofore adverted to (see supra, I.); there being, as is there stated, many cases which hold that adverse possession under an oral gift or sale gives title to the property actually and visibly occupied, which are excluded from consideration in this note, as involving no question of color of title.

In those jurisdictions wherein it is held that a writing is not essential to color of title, possession under an oral gift or sale is, of course, under color of title. Wilson v. Campbell (1889) 119 **Ind.** 286, 21 N. E. 893; Boyce v. Blake (1834) 2 Dana (Ky.) 127.

In jurisdictions wherein color of title is deemed to consist in a writing

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purporting to be evidence of title, possession under a parol gift or sale is not under color of title as to persons not in privity with the donor or vendor.

Alabama. — Hawkins v. Hudson (1871) 45 Ala. 482; Clements v. Hays (1884) 76 Ala. 280; Tennessee Coal, Iron & R. Co. v. Linn (1898) 123 Ala. 112, 82 Am. St. Rep. 108, 26 So. 245.

Arkansas. — King v. Campbell (1909) 89 Ark. 450, 116 S. W. 899.

Georgia.—Watson v. Tindal (1858) 24 Ga. 494, 71 Am. Dec. 142; Cook v. Long (1859) 27 Ga. 280.

Maryland. — Walsh v. McIntyre (1888) 68 Md. 402, 13 Atl. 348.

Mississippi.—See the reported case (BROOKS-SCANLON CO v. CHILDS, ante, 1453).

North Carolina.—Doe ex dem. Tate v. Southard (1824) 10 N. C. (3 Hawks) 119, 14 Am. Dec. 578.

South Carolina.—Goolson v. Hook (1848) 4 Strobh. L. 23.

Tennessee.—Slatton v. Tennessee Coal, Iron & R. Co. (1902) 109 Tenn. 415, 75 S. W. 926.

"Occupancy under a parol gift is not possession under color of title." Walsh v. McIntyre (1888) 68 Md. 402, 13 Atl. 348.

"The idea of a parol sale being color of title so as to make out adverse possession under the statute, as has been suggested in argument, is, of course, out of the question." Slatton v. Tennessee Coal, Iron & R. Co. (Tenn.) supra.

In Tennessee Coal, Iron & R. Co. v. Linn (1898) 123 Ala. 112, 82 Am. St. Rep. 108, 26 So. 245, adverse possession was claimed by one in possession under a parol exchange of lands with his brother, as against one claiming a title paramount to that of the brother. Holding that the occupant had no color of title, the court said: "A majority of the court are of the opinion that the doctrine announced, extending the adverse possession under a valid parol contract of sale to the boundary of the lands as fixed by the contract, is limited in its application as between vendor and vendee, or, in case of execution sale, to the defendant in execution and the purchaser at such sale. That when no such relation exists between the parties litigant, or their privies, that the possession of the adverse holder is limited to his possessio pedis, unless he holds under written color of title. In other words, to extend adverse possession beyond the actual possession, the adverse holder must enter upon and hold the lands under a paper writing fixing its boundaries; that color of title cannot exist or be evidenced in any other way, except where the relation exists between the parties litigant, above pointed out." That case was followed in Howell v. Henry (1908) 157 Ala. 43, 47 So. 132, a case involving possession under a parol sale of land.

In King v. Campbell (1909) 89 Ark. 450, 116 S. W. 899, it appeared that a tract of land was in a wild state, and that a person having a verbal contract to purchase it entered, built a house, and fenced about 1 acre. Holding that the adverse possession was, as against the vendee of one who purchased at a mortgage foreclosure sale, confined to the acre fenced in, the court said: "When she took possession of the 1 acre in August, 1897, she had no deed or written instrument of any kind, granting to her the land or any portion thereof, and therefore had no color of title thereto."

In Cook v. Long (1859) 27 Ga. 280, it was held that a person entering under a parol gift had no such color of title as to extend his possession beyond the visible limits of his occupancy.

In Hawkins v. Hudson (1871) 45 Ala. 482, involving the effect of possession under a parol gift to render champertous a subsequent sale by the owner, it was said: "The entry, if any, was not under color of title."

In Baird v. Evans (1877) 58 Ga. 350, it was sought to show by parol who purchased at an execution sale, the record showing only the issuance of the execution. The court said: "To constitute a good prescriptive title to land, the possession thereof must be under written evidence of title, not part in writing and part in parol."

In Roe ex dem. Watson v. Doe (1858) 24 Ga. 494, it appeared that, under a parol gift of land, the donee

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took possession, the visible possession being confined to a part of the tract. Five years later the donor gave him a quitclaim deed. It was held that the deed did not relate back to extend the limits of his actual possession, as against a person not in privity with the donor.

b. As against donor or vendor.

As between the donee or vendee in possession under an oral gift, and the donor or vendor or a person in privity with him, the oral gift or sale is color of title, and the possession is extended by construction to the boundaries fixed thereby. Normant v. Eureka Co. (1893) 98 Ala. 181, 39 Am. St. Rep. 45, 12 So. 454; Tennessee Coal, Iron & R. Co. v. Linn (1898) 123 Ala. 112, 82 Am. St. Rep. 108, 26 So. 245; Howell v. Henry (1908) 157 Ala. 43, 47 So. 132; Niles v. Davis (1883) 60 Miss. 750; Davis v. Davis (1890) 68 Miss. 478, 10 So. 70; Sumner v. Murphy (1834) 2 Hill, L. (S. C.) 488, 27 Am. Dec. 397. And see the reported case (BROOKS-SCANLON CO. v. CHILDS, ante, 1453).

In Normant v. Eureka Co. (1893) 98 Ala. 181, 39 Am. St. Rep. 45, 12 So. 454, the court stated the rule as follows: "We are clearly of the opinion that a purchaser who pays the purchase money for land, and takes possession of it under a legal contract of sale, whether verbal or written, has possession coextensive with the lands included in his contract of purchase, and he may show the extent of his possession by proof of the contract of sale and purchase; that in such a case the contract will fix the boundary of his possession. This principle applies as between vendor and vendee, or, in case of execution sale, to the defendant in execution and the purchaser at such sale. It is not intended to modify or affect, in any way, the doctrine declared in the above authorities, as to the possession of mere trespassers, or those who claim under color of title, but simply to declare that a valid contract of sale of land fixes the extent of the possession of one entering upon, and holding possession under, such a contract, just as the possession of one who is under color of title is limited by the description in the writings which confer color of title."

In Tennessee Coal, Iron & R. Co. v. Linn (1898) 123 Ala. 112, 82 Am. St. Rep. 108, 26 So. 245, the rule stated in the case last cited was recognized, and was held not to be applicable as against a stranger. See to the same effect, Howell v. Henry (1908) 157 Ala. 43, 47 So. 132.

In Niles v. Davis (1883) 60 Miss. 750, the court said: "While there are many cases in which the doctrine that a parol sale or gift of lands is sufficient to give color of title to the vendee or donee, we have been unable to discover any case in which the question whether the parol sale or gift extends the boundaries of the tenant's possession to those of the whole tract, though only a part be actually occupied; but we think that, as against the parol vendor or donor, the law will impute possession in the vendee or donee to all the lands comprised in the verbal contract or gift. A mere trespasser in possession of land is restricted to so much only as is actually occupied by him, because no one can tell what are the limits of his claim, otherwise than by the evidence afforded by his occupancy; while one in possession, claiming under a written instrument, gives to the world notice of the extent of his claim. But one who claims under a parol sale, and to whom possession of the land has been yielded by the vendor, certainly as against the vendor, gives notice, by the mere occupancy of a part of the land purchased, of his claim to the whole. Such occupancy is evidence of a claim under the contract, and the contract, though void by the Statute of Frauds, embraces the whole body of land. The delivery of possession by the vendor is an admission by him that the vendee enters, claiming as owner to the extent of the right which would have been conferred if the sale had been evidenced by a formal deed. It is not a question of the validity of the title, but of the character and extent of the possession, and of this the vendor has notice, not by the character of the occupancy, as being visible and notorious, but by the very contract to which he is a

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party." That decision was followed in Davis v. Davis (1890) 68 Miss. 478, 10 So. 70. In the reported case (BROOKS-SCANLON CO. v. CHILDS), it is held that the doctrine of Niles v. Davis (Miss.) supra, is not applicable to persons not in privity with the donor or vendor.

In Sumner v. Murphy (1834) 2 Hill, L. (S. C.) 488, 27 Am. Dec. 397, wherein it appeared that the person against whom adverse possession was claimed was in privity with the donor in a parol gift, the court, while not referring to the fact of privity, held that the donee had color of title, saying: "This is giving to the parol gift its true effect. It does not operate as title per se; but it gives a character to the possession, and operates as a color of title, to show how far the actual possession should have constructive effect."

In Trotter v. Neal (1887) 50 Ark. 340, 7 S. W. 384, the same result was reached by a somewhat different course of reasoning, the court holding that, as against the donor, the parol gift defined the limits of the possession so that color of title was unnecessary. The court said: "If this be true, the possession was adverse as against the father, and, if continued for the requisite statutory period, would have perfected the title of the son as against the father and his children claiming under him. The father and the children, in that event, would have known that such possession was adverse, and the extent of the claim. In such cases there is no occasion for the possession being notorious, or that it should be held under some document showing color of title. For notoriety is only necessary to give the true owner notice of the adverse possession; and color of title is important to show the character of the possession, and the boundaries of the occupant's claim. Of course, where the occupant claims and holds under parol gift of the true owner, the manner and the right under which he claims being known to the donor, and after his death to those claiming under him, notoriety and color of title are unimportant, and can serve no useful purpose, for no other persons have any legal interest in the question, or right to be informed of the existence and nature of such possession." Trotter v. Neal (Ark.) supra, was followed in Brown v. Norvell (1905) 74 Ark. 484, 86 S. W. 306.

IV. Possession under descent cast.

It has been held that descent cast is, of itself, color of title, regardless of whether the ancestor had color of title. Teabout v. Daniels (1873) 38 Iowa, 158, wherein the heirs of one who held under a mere claim of right were held to hold under color of title, the court saying: "There are other modes of acquiring color of title than through a paper conveyance." See to the same effect, Hamilton v. Wright (1870) 30 Iowa, 480.

On the other hand, it was held in Nicklace v. Dickerson (1898) 65 Ark. 422, 46 S. W. 945, that if the ancestor had no color of title the rights of his heirs are limited to his actual possession.

Where an ancestor was, at the time of his death, in adverse possession of land under color of title, his heirs claiming by descent hold under color of title. Dougherty v. Miles (1893) 97 Cal. 568, 32 Pac. 597; Peadro v. Carriker (1897) 168 Ill. 570, 48 N. E. 102; Miller v. Davis (1895) 106 Mich. 300, 64 N. W. 338; East Tennessee Iron & Coal Co. v. Broyles (1895) 95 Tenn. 612, 32 S. W. 761. And see Lund v. Parker (1824) 3 N. H. 49, wherein, after referring to a finding that the claimant did not enter as the heir of his father, the court said: "All the possession, then, on which the plaintiff relied, was without color of title."

In Hubbard v. Wood (1853) 1 Sneed (Tenn.) 279, wherein it appeared that the heir of a tenant in common took possession of the entire tract, the court said: "We take it to be too clear to admit of any discussion that a title by descent is an 'assurance' of title, within the meaning of the Act of 1819." See to the same effect, King v. Rowan (1873) 10 Heisk. (Tenn.) 675.

In Dougherty v. Miles (1893) 97 Cal. 568, 32 Pac. 597, it was held that possession taken by an heir [illegible]

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color of title, as against a purchaser at a probate sale.

In East Tennessee Iron & Coal Co. v. Broyles (1895) 95 Tenn. 612, 32 S. W. 761, wherein it appeared that possession was continued by the heirs of an occupant claiming under paper title, the court said: "Felix Broyles was in the adverse possession of that tract of land, and the statute began to run in his favor as early as 1867. He continued that possession so long as he lived, and since his death his heirs have kept it up, thereby making, in all, a continuous adverse possession from 1867 to the 7th day of May, 1889 (the date of the amendment), a period of some twenty-two years. Possession of the heir may be coupled with that of the ancestor holding under paper title, descent being an 'assurance of title,' within the meaning of the statute."

The existence of color of title in an ancestor will not avail the heirs, if he never took possession thereunder. Barrett v. Brewer (1910) 153 N. C. 547, 42 L.R.A.(N.S.) 403, 69 S. E. 614, wherein it was said: "When they entered they knew, and admit, their ancestor had never entered upon the land and had never perfected his colorable title. It is different when the ancestor enters and takes possession under colorable title. At his death the possession is cast by descent upon his heirs, who may continue the possession in good faith in himself, and tack it to that of his ancestor's so as to complete the necessary statutory period. Atwell v. Shook (1903) 133 N. C. 391, 45 S. E. 777; Alexander v. Gibbons (1896) 118 N. C. 796, 54 Am. St. Rep. 757, 24 S. E. 748. It is the continuity of possession which gives to the heir the benefit of the entry under color made by his ancestor." A like result was reached in Brown v. Watkins (1897) 98 Tenn. 454, 40 S. W. 480, wherein it appeared that the ancestor abandoned his possession and was not in possession at the time of his death, the court holding that the infancy of the heir did not prevent his being concluded by the abandonment. So, in Harris v. Hardeman (1863) 27 Tex. 248, wherein it appeared that the owner of premises sold them, but remained in possession, it was held that a continuation of the possession by his heirs was not under color of title.

The heir of a person who had paper title has color of title within the Texas statute, requiring, to constitute color of title, a "consecutive chain of transfer." Williamson v. Simpson (1856) 16 Tex. 433; Whitehead v. Foley (1866) 28 Tex. 1; Kennon v. Miller (1912) — Tex. Civ. App. —, 143 S. W. 986. In Whitehead v. Foley (1866) 28 Tex. 1, supra, it was said: "Title acquired by inheritance is as regular and effectual as if by written memorial."

In Melia v. Simmons (1878) 45 Wis. 334, 30 Am. Rep. 746, it was apparently considered that an entry as heir was not under color of title, the court holding that, since the entry was prior to the settlement of the estate, it was not within a statute relating to possession under a judgment. W. A. S.

ETTA I. PATTERSON, Appt.,

v.

M. C. CHAPMAN et al., Exrs., etc., of William E. Dargie, Deceased, Respts.

(Two cases.)

California Supreme Court (In Banc) — November 4, 1918.

(— Cal. —, 176 Pac. 37.)

Will — instrument directing payment of money after death — validity.

1. An instrument reciting a valuable consideration and directing the maker's executor to pay money within a specified time after his death is enforceable, although not executed as a will.

[*See note on this question beginning on page* 1471.]

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Pleading — complaint on written instrument — consideration.

2. A complaint to enforce an obligation to pay money, evidenced by an unsealed written instrument, need not allege consideration, where the statute provides that a written instrument is presumptive evidence of a consideration.

Contract — what constitutes.

3. Any memorandum in writing, regardless of its form and whether payable in money or in specific property, whereby a debt is acknowledged by one as owing to another to whom the memorandum is delivered, is sufficient to create an enforceable obligation.

— promise to pay — implication.

4. Where the existence of an indebtedness based upon consideration is acknowledged, the law implies a promise to pay.

(Wilbur, J., dissents.)

APPEAL by plaintiff from judgments of the Superior Court for Alameda County in favor of defendants in each case, in actions brought to enforce payment of a claim against the estate of William E. Dargie, deceased, under an instrument alleged to have been made, executed, and delivered by him to plaintiff. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. **McClanahan & Derby** and **Peter F. Dunne**, for appellant:

The instrument in question is a contract executed and delivered by decedent in his lifetime, which created an obligation to be discharged by the executors after his death.

8 Am. & Eng. Enc. Law, 2d ed. 1007; Feeser v. Feeser, 93 Md. 716, 50 Atl. 406; Price v. Jones, 105 Ind. 543, 55 Am. Rep. 230, 5 N. E. 683; Hegeman v. Moon, 60 Hun, 412, 15 N. Y. Supp. 596, 131 N. Y. 462, 30 N. E. 487; Banker v. Coons, 40 App. Div. 572, 58 N. Y. Supp. 47; Robbins v. Robbins, 175 Mo. App. 609, 158 S. W. 400; Kirkpatrick v. Pyle, 6 Houst. (Del.) 569; 1 Page, Wills, § 54; 29 Am. & Eng. Enc. Law, 2d ed. 579; Wolfe v. Wilsey, 2 Ind. App. 549, 28 N. E. 1004; Martin v. Stone, 67 N. H. 367, 29 Atl. 845; Crider v. Shelby, 95 Fed. 212; Carnwright v. Gray, 127 N. Y. 92, 12 L.R.A. 845, 24 Am. St. Rep. 424, 27 N. E. 835; Beatty v. Western College (Miller v. Western College) 177 Ill. 280, 42 L.R.A. 797, 52 N. E. 432; Central University v. Cox, 136 Ky. 260, 124 S. W. 299; Nassano v. Tuolumne County Bank, 20 Cal. App. 603, 130 Pac. 29; 1 Woerner, Administration, 2d ed. *11; 1 Dan. Neg. Inst. 5th ed. § 46; 18 Cyc. 418, 419; Ward v. Bush, 59 N. J. Eq. 144, 45 Atl. 534.

Messrs. **E. E. Trefethen** and **Fitzgerald, Abbott, & Beardsley**, for respondents:

The writing upon which plaintiff relies is testamentary in character, because it neither creates nor evidences any debitum in præsenti.

Cover v. Stem, 67 Md. 449, 1 Am. St. Rep. 406, 10 Atl. 231; Haines v. Rogers, 73 N. J. L. 51, 62 Atl. 272; Moore v. Stephens, 97 Md. 271; Pena v. New Orleans, 13 La. Ann. 86, 71 Am. Dec. 506; Frew v. Clarke, 80 Pa. 170; Stone v. Gerrish, 1 Allen, 175; Templeton v. Butler, 117 Wis. 455, 94 N. W. 306; Ga Nun v. Palmer, 159 App. Div. 86, 144 N. Y. Supp. 457; Board v. Callihan, 33 W. Va. 209, 10 S. E. 382.

The writing upon which plaintiff relies does not pass any present interest to her, but only an interest after death, and it is therefore inoperative because not executed in accordance with the Statute of Wills.

Schouler, Wills, § 1; Niccolls v. Niccolls, 168 Cal. 444, 143 Pac. 712; Noble v. Garden, 146 Cal. 225, 79 Pac. 883, 2 Ann. Cas. 1001; Tennant v. John Tennant Memorial Home, 167 Cal. 579, 140 Pac. 242; Demartini v. Allegretti, 146 Cal. 214, 79 Pac. 871; Teske v. Dittberner, 65 Neb. 167, 101 Am. St. Rep. 614, 91 N. W. 181; Reed v. Hazleton, 46 Kan. 73, 26 Am. St. Rep. 86, 26 Pac. 450, 37 Kan. 321, 15 Pac. 177; Burlington University v. Barrett, 22 Iowa, 72, 92 Am. Dec. 376; Comer v. Comer, 120 Ill. 420, 11 N. E. 848; Re Diez, 50 N. Y. 93.

The writing in question is not a bill of exchange, and no debt was created as a result of the refusal of the drawees named therein to honor the instrument.

Wright v. Traver, 73 Mich. 493, 3 L.R.A. 50, 41 N. W. 517; 7 Cyc. 582; Kendall v. Parker, 103 Cal. 319, 42 Am. St. Rep. 117, 37 Pac. 401; Coyle v. Satterwhite, 4 T. B. Mon. 124; Scud-

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der v. Clarke, 1 Colo. 192; Mershon v. Withers, 1 Bibb, 503; First Nat. Bank v. Sullivan, 66 Wash. 375, 119 Pac. 820, Ann. Cas. 1913C, 932; Hays v. Lapeyre, 48 La. Ann. 749, 35 L.R.A. 647, 19 So. 821; First Nat. Bank v. Lightner, 74 Kan. 736, 8 L.R.A.(N.S.) 231, 118 Am. St. Rep. 353, 88 Pac. 59, 11 Ann. Cas. 599.

The presence of the words, "value received," lends no support to the instrument as an instrument creating a present indebtedness.

Sears v. Lawrence, 15 Gray, 267; Mershon v. Withers, 1 Bibb, 503.

Messrs. Stanley Moore and Edgar D. Peixotto also for respondents.

Per Curiam:

In these two appeals from judgments entered in favor of the defendants the plaintiff attacks the rulings of the court sustaining general demurrers to the complaints without leave to amend.

The question involved in each case is the same.

It appears from the complaints that William E. Dargie made, executed, and delivered to plaintiff an instrument in writing, a copy of which as set out therein is as follows:

Oakland, Jan. 16–08.

For value received I hereby instruct the administrator of my estate to pay to Miss Etta Patterson, formerly of Edgewood, California, the sum of $50,000, within one year from the date of my death—or two years at the least. Interest at the rate of 5 per cent per annum is to be paid on said sum, quarterly, till said amount is paid in full. Said $50,000 may be paid in real estate or stocks and bonds, which I may own at the time of my death, if cash cannot be paid without sacrificing my estate; but said stocks, bonds or real estate must be the full value of cash at the date of delivery. I desire this request and order to be carried out promptly and without question of any kind.

W. E. Dargie.

Dargie died testate on February 10, 1911, and thereafter plaintiff duly presented her claim, based upon said instrument, to the executors of his estate, by whom it was rejected.

Some confusion of thought may arise if there is not kept constantly in mind the difference between the question of the sufficiency of the complaint as a pleading, and the question of the sufficiency of the instrument as evidence of a valid contract or obligation for the payment of money. At common law a seal was necessary in order to create the presumption that an executory contract was founded upon a valuable consideration, and therefore, if it was not under seal, the rule of pleading was that the complaint or declaration must allege that the contract was executed for a valuable consideration. Our Civil Code declares that "a written instrument is presumptive evidence of a consideration." § 1614. Hence it follows that in this state, in an action upon an unsealed written instrument as evidence of an obligation to pay money, the common-law rule applicable to sealed instruments prevails, and it is not necessary to make the additional allegation that it was made for a valuable consideration. Henke v. Eureka Endowment Asso. 100 Cal. 429, 34 Pac. 1089; Williams v. Hall, 79 Cal. 606, 21 Pac. 965. Hence, the complaints are not rendered bad because of the failure to make such allegation.

Pleading—complaint on written instrument—consideration.

The sole question presented for determination is whether or not the writing upon which plaintiff relies is in form and character testamentary, as held by the trial court, or, as claimed by appellant, it is a contract, by virtue of the execution and delivery of which Dargie, in his lifetime, created an obligation to be discharged after his death by his executors.

If the instrument created a debitum in præsenti, an obligation existing in the lifetime of the obligor, the fact that it was not to be discharged until after Dargie's death, renders it none the less enforceable

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as a demand against his estate. 8 Cyc. 1007. "Where a testator has not, in a paper payable post mortem, recognized himself either by intendment, or language, as under legal indebtedness to the party in whose favor it is made, such instrument is without consideration, purely voluntary, and testamentary in its character." Kirkpatrick v. Pyle, 6 Houst. (Del.) 569. Any memorandum in writing, however, regardless of its form, and whether payable in money or specific property, whereby a debt is acknowledged by one as owing to another to whom the memorandum is delivered, is sufficient to create such obligation. "Any words which prove a man to be a debtor will charge him with the payment of the money." Cover v. Stem, 67 Md. 449, 1 Am. St. Rep. 406, 10 Atl. 231. Hence, conceding the document in question is not a negotiable instrument, draft, check, or bill of exchange, as claimed by respondent, the want of such character is immaterial, if terms are employed therein, which, at the time of its execution, created a debitum in præsenti. Banker v. Coons, 40 App. Div. 572, 58 N. Y. Supp. 47; Robbins v. Robbins, 175 Mo. App. 609, 158 S. W. 400; Kirkpatrick v. Pyle, supra.

Contract—what constitutes.

Will—instrument directing payment of money after death—validity.

It is true the instrument contains no express promise to pay, but, where the existence of an indebtedness based upon consideration is acknowledged, the law implies a promise to pay it (Ward v. Bush, 59 N. J. Eq. 144, 45 Atl. 534), and the fact that payment is postponed until after the death of the party so acknowledging it is immaterial (Robbins v. Robbins, supra; Hegeman v. Moon, 131 N. Y. 462, 30 N. E. 487).

Contract—promise to pay—implication.

The instrument being signed by Dargie, every statement therein must be considered as his declaration, and given effect accordingly. In the absence of any defense on the ground of fraud, mistake, or want of consideration, each declaration therein made, or necessarily implied from its language, must be given the full effect that the meaning carries. The instrument, therefore, contains a declaration by Dargie that in his lifetime, and before or at the time of its execution, he had received from the plaintiff something of value, a value which he considered equal to $50,000, and that for that consideration his executors are ordered and directed to pay to the plaintiff that sum, in the manner and at the time specified. This precludes the idea of a gift to her. Its meaning is that he is ordering the payment to be made to her as a return for the value which he had received from her. This makes it a payment or recompense, not a gift. Furthermore, as it was an admission by him that in his lifetime he had received from her that value, not as a gift or as payment of any obligation to him, this fact alone, without any order to his executors to pay, would, in law, raise an implied promise by him to pay her for the benefit so received, and would be a sufficient foundation for a claim against the estate for such value. Cover v. Stem, supra. The only effect of the order, it having been accepted by her, is to merge the implied contract, and to modify it, so that she is thereby obliged to accept payment at the time and in the manner therein provided.

An examination of the authorities cited by respondent, chief among which is that of Cover v. Stem, supra, discloses that the instruments under consideration, and constituting the subjects of the actions, contained no promise and no words which, by intendment or otherwise, could be construed as acknowledging an indebtedness. Thus, in Cover v. Stem, supra; Moore v. Stephens, 97 Ind. 271; Pena v. New Orleans, 13 La. Ann. 86, 71 Am. Dec. 506, and other like cases, it was held that in the absence of a prom-

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ise, and without recital or acknowledgment of consideration, an instrument containing a mere direction to the executors to pay the sum mentioned was testamentary in character. And to like effect are the cases in this state, namely, Wisler v. Tomb, 169 Cal. 382, 146 Pac. 876, and Tracy v. Alvord, 118 Cal. 655, 50 Pac. 757, both of which involved notes shown to have been given without consideration, and in the first of which such fact appeared from the complaint. On the other hand, in the cases of Banker v. Coons, Robbins v. Robbins, and Kirkpatrick v. Pyle,—supra, Hatch v. Gillette, 8 App. Div. 605, 40 N. Y. Supp. 1016, and Ward v. Bush, supra, where the instruments were executed under seal, but in addition to the fact presumed therefrom, as in the case at bar, contained the words, "For value received," or those of like import, it was held they created a debitum in præsenti, which obligation being established, the law implied a promise to pay it.

The judgments are reversed.

Wilbur, J.: I dissent.

ANNOTATION.

Validity of instrument for payment of money as affected by mere fact that payment is postponed until death.

I. Scope, 1471.
II. General rule, 1471.
III. Objection of uncertainty, 1472.
IV. Objection that instrument is testamentary, 1473.

I. Scope.

The present annotation treats only the question whether or not the mere fact that an instrument for the payment of money postpones payment until, or after, death, thereby renders it an unenforceable obligation. This limitation excludes the question of the negotiability of notes made payable after death. And cases wherein the instrument was executed with the formalities of a will have also been excluded. The question whether such an instrument, if not supported by a consideration, may be upheld as a gift, is beyond the scope of the note.

II. General rule.

The general rule is that an instrument in the form of, and otherwise valid as, a note, bond, or other instrument for the payment of money, is not rendered invalid as such, merely because payment is postponed until, or after, death.

United States.—Crider v. Shelby (1899) 95 Fed. 212.

Alabama. — Dorsey v. Hudmon (1912) 179 Ala. 520, 60 So. 303.

Arkansas.—Simon v. Pine Bluff Trust Co. (1911) 99 Ark. 523, 138 S. W. 986.

California.—PATTERSON v. CHAPMAN (reported herewith) ante, 1467; Nassano v. Tuolumne County Bank (1912) 20 Cal. App. 603, 130 Pac. 29.

Connecticut. — Bristol v. Warner (1848) 19 Conn. 7.

Delaware. — Kirkpatrick v. Pyle (1881) 6 Houst. 569.

Georgia.—Huguley v. Lanier (1890) 86 Ga. 636, 22 Am. St. Rep. 487, 12 S. E. 922.

Illinois. — Kelley v. Hemmingway (1852) 13 Ill. 604, 56 Am. Dec. 474 (dictum); Shaw v. Camp (1896) 160 Ill. 425, 43 N. E. 608, affirming (1895) 61 Ill. App. 62; Beatty v. Western College (Miller v. Western College) (1898) 177 Ill. 280, 42 L.R.A. 797, 69 Am. St. Rep. 242, 52 N. E. 432, affirming (1897) 71 Ill. App. 587; Forbes v. Williams (1883) 13 Ill. App. 280; Safford v. Graves (1894) 56 Ill. App. 499.

Indiana.—Hathaway v. Roll (1882) 81 Ind. 567; Price v. Jones (1885) 105 Ind. 543, 55 Am. Rep. 230, 5 N. E. 683; Wolfe v. Wilsey (1891) 2 Ind. App. 549, 28 N. E. 1004; Garrigus v. Home Frontier & F. Missionary Soc. (1891) 3 Ind. App. 91, 50 Am. St. Rep. 262, 28 N. E. 1009; Barnett v. Franklin College (1894) 10 Ind. App. 103, 37 N. E. 427; Woodworth v. Veitch (1902)

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29 Ind. App. 589, 64 N. E. 932; Robinson v. Foust (1903) 31 Ind. App. 385, 99 Am. St. Rep. 269, 68 N. E. 182.

Iowa.—Church v. Dennis (1917) — Iowa, —, L.R.A.1917C, 1005, 161 N. W. 188.

Kentucky. — Sullivan v. Sullivan (1906) 122 Ky. 707, 7 L.R.A.(N.S.) 156, 92 S. W. 966, 13 Ann. Cas. 163; Central University v. Cox (1910) 136 Ky. 260, 124 S. W. 299; Foxworthy v. Adams (1910) 136 Ky. 403, 27 L.R.A. (N.S.) 308, 124 S. W. 381, Ann. Cas. 1912A, 327.

Maine.—Leader v. Plante (1901) 95 Me. 341, 85 Am. St. Rep. 415, 50 Atl. 54 (dictum).

Maryland.—Cover v. Stem (1887) 67 Md. 449, 1 Am. St. Rep. 406, 10 Atl. 231 (dictum); Feeser v. Feeser (1901) 193 Md. 716, 50 Atl. 406; Junkins v. Sullivan (1909) 110 Md. 539, 73 Atl. 264; Harper v. Davis (1911) 115 Md. 349, 35 L.R.A.(N.S.) 1026, 80 Atl. 1012, Ann. Cas. 1913A, 861.

Massachusetts.—Parker v. Coburn (1865) 10 Allen, 82; Krell v. Codman (1890) 154 Mass. 454, 14 L.R.A. 860, 26 Am. St. Rep. 260, 28 N. E. 578.

Michigan.—Taylor v. Taylor (1904) 138 Mich. 658, 101 N. W. 832.

Minnesota.—Fitzgerald v. English (1898) 73 Minn. 266, 76 N. W. 27.

Missouri.—Maze v. Baird (1901) 89 Mo. App. 348; Robbins v. Robbins (1913) 175 Mo. App. 609, 158 S. W. 400.

Nebraska. — Specht v. Beindorf (1898) 56 Neb. 553, 42 L.R.A. 429, 76 N. W. 1059 (dictum); Russell v. Close (1909) 83 Neb. 232, 119 N. W. 515.

New Hampshire. — Alexander v. Follet (1831) 5 N. H. 499; Martin v. Stone (1892) 67 N. H. 367, 29 Atl. 845.

New York.—Worth v. Case (1870) 42 N. Y. 362; Carnwright v. Gray (1891) 127 N. Y. 92, 12 L.R.A. 845, 24 Am. St. Rep. 424, 27 N. E. 835, affirming (1890) 57 Hun, 518, 11 N. Y. Supp. 278; Hegeman v. Moon (1892) 131 N. Y. 462, 30 N. E. 487, affirming (1891) 60 Hun, 412, 15 N. Y. Supp. 596; Root v. Strong (1894) 77 Hun, 14, 28 N. Y. Supp. 278; Hatch v. Gillette (1896) 8 App. Div. 605, 40 N. Y. Supp. 1016; Banker v. Coons (1899) 40 App. Div. 574, 58 N. Y. Supp. 47; Yarwood v. Trusts & G. Co. (1904) 94 App. Div. 47, 87 N. Y. Supp. 947, appeal dismissed in (1905) 182 N. Y. 527, 74 N. E. 1128; Hamilton v. Hamilton (1908) 127 App. Div. 871, 112 N. Y. Supp. 10; Re Simmons (1905) 48 Misc. 484, 96 N. Y. Supp. 1103; Re Burhans (1917) 100 Misc. 646, 166 N. Y. Supp. 1027.

Pennsylvania. — Shields v. Irwin (1802) 3 Yeates, 389; Mack's Appeal (1871) 68 Pa. 231; Eisenlohr's Estate (1917) 258 Pa. 438, 102 Atl. 117; Brown's Estate (1895) 4 Pa. Dist. R. 587.

South Carolina.—Carter v. King (1857) 11 Rich, L. 125.

Vermont. — Giddings v. Giddings (1878) 51 Vt. 233, 31 Am. Rep. 682.

England.—Colehan v. Cooke (1742) Willes, Rep. 393, 125 Eng. Reprint, 1231, affirmed in (1744) 2 Strange, 1217, 93 Eng. Reprint, 1140. And see Powell v. Graham (1817) 1 J. B. Moore, 305, 7 Taunt. 580, 129 Eng. Reprint, 232, 18 Revised Rep. 593, and Roffey v. Greenwell (1839) 10 Ad. & El. 222, 113 Eng. Reprint, 86, 2 Perry & D. 365, 8 L. J. Q. B. N. S. 336.

In Huguley v. Lanier (1890) 86 Ga. 636, 22 Am. St. Rep. 487, 12 S. E. 922, supra, the instrument was an antenuptial contract, and the covenant was to pay money after the death of the covenantor, and it was held that it created an absolute, irrevocable obligation, and that it was not testamentary in its nature simply because made payable after the death of the promisor. And in Krell v. Codman (1891) 154 Mass. 454, 14 L.R.A. 860, 26 Am. St. Rep. 260, 28 N. E. 578, supra, the promise to pay was in a covenant in an indenture under seal, executed in England. And in Russell v. Close (1909) 83 Neb. 232, 119 N. W. 515, supra, the instrument was regarded not as a promissory note, but merely a simple written agreement to pay.

III. Objection of uncertainty.

Instruments for the payment of money, which postpone payment until or after death, are not regarded as void for uncertainty as to time of payment, for the reason that, in law, that

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is certain which will be rendered certain, and the contingency of the death of the maker is an event certain to occur.

United States.—Crider v. Shelby (1899) 95 Fed. 212.

Alabama. — Dorsey v. Hudmon (1912) 179 Ala. 520, 60 So. 303.

Arkansas.—Simon v. Pine Bluff Trust Co. (1911) 99 Ark. 523, 138 S. W. 986.

Illinois.—Kelley v. Hemmingway (1852) 13 Ill. 604, 56 Am. Dec. 474 (dictum); Shaw v. Camp (1896) 160 Ill. 425, 43 N. E. 608; Beatty v. Western College (Miller v. Western College) (1898) 177 Ill. 280, 42 L.R.A. 797, 69 Am. St. Rep. 242, 52 N. E. 432.

Indiana.—Wolfe v. Wilsey (1891) 2 Ind. App. 549, 28 N. E. 1004.

Maine.—Leader v. Plante (1901) 95 Me. 341, 85 Am. St. Rep. 415, 50 Atl. 54.

Missouri.—Maze v. Baird (1901) 89 Mo. App. 348; Robbins v. Robbins (1913) 175 Mo. App. 609, 158 S. W. 400.

Nebraska. — Specht v. Beindorf (1898) 56 Neb. 553, 42 L.R.A. 429, 76 N. W. 1059.

New Hampshire.—Alexander v. Follet (1831) 5 N. H. 499.

Pennsylvania. — Mack's Appeal (1871) 68 Pa. 231.

England.—Colehan v. Cooke (1742) Willes, Rep. 393, 125 Eng. Reprint, 1231, affirmed in (1744) 2 Strange, 1217, 93 Eng. Reprint, 1140.

Nor is an instrument payable at a time not fixed because made payable "after my death date," but rather becomes due at once upon the death of the maker. Shaw v. Camp (1896) 160 Ill. 425, 43 N. E. 608, affirming (1895) 61 Ill. App. 62.

The foregoing conclusions are in keeping with the terms of the Uniform Negotiable Instruments Law, as enacted in a considerable number of jurisdictions, such statutes usually providing in effect that an instrument is payable, within the meaning thereof, when it is expressed to be payable on or at a fixed period after the occurrence of a specified event which is certain to happen, although the time of happening is itself uncertain.

IV. Objection that instrument is testamentary.

An instrument in the form of an ordinary promissory note, with the single exception that it fixes the time of payment at or after the death of the promisor, is not testamentary in character and hence unenforceable unless executed as a will. In other words, the mere fact that payment is postponed until or after death is not sufficient to give an instrument character as a will or testament.

United States. — Crider v. Shelby (1899) 95 Fed. 212.

California.—Nassano v. Tuolumne County Bank (1912) 20 Cal. App. 603, 130 Pac. 29.

Connecticut. — Bristol v. Warner (1848) 19 Conn. 7.

Delaware. — Kirkpatrick v. Pyle (1881) 6 Houst. 569.

Illinois.—Beatty v. Western College (Miller v. Western College) (1898) 177 Ill. 280, 42 L.R.A. 797, 69 Am. St. Rep. 242, 52 N. E. 432, affirming (1897) 71 Ill. App. 587.

Indiana.—Price v. Jones (1885) 105 Ind. 543, 55 Am. Rep. 230, 5 N. E. 683; Wolfe v. Wilsey (1891) 2 Ind. App. 549, 28 N. E. 1004; Garrigus v. Home Frontier & F. Missionary Soc. (1891) 3 Ind. App. 91, 50 Am. St. Rep. 262, 28 N. E. 1009.

Iowa.—Church v. Dennis (1917) — Iowa, —, L.R.A.1917C, 1005, 161 N. W. 183.

Maryland. — Junkins v. Sullivan (1909) 110 Md. 539, 73 Atl. 264.

Massachusetts.—Parker v. Coburn (1865) 10 Allen, 82.

Michigan.—Taylor v. Taylor (1904) 138 Mich. 658, 101 N. W. 832.

Minnesota.—Fitzgerald v. English (1898) 73 Minn. 266, 76 N. W. 27.

Missouri.—Maze v. Baird (1901) 89 Mo. App. 348; Robbins v. Robbins (1913) 175 Mo. App. 609, 158 S. W. 400.

New York.—Worth v. Case (1870) 42 N. Y. 362 Hegeman v. Moon (1892) 131 N. Y. 462, 30 N. E. 487, affirming (1891) 60 Hun, 412, 15 N. Y. Supp. 596; Banker v. Coons (1899) 40 App. Div. 573, 58 N. Y. Supp. 47.

Pennsylvania. — Shields v. Irwin (1802) 3 Yeates, 389; Mack's Appeal

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(1871) 68 Pa. 231; Eisenlohr's Estate (1917) 258 Pa. 438, 102 Atl. 117; Brown's Estate (1895) 4 Pa. Dist. R. 587.

The fact that a covenant in an antenuptial contract makes the money payable after the death of the promisor does not render it testamentary in its nature, or affect its character as an enforceable contract. Huguley v. Lanier (1890) 86 Ga. 636, 22 Am. St. Rep. 487, 12 S. E. 922. So, it has been held that a covenant to pay money after death, contained in an indenture under seal, was an enforceable obligation, although it was not executed as a will. Krell v. Codman (1890) 154 Mass. 454, 14 L.R.A. 860, 26 Am. St. Rep. 260, 28 N. E. 578. But that a note or check payable after death may be sustained as a testamentary disposition of personal property, see Jackson v. Jackson (1838) 6 Dana (Ky.) 257; Bartholemew v. Henley (1820) 3 Phillim. Eccl. Rep. (Eng.) 317, and Walsh v. Gladstone (1843) 1 Phill. Ch. 294, 41 Eng. Reprint, 644, 13 L. J. Ch. N. S. 52, 7 Jur. 1143, in none of which does it appear that the instrument was executed with the formality of a will.

However, an instrument for the payment of money cannot be enforced as a note against the estate of the promisor, until whose death payment was postponed, unless it either expressly or impliedly recognizes an existing present indebtedness, since the lack thereof, together with the fact that payment is postponed until death, makes the instrument testamentary in character.

California. — PATTERSON v. CHAPMAN (reported herewith) ante, 1467.

Delaware. — Kirkpatrick v. Pyle (1881) 6 Houst. 569.

Georgia. — Johnson v. Yancey (1856) 20 Ga. 707, 65 Am. Dec. 646.

Indiana.—Moore v. Stephens (1884) 97 Ind. 271.

Maryland.—Cover v. Stem (1887) 67 Md. 449, 1 Am. St. Rep. 406, 10 Atl. 231.

Massachusetts. — Stone v. Gerrish (1861) 1 Allen, 175.

New Jersey. — Haines v. Rogers (1905) 73 N. J. L. 51, 62 Atl. 272.

Pennsylvania. — Frew v. Clarke (1875) 80 Pa. 170; Snayberger's Estate (1916) 62 Pa. Super. Ct. 390; Snayberger's Estate (1916) 62 Pa. Super. Ct. 395.

In Cover v. Stem (1887) 67 Md. 449, 1 Am. St. Rep. 406, 10 Atl. 231, supra, in discussing an instrument reading: "At my death my estate or my executor pay to J. A. C., the sum of $3,000," it was said that, to create a valid note, "there must be terms employed to create a debitum in præsenti, though the solvendum may be in futuro and even after the death of the obligor. . . . In the instrument before us there are no words that create a debitum in præsenti . . . but the words employed simply import a posthumous disposition of a part of the estate of the maker of the instrument, and nothing more. . . . No language could be more expressive of a testamentary purpose."

And where it also clearly appeared that an instrument for the payment of money at or after the death of the promisor was intended to take the place of a will, and to be testamentary merely, it has been held that the instrument cannot be enforced as a note, although in the form generally used for notes. Graves v. Safford (1891) 41 Ill. App. 659, on subsequent appeal in (1894) 56 Ill. App. 499.

And an attempt to make a gift causa mortis of an instrument for the payment of money, which is invalid as such because payment is postponed until the donor's death, amounts to a testamentary disposition which is not an enforceable obligation when not made and proved as a will. Basket v. Hassell (1883) 107 U. S. 602, 27 L. ed. 500, 2 Sup. Ct. Rep. 415; Hamor v. Moore (1858) 8 Ohio St. 239.

So, in Moore v. Stephens (1884) 97 Ind. 271, an instrument containing no admission of indebtedness, and reading: "At my death my estate shall pay to," etc., to be used for a certain named purpose, was held simply an attempt to dispose of a part of the executor's estate after death, and therefore to be testamentary and unenforceable when not executed as a will.

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And in Johnson v. Yancey (1856) 20 Ga. 707, 65 Am. Dec. 646, an instrument, in form a note or bond payable at the maker's death, but designated as a "gift," was held to be testamentary only, being declared ambulatory and revocable during the life of the maker.

And in Stevenson v. Earl (1903) 65 N. J. Eq. 721, 103 Am. St. Rep. 790, 55 Atl. 1091, 1 Ann. Cas. 49, an instrument reading: "In the event of my death all deposits standing to my credit in said savings fund, and all interest due thereon, shall be paid to my wife," was held to be testamentary in character, and invalid because not executed as a will. The court said: "Such a gift, it seems to us, is purely testamentary in its character. If it is not, then it is a perfectly easy thing for a person to retain the absolute control and dominion over his moneys and personal securities during his life, and transfer that dominion to another at his death, with total disregard of the requirements contained in the Statute of Wills, by the simple device of depositing such moneys and securities, under an agreement with the depositary that he shall have the right to use them as he pleases during his life, and that at his death so much of them as may remain shall be delivered to such person as is named in the agreement, who shall then become the owner thereof, and then delivering the agreement to the beneficiary with a statement of the same purport as that made by the deceased to his wife when he gave the pass book to her. To hold that such a method of disposition of property by the owner at his death is valid would be to practically repeal the Statute of Wills in its operation upon personal property, so far as its mandatory provisions are concerned."

G. J. C.

D. M. LYON, Plff. in Err.,

v.

C. G. PIGNATEL, Exrx., etc., of T. B. Sale, Deceased.

Georgia Supreme Court — December 14, 1916.

(146 Ga. 272, 91 S. E. 53.)

Witness — death of obligee — obligor as witness for co-obligor.

In a suit by an executrix of a deceased payee on a note signed by two persons, where the plaintiff concedes the liability of one of them to be only that of a surety, and where the principal makes no defense, such principal is not incompetent to testify, on the trial of an issue formed by the surety, that he made an accord and satisfaction with the deceased payee. As the principal has filed no defense, and judgment against him is inevitable, and as he will not be affected by the discharge of the surety, his testimony in behalf of the surety is not in his own favor so as to disqualify him as a witness under the Evidence Act of 1889.

[*See note on this question beginning on page* 1477.]

Headnote by EVANS, P. J.

ERROR to the Superior Court for Wilkes County to review a judgment in plaintiff's favor in an action brought to recover the amount alleged to be due on a note. *Reversed.*

The facts are stated in the opinion of the court.

Mr. Clement E. Sutton for plaintiff in error.

Messrs. William Wynne and W. A. Slaton for defendant in error.

Evans, P. J., delivered the opinion of the court:

T. B. Sale executed to T. Burwell Green his note for $500. The note

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contained this entry on the back of it: "I guarantee one-half payment of within note. D. M. Lyon." The note was sued on by the executrix of the payee. The principal maker, Sale, made no defense. Lyon pleaded a discharge of liability because the payee had released Sale. On the trial it was stipulated that Lyon's liability on the note was only that of a surety. A verdict was directed against the principal maker for the full amount, and against the surety for one half of the amount due on the note. The surety moved for a new trial, which was refused.

The surety offered to prove by the principal maker (Sale) that after the note became due, in consideration that the automobile for the purchase of which the note was given was to be used by the payee, the latter agreed to release the witness from the payment of the note, and that the witness had never told the surety anything concerning such agreement to release. The court repelled the testimony, on the ground that the witness was a party at interest and incompetent to testify in the suit brought on the note by the executrix of the deceased payee. The statute declares that, where a suit is instituted by the personal representative of a deceased person, the opposite party shall not be permitted to testify in his own favor against the deceased person as to transactions or communications with such deceased person. Civ. Code 1910, § 5858(1). If Sale had filed a defense of accord and satisfaction of the note by delivery of the car to the deceased payee for use by him, Sale would have been incompetent to testify as to such defense. Is the statute applicable where he files no defense, and is offered as witness in behalf of his surety to establish his surety's defense, which is dependent on the witness's exoneration from the debt? The statute prohibits the witness from testifying in his own favor. If his testimony be not in his own favor, but in favor of a codefendant, he is not disqualified as a witness. This is illustrated by the case of Reed v. Baldwin, 102 Ga. 80, 29 S. E. 140. There the executors of a deceased payee sued a husband and wife on a note signed by them as joint makers. The wife pleaded that the debt was her husband's, and she signed as his surety. It was held that the husband was a competent witness in support of the plea of the wife, because his testimony was not in his own favor, in that he sought to discharge his wife from liability as a joint principal. The principle of this was applied in Hawes v. Glover, 126 Ga. 305, 314, 55 S. E. 62. In the instant case Sale filed no defense. He is not offered as a witness in his own behalf. His testimony cannot and will not affect his liability to the plaintiff. The discharge of his surety is of no concern or interest to him.

Witness—death of obligee—obligor as witness for co-obligor.

His testimony cannot be said to be in his own favor, because he is not affected by the result of the issue between the plaintiff and his codefendant. We do not think that the witness, whose liability is not disputed by plea, and where judgment against him is inevitable, is disqualified to testify to a transaction with the plaintiff's testate, which exonerated the surety, notwithstanding the same testimony would relieve the witness had he made defense on that ground.

Judgment reversed.

All the Justices concur.

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ANNOTATION.

Death of obligee as affecting competency of obligor to testify in favor of co-obligor.

I. Introductory, 1477.
II. Status as a "party:"
a. In general, 1477.
b. Adverse party, 1480.
c. Party to contract, 1480.
III. "Interested in the event of the action," 1480.
IV. "In witness's own behalf or interest," 1483.
V. "In behalf of successor in interest," 1485.
VI. "Adverse interest," 1485.
VII. Persons against whom witness is incompetent, 1486.
VIII. Transactions with deceased, 1486.

I. Introductory.

This note is limited to actions in behalf of a deceased obligee, and does not include cases passing upon the competency of an obligor as a witness, as affected by the death of the co-obligor. Cases in which the witness was a defendant in the action, and was apparently called to testify generally for all of the defendants, and not for some particular defendant, or defendants, other than himself, have also been excluded. For cases of this kind, see Hisaw v. Sigler (1878) 68 Mo. 449; Powell v. Bosard (1899) 79 Mo. App. 627; Neitch v. Hillman (1902) 29 Tex. Civ. App. 544, 69 S. W. 494; Grigsby v. Simpson (1877) 28 Gratt. (Va.) 348.

For the reason that the various disqualifying clauses typical of the statutes under consideration appear in a variety of combinations, it has been deemed advisable to consider each clause separately; and to classify the cases with reference to the particular clause on which the decision turned, rather than with reference to the combination of clauses, or elements, presented by the particular statute.

It will be observed that in many of the cases that fall within the scope of this note the decisions were controlled by principles or rules of construction which are not distinctive to the narrow question under consideration, but are susceptible of much broader application, and may, of course, be challenged or disputed, or even overruled, in cases that do not fall within the scope of the note.

II. Status as a "party."

a. In general.

If the statute, without other condition, disqualifies a party to the action, one who is in fact a party is disqualified, although he may have no interest in the event. Jenks v. Opp (1873) 43 Ind. 108 (holding one joint maker, although discharged in bankruptcy since the making of the note, incompetent as a witness).

But see Upton v. Adams (1867) 27 Ind. 432, holding that the term "party," as used in this statute, refers to a person who is a party to, and interested in, the particular issue in which he is offered as a witness, and that a defendant to a suit on a note, who has suffered a default judgment therein and hence is not interested in the issue between his codefendants and the plaintiff, is not disqualified as a witness in behalf of the former.

And under such a statute, one who is a party cannot testify, though offered as a witness only for his codefendants, if the statute makes no distinction between testimony in his own behalf, and testimony in behalf of codefendants. Alexander v. Dutcher (1877) 70 N. Y. 385, affirming (1876) 7 Hun, 439 (holding maker disqualified to testify for indorsers, and one indorser disqualified to testify for maker and other indorsers).

In some forms, however, the disqualification is not broadly of parties, but qualifiedly of parties interested in the event, or parties adversely interested; or some similar condition is attached to the disqualification of a par-

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ty to the action. In that case, of course, the mere fact that one is a party will not necessarily disqualify him as a witness in favor of his co-obligor. Upon the other hand, as already intimated, the statute which disqualifies parties to the action may also prescribe alternative grounds of disqualification, so that the fact that one is not a party may not prevent his disqualification. The construction and effect of phrases, such as "adversely interested," "interested in the event," etc., etc., either as distinct grounds or as conditions of disqualification, will be treated subsequently in the note, in their bearing on the disqualification of an obligor as a witness in favor of his co-obligor. The rest of the present division is concerned merely with the question as to when a co-obligor is to be regarded as a party to the action, within the meaning of the statute which makes one's status, as such, a ground or a condition of disqualification.

It has been held that one of the joint makers of a note, who is a necessary party to an action thereon, and has been named as a party, is to be regarded as such for the purposes of the statute, although not served, and although discharged in bankruptcy since the making of the note. Jenks v. Opp (Ind.) supra.

And the mere fact that two of the makers of a note have been discharged in bankruptcy does not render them nominal parties, and competent witnesses to show that another party to the note signed it after it had been delivered to the payee, who has since died, and that there was no consideration for such signature. The discharged makers are still parties to the suit, and may be interested in some issue developed during the trial, as, for instance, the issue of a new promise since their discharge. Greely v. Willey (1902) 71 N. H. 240, 51 Atl. 913.

But in Bonte v. Hinman (1883) 6 Ohio Dec. Reprint, 1173, it was held that, where the maker of a note had been discharged in bankruptcy, he was no longer a party to the issue between the holder's administrator and an indorser, and was a competent witness for the indorser.

Nor does the fact that the maker of a note, who has been made a party not only by the pleadings of the plaintiff, but also by the cross pleadings of the other defendants, who answered that they were merely sureties, did not file an answer, but confessed judgment, relieve him of the status of a party within such a statute. Pipkin v. Tuer (1915) — Tex. Civ. App. —, 177 S. W. 983 (holding him disqualified to testify that other defendants were sureties).

And one of the signers of the note sued on was still a party, though he admitted his indebtedness, and the contested issues were between his co-defendants and the executrix. Coffin v. Loomis (1897) — Tex. Civ. App. —, 41 S. W. 511.

And in an action on a note, a defendant, whose default was taken, was held incompetent to testify that another defendant was a surety, the court saying that he was a party defendant, and came within the interdiction of the statute (which disqualified parties from testifying in their own behalf). Langley v. Dodsworth (1876) 81 Ill. 86.

And see Genet v. Lawyer (1871) 61 Barb. (N. Y.) 211, holding that, where the maker of a note was a party to an action thereon against him and indorsers, by the personal representative of the holder, he was disqualified as a witness in behalf of the indorsers, although he did not appear and answer, and his default was entered, and the indorsers released him from all liability on the note. His default did not operate to sever the action, or discontinue it as to him, and he was still a party.

But see Bell v. Wilson (1867) 17 Ohio St. 640, holding that, where the principal maker of a note made no defense, he was a competent witness for the surety, to prove an extension of time of payment. The court may not have meant that he was not a "party," however, as the statute only disqualified parties where the adverse party was an executor or administrator, and, in another case, this is held to mean

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that the witness and the representative must be "adverse in interest."

Following this case, it was held in Brinker v. Schreiber (1883) 8 Ohio Dec. Reprint, 759, that, in an action for goods sold, a defendant who made default could testify for the other defendant, concerning transactions with a deceased member of the partnership of which plaintiff was surviving member.

And see Church v. Howard (1880) 79 N. Y. 415, where, in disposing of the case on other grounds, the court said that the question whether the principal maker of a note was a "party" to an action against the surety, where, though named as such, he did not answer, was not free from difficulty.

Where judgment against the principal and surety in a judgment note was opened, and the surety permitted to defend, the principal was a competent witness in behalf of the surety to show the invalidity of the note, under a statute leaving the common-law disqualification of parties in force in actions by or against executors. Simpson v. Bovard (1873) 74 Pa. 351.

And so it has been held that, though technically a party to an action against a surety, the principal was not a party within the meaning of the statute, where a stipulation was entered between him and plaintiff, whereby he withdrew his answer and consented to judgment against himself, although the judgment had not been actually entered. Conger v. Bean (1882) 58 Iowa, 321, 12 N. W. 284.

And where plaintiff discontinued an action against one of the makers of a note on acount of his insolvency, such maker was no longer a defendant, and was not disqualified as a witness in behalf of the other parties, to prove payment of the note. Segar v. Lufkin (1885) 77 Me. 142 (holding that, as the statute excluded only parties, persons not parties were competent, though interested in the result).

It has been held that the principal on a note is not a party to an action against the surety, within such a statute, where, although named as a party, he has never been served. Hicks v. Williams (1901) 112 Iowa, 691, 84 N. W. 935; Koger v. Armstrong (1906) 72 Kan. 691, 83 Pac. 1029. Thus, in Koger v. Armstrong, where the principal was named as a party a few days before the trial, by an amended petition, but was not served, and lived beyond the jurisdiction, it was held that he was not a party. But in Williams v. Carr (1894) 4 Colo. App. 363, 39 Pac. 644, it was held that the principal was a party to an action against the surety, though not served. He was, however, also held disqualified as a "person interested in the event," an alternative ground of disqualification. And see also Jenks v. Opp (1873) 43 Ind. 108, as to status of one not served as a party.

Though this point was probably not in controversy, it was held in Whitehead v. Smith (1878) 14 Hun (N. Y.) 531, that, in a mortgage foreclosure suit against the mortgagor, her husband, who joined in the bond, and a subsequent purchaser, the husband was a party, and, as such, incompetent to testify to usury; a deficiency judgment being sought against him.

Of course, where the disqualification is only of parties, generally or qualifiedly, one not in fact a party is competent, though liable on the obligation and interested in the event of the action. McMullen v. Ritchie (1894) 64 Fed. 253, modified on other grounds in (1897) 25 C. C. A. 50, 47 U. S. App. 470, 79 Fed. 522; Segar v. Lufkin (1885) 77 Me. 142; Wager v. Barbour (1888) 84 Va. 419, 4 S. E. 842. These cases, of course, should not be confused with those arising under statutes which are in the alternative, and disqualify both "parties" and "persons interested in the event."

Thus, in a creditor's bill proceeding by the personal representative of a judgment creditor, to subject to the payment of the judgment certain property of one of the joint makers of the note reduced to judgment, the other joint maker was held not disqualified as a witness in favor of his co-obligor, where he was not a party to the proceedings. McMullen v. Ritchie (Fed.) supra. And in Segar v. Lufkin (Me.) supra, one of the makers of a note was

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held competent, where plaintiff discontinued the action as against him because of his insolvency.

See also Hayden v. McKnight (1872) 45 Ga. 147 (holding a witness discharged in bankruptcy not disqualified from testifying in behalf of another party to the obligation sued upon, and to which the witness was also a party, where the statute disqualified parties from testifying in their own behalf. The ground of the holding was, that the evidence was not in favor of the witness, and he was not a party to the record).

b. Adverse party.

See Greely v. Willey (1902) 71 N. H. 240, 51 Atl. 918 (cited above) holding that the mere fact that two of the signers of a note had obtained discharges in bankruptcy did not conclusively show that they were nominal parties to the action on the note, as they might be interested in some issue developed at the trial; as the issue of a new promise after the discharge, for example. The statute disqualified adverse parties from testifying against executors or administrators.

And see also VI., infra.

c. Party to contract.

In Pennsylvania, the statute disqualifies the surviving or remaining party to the thing or contract in action. This, it will be noted, does not refer to parties to the action. Thereunder, a guarantor of payment of an obligation, by a separate contract of guaranty indorsed on the obligation, is not a party to the obligation. The contract to which he is a party is entirely separate, and, in an action on the obligation, he is not disqualified to testify that the obligation has been paid. Pattison v. Cobb (1905) 212 Pa. 572, 61 Atl. 1108.

But where a testatrix provides for the deduction from the share of any child in the residuary estate, of any amount due from such child, and a daughter and her husband have given notes to the testatrix, the husband cannot testify that the wife was only a surety for his debt, which would invalidate the notes as against her. The contracts in such case are the notes. Loudermilch's Estate (1908) 18 Pa. Dist. R. 781.

Under a statute providing that, where one of the original parties to the contract or other transaction is dead, the other party shall not be admitted to testify, etc., one not a party to the contract is not disqualified, though interested in the result. Therefore, in an action on a bond, though the obligee is dead, a person who has received money from one of the obligors for the payment of the bond, and has bound himself to pay it, is not incompetent. Wager v. Barbour (1888) 84 Va. 419, 4 S. E. 842.

In Freeman v. Bigham (1880) 65 Ga. 580, it was held that the principal maker of a note could testify to a release by the payee, since deceased, of an indorser, who alone was sued, in consideration of his professional services in collecting the note. The holding was that the indorsement was a new contract, and that the witness was, therefore, not a party to the contract or cause of action; this, apparently, being the statutory ground of disqualification.

III. "Interested in the event of the action."

In some states, an interest in the event, or in the result of the suit, is a ground or condition of disqualification. In others, an "adverse interest" may disqualify the witness (see VI., infra). So far as cases under statutes of the kind last mentioned turn on the meaning of the word, "interest," and not on the meaning of "adverse," they are treated in this division.

A principal who seeks to testify in an action against the surety, to a payment of the obligation, is a person directly interested in the event, within the meaning of a statute disqualifying a party or person directly interested in the event from testifying of his own motion, or in his own behalf. Williams v. Carr (1894) 4 Colo. App. 363, 36 Pac. 644 (holding witness disqualified).

Applying the principle that the true test of the interest of a witness is, that he will either gain or lose "by the direct legal operation and effect of

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the judgment," it has been held, in New York, that a principal who was not a party to an action against the surety, nor given notice by the surety to defend such action, and who had not undertaken the defense, was not disqualified as a witness for the surety, since a recovery against the surety would not fix the liability of the principal. Wallace v. Straus (1889) 113 N. Y. 238, 21 N. E. 66.

But in an earlier case in this state, it was held by the same court that, regardless of whether a principal who was named as a defendant, but did not answer, was to be regarded as a party, and incompetent upon that ground, he was interested in the event, and disqualified on that ground as a witness in favor of the surety. Church v. Howard (1879) 79 N. Y. 415.

In Hill v. Hotchkin (1881) 23 Hun (N. Y.) 414, in which the facts were very similar to the facts in the Church Case, and the doctrine of that case was followed, the court remarked that, if the question were an open one, it would incline to the opinion that the real inquiry was not whether the witness was interested in the event, but whether his testimony was offered or could be offered in his own interest or behalf; and that even if the question whether he was interested was material, he having withdrawn his defense, and the plaintiff being thereby entitled to judgment against him for the amount of the debt and costs of the action up to the time of such withdrawal, he was no longer interested in the event, in as much as the surety could only look to him for indemnity for that amount, and not for the costs of his defense, thereafter persisted in without the assent of his principal.

In Pennsylvania, it has been held that where the principal, though named as a defendant in an action on a note, makes no defense, and judgment is entered against him, he has no further legal interest in the event of the suit, and is not disqualified as a witness for the sureties. Cunningham v. Morrow (1899) 24 Pa. Co. Ct. 348.

The maker of a note, when not a party, is not interested "in the event," so as to disqualify him to testify in favor of an indorser before delivery, who is seeking to restrain the enforcement by the estate of the payee, of a judgment obtained on the note and assigned to the payee, upon the ground that the note was made and indorsed for the payee's accommodation. Franklin v. Kidd (1916) 219 N. Y. 409, 114 N. E. 839, reversing (1915) 167 App. Div. 958, 152 N. Y. Supp. 1112, which affirmed (1914) 87 Misc. 399, 149 N. Y. Supp. 767. The court said that, to make out an interest in the event, it was not enough that the judgment would leave open the possibility of another action, but that the judgment must be evidence in such other action, and evidence adverse to the witness. The possibility that the indorser might sue the witness, claiming that he signed for the accommodation of the witness, in case he failed in his suit against the payee's estate, therefore did not establish the interest of the witness. The court also said that a result favorable to the indorser would not avoid further litigation, as the payee's estate might, in that case, sue the witness; but in making this argument, the court seems to have overlooked the fact, pointed out by the lower court, that such an action would be barred by limitations, while an action by the indorser would not be.

But in an action by a payee's administrator against the apparent maker and indorser of a note, though the indorser testifies for the maker, and not as a witness for himself, his testimony as to usury is affected with a personal interest which disqualifies him, where the defense of usury proceeds on the theory that the apparent maker was only an accommodation maker, and that the note had its inception in the usurious transfer from the ostensible indorser to the payee. The indorser clearly had an interest in relieving the accommodation maker from liability, as otherwise he would be answerable to such maker. The maker was likewise interested in the issue between plaintiff and the indorser, as a result favorable to the indorser would relieve him of the necessity of resisting the indorser's presumptive claim of recourse to him, by proof

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that, as between them, the note was an accommodation note. Frey v. Horton (1903) 85 N. Y. Supp. 402.

An indorser of a note, who has not been charged as such, is not interested in the event of an action against the maker. Nearpass v. Gilman (1878) 16 Hun (N. Y.) 121, affirmed in (1887) 104 N. Y. 506, 10 N. E. 894.

But Campbell v. Walker (1917) 20 Ga. App. 88, 92 S. E. 545, holding the indorser of a note incompetent in an action against the maker, seems to involve a holding that he is ordinarily interested in the result. The statute prohibits parties from testifying in their own behalf, and further provides that any person interested in the result shall not be competent, if, as a party to the suit, he would for any cause be incompetent.

And a surety on a note, though not sued, has a direct pecuniary interest in the issue raised by the principal's defense of usury, as he would be discharged from liability if the principal escaped liability, while otherwise he might be held liable. Hinkson v. Wigglesworth (1899) 20 Ky. L. Rep. 1161, 48 S. W. 1079. The statutory prohibition, however, was against any person testifying "for himself."

It has been held that the guarantor of an obligation, who has been discharged from liability on the guaranty by a discharge in bankruptcy, has no interest adverse to the estate of the obligee, in an action against the principal, and is competent to testify to the payment of the obligation. Pattison v. Cobb (1905) 212 Pa. 572, 61 Atl. 1108. It would seem that any interest of the witness would be adverse, and that the court must mean that he had no interest, adverse or otherwise.

But the surety on an executor's bond is "interested in the event" of the executor's accounting, and therefore incompetent to testify to prohibited matters, the adverse parties being legatees. Miller v. Montgomery (1879) 78 N. Y. 282 (the decedent, of course, was not the obligee in the bond, and this case is not, therefore, strictly within the scope of this note, but seems governed by the same principle as those within its scope).

In a suit by one of two judgment debtors to enjoin proceedings under an execution against his property, the other judgment debtor has no disqualifying interest, preventing him from testifying to a release of plaintiff from all liability on the judgment, where it is not claimed that the witness has paid the judgment. It is still in full force as to him, and he neither gains nor loses by the result, whatever it may be. Fuller v. Lendrum (1882) 58 Iowa, 353, 12 N. W. 340.

In an action against partners on a partnership note, one of the members of the firm, against whom a default has been entered, is not a competent witness to show that he signed the partnership name to the note without the authority of the firm, and that he used the proceeds for his personal benefit, since, if this defense should prevail, the entire action would fail, including the default judgment against the witness. He was, therefore, interested adversely to the deceased holder of the note. Dick v. Williams (1889) 130 Pa. 41, 18 Atl. 615.

Under a statute prohibiting a party from testifying where the adverse party is an executor or administrator, under which the court held that the parties must be "adverse in interest," and not merely in their nominal status as plaintiffs or defendants, it has been held that one of the signers of a note was competent to testify that the other was a surety, where the witness made no defense. The court said that there was no controversy beween him and plaintiffs. Baker v. Kellogg (1876) 29 Ohio St. 663. The basis of this decision may be that the witness had no interest, or that such interest was not adverse.

Where the maker of a note claims that the payee made a gift to K., and delivered money to him for K.'s benefit, and that the note did not represent an actual indebtedness, but was executed to enable the payee to exhibit it to third parties, and that it was understood that K. should sign the note, but he did not do so, K. is "directly interested in the event," and disqualified to testify to such arrangement, since, if

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plaintiff prevailed, defendant could recover against him, while, if defendant prevailed, he would be relieved from liability. Cordingly v. Kennedy (1917) 152 C. C. A. 479, 239 Fed. 645.

In Illinois, a defendant may, in chancery, testify for his codefendant on any question in the decision of which he has no interest. This is for the reason that he could so testify prior to the statute on this subject, and the statute is a mere limitation on the effect of the act removing the common-law disqualification of parties, and does not render any witness incompetent who was previously competent. Bradshaw v. Combs (1880) 102 Ill. 428. The surety on a note may, therefore, sue to enjoin the collection of the note or an action thereon, and, in such a suit, the principal maker may testify for the surety to an extension of time of payment. Ibid.; English v. Landon (1899) 181 Ill. 614, 54 N. E. 483. This is evidently on the ground that he has no interest in that question.

IV. "In witness's own behalf or interest."

In many jurisdictions, the prohibition against a party to an action testifying, where the action is prosecuted or defended by the personal representative, applies only to testimony "in his own behalf," against the other party to the action.

A statute of this character has been held not to disqualify the principal in an obligation from testifying in behalf of his surety, where such principal had not been served with process, and hence was not a party to the action. Koger v. Armstrong (1905) 72 Kan. 691, 83 Pac. 1029 (testimony related to the extension of time by the deceased to the witness, for the purpose of showing that thereby the surety was released. The court pointed out that the witness expressly admitted his liability on the note, and that, under the circumstances, neither the letter nor the spirit of the statute rendered him an incompetent witness).

And it will be observed that in the reported case (LYON v. PIGNATEL, ante, 1475) it was held that the proffered testimony of the principal maker of a note, who made no defense in an action against the surety and himself, which tended to establish an accord and satisfaction which would have been available to the witness, if it had been pleaded by him, was not testimony "in his own behalf," since judgment against the witness was inevitable, and he was not interested, within the meaning of the statute, in the exoneration of his surety. The court said that if the principal had filed a defense of accord and satisfaction of the note he would have been incompetent to testify as to such defense.

Under a substantially similar statute, in another jurisdiction, the maker of a note who did not contest his liability was held competent as a witness in behalf of a surety on the note, to establish the release of the latter by an extension of time to the witness. The conclusion of the court is based on the ground that the witness was not testifying in his own behalf, for he did not contest his liability, and his individual interest could not, in any way, be affected by his testimony. Sutton v. Walters (1896) 118 N. C. 495, 24 S. E. 357.

But see Langley v. Dodsworth (1876) 81 Ill. 86, holding a defendant, whose default was taken, incompetent to testify for another defendant, who alleged that he was a surety and had been discharged by an extension of time of payment. The statutory disqualification was limited to testimony "in his own behalf."

Such a statute does not disqualify the maker of a note, as a witness in behalf of the indorser, upon the issue of a discharge of the latter by the extension of time for payment to the maker, where the action has been discontinued as to the latter, owing to his discharge in bankruptcy. Hayden v. McKnight (1872) 45 Ga. 147. The court pointed out that the witness was not a party to the record, and was not offered to testify in his own favor, and remarked that this would seem to be a touchstone under the statute. If he is not called to testify in his own favor, he is competent; and that, even when called to testify in his own favor, if he is not called against the

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interest of the deceased party to the contract, he is likewise competent.

Where judgment is taken upon a note against both maker and surety in the justice's court, and the latter, only, appeals, the former, in testifying in favor of the latter in the county court, is not testifying in his own behalf or interest. Allis v. Stafford (1878) 14 Hun (N. Y.) 418 (witness held not disqualified).

An indorser who has not been charged as such does not testify "in his own behalf," when he testifies in favor of the maker. Nearpass v. Gilman (1878) 16 Hun (N. Y.) 121, affirmed in (1887) 104 N. Y. 506, 10 N. E. 894 (holding the witness competent, he not being a party).

But a surety on a note, though not sued, is testifying "for himself," when he testifies in support of the principal's defense of usury. Hinkson v. Wigglesworth (1899) 20 Ky. L. Rep. 1161, 48 S. W. 1079. The court said that if the principal escaped liability the surety would be discharged from liability; while if judgment should be recovered against the principal, and he should be insolvent, a suit might be maintained against the surety.

One not a party to the record, who indorsed his name on a note, does not testify in his own favor within such a statute, where, for the purpose of showing that payments made by him did not toll the Statute of Limitations as regards the defendant, alleged to have been a comaker with the witness, he testified that he was guarantor; since the payments, whether made by him as guarantor or comaker, would be effective to toll the statute as against him, and a judgment in favor of the defendant in the present action would not preclude a subsequent recovery against the witness, as a guarantor. Thompson v. Brown (1906) 121 Mo. App. 524, 97 S. W. 242.

Rather a peculiar result was reached in the case of Ely v. Clute (1879) 19 Hun (N. Y.) 35, holding that, in an action by the executrix of the payee of a joint and several note made by the two defendants, each defendant was a competent witness to testify in behalf of the other as to personal transactions with the deceased, to establish the defense of usury. The decision was upon the ground that the testimony of either witness could not inure to his "own interest or behalf," within the meaning of the statute, as he was expressly offered only in behalf of the other defendant. The court said, in support of its decision, that the fact that the plaintiff sued the defendants jointly did not affect the right of either to any order or other relief to which he would have been entitled, if separately sued.

Under a statute prohibiting any person from testifying "for himself," concerning any transaction, etc., with one who is dead when the testimony is offered, it has been held that one of the joint makers of a note, though not served in an action thereon, cannot testify for the active defendant, to false representations by plaintiff's deceased agent in the sale of stock for which the note was given. The court said that, in case the defense failed, he would be liable by way of contribution, and that, as he was jointly interested in defeating the suit, there was no way in which he could testify for the other defendant without testifying for himself. Cain v. Levy (1918) 179 Ky. 32, 200 S. W. 326.

But under such statute, one of the signers of a note, against whom judgment has been obtained, may testify for another signer, who claims that he is a surety, and that the action is barred by limitations. Walker v. Turley (1906) 28 Ky. L. Rep. 809, 90 S. W. 576.

And the clause, "in his own behalf or interest," applies to a husband who is called to testify in support of the defense of usury, in a suit to foreclose a mortgage upon the wife's property, given to secure a bond in which he joined, where a deficiency judgment is sought against him. Whitehead v. Smith (1878) 14 Hun (N. Y.) 531.

But in an action by the executors of the payee of a note executed by a man and his wife, the man is not testifying "in his own favor," when introduced as a witness to sustain the wife's plea that the debt was that of the husband, and not her debt; but,

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from a legal standpoint, was testifying against his own interest, as the plea, if established, would make him liable for the whole debt. Reed v. Baldwin (1897) 102 Ga. 80, 29 S. E. 140.

If the statute disqualifies parties, without making any distinction between testimony in their own behalf and testimony in behalf of their co-defendants, the maker of a note cannot testify for the indorsers in an action against both maker and indorsers, nor can one indorser testify for the maker and the other indorsers. Alexander v. Dutcher (1877) 70 N. Y. 385, affirming (1876) 7 Hun, 439.

V. "In behalf of successor in interest."

Statutes disqualifying witnesses from testifying in their own behalf usually disqualify them, also, from testifying in behalf of one succeeding to their title or interest. In two cases within the scope of this note, the court referred to this alternative provision merely to say that the witness did not come within it. In neither case does it appear that there was any contention, or any substantial ground for contending, that the witness was disqualified on this ground. See Nearpass v. Gilman (1878) 16 Hun (N. Y.) 121, affirmed in (1887) 104 N. Y. 506, 10 N. E. 894, and Sutton v. Walters (1896) 119 N. C. 495, 24 S. E. 357, supra.

VI. "Adverse interest."

In Pennsylvania, the statute disqualifies persons whose interest is adverse to the right of the deceased (though it is not quite clear whether this is an independent ground of disqualification, or a condition on which the disqualification of the surviving party to the contract depends). In Ohio, parties are disqualified where the adverse party is an executor or administrator, and the court construes this to mean that the witness and the representative must be "adverse in interest," and not merely in their nominal status as plaintiffs or defendants. Baker v. Kellogg (1876) 29 Ohio St. 663. These provisions present two questions: First, Has the witness an interest? and, second, Is it adverse to the executor or administrator? The first question appears to be no different from that arising under statutes disqualifying persons interested in the event, and the cases presenting it have been discussed in that connection.

It is not clear whether the second question is presented by any of the cases within the scope of this note, though it may have been involved in Baker v. Kellogg (Ohio) supra (holding that one signer of a note who made no defense could testify that the other was a surety); Bell v. Wilson (1867) 17 Ohio St. 640 (holding the principal maker of a note, who made no defense, a competent witness for the surety, to prove an extension of time of payment); Brinker v. Schreiber (1883) 8 Ohio Dec. Reprint, 759 (holding a defendant who made default a competent witness for his co-defendant); Dick v. Williams (1889) 130 Pa. 41, 18 Atl. 615 (holding that, in an action on a partnership note, a partner against whom a default was entered could not testify that he signed the firm name without authority, and used the proceeds for his personal benefit, the court saying that he was interested adversely to the deceased holder of the note, since, if this defense prevailed, the entire action would fail); Cunningham v. Morrow (1899) 24 Pa. Co. Ct. 348 (holding a principal who made no defense, and against whom judgment was entered, a competent witness for the sureties); Pattison v. Cobb (1905) 212 Pa. 572, 61 Atl. 1108 (holding that the guarantor of an obligation, who has been discharged from liability on the guaranty by a discharge in bankruptcy, has no interest adverse to the estate of the obligee in an action against the principal, and is competent to testify to the payment of the obligation).

The Pennsylvania statute, as referred to in Pattison v. Cobb (Pa.) supra, would seem to exclude two classes of witnesses, i. e., the remaining party to the contract, and other persons adversely interested; and that seems to be the assumption in the Pattison Case, as it held that the witness was not in the first class because he

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was not a party to the contract in suit, the guaranty being a separate contract.

In other Pennsylvania cases, however, the view is apparently taken that even a remaining party to the contract is not disqualified, unless he is adversely interested. See Dickson v. McGraw Bros. (1892) 151 Pa. 98, 24 Atl. 1043, and Cunningham v. Morrow (Pa.) supra.

VII. Persons against whom witness is incompetent.

In Guery v. Kinsler (1872) 3 S. C. 423, it was held that the principal in a bond was not rendered incompetent to testify for a surety, in an action brought by a trustee appointed by the court as successor of one to whom the obligee bequeathed the bond in trust, by a statute prohibiting interested persons from testifying in actions by or against the executor, "assignee," etc., of any deceased person. The court rejected the contention that the trustee was an assignee by operation of law. This appears like a narrow construction of the statute, notwithstanding the court's intimation that they would willingly extend the statute to include such cases, if they could do so without violating rules of construction.

VIII. Transactions with deceased.

Under many of the statutes the disqualification applies only to testimony concerning transactions or communications with the deceased. The only case within the scope of this note, which turned on the meaning of such a statutory provision, seems to be Coffin v. Loomis (1897) — Tex. Civ. App. —, 41 S. W. 511. In that case, two of the signers of a note claimed that they were sureties, and had been discharged by the deceased payee's release of collateral. To establish the payee's knowledge that they were sureties, they sought to prove by the third signer that he received the consideration for the note, but this was held to relate to a transaction with the deceased; and the same ruling was made regarding his testimony as to the delivery of collateral to the payee.

A. McT.

J. T. THOMSON
v.
FINDLATER HARDWARE COMPANY.

Texas Supreme Court—October 17, 1918.

(— Tex. —, 205 S. W. 831.)

Attorney and client — lien on surplus of collateral.

1. An attorney has no lien for services on the proceeds of a note placed by a client in his hands as collateral for a note due him by the client.

[*See note on this question beginning on page* 1488.]

Assignment — surplus of collateral — intention to apply to debt.

2. The intention of the parties at the time a note is delivered as collateral for a note of the assignor that the assignee may apropriate so much of the surplus of the collateral as may be necessary to satisfy his claim for services rendered the assignor does not constitute an equitable assignment for that purpose which will defeat the rights of a creditor of the assignor, garnishing such surplus in the hands of the assignee.

CERTIFICATION by the Court of Civil Appeals for the Third Supreme Judicial District for determination by the Supreme Court of a question arising upon appeal by intervener from a judgment of the Tom Green

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County Court in favor of plaintiff, in a garnishment proceeding. *Negative answer returned.*

The facts are stated in the opinion of the court.

Messrs. **J. T. Thomson** and **I. J. Curtsinger** for intervener.

Messrs. **Thomas & McCarty**, for plaintiff:

An intention not expressed, communicated, or withdrawn before communication is generally inoperative and immaterial to the question of an agreement.

13 C. J. p. 265, § 50; Simkins, Contracts, 3d ed. pp. 8, 16, 21; Wright v. Ellison, 1 Wall. 16, 22, 17 L. ed. 555, 557; Goodsell v. Benson, 13 R. I. 230.

The indorser of a note as collateral security, for a debt of less amount than the note, has an interest in the note indorsed as collateral security.

Jackson v. Fawlkes, — Tex. —, 20 S. W. 136; Thompson v. Gainesville Nat. Bank, 66 Tex. 156, 18 S. W. 350; Forty-Acre Spring Live Stock Co. v. West Texas Bank & T. Co. — Tex. Civ. App. —, 111 S. W. 420; Huyler v. Dahoney, 48 Tex. 234.

The maker of a negotiable note, as garnishee, is liable to judgment in garnishment for any interest principal defendant may have had in the note when the writ of garnishment was served, and at the date of maturity, provided the note matures before he files his answer, though when he was served it had not matured.

Thompson v. Gainesville Nat. Bank, 6 Tex. 156, 18 S. W. 350; Bassett v. Garthwaite, 22 Tex. 231, 73 Am. Dec. 257; Drake, Attachm. 6th ed. §§ 587, 588.

The lien of an attorney for compensation for professional services, on the papers of his client in his possession, is nothing more than a mere right to retain them until the claim is satisfied; it confers no further rights or powers and cannot be actively enforced.

Casey v. March, 30 Tex. 181; 4 Cyc. 1005, 1023; 3 Am. & Eng. Enc. Law, 2d ed. 434, 464; 13 Am. & E. Enc. Law, 613; Jones, Liens, § 132; McDonald v. Charleston, C. & C. R. Co. 93 Tenn. 281, 24 S. W. 252.

Greenwood, J., delivered the opinion of the court:

Question certified from the court of civil appeals of the third supreme judicial district of Texas, in an appeal from the county court of Tom Green county. The certificate of the honorable court of civil appeals is as follows:

"To the Supreme Court of Texas:—

"The above-entitled cause is now pending before us on motion for rehearing and we have thought it advisable to certify to you for your decision the question hereinafter set out, which, among others, has arisen for our determination in said case. A copy of our opinion is hereto attached and made a part hereof.

"The facts pertinent to said question are these: George Allen executed to one Simpson his negotiable promissory note for $300, due March 23, 1912. Simpson indorsed this note to S. K. P. Jackson, but in fact Hugh Jackson owned a one-half undivided interest in said note, as was shown by oral testimony. He afterwards inherited a one-fourth interest in said note from said S. K. P. Jackson. On January 6, 1912, Hugh Jackson indorsed said note and delivered it to J. T. Thomson, an attorney at law, as collateral security for a $50 note that he owed Thomson and $33 that he owed one Scott. Findlater & Company obtained judgment against Hugh Jackson and garnisheed Allen. Thomson and Jackson intervened.

At the time this note was delivered to Thomson, Hugh Jackson was indebted to him for various legal services in the sum of $75. Thomson never rendered an account to Jackson. Jackson knew that he was indebted to Thomson for legal services, but did not know the amount. Nothing was said by either Jackson or Thomson, at the time said note was so indorsed and delivered, nor at any time prior to the service of the writ of garnishment on Allen, or prior to Allen's answer in said suit, about Thomson's appropriating any of the money, when collected, on the debt that Jackson owed Thomson for legal services, though Jackson ex-

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pected, at the time he delivered said note to Thomson, that Thomson would retain whatever was necessary out of said collection to pay such debt, and Thomson, at the time said note was indorsed and delivered to him, expected to appropriate the money, when collected, on said Allen note, or so much thereof as was necessary, after paying said $50 note and the $33 due Scott, to the payment of the debt due him for such legal services. Thomson still retains possession of said note.

"With the foregoing statement and explanation, the court of civil appeals certifies to the supreme court for its decision the following question: Did the facts above stated constitute an equitable assignment to Thomson by Jackson of said Jackson's interest in the debt due on said Allen note, to the extent of said $75 indebtedness, in addition to said indebtedness of $50 and $33?"

We answer "No" to this question. On the facts certified, the note of Allen never came into the hands of Thomson by virtue of any relation of attorney and client between Thomson and Jackson. Thomson held the note as collateral security, as would any other creditor, and, as announced by this court in San Antonio Nat. Bank v. Blocker, 77 Tex. 78, 13 S. W. 962: "The rule is well established that a pledge, or collateral, cannot be held or used as a security for any debt, or for any purpose, save such as is covered by the agreement of the parties."

Assignment—surplus of collateral—intention to apply to debt.

Mechem accurately states the rule, which precludes the holding that an attorney's lien attached in favor of Thomson, in the following language: "An attorney has a general lien upon all the papers, deeds, vouchers, and other documents of his client, which come into the possession of the attorney while he is acting for his client in a professional capacity. But, in order to the creation of the lien, the papers must not only have come into the actual possession of the attorney, but they must have so come into his possession in his character as an attorney at law. Thus he has no lien on papers which he receives . . . as a mortgagee." Mechem, Agency, § 862.

The note was not placed in Thomson's hands for collection by him as an attorney. Since Thomson did not hold the note as attorney for Jackson, and since he would not have held any part of the proceeds of the note's collection as Jackson's attorney, there was no attorney's lien in favor of Thomson, and there was no assignment save to secure the $50 and $33 notes. Pelly v. Wathen, 7 Hare, 364, 68 Eng. Reprint, 144, 18 L. J. Ch. N. S. 281, 14 Jur. 9; Weed Sewing Mach. Co. v. Boutelle, 56 Vt. 570, 48 Am. Rep. 822; 2 R. C. L. p. 1065, § 153; note to Andrews v. Morse, 31 Am. Dec. 759.

Attorney and client—lien on surplus of collateral.

ANNOTATION.

Attorney's lien on papers or securities that come into his possession otherwise than in his professional capacity.

This note deals only with an attorney's right to a lien on papers or securities that come into his possession in other than his professional capacity. Questions arising where the papers or securities on which the lien is claimed are received by him in his professional capacity, but the services for which the lien is claimed are performed in some other capacity, are not embraced.

While there is little direct authority on the question, it is doubtless the rule, as is intimated in the reported case (THOMSON v. FINDLATER HARDWARE CO. ante, 1486) that an attorney has no lien, as such, on securities or papers of his client not received by

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him in his professional capacity as an attorney. Mechem, Agency, 2d ed. § 2267; Thornton, Attys. § 639; Weeks, Attys. 2d ed. § 371.

In other words, it is essential to the existence of a lien on papers or securities (usually known as a possessory or retaining lien, as distinguished from the so-called charging lien on the proceeds of the action brought by the attorney) that the papers or securities should be received by him in the course of his professional employment, or business.

Illinois.—Sanders v. Seelye (1889) 128 Ill. 631, 21 N. E. 601, affirming (1888) 27 Ill. App. 288; Needham v. Voliva (1915) 191 Ill. App. 256.

Iowa.—Foss v. Cobler (1898) 105 Iowa, 728, 75 N. W. 516.

Massachusetts. — Newell v. West (1889) 149 Mass. 520, 21 N. E. 954.

New Hampshire.—Dennett v. Cutts (1840) 11 N. H. 163.

New Jersey.—Osborne v. Dunham (1888) — N. J. Eq. —, 16 Atl. 231; Bracher v. Olds (1900) 60 N. J. Eq. 449, 46 Atl. 770.

New York.—Henry v. Fowler (1870) 3 Daly, 199; De Lamater v. McCaskie (1886) 4 Dem. 549; Re Stenton (1907) 53 Misc. 515, 105 N. Y. Supp. 295.

South Dakota.—Winans v. Grable (1904) 18 S. D. 182, 99 N. W. 1110.

Vermont.—Weed Sewing Mach. Co. v. Boutelle (1884) 56 Vt. 570, 48 Am. Rep. 821.

Virginia. — Watts v. Newberry (1907) 107 Va. 233, 57 S. E. 657.

Ireland.—Ex parte Nesbitt (1805) 2 Sch. & Lef. 279.

England.—Stevenson v. Blakelock (1813) 1 Maule & S. 535, 105 Eng. Reprint, 200, 24 Eng. Rul. Cas. 694; Champernown v. Scott (1821) 6 Madd. Ch. 93, 56 Eng. Reprint, 1026, 22 Revised Rep. 248; Rex v. Sankey (1836) 5 Ad. & El. 423, 111 Eng. Reprint, 1226, 6 Nev. & M. 839, 5 L. J. K. B. N. S. 255; Pelly v. Wathen (1849) 7 Hare, 351, 68 Eng. Reprint, 144, 18 L. J. Ch. N. S. 281, 14 Jur. 9, affirmed in (1851) 1 De G. M. & G. 16, 42 Eng. Reprint, 457, 21 L. J. Ch. N. S. 105, 16 Jur. 47, see also 2 R. C. L. p. 1065; 1 Jones, Liens, 82.

In Henry v. Fowler (N. Y.) supra, the attorney claimed that a bond was delivered to him by his client, to be held by him in trust for certain purposes. It was held that he had no lien thereon for professional services, the court saying: "An attorney has no lien except upon such papers of his client as have come into his hands for the purpose of business, in the ordinary course of his professional employment, . . . which was not the case here, as the bond came into the defendant's hands, upon his own statement, as a trustee, and he could consequently have no lien upon it in his professional character as an attorney."

In Winans v. Grable (1904) 18 S. D. 182, 99 N. W. 1110, supra, the court referred to statutes of Nebraska and South Dakota, giving an attorney a lien upon papers of his client coming into his hands in the course of his professional employment, and said: "It will be noticed that, under either statute, it is necessary for [that] the papers upon which the attorney claims a lien shall have come into his hands in the course of his professional employment. There was no evidence introduced by the appellant, showing or tending to show that the assets of the bank came into his possession in the course of his professional employment. For what purpose the notes and securities of the bank were placed in his possession or came into his possession is left in doubt. The court was, therefore, clearly justified in denying appellant's application upon the ground that he had not shown facts sufficient to entitle him to a lien upon the assets delivered by him to the receiver."

In Sanders v. Seelye (1889) 128 Ill. 631, 21 N. E. 601, affirming (1888) 27 Ill. App. 288, the court, in discussing the right of attorneys to a lien on bonds of their client in their possession, after remarking that the retaining lien existed on all papers or documents of the client placed in the attorney's hands in his professional character or in the course of his professional employment, said: "Did the bonds in question come into the possession of appellees, within the meaning of these rules? It is insisted that

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they were left with Seelye merely for safe-keeping, subject to appellant's orders, and that their deposit with him had no connection with either his or Quick & Miller's professional employment in the Peck case. . . . We think, however, that the evidence is clear to the effect that they were placed in the hands of Seelye, as the attorney of appellant in the Peck case, so that they might be used in securing to the client the benefits resulting to him from the successful litigation of that case in the supreme court." While the court, having reached the conclusion that the bonds were received by the attorneys as such, did not decide that, if they had not been so received, there would have been no lien, the court evidently thought that the right to a lien depended on the capacity in which the attorneys received the bonds.

An even stronger case of implied holding against the existence of the lien in such a case is that of Stevenson v. Blakelock (1813) 1 Maule & S. 535, 105 Eng. Reprint, 200, 24 Eng. Rul. Cas. 694. In that case the attorney was furnished money by his client with which to pay a debt of the client, and on payment of the debt the creditor delivered to the attorney a lease, held as collateral security. In discussing the attorney's right to a lien on the lease, the court said: "The first impression on my mind was that the general lien would not attach. The lease did not appear to have come into the possession of the defendant as attorney in the ordinary course of business, but he appeared rather a mere bailee; but on further consideration, the possession seems to us to have been acquired by the defendant in the course of his professional business."

In Watts v. Newberry (1907) 107 Va. 233, 57 S. E. 657, it was contended that attorneys had no lien on drafts in their hands, because they were not placed in their hands in the course of their professional employment; but the court, without suggesting that this would be no answer to the claim of lien, said that it was unnecessary to consider whether or not the drafts came into the hands of the attorneys in the course of their professional employment, because, if it were conceded that they were deposited with the attorneys in the course of their professional employment, they were nevertheless placed in their hands for a special purpose, inconsistent with the claim of a lien.

In harmony with the rule as stated above, it has been held that where an attorney prosecuting a claim against the government became the claimant's administrator, and, as such, received the amount awarded on the claim, he could assert no attorney's lien thereon for his services. Newell v. West (1889) 149 Mass. 520, 21 N. E. 954. The court said that, having received the money in the capacity of administrator, he must account for it, and could assert no claim, by virtue of the possession thus acquired, to any personal benefit therefrom, to the exclusion of other creditors.

And where, after a will was executed, it was in the testator's possession, and was delivered by him to the attorney who prepared it, with instructions to make copies and then deposit it in the testator's safe, it was held that such possession was not that of an attorney or confidential adviser, but that of an agent or messenger, and that by such possession he acquired no right to retain the will until payment for his services, any more than if he had surreptitiously abstracted the will from the testator's possession. Bracher v. Olds (1900) 60 N. J. Eq. 449, 46 Atl. 770. This appears to be a somewhat extreme application of the rule, though the decision would seem to be correct, on the principle applied in Watts v. Newberry (Va.) supra, the will having been placed in the attorney's hands for a purpose inconsistent with his retention of possession.

And a solicitor who is also steward of a manor has no lien, as solicitor, on papers received by him as steward, though he has a lien upon papers delivered to him as solicitor. Champernown v. Scott (1821) 6 Madd. Ch. 93, 56 Eng. Reprint, 1026, 22 Revised Rep. 248.

And though a town clerk, who was

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also an attorney or solicitor, had a lien on papers of the corporation on which he had done work as attorney or solicitor, he had no lien on papers with respect to which he had performed no services as attorney, or which he received merely as town clerk. Rex v. Sankey (1836) 5 Ad. & El. 423, 111 Eng. Reprint, 1226, 6 Nev. & M. 839, 5 L. J. K. B. N. S. 255, and see also Newington v. Eldridge (1879) L. R. 12 Ch. Div. (Eng.) 349, with respect to the clerk of a local board, who was also a solicitor, and was employed to conduct the legal business as well as the ordinary business of the board. In that case, however, the vice chancellor appeared to doubt the right of the clerk to any lien, and the question was not passed upon by the court of appeal.

So, a solicitor does not, as such, acquire a lien for costs upon the documents of his client, which came into the possession of the solicitor, not in that character, but as mortgagee of the client's estate. Pelly v. Wathen (1849) 7 Hare, 351, 68 Eng. Reprint, 144, 18 L. J. Ch. N. S. 281, 14 Jur. 9, affirmed in (1851) 1 De G. M. & G. 16, 42 Eng. Reprint, 457, 21 L. J. Ch. N. S. 105, 16 Jur. 47.

In determining whether an attorney's answer in a proceeding to require him to surrender securities belonging to an estate was sufficient to oust the surrogate's court of jurisdiction, the court in De Lamater v. McCaskie (1886) 4 Dem. (N. Y.) 549, referred to the fact that the answer did not allege that the attorney was entitled to possession, and said that if the property were wrongfully obtained he was not entitled to possession as against the executrix, and that there could be no lien based upon a tortious possession.

In some cases not involving any claim to a lien on papers of the client coming into the hands of the attorney, otherwise than in his professional capacity, the courts have said that an attorney has a lien on papers or property of his client coming into his hands "in the course of his professional employment," or "in the regular course of business," or "professionally as an attorney." While a holding that there is a lien in the cases mentioned does not amount to a holding that there is no lien in any other case, the qualified language in which the court in these cases states the right to a lien throws some light on the general understanding as to the cases in which the lien exists. No exhaustive collection of cases of this character has been made; but see Needham v. Voliva (1915) 191 Ill. App. 256; Foss v. Cobler (1898) 105 Iowa, 728, 75 N. W. 516; Dennett v. Cutts (1840) 11 N. H. 163; Osborne v. Dunham (1888) — N. J. Eq. —, 16 Atl. 231; Weed Sewing Mach. Co. v. Boutelle (1884) 56 Vt. 570, 48 Am. Rep. 821.

See also Re Stenton (1907) 53 Misc. 515, 105 N. Y. Supp. 295, in which the court said that, as an incident of the employment of the attorney, who in that case was seeking a lien, he acquired a lien on bank books "that came into his possession in the course of that employment;" also Ex parte Nesbitt (1805) 2 Sch. & Lef. (Ir.) 279, in which it is said that the attorney has a lien if the papers come into his hands in the character of attorney or solicitor for the purpose of business, though they do not come into his hands in the particular case in which he makes the demand of costs.

In some cases the lien is given by statute on papers of the client coming into the hands of the attorney "in the course of his professional employment." See Foss v. Cobler (1898) 105 Iowa, 728, 75 N. W. 516; Winans v. Grable (1904) 18 S. D. 182, 99 N. W. 1110.

The only cases which appear to be out of harmony with the rule as above stated are Re Edward Ney Co. (1906) 114 App. Div. 467, 99 N. Y. Supp. 982, and Re Walker (1893) 68 L. T. N. S. (Eng.) 517, and in neither case is it clear that the court intended to decide anything inconsistent with the rule as stated. Re Edward Ney Co. (N. Y.) supra, was a proceeding for the purpose of obtaining papers in the possession of an attorney, and to require him to account for money which it was claimed he received from the client under an agreement by which

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he was to attend to the financial end of the client's business, and to collect and disburse its money. The court said: "If this claim were borne out by the record, it is doubtful whether this proceeding could be maintained, for the inference would be that the money was received by the appellant, not in his professional capacity, but in the course of an employment as an agent in rendering nonprofessional services to the company in its financial management. . . . Apart from the statute, and in addition to this statutory lien, an attorney and counselor also has a common-law lien upon any papers, securities, or other property delivered to him by his client, where no action or proceeding is commenced or pending, and upon the application of the client the court has inherent authority to determine the amount of the lien, and, upon payment thereof or security given require the attorney to return the property to the client. . . . It does not follow, however, that in all cases this remedy should be adopted. This summary authority over attorneys, given by the common law and conferred by statute, is limited to their professional relations with clients, and does not extend to transactions of a business nature, such as might be performed by an agent who is not an attorney or counselor; and although the client asserts that the controversy has arisen in the course of professional employment, yet when this is denied by the attorney, the court, if the fact be found as asserted by the attorney, may proceed no further summarily, and the petitioner must be left to his remedy by action." The court then points out that the moving papers do not show that any of the services were nonprofessional services, and therefore upholds the proceeding; but its remarks, as quoted, would seem open to the construction that, in the court's opinion, the fact that the money was received by the attorney in the course of his employment as agent in rendering nonprofessional services affected only the remedy, and not the right to the lien itself.

The solicitor claiming the lien in Re Walker (Eng.) supra, also acted as land agent for the client, and was also solicitor for the mortgagee of the client's property. The insurance policies on which the lien was claimed were apparently assigned to him as trustee, to further secure the mortgagee, and it was argued that there was no lien because "he must not only have possession, but also possession on behalf of the client," and that the policies were not delivered to the solicitor to hold on behalf of the client, but were assigned to him for the purpose of raising money for the client. The court said: "I think I should be cutting down the well-established right of a solicitor to lien if I were to hold, merely because a mortgage was made to clients of his and he held the deeds of the mortgage, that he should lose his lien. Where the deeds remain in the solicitor's possession I think the lien is preserved subject to the mortgage. . . . The policies were assigned to Bourke [the solicitor] by Walker [the client] for the purpose of raising money thereon, and, subject thereto, for Walker." It is not very clear whether it was contended, or intended to be held, that the solicitor received the policies in any other capacity than that of solicitor for the client.

It will be observed that the decision of the court of civil appeals in Thomson v. Findlater Hardware Co. (1913) — Tex. Civ. App. —, 156 S. W. 301 (the case in which the question under review in the reported case was certified), was predicated upon findings of fact which included a finding that the note was delivered to Thomson on the agreement that he should hold it as collateral, and on the further agreement that he should collect it. The latter agreement was not incorporated in the question certified to the supreme court. If the court of civil appeals meant to find that the agreement as to collection was with Thomson in his professional capacity, and not merely in his capacity as holder of the collateral, the difference in the conclusions reached by the two courts as to the existence of the lien may be accounted for by their different assump-

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tions as to the facts, and does not necessarily involve any difference in their views of the law; but if the agreement as to collection was merely an agreement that Thomson should collect the note in his capacity as pledgee, and not as attorney, and the court of civil appeals intended to so find, its holding that he had a lien as attorney is inconsistent with the decision of the supreme court, and against the weight of authority. A. McT.

TRISTRAM W. SHELDON, Appt.,
v.
L. L. JAMES, Respt.

California Supreme Court—June 14, 1917.

(175 Cal. 474, 166 Pac. 8.)

Automobile — backing as negligence.

1. The mere backing of an automobile on a public street is not negligence per se.

[*See note on this question beginning on page* 1499.]

— backing on wrong side of street — negligence.

2. Backing an automobile a short distance to occupy space for parking purposes on the right-hand side of the street did not, although it results, when viewed in the direction in which the machine is moving, in propelling it on the left side of the street, violate a municipal ordinance requiring vehicles to travel on the right-hand side of the street and near the right-hand curb thereof.

Municipal corporation — ordinance — construction — backing vehicle.

3. A municipal ordinance making it unlawful to propel any vehicle in a backward direction if, in so doing, the free and uninterrupted passage of any vehicle or any street car or interurban car shall be impeded, has no application in an action to recover damages for injury to a pedestrian by attempting to back an automobile into a parking space.

Automobile — backing car — negligence.

4. In determining whether or not one backing an automobile in a public street into collision with a pedestrian on the street was guilty of negligence resulting in the injury, the jury must consider all the facts of the case, the direction in which the car was traveling, the rate of speed, whether any signal or warning was given. the condition of the street, the situation and surroundings of the parties, the manner in which the injured person was crossing the street, and what observation, if any, the one in charge of the car made while backing it.

— backing without looking — negligence.

5. One who backs an automobile on the wrong side of a public street without looking in the direction in which it is moving to ascertain if anyone is in danger of being hit, and in consequence strikes and injures a pedestrian, is guilty of negligence.

— absence of signal — effect.

6. One cannot recover damages from another backing an automobile on a public street without signals and warnings unless he was injured because of absence of such signals.

— inability to look over back of car.

7. One is not negligent per se in backing an automobile when he cannot see over the back of the car so as to know what might be in his way, if he takes reasonable precautions before starting to back, to make proper observations by looking to the right and left of the car and standing up and looking over the back.

Highway — crossing street — care required.

8. One attempting to cross a congested highway by a long diagonal route other than at an established crossing must exercise greater care than is required of one using such crossing.

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— looking for backing vehicle.

9. One attempting to cross a congested street in a diagonal direction does not exercise his full duty of care by merely looking in the direction from which traffic may be expected under the municipal ordinance, but must also look for automobiles which may be backing into parking space.

Evidence — negligence — sufficiency.

10. A pedestrian attempting to cross a congested street at a place other than a regular crossing may be found to be negligent in failing to observe an automobile attempting to back into a parking space by traveling in the direction opposite to that provided by the municipal ordinance, if in so doing it was making a loud noise which should have attracted his attention.

Trial — instruction — construction.

11. An instruction in an action by a pedestrian injured by a backing automobile on a public street, that where plaintiff is a foot passenger crossing a street where vehicles are numerous it is his duty to look both ways, does not mean that he must look backwards, nor is it an effort to standardize the law by declaring that a pedestrian must constantly and continuously be looking from right to left, but it is no more than a declaration that in the exercise of ordinary care it is the duty of a pedestrian to look to the right and to the left whenever he has voluntarily put himself in a position which may be one of peril coming from either direction.

— duties of pedestrian and driver.

12. An instruction in an action to recover for injuries inflicted upon a pedestrian by a backing automobile, that where a foot passenger crosses a street where vehicles are numerous, it is his duty to look both ways, and the same duty was imposed upon the one driving the car backwards, is not erroneous as making the duty of driver and pedestrian the same, but merely states the duty of the driver to look both ways before backing the car.

— absence of contributory negligence.

13. An instruction that where the evidence is as consistent with a neglect of duty or care on the part of the injured person as it is with a neglect of duty or care on the part of the person charged with causing the injury, the injured person cannot recover in an action for damages for the injury sustained, is not erroneous as casting the burden of proof on plaintiff to show absence of contributory negligence.

Appeal — breach of rule of court — nonprejudicial error.

14. One must show injury to secure a reversal for breach of a rule of court requiring instructions to be settled between court and counsel before argument to the jury begins.

— appeal from judgment — errors open.

15. An appeal from a judgment unsupported by a bill of exceptions does not raise the question of error in failing to follow a rule of court, requiring the settlement of instructions between court and counsel before argument to the jury begins.

— appeal from motion for new trial.

16. An appeal from a denial of a motion for new trial brings before the reviewing court only the errors relied upon in support of that motion.

— absence of surprise.

17. One charged with notice of a rule of court requiring settlement of the instructions between court and counsel before argument to the jury begins cannot secure relief in the appellate court on the ground of surprise for failure to submit given instructions to him, since he had knowledge of the fact that he had not received them.

APPEAL by plaintiff from a judgment of the Superior Court for the City and County of San Francisco in favor of defendant, and from an order denying a new trial, in an action brought to recover damages for personal injuries, alleged to have been caused by the negligent operation of defendant's automobile. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **H. L. Clayberg** and **Clayberg & Whitmore**, for appellant:

It was not the duty of plaintiff to look both ways while crossing the street.

Raymond v. Hill, 168 Cal. 473, 143 Pac. 743; Graham v. Evening Press Co. 135 Mich. 298, 97 N. W. 697; Hennessey v. Taylor, 189 Mass. 583, 3 L.R.A.(N.S.) 345, 76 N. E. 224, 4 Ann. Cas. 396, 19 Am. Neg. Rep. 285; Tif-

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fany v. Drummond, 93 C. C. A. 469, 168 Fed. 47; Baker v. Close, 204 N. Y. 92, 38 L.R.A.(N.S.) 487, 97 N. E. 501, 2 N. C. C. A. 289; Gerhard v. Ford Motor Co. 155 Mich. 618, 20 L.R.A. (N.S.) 232, 119 N. W. 904; Blackwell v. Renwick, 21 Cal. App. 131, 131 Pac. 94; Wiel v. Wright, 29 N. Y. S. R. 763, 8 N. Y. Supp. 779; Crosby v. East Orange, 84 N. J. L. 708, 87 Atl. 341; Hillebrant v. Manz, 71 Wash. 250, 128 Pac. 892; Mosso v. E. H. Stanton Co. 75 Wash. 220, L.R.A.1916A, 943, 134 Pac. 941; Lampe v. Jacobsen, 46 Wash. 533, 90 Pac. 655; O'Connor v. United R. Co. 168 Cal. 48, — A.L.R. —, 141 Pac. 809; Burvant v. Wolfe, 126 La. 787, 29 L.R.A.(N.S.) 677, 52 So. 1025; Savoy v. McLeod, 111 Me. 234, 48 L.R.A.(N.S.) 971, 88 Atl. 721; Bradley v. Jaeckel, 65 Misc. 509, 119 N. Y. Supp. 1071.

Pedestrians, while crossing a street, may rely upon the presumption that, so long as they occupy one place or pursue a given course, all persons in charge of autos or vehicles, and driving them along the street, will drive them in a lawful manner, and look out for their safety.

Oates v. Union R. Co. 27 R. I. 499, 63 Atl. 675, 20 Am. Neg. Rep. 213; Cæsar v. Fifth Ave. Coach Co. 45 Misc. 331, 90 N. Y. Supp. 359; Baker v. Close, 204 N. Y. 92, 38 L.R.A.(N.S.) 487, 97 N. E. 501, 2 N. C. C. A. 289; Crosby v. East Orange, 84 N. J. L. 708, 87 Atl. 341; Lewis v. Seattle Taxicab Co. 72 Wash. 320, 130 Pac. 341; Bartley v. Marino, — Tex. Civ. App. —, 158 S. W. 1157; Diamond v. Cowles, 98 C. C. A. 417, 174 Fed. 571; Brewster v. Barker, 129 App. Div. 724, 113 N. Y. Supp. 1026; Burvant v. Wolfe, 126 La. 787, 29 L.R.A.(N.S.) 677, 52 So. 1025.

Where a trial court has given inconsistent and contradictory instructions, no matter if one states the law correctly, a new trial must be granted, because it is impossible to tell which instruction the jury followed.

Parkin v. Grayson-Owen Co. 157 Cal. 41, 106 Pac. 210.

Mr. Walter H. Linforth, for respondent:

It was negligence of the grossest kind for plaintiff to attempt to cross the street in the manner in which he says he did, evidently oblivious to his surroundings, and without exercising his faculties of either sight or hearing.

Limberg v. Glenwood Lumber Co. 127 Cal. 600, 49 L.R.A. 33, 60 Pac. 176.

Where plaintiff is a foot passenger, crossing a street where vehicles are numerous, it is his duty to look both ways, and the same duty was imposed on defendant's driver in driving the car backward.

Niosi v. Empire Steam Laundry, 117 Cal. 257, 49 Pac. 185, 2 Am. Neg. Rep. 494; Baker v. Close, 204 N. Y. 95, 38 L.R.A.(N.S.) 487, 97 N. E. 501, 2 N. C. C. A. 289; Peterson v. Ballantine, 205 N. Y. 29, 39 L.R.A.(N.S.) 1147, 98 N. E. 202; 2 Elliott, Roads & Streets, 3d ed. § 1123, p. 667.

Henshaw, J., delivered the opinion of the court:

This appeal is from the judgment and from the order denying plaintiff's motion for a new trial. The cause was tried before a jury, which gave its verdict for defendant. The action was to recover damages for personal injuries. The facts and circumstances are the following: Powell street runs northerly and southerly in the city and county of San Francisco. It is crossed to the north by Geary street, and to the south by O'Farrell street. Plaintiff's office was in the Elkan Gunst Building, situated at the southwest corner of Geary and Powell streets. Plaintiff had eaten his lunch in a building at the northeast corner of O'Farrell and Powell streets, across Powell street, and a block southerly from his office. He was late in keeping an appointment at his office at 1 o'clock of the afternoon, and so hurried back by a short cut. Thus, he did not cross to the westerly side of Powell street by the crosswalk established for pedestrians at its junction with O'Farrell, nor yet did he walk along the east side of Powell street to the crosswalk for pedestrians at its junction with Geary street. To the contrary, he stepped into Powell street a short distance from the corner of O'Farrell, and proceeded to cross Powell street at an acute angle and by a long diagonal. In so doing it is contended that he used all due care and was in the normal possession of all his faculties. Defendant's automobile, of the

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touring type, with hood lowered and projecting beyond the tonneau, had proceeded down or southerly on Powell street from Geary to about the middle of the block, where, in front of the Manx Hotel, situated on the west side, an occupant of the automobile alighted. The chauffeur was left alone in the car. It was his duty to await the return of the occupant. There was vacant space along the curb immediately to the rear of the place where the automobile had stopped, and the chauffeur proceeded to back his car into this space. While so doing, plaintiff, hurrying to his office and neither seeing nor hearing nor knowing of the presence of the backing automobile, was struck by the projecting hood and thrown down, sustaining the injuries complained of. It was a little after midday, the street carried a heavy traffic, and automobiles were parked along all of the west side of Powell street saving at the one available place which the chauffeur sought to occupy. Powell street descends sharply toward the south, and the grade up which the chauffeur was thus backing his car was from 7 to 10 per cent.

The foregoing sufficiently presents the facts necessary to an understanding of the complaints which appellant makes on this appeal. These complaints are directed to the instructions given and refused. Such other facts as may become pertinent to an understanding of the instructions will be presented as called for.

The court refused to instruct the jury as requested by plaintiff, that if it found from the evidence that defendant's auto was driven "backward in a northerly direction on the west side of Powell street, etc., you may find defendant guilty of negligence from this fact alone." This instruction is predicated upon an ordinance of the city of San Francisco that every vehicle upon the streets of San Francisco shall travel on the right side of such streets and near the right-hand curb thereof. The instruction was properly refused. The ordinance is to be reasonably construed. Its terms have no reference to the right of chauffeurs, in congested districts of the city where the parking area is limited and the vacant spaces in that area even more limited, to back their automobiles into such a limited space, and it requires little knowledge of the operation of such vehicles to know that such backing is, in many instances, the only method by which the machine can be worked into the space and up to the curb of the street. Another section of this ordinance which is relied on declares it shall be unlawful to propel "any vehicle in a backward direction, if, by so doing, the free and uninterrupted passage of any vehicle or any street car or interurban car shall be impeded." This has absolutely no relevancy to the evidence and issues in this case, and could not, therefore, have been made with propriety the basis of any instruction.

Automobile—backing on wrong side of street—negligence.

Municipal corporation—ordinance—construction—backing vehicle.

The court modified certain instructions proposed by plaintiff and gave them in modified form. As modified, the instructions were unimpeachable, they being in the following language:

"In determining whether the defendant's chauffeur was guilty of negligence resulting in plaintiff's injury, you should consider all the facts of the case, the direction in which the car was traveling, the rate of speed it traveled, whether the chauffeur gave any signal or warning before turning, or while traveling backward, the condition of the street, the situation and surroundings of the parties, the manner in which plaintiff was crossing the street, and what observation, if any, the chauffeur made while backing his car.

Automobile—backing car—negligence.

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"If the jury find from the evidence that the person in charge of defendant's automobile was driving the same backward in a northerly direction on the west side of Powell street, and did not look in the direction that said auto was running, to ascertain if anyone was traveling upon or crossing said street in his immediate vicinity, and, in consequence, ran into and injured the plaintiff, then the defendant was guilty of negligence."

—backing without looking—negligence.

The court was justified in refusing to give the instructions except in the modified form, the first, because it predicated negligence, as did the instruction which we first considered, solely upon the backing of the automobile. Also, it charged the jury specifically to find the defendant guilty of negligence if the chauffeur gave no signals or warning before starting backward and while going backward, and yet it is too plain to need discussion that unless plaintiff was injured because of the absence of such signals, such negligence, even if it were proved, would not have been the contributing cause of his injury, and the jury's verdict could not have been founded upon it; and the second, because it directs the jury to find that defendant's chauffeur was negligent if he backed his car when "he could not see over the back of said auto," yet the mere fact that the chauffeur could not see over the back of the automobile while sitting would not, in and of itself, convict him of negligence in the backing of his car if he took reasonable precautions before so doing by looking backward to the right and left, or by standing up and so looking over the back of his car.

—backing as negligence.

—absence of signal—effect.

—inability to look over back of car.

The court instructed the jury, at the request of the defendant, as follows: "Ordinary care, or its opposite, neglect, are not absolute terms, but they have reference to times, places, and circumstances, and where a plaintiff is a foot passenger, crossing a street where vehicles are numerous, it is his duty to look both ways, and the same duty was imposed on defendant's driver in driving the car backward." The complaint which appellant makes of this instruction is that it contains the unjustifiable declaration, as a matter of law, that it is the duty of a pedestrian in crossing a street to look both ways; that this duty is imposed upon the pedestrian when about to cross a street (Niosi v. Empire Steam Laundry, 117 Cal. 257, 49 Pac. 185, 2 Am. Neg. Rep. 494), and that no such duty is incumbent on him when actually on the thoroughfare. Further, appellant construes the instruction as asserting that "looking both ways" means looking backward as well as forward, and that such is distinctly not the rule of law as evidenced by cases like Raymond v. Hill, 168 Cal. 473, 143 Pac. 743. It is not overstating it to say that in the present day, in the city of San Francisco, vehicular traffic by automobiles is a hundred times as great as that by horse-drawn vehicles. Automobiles have ceased to be the mere playthings of the rich. They have become a part, and well-nigh an essential part, of the business life of a city. They make greatly for expedition in the transaction of business, and in the accomplishment of this attain a speed far beyond that of horse-drawn vehicles. Business has adjusted itself to this new mode of transportation, and would be as little inclined to abandon it as it would be to abandon the telephone. Municipal authorities have, and properly have, recognized the necessity of regulatory provisions controlling automobile traffic for the safety of pedestrians upon the one hand, and at the same time, to the end that the traffic may not be unduly interfered with, have adopted regulatory provisions controlling the movements of pedestrians. The most familiar of these provisions is the one checking automobiles or

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bringing them to a full stop as they draw up to intersecting streets in the congested portions of the city, and here police officers are frequently stationed to regulate the traffic. It then becomes a necessity for the orderly and expeditious movement of this traffic in such congested districts that automobiles should be allowed to move at reasonable speed between intersecting streets. In many municipalities this is declared in terms, without an express limitation upon that speed. In others, to the end that such movements may not be unduly impeded and interfered with, the right of crossing streets by pedestrians is limited to the established crosswalks. No such ordinance has yet been passed in the city of San Francisco, or at least we have not been advised of its passage, but aside from the existence of such an ordinance, it is palpably true that in the exercise of the due care for one's own protection which the law exacts of everybody, a greater degree of care is necessary upon the part of the pedestrian who undertakes to cross a congested highway other than at the established crosswalk, and especially so, if in the act he does not essay a direct crossing, but pursues a long diagonal route. It is true that in so crossing the care required of this pedestrian was especially directed to the observation of vehicles going north on the easterly side of Powell street and south on the westerly side, but upon neither side of the street was he relieved from the duty of exercising ordinary care to protect himself against automobiles which might, as they had a perfect right to do, be backing into a vacant parking stand. The observation of ordinary care by such a pedestrian is not fully performed by merely looking to the left or right as he steps upon the street. The observance of that care is imperative upon him during all of the time that he is crossing. Scott v. San Bernardino Valley Traction Co. 152 Cal. 604, 93 Pac. 677. Here it is in evidence from plaintiff's own witnesses that the automobile, in backing up the grade, made an extremely loud and raucous noise, sufficient to attract the attention of people upon the opposite side of the street, and such as should have attracted the attention of the plaintiff before he put himself in a place of danger. If, then, under these circumstances, he did not look, the jury was justified in concluding that he was negligent in not having looked. We do not construe the instruction given as meaning that it is the duty of a pedestrian to look backward, nor yet as an effort to standardize the law by declaring that a pedestrian must constantly and continuously be looking from right to left. We construe it to be no more than a declaration that in the exercise of ordinary care it is the duty of such a pedestrian to look to the right and to the left whenever he has voluntarily put himself in a position which may be one of peril coming from either direction, and in particular where he has received adequate warning of the likelihood of peril. The final objection to this instruction, namely, that it declares the duty of the pedestrian and the duty of the driver to be the same, and that this is an erroneous statement of the law, is not sustainable. The court was not here attempting an elaboration of the duties of either, or of both. It was not attempting to declare that in the exercise of the due care required of each the quantum which would measure up to due care was the same as to each. It was merely stating, so far as the chauffeur was concerned, the unimpeachable proposition, favorable in its terms to the pedestrian, that it was the duty of the chauffeur to look carefully about, "to look both ways," before backing his car.

The court instructed the jury as

Highway—crossing street—care required.

—looking for backing vehicle.

Evidence—negligence—sufficiency.

Trial—instruction—construction.

—duties of pedestrian and driver.

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follows: "Where the evidence is as consistent with a neglect of duty or care on the part of the injured person as it is with a neglect of duty or care on the part of the person charged with causing the injury, the injured party cannot recover in an action for damages for the injuries sustained."

Appellant founds his objection to this in that it casts the burden of proof upon the plaintiff, not only to show the negligence of the defendant, but to show his own absence of contributory negligence, and it is said that while this instruction, given in the case of Peterson v. Ballantine, 205 N. Y. 32, 39 L.R.A. (N.S.) 1147, 98 N. E. 202, is sound declaration of the law, because in the state of New York the burden of proving these things is on the plaintiff, the rule being to the contrary in California touching the burden of proving contributory negligence, the instruction was erroneous. The difficulty with this objection, however, is that the instruction has not the slightest reference to the burden of proof at all, but deals only in general and unimpeachable terms with the weight and effect of evidence.

—absence of contributory negligence.

It is contended that the instructions are inconsistent with each other. It would serve no useful purpose to set forth these asserted contrary instructions at length. So doing would only establish the hypertechnicality and unsoundness of the attack.

Finally, a reversal is sought upon the ground that the court disregarded one of its own rules, which provides that instructions proposed by either party shall be handed to the judge personally, and a copy thereof delivered to the adverse party, and that all instructions to the jury shall be settled between court and counsel before argument to the jury begins. Aside from the fact that, before appellant can justly ask a reversal upon this ground, he must show injury from a nonobservance of the rule, and here shows none, it may be added that the asserted error is not before this court. It cannot arise on the appeal from the judgment, for it is supported by no bill of exceptions. It cannot arise on the appeal from the order denying the motion for a new trial, as it is not one of the errors or irregularities relied on in support of that motion. Nor can appellant, charged with knowledge of this rule since he here relies upon it, rest his contention upon any surprise, since he must have known before the instructions were given by the court to the jury that they had not been submitted to him.

Appeal—breach of rule of court—nonprejudicial error.

—appeal from judgment—errors open.

—appeal from motion for new trial.

—absence of surprise.

The judgment and order appealed from are therefore affirmed.

Melvin, J., and Lorigan, J., concur.

ANNOTATION.

Liability for injury by automobile while being backed.

I. Backing in street generally, 1499.
II. Where car is backed near street cars, 1500.
III. Where machine is backed at intersection of streets, 1501.
IV. Where machine is backed from garage, 1501.

I. Backing in street generally.

Drivers of automobiles have equal rights in using the streets with drivers of other vehicles and pedestrians, the duty resting on all alike to exercise reasonable care. What amounts to an exercise of such care, of course, depends primarily upon the surrounding circumstances. Compliance with this duty in most, if not all, cases, would seem at least to impose upon the driver of an automobile about to back his machine, the duty to look in

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the direction in which he is about to move.

It will be observed that in the reported case (SHELDON v. JAMES, ante, 1493) recovery was sought by one who was struck, while crossing the street diagonally, by an automobile which was being backed on the left side of the street into a parking space, and that the court there passes upon the applicability of certain ordinances, and considers numerous contentions as to the negligence and contributory negligence of the parties under the circumstances.

In Pease v. Gardner (1915) 113 Me. 264, 93 Atl. 550, where a chauffeur suddenly backed an automobile, having its top up, against a horse and wagon, of the presence of which he was not aware, and took no sufficient means to ascertain, his conduct was held negligent, the court stating that to suddenly back an automobile in a street of a village without first ascertaining, or making reasonable efforts to ascertain, whether another vehicle was standing within a short distance, and without giving any warning, save perhaps that of the cut-out, which sounded almost at the time the team was struck, clearly showed negligence.

And in Grudberg v. Ehret (1913) 79 Misc. 627, 140 N. Y. Supp. 379, where just as the plaintiff got off an automobile, which was standing still, and on which he had climbed to assist a boy to free his foot, the machine was backed, without warning, uphill a distance of 5 feet, and ran over him, it was held that the plaintiff had a right to be in the street, and that the unexplained sudden backing without warning called for an explanation, and that a dismissal of the complaint was error.

And in Enstrom v. Neumoegen (1911) 126 N. Y. Supp. 660, it was held that a pedestrian, injured during the middle of the day by an automobile which was backed without warning, was not guilty of contributory negligence in attempting to cross back of the automobile which was about 6 feet distant, when others directly in front of him had crossed safely, as he was not called upon to assume that the machine would be backed without warning.

In Pyers v. Tiers (1916) 89 N. J. L. 520, 99 Atl. 130, where a motor cyclist collided with an automobile while attempting to avoid the defendant's automobile, which there was evidence to show was backed into the street without warning, in violation of the Motor Vehicle Act, providing that no vehicle should back or make a turn in any street if by so doing it interferes with other vehicles, the questions of negligence and contributory negligence were held for the jury.

And in Curley v. Electric Vehicle Co. (1902) 68 App. Div. 18, 74 N. Y. Supp. 35, it was held that whether the driver of the horse attached to the plaintiff's cab was guilty of contributory negligence, and whether the act of the defendant's employee in backing an electric cab into the horse constituted negligence, or a trespass, were for the jury, there being evidence that, upon the refusal of the plaintiff's driver to yield an advantageous position in a line of cabs at the demand of the defendant's driver, the latter cut in ahead of the plaintiff's cab and backed into the horse.

II. Where car is backed near street cars.

The presence of street cars, or street car stops, near the point where an automobile is backed, is a fact entering into the determination of whether proper care was exercised.

Thus, it has been held that it is negligence for the driver of an automobile standing near the pavement in a city near the point where street car passengers are admitted and discharged, to back the machine with great force without warning, and without looking around to ascertain whether or not his act will endanger persons about to board a street car. Shamp v. Lambert (1909) 142 Mo. App. 567, 121 S. W. 770. The question of contributory negligence in this case was held properly left to the jury, there being evidence that only a moment before being struck the plaintiff had taken her place near the point where street cars took on passengers,

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and was watching an approaching car which she wished to board.

In Pierson v. Lyon (1910) 243 Ill. 370, 90 N. E. 693, affirming (1909) 150 Ill. App. 116, where a street car conductor was injured while on the running board of his car, through a collision between the car and a motor truck, and the evidence was conflicting as to whether the truck backed into the car, or the latter ran into the truck, the evidence was held to justify the jury's finding that the backing of the truck was the proximate cause of the injury.

It was further held in this case that it could not be said as a matter of law, that the plaintiff was guilty of contributory negligence in riding on the footboard of an open car while collecting fares, or that his failure to see and anticipate the danger was contributory negligence, but that these were questions for the jury.

III. Where machine is backed at intersection of streets.

While the duty to exercise reasonable care in backing at street intersections remains the same as elsewhere, the crossing and recrossing of traffic at such places injects another element in determining whether such care has been exercised under the circumstances. But one case involving an injury from backing an automobile at a street intersection has been disclosed.

In Westervelt v. Schwabacher (1918) — Wash. —, 176 Pac. 545, where the plaintiff was struck by the defendant's automobile, which was being backed, the question of contributory negligence was held properly left to the jury, where it appeared that as the plaintiff neared a right-angle intersection of streets the defendant's automobile passed him going in the same direction, and started over the crossing, apparently with the intention of turning into the intersecting street; that when last noticed by the plaintiff the machine was near the center of the intersection; that the plaintiff started to cross the street on which he was walking, stopped momentarily to allow an automobile proceeding along the intersecting street to cross, and, without again looking, proceeded on his way, and, after taking a few steps, was struck by the defendant's machine, which was being backed.

IV. Where machine is backed from garage.

Several cases have arisen in which an injury resulted from the backing of an automobile from a garage.

In Holmes v. Sandpoint & Interurban R. Co. (1913) 25 Idaho, 345, 137 Pac. 532, where an owner of an automobile sought to recover for an injury to his machine by a street car while the automobile was being backed out of a garage, an instruction that it was not negligence in law for the driver to back the machine into the street, and that it was not his duty to look and listen before doing so, was held erroneous. The court stated that they were unable to understand how it could be assumed that the owner or his chauffeur had a right to back the car out of the garage across the sidewalk and street without ever looking back to see whether a pedestrian, team, or street car might be passing, that if the machine had backed onto a child passing along the sidewalk the owner no doubt would have been liable, and laid down the rule that it was the duty of a person moving a machine out of the garage onto the street to keep a lookout for the traveling public.

In Texas Motor Co. v. Buffington (1918) 134 Ark. 320, 203 S. W. 1013, where the right of a pedestrian to recover for an injury received by an automobile which was being backed was involved, the rights and duties of the parties were stated in the following language: "Automobilists and the drivers of other vehicles have the right to share the street with pedestrians, but they must anticipate the presence of the latter, and exercise reasonable care to avoid injuring them; care must be exercised commensurate with the danger reasonably to be anticipated." In this case an instruction, in effect, that the failure of the driver of the defendant's car to keep a lookout for pedestrians, and to sound his horn as a warning, constituted negligence per se, was held

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incorrect, the testimony in the case being such that reasonable minds might draw different inferences on the question.

A further instruction was held erroneous that the verdict should be for the plaintiff, if it was found that the automobile was being backed at a greater speed than a person of ordinary prudence would have done, taking into consideration the location of the garage, the pedestrians ordinarily passing along and across the street, and the general traffic, since it omitted all consideration of the speed of the car being the proximate cause of the injury.

In this case, where the evidence was conflicting as to whether the machine which struck the plaintiff when he was crossing the street between blocks was backed out of a garage, or merely backed out of the entrance, and as to the distance the car was moved, the speed, the care exercised by the driver in looking, and the exercise of care by the plaintiff in crossing the street diagonally between blocks, it was held that the questions of negligence and contributory negligence were for the jury.

In Ostermeier v Kingman-St. Louis Implement Co. (1914) 255 Mo. 128, 164 S. W. 218, where a chauffeur, after asking some school boys if the way was clear and getting an affirmative answer, backed his car from a garage in a quadrant of a circle, blowing his horn as he started and again as he entered the street, and continued backing and looking in the direction opposite to that in which he was going until he struck a street sweeper working near the middle of the street with his back toward the automobile, it was held that the chauffeur was guilty of negligence in backing his car over the plaintiff while looking in the opposite direction, and that it was not negligence for the plaintiff to have his eyes on his work and fail to see the car, under the circumstances.

In Ferguson v. Reynolds (1918) — Utah, —, 176 Pac. 267, where a street sweeper was injured by an automobile being negligently backed out of a garage without giving any warning, contrary to an ordinance providing that "no person in charge of a vehicle shall back the same without ample warning having been given by him; and while backing unceasing vigilance must be exercised not to injure persons or property in the rear," the negligence of the chauffeur was not disputed, the questions at issue being as to the ownership of the car, and the relation of the chauffeur and the defendants.

In this case an instruction, in effect, that a street sweeper, or pedestrian, who undertakes to use the street where it is frequently used by automobiles or other vehicles, has the right, without looking or listening, to presume that drivers of automobiles are observing the law, and will so reduce or gauge their speed and will conduct themselves so as to meet the obligations which circumstances demand of them at such place, was held to merely inform the jury that the plaintiff had a right to assume that the driver of the automobile would exercise ordinary care in driving the car, which the court stated was the law everywhere, and the instruction was held not tantamount to charging the jury that the plaintiff was not required to exercise any care.

J. T. W.

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NATIONAL COUNCIL OF THE KNIGHTS AND LADIES OF SECURITY, Plff. in Err.,
v.
MORGAN L. GLENN.

Florida Supreme Court — December 21, 1918.

(— Fla. —, 80 So. 516.)

Insurance — reinstatement — pregnancy as ill health.

1. Pregnancy is not a personal ailment or condition of bad or unsound health, so as to violate an agreement or stipulation that a member of a beneficiary society shall not be reinstated after suspension for nonpayment of dues, unless such member is in good health at the time of the reinstatement.

[*See note on this question beginning on page* 1507.]

Pleading — plea of want of good health.

2. In a suit on an insurance policy issued by a beneficiary society, where the terms of the contract provide for the reinstatement of a policyholder who is in arrears, upon his payment of all overdue assessments, provided "he be in good health at the time of making payment to the financier, with a view to reinstatement," a plea that the insured was "not in good health" at the time of his reinstatement is too vague and indefinite, and the defendant may be required to set forth definitely and specifically in what respect the insured was not in good health, and the nature of his ill health.

Evidence — burden of proof.

3. Where such ill health is pleaded, the burden of proof is upon the defendant to establish it by a preponderance of the testimony.

Appeal — refused instruction — general charge.

4. The fact that an instruction contains the correct law governing the case is no ground for exception, if refused, if it appears that the court's charge covered the principle embodied in the instruction requested, and fully and correctly instructed the jury on the point.

Trial — question for jury — good health.

5. The jury must determine from all the evidence whether or not insured was in good health when he was reinstated in a benefit society whose rules required good health as a condition of reinstatement.

Evidence — hearsay — opinion as to health.

6. The opinion of a man who is in one city on a certain date about the state of health, on that date, of his wife, who is in another city, or what he has heard about it, is not admissible in evidence upon the question of such state of health.

Appeal — refusal to strike testimony — issue not in case.

7. Refusal to strike testimony alleged to show waiver of forfeiture in an action on a mutual benefit certificate is not error, where no such error was claimed or presented in the case.

Headnotes 1–4 by BROWNE, Ch. J.

ERROR to the Circuit Court for Gadsden County to review a judgment in favor of plaintiff in an action brought to recover the amount alleged to be due on a beneficiary certificate. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **Greene S. Johnston, Jr., and Guyte P. McCord,** for plaintiff in error:

The contract should not be more liberally construed in favor of the insured or his beneficiary than in favor of the remainder of the membership composing the society.

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Crosse v. Supreme Lodge, K. & L. H. 254 Ill. 80, 45 L.R.A.(N.S.) 162, 98 N. E. 261; Timmerhoff v. Supreme Tent, K. M. 155 Ill. App. 395; Coughlin v. Knights of Columbus, 79 Conn. 218, 64 Atl. 223; Supreme Lodge, K. H. v. Jones, 35 Ind. App. 121, 69 N. E. 718; Thomas v. Knights of Maccabees, 85 Wash. 665, L.R.A.1916A, 750, 149 Pac. 7, Ann. Cas. 1917B, 804.

Where there is no ambiguous language in the contract requiring the meaning to be construed by the court, it is the duty of the court to enforce the contract as made, so long as it is not in violation of law or against public policy.

Crosse v. Supreme Lodge, K. L. H. 254 Ill. 80, 45 L.R.A.(N.S.) 162, 98 N. E. 261; Thomas v. Knights of Maccabees, 85 Wash. 665, L.R.A.1916A, 750, 149 Pac. 7, Ann. Cas. 1917B, 804; Hartman v. National Council, 76 Or. 153, L.R.A.1915E, 152, 147 Pac. 931; Burke v. Grand Lodge, A. O. U. W. 136 Mo. App. 450, 118 S. W. 493; Coughlin v. Knights of Columbus, 79 Conn. 218, 64 Atl. 223; Supreme Lodge, K. H. v. Jones, 35 Ind. App. 121, 69 N. E. 718.

By failure to pay the April, 1915, assessment until June 4, 1915, or the May, 1915, assessement until June 4, 1915, the insured, by such failure, ipso facto forfeited all her rights under the certificate, and no act of any kind was necessary by anyone else to complete such forfeiture.

Modern Woodmen v. Tevis, 54 C. C. A. 293, 117 Fed. 369; Lehman v. Clark, 174 Ill. 279, 43 L.R.A. 648, 51 N. E. 222; Northwestern Traveling Men's Asso. v. Schauss, 148 Ill. 304, 35 N. E. 747; Field v. National Council, K. L. S. 64 Neb. 226, 89 N. W. 774.

In order to reinstate, the suspended member must comply with the terms of the contract relating to reinstatement. And the question on this point is the condition of the health of the insured at the time payment was made, and not what the beneficiary knew or did not know about it when he paid the assessment in another town, many miles away from the insured.

Court of Honor v. Dinger, 221 Ill. 176, 77 N. E. 557; Modern Woodmen v. Tevis, 54 C. C. A. 293, 117 Fed. 369; Field v. National Council, K. L. S. 64 Neb. 226, 89 N. W. 774; Graves v. Modern Woodmen, 85 Minn. 396, 89 N. W. 6; Odd Fellows Ben. Asso. v. Smith, 101 Miss. 332, 58 So. 100.

It is sound policy to hold a member to strict compliance with the laws of the order respecting the payment of dues, and the regulation requiring the applicant for reinstatement to be at the time in good health.

Woodmen of World v. Jackson, 80 Ark. 419, 97 S. W. 673; Supreme Commandery, U. O. G. C. v. Bernard, 26 App. D. C. 169, 6 Ann. Cas. 694; Sheridan v. Modern Woodmen, 44 Wash. 230, 7 L.R.A.(N.S.) 973, 120 Am. St. Rep. 987, 87 Pac. 127; Hay v. People's Mut. Benev. Asso. 143 N. C. 256, 55 S. E. 623; Gifford v. Workmen's Ben. Asso. 105 Me. 17, 72 Atl. 680, 17 Ann. Cas. 1173; Showalter v. Modern Woodmen, 156 Mich. 390, 120 N. W. 994; Grand Lodge, A. O. U. W. v. Taylor, 44 Colo. 373, 99 Pac. 570; Bixler v. Modern Woodmen, 112 Va. 678, 38 L.R.A.(N.S.) 571, 72 S. E. 704; Royal Highlanders v. Scovill, 66 Neb. 213, 4 L.R.A.(N.S.) 421, 92 N. W. 206; Modern Woodmen v. Tevis, 54 C. C. A. 293, 117 Fed. 369; Clair v. Supreme Council, R. A. 172 Mo. App. 709, 155 S. W. 892; Jones v. Modern Brotherhood, 153 Wis. 223, 140 N. W. 1059; Knode v. Modern Woodmen, 171 Mo. App. 377, 157 S. W. 818; United Commercial Travelers v. Young, 128 C. C. A. 648, 212 Fed. 132; Borgraefe v. Supreme Lodge, K. L. H. 22 Mo. App. 127.

Messrs. **Watson & Wright** for defendant in error.

Browne, Ch. J., delivered the opinion of the court:

This is an action brought to recover upon a beneficiary certificate issued by the plaintiff in error to Mrs. Lonnie L. Glenn, in which her husband, Morgan L. Glenn, was the beneficiary. Verdict was rendered, and judgment entered against defendant below, who brings writ of error to this court.

By the terms of the contract, assessments of holders of insurance certificates became due on the first of each month, and in case of failure to pay the assessment on or before the last day of the month, the holder would be automatically suspended, but could reinstate himself by making payment within sixty days of all arrears of every kind, "provided, however, that he be in good health at the time of making payment to

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the financier, with a view to reinstatement."

Mrs. Glenn failed to pay her April and May assessments, and thereby became automatically suspended on the last day of April. Within sixty days, to wit, the 4th day of June thereafter, payment of all arrears was made and accepted by the financier. On June 9th, Mrs. Glenn died.

The first assignment of error is based upon the overruling of defendant's motion for a new trial, the first three grounds of which are that the verdict was contrary to law, to the evidence, and to the law and evidence. In discussing these, the plaintiff in error contends that the rule that contracts of insurance should be liberally construed in favor of the insured does not apply to insurance contracts with beneficiary associations. Neither the record nor the briefs disclose any reason for invoking this rule, and no question arose in the trial of the cause which makes it pertinent.

As we view this case it hinges solely upon the question of fact, whether or not the beneficiary was in good health at the time she made payment of what she was in arrears, for the purpose of reinstatement. On this question the court charged the jury that "pregnancy is not a personal ailment or condition of bad or unsound health so as to violate an agreement or stipulation that a member of a beneficiary society shall not be reinstated after suspension for nonpayment of dues, unless such member is in good health at the time of the reinstatement."

Insurance—reinstatement—pregnancy as ill health.

This charge correctly states the law.

In Rasicot v. Royal Neighbors, 18 Idaho, 85, 29 L.R.A.(N.S.) 433, 138 Am. St. Rep. 180, 108 Pac. 1048, it was held: "An agreement or stipulation in a contract of insurance made with a married woman that the policy shall not go into effect unless it is delivered to her 'while in sound health' is not violated by reason of the applicant being pregnant at the time of the delivery of the policy."

See also American Order v. Stanley, 5 Neb. (Unof.) 132, 97 N. W. 467.

Whether the insured was in good health on the 4th of June was a question of fact for the jury to determine from the evidence. The defendant pleaded that the insured was not in good health when she was reinstated, and the burden was upon him to prove this by a preponderance of the testimony. Dr. Greene, of Greenville, and Dr. Davis, of Quincy, were the only witnesses who testified on this point, and neither one undertook to state that on the day when she was reinstated she was not in good health, in the legal acceptance of the term as applied to contracts of life insurance.

Trial—question for jury—good health.

Evidence—burden of proof.

In a letter from Dr. Greene to Dr. Davis, introduced in evidence, he said: "I desire to say that up until the 3d or 4th of June, 1915, when I last saw her, her indisposition was merely the vomiting of pregnancy. In other words, her condition at that time was absolutely a physiological one."

He testified: "On June 4, 1915, Mrs. Glenn's condition was the direct result of her pregnancy, which I consider a physiological condition. It is not possible for a person's condition as to the same subject-matter to be both physiological and pathological at one and the same time. However, a physiological condition may become pathological; for instance, the normal vomiting of pregnancy may become so pronounced as to endanger the life of a woman, in which case it would undoubtedly be classed as a pathological condition. . . . In my letter to Dr. J. C. Davis, of Quincy, I meant that all of the symptoms with which Mrs. Glenn was suffering were due to pregnancy, which pregnancy I consider a physiological condition, or natural condition. I have never

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seen Mrs. Glenn since the night she was taken from Greenville to Quincy, Florida."

He also testified that he made an examination of Mrs. Glenn's urine, and found no albumen or casts, and there was no sugar present.

Dr. J. C. Davis, a medical expert, testified in part as follows: "From my experience as a physician I would say that if an examination is made of the urine of a person, and that examination shows no albumen or casts in the urine, I would say that the person whose urine had been examined was not suffering from pernicious vomiting of pregnancy. The condition of pernicious vomiting of pregnancy could not exist without at the same time there being albumen or casts in the urine. . . . A physiological condition with reference to a human being is a normal condition. A pathological condition is a diseased condition. It is not possible for a physiological and a pathological condition to exist at one and the same time with reference to the same subject-matter in one person. The condition of a woman who is pregnant, in a state of normal pregnancy, is physiological. A person who is in a physiological condition of health is in good health. . . . If a woman was pregnant, and examination was made of the urine, and that examination disclosed no albumen and no casts, I would say she was in a normal condition."

Mrs. Glenn came under Dr. Davis's care on the morning of June 6th; twelve hours later he made his first examination of her, and "found that she was affected with pernicious vomiting of pregnancy." He also testified that when Dr. Greene turned her over to him on the morning of June 6th, he stated "that she was in a normal condition." He also testified that "it is possible for a patient to develop a condition of pernicious vomiting of pregnancy and die within twelve hours, of uremic poisoning."

From this it appears that there was sufficient evidence to justify the jury in their verdict, and that the defendant below failed to establish his plea that on June 4th the insured was "not in good health, suffering from a pernicious vomiting of pregnancy."

The second assignment of error is based upon the ruling of the court, requiring compulsory amendment of the defendant's plea that at the time the insured was reinstated she was "not in good health." The court required the defendant to "definitely and specifically set forth in what respect the insured was not in good health at the time alleged in said plea, and the nature of her ill health at such time." We find no error in this ruling. The allegation that a person was "not in good health" is too vague and indefinite to put a party on notice of what is intended to be proved under that allegation, and tends to subject him to surprise and prevent him from preparing to meet it on the trial. If the defendant was sufficiently advised at the time it swore to its plea that the insured "was not in good health," it must have known the malady it claimed she was suffering from, and it was its duty to state it so that the plaintiff could be prepared to meet it on trial.

Pleading—plea of want of good health.

The third, fourth, fifth, sixth, and seventh assignments relate to rulings of the court sustaining objections by the plaintiff to questions propounded to the husband of the insured as to "when was it first brought to his notice that his wife was ill;" "when was he notified to come and bring his wife home;" "whether or not, on or about June 4th, he received information that his wife was ill;" "whether or not he had sworn at a previous trial that he had received information on June 4th that she was ill;" and "whether he went to Greenville in answer to any summons from any member of his wife's family or her attending physician."

The pivotal point in this case was the actual condition of health of the insured on the 4th day of June. On

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this day and for some days prior thereto the husband was in Quincy, and his wife in Greenville, and his opinion of the condition of her health, or what he had heard about it, was not competent testimony as to the actual condition of her health. Counsel for plaintiff in error has correctly stated the proposition: "The question on this point is the condition of health of the insured at the time payment was made, and not what the beneficiary knew or did not know about it when he paid the assessment in another town, many miles away from the insured."

Evidence—hearsay—opinion as to health.

The eighth and ninth assignments relate to the denial of the defendant's motion to strike testimony which he claims tended to show a waiver of forfeiture. The plaintiff below did not claim any waiver of forfeiture, and no testimony was introduced for that purpose. In denying the defendant's motion to strike on the ground that there was nothing in the pleadings to show that the plaintiff intended to rely upon a waiver of forfeiture, the court said: "If they do, under the present state of the pleadings I will not allow it, but I don't think that would be an issue in the case. It would be improper evidence tending to support that question."

The insured had failed to pay her April and May assessments, and became automatically suspended on the last day of April. Under the constitution and by-laws which were a part of the contract, she had sixty days in which to pay up her arrears and become reinstated. This was done on June 4th, and she was well within the sixty days, and no question of waiver of forfeiture was involved or was presented. There was no error in overruling these objections.

Appeal—refusal to strike testimony—issue not in case.

The tenth, eleventh, twelfth, and fourteenth assignments relate to the refusal of the court to give certain instructions at the request of the defendant. Under the rule laid down by this court, these assignments should be considered as abandoned, as the plaintiff in error has not discussed them, but contented himself with stating that he believes these instructions contain the correct law as revealed by decisions hereinbefore referred to and quoted from. The fact that an instruction contains the correct law governing the case is no ground for exception, if refused, if it appears that the court's charge covered the principle embodied in the instruction requested, and fully and correctly instructed the jury on the point, as was done in this case. We therefore find no error in the refusal of the court to give the charges requested.

—refused instruction—general charge.

The thirteenth and sixteenth assignments are abandoned.

The fifteenth, that the verdict was contrary to the law, is covered in the discussion of the first assignment.

Finding no error, the judgment is affirmed.

Taylor, Whitfield, Ellis, and West, JJ., concur.

ANNOTATION.

Insurance; pregnancy as misrepresentation or breach of warranty.

The conclusion in the reported case (NATIONAL COUNCIL, K. L. S. v. GLENN, ante, 1503), that pregnancy is not a personal ailment or condition of bad or unsound health so as to violate a provision that a member of a benefit society should not be reinstated, after suspension for nonpayment of dues, unless in good health at the time of reinstatement, is supported by other cases.

Thus, in Rasicot v. Royal Neighbors (1910) 18 **Idaho**, 85, 29 L.R.A.(N.S.) 433, 138 Am. St. Rep. 180, 108 Pac.

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1048, it was held that a provision in a contract of insurance with a married woman, that the policy should not go into effect unless it was delivered to her "while in sound health," was not violated by reason of her being pregnant at the time the policy was delivered. The court said: "Pregnancy is not, per se, a condition of 'unsound' health, nor is it a 'disease,' or 'ailment,' within the meaning of those terms used in this application and policy. The term, 'sound health,' has been frequently defined by the courts, and, so far as we are advised, it has never been held that this term, used in an insurance policy or certificate, covered every slight ailment or indisposition of health of a temporary character, which does not tend directly to shorten the life or undermine the constitution of the insured. . . . So far as we are informed, this term, of itself and standing alone, has never been held to cover or include a case of pregnancy."

And in Merriman v. Grand Lodge, D. H. (1906) 77 **Neb.** 544, 8 L.R.A. (N.S.) 983, 124 Am. St. Rep. 867, 110 N. W. 302, 15 Ann. Cas. 124, it was held not a false representation for a married woman to sign a certificate stating that she was in sound health, although she was pregnant at the time.

In American Order v. Stanley (1903) 5 **Neb.** (Unof.) 132, 97 N. W. 467, where in the original application questions were asked as to whether the applicant was pregnant, and whether she was in sound health, but subsequently, on an application for an increased amount of insurance, the insurer, in a health certificate presented, failed to ask the above questions, and merely required the applicant to certify that she was not afflicted with any disease, and was in good health, it was held that the language should not be technically construed, and that the policy was not avoided because the applicant, at the time of making the certificate of good health, was pregnant.

It has been held that a married woman, who was an applicant for insurance in a company issuing policies to married women, was not required to inform the company of evidence of pregnancy, discovered subsequent to her physical examination and application. Merriman v. Grand Lodge, D. H. (**Neb.**) supra.

Where an applicant warrants her answers to be true, and declares that the answers as written by the medical examiner are as given by her, it has been held that an untrue answer written by the examiner, that the applicant was not pregnant, although it was his deduction from her answers, and was believed by her to be true, will avoid the risk. Supreme Lodge, K. L. H. v. Payne (1908) 101 **Tex.** 449, 15 L.R.A.(N.S.) 1277, 108 S. W. 1160.

In Rasicot v. Royal Neighbors (**Idaho**) supra, the applicant warranted the literal truth of her answers, and in good faith gave a negative answer to a question whether she was at the time pregnant, when in fact she was; but the insurer was held to have waived the right to insist on the breach, by reason of its subsequent conduct in receiving assessments for a long period.

In Gallop v. Royal Neighbors (1912) 167 **Mo.** App. 85, 150 S. W. 1118, where an applicant agreed that the by-laws of the insurer became a part of the contract, and one of these provided that liability should not begin until, in the case of a married woman, actual delivery of a certificate when she was not pregnant, it was held that no contract was ever consummated where it appeared that a married woman was not pregnant at the time of her application, but at the time of the delivery of the certificate she was pregnant.

J. T. W.

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H. S. GRIFFITH et al., Appts.,
v.
CHARLES GIFFORD et al., Respts.

Washington Supreme Court (Dept. No. 1)—June 18, 1917.

(97 Wash. 22, 165 Pac. 874.)

Rescission — misrepresentation as to weeds on farm.

1. A false representation by the owner that there is no wild snapdragon upon a farm that he is about to sell warrants a rescission, if the weed was present in considerable quantities, was difficult, if not impossible, to eradicate, and materially reduced the value of the farm.

[*See note on this question beginning on page* 1511.]

Evidence — fraud — weight.

2. Clear and convincing evidence is necessary to establish the existence of fraud.

APPEAL by plaintiffs from a judgment of the Superior Court for Spokane County in favor of defendants, in an action brought to rescind a contract for the purchase of real estate for alleged fraud. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. **Zent & Powell**, for appellants:

Plaintiffs had a right to assume that defendant knew what he was talking about, and to rely upon his representations.

Best v. Offield, 59 Wash. 466, 30 L.R.A.(N.S.) 55, 110 Pac. 17.

If defendant made misrepresentations, the fact that he did so in good faith and without knowledge of their falsity will not save him.

Shaw v. O'Neill, 45 Wash. 98, 88 Pac. 111; Best v. Offield, supra.

The school facilities were misrepresented.

Becker v. Clark, 83 Wash. 37, 145 Pac. 65.

Main, J., delivered the opinion of the court:

This action was brought to rescind a contract for the purchase of real estate, on the ground of fraud. The trial in the superior court resulted in a judgment denying rescission, from which the plaintiffs appeal.

The facts out of which the litigation arose are these: For some time prior to the month of March, 1916, the appellants had owned and occupied a farm in Grant county, which they had sold a short time prior to entering into the transaction out of which this controversy arose. After selling the farm in Grant county, Mr. Griffith, in looking about for the purchase of another place, came to Latah, in Spokane county. This was in what is referred to in the evidence as the "Palouse country." After coming to Latah, he met friends there who warned him against purchasing a farm upon which there was any "wild snapdragon." After being so warned, he fully made up his mind not to purchase a farm if there was growing thereon any of that weed.

A few days after coming to Latah, Griffith was taken by one J. S. Farrelly, who lived in or near that town, 6 miles into the country, to look at a place then owned by the respondents. Two or three days after having made this trip, Griffith met the respondent, Charles Gifford, in Latah, and talked with him relative to the farm. During this conversation, Farrelly asked Gifford if there was any snapdragon on the farm, and received the reply: "Not to my knowledge." Shortly after this conversation, or within a few days,

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Gifford took Mr. and Mrs. Griffith out to see the farm, and, as the Griffiths both testified, while they were driving along the highway adjacent thereto, they inquired whether there was any snapdragon on the place, and received the positive answer that there was not. Gifford denies this conversation. Upon this trip, the parties did not go over the place, but a few days later, Gifford and Griffith again visited the farm and walked over it. The place had been owned by the respondents for seven years prior to this time, and had been occupied by them during all of that time, with the exception of one year. The negotiations referred to resulted in a contract on March 30, 1916, by which the respondents sold to the appellants the farm, consisting of approximately 70 acres, for the sum of $8,300. Of this sum, $1,780 was paid in cash, and the balance was to be paid by the transfer of notes and a mortgage then owned by the appellants.

After making this contract, and on the 17th day of April, the appellants went into possession of the farm. Thereafter, and on the 28th day of that month, Mr. Griffith, while plowing preparatory to planting a crop, discovered what he thought might be wild snapdragon. He had never seen it before, as it did not grow where he had previously lived and farmed land. After inquiry, Griffith learned that the weed he had discovered was wild snapdragon. He then sought Mr. Gifford and demanded his money back, as well as rescission of the contract. This, the latter, after considering for a few days, declined to do. Thereafter, and during the succeeding month, the appellants vacated the place and instituted this action. Neither party to the conroversy being willing to exercise control over the farm during the litigation, by mutual arrangement, the management thereof was given to a third person.

The first question is, whether the presence of wild snapdragon upon the farm was of such material consequence as to justify a rescission of the contract, providing there had been misrepresentation relative to its existence. The evidence shows that wild snapdragon is a noxious weed, and when it once appears upon a farm it is practically impossible to eradicate it. So serious is its presence considered that, when it appears, some farmers build a fence around it and cover the ground with salt. The appellants offered evidence to the effect that the presence of snapdragon upon a farm would materially reduce its salable value. The respondents offered no evidence on this question. The amount of snapdragon which was discovered upon the place after the appellants went into possession thereof consisted of approximately ten patches, located near the center of the farm. These patches varied in size from about 11 by 13 feet down to places where there was only an individual plant. The party to whom the management of the place was committed during the pendency of this litigation testified that he had covered the three larger patches with tar paper, and that it took about 250 square feet thereof. One of the witnesses, testifying for the respondents, referred to a patch of snapdragon 6 feet across as "quite a large patch." Taking into consideration the character of the weed and the difficulty, if not the impossibility, of its total extinguishment, as well as the size and number of patches, together with the fact that the presence of such weed will materially reduce the value of a farm, we cannot hold that a misrepresentation relative thereto would be upon an immaterial matter such as would not justify the rescission of a contract. The next question is, whether there was a misrepresentation. The trial court made no formal findings of fact and conclusions of law, but recited in the judgment that wild snapdragon was growing upon the farm in the fall of the year 1915. The evidence

Rescission—misrepresentation as to weeds on farm.

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shows that this weed has a distinctive flower and a pronounced odor, especially when cut or bruised. During the year 1915, the portion of the farm where the snapdragon was produced a crop of oats. When this crop was harvested, Mr. Gifford testified that he shocked the oats, and admitted that he shocked the oats over the very place where the snapdragon was found by Griffith. The stubs from which the plant had been cut, along with the oats, were still on the ground during the following spring. If Griffith, who had never seen snapdragon before moving upon this farm, was able to discover its presence there within twelve days after he took possession, and at a time of year when its discovery would be much more difficult than when the flower would appear later in the season, it does seem strange that its presence there was not known to the former owner, who admitted that he knew what snapdragon was when he saw it. The testimony of the Griffiths on the one side, and Gifford on the other, as to the conversation relative to snapdragon, hereinbefore referred to, cannot be reconciled. It might be said that a way of reconciliation could be found by assuming that the Griffiths might have confused this conversation with the previous conversation occurring in Latah, where Gifford admits that he stated that there was no snapdragon upon the place, to his knowledge, but this assumption would overlook the fact that Mrs. Griffith was not present at the previous conversation. It seems altogether reasonable that the Griffiths, after having been warned relative to purchasing a farm with this weed upon it, and after having determined not to purchase such a farm, should inquire specifically in relation thereto. The trial judge, in seeking to reconcile this conflicting testimony, thought that the Griffiths might have confused the conversation that they testified to as occurring upon the highway adjacent to the farm, with the previous conversation in Latah, but doubtless overlooked the fact, as already pointed out, that Mrs. Griffith was not present at that conversation.

We cannot escape the conclusion that, under the evidence in this case, the appellants were entitled to a rescission of the contract. The rule undoubtedly is, as pointed out by the respondents, that fraud, where charged, must be established by clear and convincing evidence, but we think the appellants have met the requirements of this rule.

Evidence—fraud—weight.

The judgment will be reversed, and the cause remanded with direction to the Superior Court to enter a judgment in favor of the appellants.

Ellis, Ch. J., Chadwick, Morris, and Webster, JJ., concur.

ANNOTATION.

Presence of noxious weeds as ground for rescission of contract for purchase of land.

The cases passing upon a very similar state of facts sustain the holding in the reported case (GRIFFITH v. GIFFORD, ante, 1509), that a false representation by the vendor, that a farm he is selling is free from noxious weeds in considerable quantities, will entitle the vendee to rescind the contract, at least, where his inspection of the land would not have revealed the presence of a noxious weed, known as snapdragon, which infested the land in considerable quantities and greatly depreciated its value.

Thus, in Neely v. Rembert (1902) 71 Ark. 91, 71 S. W. 259, a contract for the purchase of a plantation was rescinded for false representations of the vendor as to the number of acres of coco grass, although the representations were not made with knowledge of their falsity. In that case, the

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vendee inspected the plantation before he purchased it, and discovered the presence of coco grass upon it, and thereupon abandoned further inspection of the land with a view of not purchasing the plantation. He was, however, induced to make the purchase, by the representations of the vendor that coco grass was only on 40 or 50 acres of the plantation, which comprised over 3,000 acres.

The same result was reached under a very similar state of facts in Oswald v. McGehee (1854) 28 Miss. 340, wherein a contract for the purchase of a plantation was rescinded at the instance of the vendee, for false representations of the vendor as to the amount of coco grass. In that case, however, the court found that the vendor knew of the falsity of his representation, and it was also held that it could not be said that the testimony showed that prevalence of the coco grass was so obvious to the senses as to destroy the legal effect of the representations made by the vendor in regard to it, and that hence the purchaser would not be denied relief on the ground of gross neglect, when he acted on the assurance of the vendor. The court said that the rule in such a case is "that, although the purchaser may, by close inspection, detect a vice in the thing sold, yet if the vendor makes representations upon which he relies and which prevent him from making a proper examination, and which prove to be unfounded, it is good ground to avoid the contract. In the absence of all representations of the vendor, the purchaser is held to strict diligence in examining and judging for himself; but where representations are made as to doubtful matters, material in the transaction, the purchaser may protect himself by relying on the good faith of the vendor; and, in breach of that, he will not be bound by the contract."

Likewise, in Woodward v. Western Canada Colonization Co. (1916) 134 Minn. 8, L.R.A.1917C, 270, 158 N. W. 706, a sale of land was rescinded for false representations by the vendor that the soil was in good condition for farming, the representations being false, due to the fact that the soil was infested with Canada thistles, wild oats, and mustard. In that case, the vendee claimed that he relied on the representations, and was induced thereby to make the purchase. He was a resident of another state, a practical farmer of many years' experience, and was familiar with farm lands and farming methods. He was taken to the farm with others in an automobile, and the opportunity for examination was limited. He did not seek a further examination. A considerable portion of the farm had grown up to weeds. The vegetation was dead, and the character of the weeds was not easily ascertainable, though the fact that weeds were present could not escape observation. The court said that the fact that plaintiff saw the land before he purchased was not conclusive proof that he did not rely upon the representations as to its character or condition, though important for consideration in determining whether he did.

While not strictly within the scope of this note, attention is called to Clary v. Myers (1897) — Tex. Civ. App. —, 40 S. W. 633, involving a suit by the vendor against the vendee to recover on two notes, given for a portion of the purchase price of land. The vendee defended on the ground that the vendor falsely represented that the land was free from Johnson grass, and sought the cancelation of the two notes on the ground that the amount he had already paid was all the land was worth under the circumstances, and the court sustained the judgment, canceling one of the notes, and denying relief on the other on the ground that it was not then due.

A somewhat similar case is Vandewalker v. Osmer (1873) 65 Barb. (N. Y.) 556, in which, however, the vendee was denied the right to recover damages in a deceit action for false and fraudulent representations by the vendor that there were no daisies on the farm he was purchasing. The plaintiff was defeated on the ground that he went to the farm on two or three different occasions before purchasing it, and might easily have as-

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certained the presence of daisies on the farm. The court said that "while it is true that the purchaser may, by relying on the representations of the vendor, be misled, and omit to make that careful examination of the property that a prudent man would and should make, yet a jury should require the clearest proof that the purchaser was induced by the representation to omit to examine the property. It will not do to permit a vendee having the property before him, and defects in it plainly discoverable, to close his eyes and ears and omit to use his senses, and pretend that he relied on the representations, and was thereby misled." To the same effect is Long v. Warren (1877) 68 N. Y. 426, wherein the vendee was denied the right to recover damages for false and fraudulent representations as to nonexistence, on the farm he was buying, of a noxious weed or grass known as quack grass. The vendor stated that there was a small quantity of quack grass at a certain place. This representation was found to be false, but the vendee was denied the right to recover, on the ground that it did not appear that the vendor used any artifice, either of word or act, to dissuade, or turn away, or hinder the vendee from making an inspection of the farm for himself, and it was evident that he had the opportunity in full degree to make a personal inspection. The court said: "One is forced by the testimony to the conclusion that, had the plaintiff, when he was on the farm before the purchase, taken ordinary pains to look out for this grass, he would have perceived it in some other lots than that to which it was confined in the defendant's representation. Now the rule of law in such case was early thus laid down: Where the matter is not peculiarly within the knowledge of the defendant, and the plaintiff has the means of obtaining correct information, apart from the statements made to him, he may not recover upon the false declaration."

In Hetland v. Bilstad (1908) 140 Iowa, 411, 118 N. W. 422, it was held in an action for fraud, based upon false representations that farming land was free from weeds, and so lay that water drained from it, and none onto it from surrounding lands, that the question whether or not these representations were matters of fact or of opinion was for the jury. The court said: "The objection is that these were mere matters of opinion, and not representations of facts. In nearly all land there is enough seed to require constant exertion for weed extermination, and, of necessity, statements of the kind above mentioned relate largely to the quality of the land. Nevertheless such statements . . . may be representations of fact, if so intended." The foregoing case is cited with approval in Franke v. Kelsheimer (1917) 180 Iowa, 251, 163 N. W. 239, wherein in an action by the lessee of farming land against the lessor to recover damages for false representations that the land was free from noxious weeds, the court said that the representation was not trade talk, mere puffing, or expressions of opinion, but, if false, it was an actionable representation. A. G. S.

JOHN BARTH COMPANY, Appt.,

v.

I. BRANDY, Impleaded, etc., Respt.

Wisconsin Supreme Court—March 13, 1917.

(165 Wis. 196, 161 N. W. 766.)

Intoxicating liquors — liability for goods sold to one conducting business.

1. One who takes out a license to sell intoxicating liquors to enable another to conduct a liquor business is answerable for the price of liquor

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sold such person, although he has no connection with the business, and the liquors are sold on the credit of the one conducting the business, where the statute makes it a misdemeanor to traffic in intoxicating liquors without license, which is assignable only in case of death of the licensee.

[*See note on this question beginning on page* 1516.]

— assignability of license.

2. A license to sell intoxicating liquors is a mere privilege to be enjoyed while the conditions and restrictions are complied with, and implies special confidence and trust in the licensee, and from the very nature of things such license is not assignable at common law.

— liability for act of agent.

3. One holding a license to sell intoxicating liquors is responsible for whatever is done in the place where the liquors ars sold by his agent in violation of law, even though it is against his express direction.

Estoppel — owner of license — denial of liability for supplies.

4. One in whose name stands the license under which a saloon business is conducted is estopped to assert that he is not the owner of the business conducted under the license, for the purpose of avoiding liability for supplies purchased for the business.

APPEAL by plaintiff from a judgment of the Circuit Court for Kenosha County dismissing an action brought to recover the balance alleged to be due for goods sold and delivered by plaintiff to defendants. *Reversed.*

Statement by **Eschweiler, J.**:

The plaintiff corporation is a wholesale liquor dealer. The defendant, I. Brandy, in the year 1914, on his personal application, obtained from the common council of the city of Kenosha a license to operate a saloon in that city. He was at the time, and for several years had been, engaged in a men's clothing and furnishing business about six or seven blocks away from the saloon. He took the license for the purpose of helping the defendant Schwartz, a poor man who wanted to run the saloon, and with the understanding that Brandy himself would not conduct it.

Plaintiff's salesman found defendant Schwartz in charge of the saloon and accepted Schwartz's order for goods. Under Schwartz's directions they were consigned to I. Brandy and delivered in Kenosha to one Grube, a drayman who was authorized to receive goods for Brandy, by general instructions not referring specifically to these liquors. The goods were used at the saloon in question and part payments made by Schwartz. Statements were sent by plaintiff to Brandy, but no response made by him, and attempts to collect of the defendant Schwartz were also made and payments made by him. Plaintiff dismissed the action as to defendant Schwartz.

Findings were made by the court to the effect that Schwartz was the owner of the saloon and the purchaser of the goods, and not the agent of Brandy, who did not authorize Schwartz to purchase goods upon Brandy's credit; that Brandy paid none of the expenses and received none of the profits of the saloon business; that no inquiry was made by plaintiff of Brandy as to such sales or as to the authority of Schwartz; that plaintiff's agent knew at the time the orders for goods were taken that Brandy was in the clothing business; that such agent called upon the defendant Schwartz for payment, but did not demand the same of Brandy. Upon such findings the court determined that plaintiff was not entitled to judgment as against Brandy, and from the judgment dismissing the action the plaintiff appeals.

Mr. George W. Taylor, for appellant:

A principal is responsible for the acts of his agent when he has either

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given his agent authority to do the act, or justified the party dealing with the agent in believing that the latter had such authority.

Kasson v. Noltner, 43 Wis. 646; Bouck v. Enos, 61 Wis. 660, 21 N. W. 825; Bentley v. Doggett, 51 Wis. 224, 37 Am. Rep. 827, 8 N. W. 155; Andrews v. Robertson, 111 Wis. 334, 54 L.R.A. 673, 87 Am. St. Rep. 870, 87 N. W. 190; Pluto Powder Co. v. Cuba City State Bank, 153 Wis. 324, 141 N. W. 220; Ruane v. Murray, 26 Pa. Super. Ct. 187.

Messrs. **Umbreit, Mahon, & Jenner**, also for appellant:

The defendant is estopped from denying Schwartz's agency.

State v. Bayne, 100 Wis. 35, 75 N. W. 403; McDermott v. Jackson, 97 Wis. 64, 72 N. W. 375; Dodge v. McDonnell, 14 Wis. 553; Aldrich v. Wilmarth, 3 S. D. 523, 54 N. W. 811; Garlick v. Morley, 147 Wis. 397, 132 N. W. 601.

Knowledge on the part of defendant's agent that the goods were billed to, and receipted by, defendant Brandy, makes defendant chargeable with knowledge thereof, and his silence and failure to act on such knowledge amount to ratification of the transaction, and estop him from denying liability.

Lakin v. Sierra Buttes Gold Min. Co. 25 Fed. 337; Wiley v. Knight, 27 Ala. 336; Saulsbury v. Wimberly, 60 Ga. 78; Meier v. Blume, 80 Mo. 179; Ingalls v. Morgan, 10 N. Y. 178; Smyth v. Oliver, 31 Ala. 39; Watson v. Wells, 5 Conn. 468; Prater v. Cox, 64 Ga. 706; Sooy v. State, 41 N. J. L. 394; Gibson v. Snow Hardware Co. 94 Ala. 346, 10 So. 304.

Mr. **Robert V. Baker** for respondent.

Eschweiler, J., delivered the opinion of the court:

By § 1550, Stat., it is made a misdemeanor, punishable by fine or imprisonment in the county jail, for any person to vend, sell, deal, or traffic in spirituous or intoxicating liquors without first having obtained a license or permit therefor, as required by law. To obtain such permit under the law of this state, chap. 66, the person must make application in writing, stating the kind of license applied for and designating the premises where such liquor shall be sold. The only statutory provision for assigning or transferring such license is in case of the death, during the license year, of such licensee. It is further provided under the same chapter that notice of such application for license shall be published before the granting thereof, and a bond must be given before the delivery of the license, such bond to provide that the applicant will keep and maintain an orderly and well-regulated house, will permit no gambling, and will not sell or give away liquor to certain classes of persons, such as minors or intoxicated persons.

It has already been held by this court that such a license is a mere privilege, to be enjoyed while the conditions and restrictions are complied with, and implies special confidence and trust in the licensee, and from the very nature of things such license is not assignable at common law. State v. Bayne, 100 Wis. 35, 75 N. W. 403. Although the license is for a fixed term, it comes to an end with the life of the licensee. State ex rel. Rich v. Steiner, 160 Wis. 175, 177, 151 N. W. 256. Even were the license assigned to Schwartz by Brandy, it would have been no protection for sales by Schwartz, except as agent for Brandy. State v. Bayne, supra.

Intoxicating liquors—assignability of license.

It has also been held that the person having obtained and holding a license is responsible for whatever is done in that place of business by his agents, in violation of law, even though it be against the express direction of the person having such license. State ex rel. Conlin v. Wausau, 137 Wis. 311, 118 N. W. 810; Olson v. State, 143 Wis. 413, 127 N. W. 975; Reismier v. State, 148 Wis. 593, 596, 135 N. W. 153.

—liability for act of agent.

Under this view of the situation that the law places a person in by the obtaining of such permit to con-

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duct a saloon, he must be presumed to be such owner and keeper as to the general public and persons dealing with those conducting the business. Therefore, goods sold in the manner of the transactions in this case, and used in the conduct of the business, must be held to have been sold to the person who in law was charged with the conduct and management of the business. It is immaterial whether plaintiff's agent knew, at the time of the sales, Schwartz claimed to be the owner in fact of the business. The defendant Brandy is estopped from now asserting that he was not such owner. It is perhaps to be regretted that one who undertook to play the part of the good Samaritan should be rewarded with such a penalty as the judgment in this case must be. We feel, however, it is the better policy that a person who has assumed to the city and the public at large the position that the defendant Brandy did, by his application for and obtaining the license, should be held to all the obligations that follow such an assumption.

—liability for goods sold to one conducting business.

Estoppel—owner of license—denial of liability for supplies.

Judgment of the Circuit Court is reversed, and the cause remanded with directions to enter judgment for the plaintiff against the defendant Brandy in accordance with the prayer of his complaint.

ANNOTATION.

Civil liability of one who takes out license for sale of intoxicating liquor for benefit of another.

I. Generally, 1516.
II. Liability of licensee for purchase price of liquor, 1517.
III. Liability of licensee on statutory bond, 1519.

I. Generally.

The law prohibits the holding of a liquor license by one person in the interest of others. Equitable Trust Co. v. Murphy (1910) 20 Pa. Dist. R. 351. Hence, a contract whereby a person takes a liquor license in his own name, to be used for the benefit of another in conducting the liquor business, is illegal and void, as being in violation of law, and as between the parties, no civil liability can be predicated on its provisions. Koppitz-Melchers Brewing Co. v. Behm (1902) 130 Mich. 649, 90 N. W. 676; Ruemmeli v. Cravens (1903) 13 Okla. 342, 649, 74 Pac. 908, 76 Pac. 188; Equitable Trust Co. v. Murphy (Pa.) supra.

In Equitable Trust Co. v. Murphy (Pa.) supra, the court held that if an agreement was made, as alleged, that the defendant, who was the widow and administratrix of the estate of a deceased retail liquor dealer, should obtain a transfer of his license to her individually, to be held by her for the benefit of herself and her children, the agreement was in violation of the law and contrary to the policy of the state, and therefore would not be enforced by a court of equity.

In Ruemmeli v. Cravens (1903) 13 Okla. 342, 649, 74 Pac. 908, 76 Pac. 188, it appeared that the plaintiff, who was a nonresident of the territory and therefore could not procure a license to sell liquors within it, entered into a contract with the defendant, whereby the latter, as the agent of the plaintiff for the wholesaling of intoxicating liquors, was to secure a license in his own name. The defendant procured the license and conducted the business in his own name, without disclosing his agency. In an action by the plaintiff to recover money alleged to have been appropriated by the defendant while acting as agent, it was held that the contract was illegal and void, and prohibited by the state, for the reason that the plaintiff had not procured a license. The court said: "The very nature of the business of selling intoxicating liquors necessitates stringent provisions to keep it within

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proper channels. How can it be said that a license obtained by Cravens, which allowed him to sell liquor at wholesale, could be used by any other person? First, it is shown by the statement of counsel to the jury, which statement is here treated as facts of the case, or evidence adduced, that the plaintiff in this case was a nonresident of the territory, and this fact alone made it impossible for him to procure a license to sell liquors within the territory, either at wholesale or retail. Not one of the provisions of the liquor law was complied with by reason of the license procured by the defendant. No bond was given upon which a recovery could have been had in case of violation of any of the provisions of the act. The bond given by the defendant could only be held for violations of the law that he might be guilty of, and in no way whatever could a suit be brought upon the bond of the defendant to recover for violations of the law or injury caused by or through the acts of the plaintiff. It would seem that the contract was entered into for the very purpose of violating the liquor laws; that the agreement was that the defendant should transact the business in his own name in order that the true conditions and facts might be kept from the public, and that it might appear upon the surface that Cravens was the principal, wholesaling liquors in his own name, instead of being simply an agent of one who, under the law, could not procure a license, and could not transact the business within the territory. It is unnecessary to enter into a discussion of the advisability of the law, its necessity, or the wholesomeness of it. It is only necessary to know that it is a law of the territory, and that a violation of it is punishable by fine and imprisonment. The business, then, conducted by the plaintiff and defendant, in wholesaling liquor in the territory without a license, was not only against public policy, but was prohibited by the laws of the territory. The contract, therefore, which is the basis of this action, is founded upon, and arises out of, a transaction prohibited by statute. All contracts which are in violation of law are illegal, and no action or suit will lie to enforce them."

In Koppitz-Melchers Brewing Co. v. Behm (Mich.) supra, the proof showed that it was agreed orally by the parties, and the contract was later put in writing, that the plaintiff should lease a building for a saloon, sell the defendant its beer, procure a license in its own name, and give the statutory saloon keeper's bond, and that the defendant should procure the United States license, carry on the business in his own name, purchase beer of the plaintiff only, pay a specified sum per month, pay for the beer, and reimburse the plaintiff for the costs of the license. In an action for a balance claimed to be due, it was held that the contract was clearly illegal and void, since one could not lawfully carry on the business without himself procuring authority by license and giving a bond as indemnity against his own illegal sales and those of his agent. It was also held that testimony offered by the plaintiff that it was a custom for brewing companies to take licenses in their names, to be used by others, for the purpose of securing payment of the price advanced by them, was properly excluded, as a custom to violate the law would be ineffective, if proved.

II. Liability of licensee for purchase price of liquor.

With respect to the civil liability of the licensee, that is, the person in whose name the license is issued for the benefit of another, for the purchase price of the liquor sold to the other person, there is conflict in the decisions. Thus, in the reported case (JOHN BARTH CO. v. BRANDY, ante, 1513) it appeared that the defendant obtained a license to operate a saloon, for the purpose of helping another, and did not himself conduct it. The court holds that, in view of the statute requiring the license and providing for its assignment, the law placed the person obtaining a permit to conduct a saloon in such a position that he must be presumed to be the owner and

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keeper, as to the general public and persons dealing with those conducting the business. Therefore, the court holds, goods sold and used in the conduct of the business must be held to have been sold to the person who in law was charged with the conduct and management of the business. The court states that it is immaterial whether the plaintiff knew at the time of the sales that the person conducting the business claimed to be the owner, in fact, of it, and holds that the defendant was estopped from asserting that he was not the owner.

In Harris v. North (1916) 78 W. Va. 76, 1 A.L.R. 356, 88 S. E. 603, however, an action against three defendants for the balance due on an account for liquors bought from a wholesale house for a saloon, lack of any direct pecuniary interest in the saloon or copartnership on the part of North [one of the defendants] was asserted and proved by way of defense. He owned the building in which the business was conducted by the other defendants, and the state license under which, ostensibly, they sold liquors, was in his name and conspicuously posted in the saloon room. It was procured in his name because the owners of the business were aliens, and could not, for that reason, obtain a license in their own names. Prior to their occupancy of the building as North's tenants, another person had conducted a saloon in it. On his failure in the business, North took an assignment and transfer of the license for the unexpired portion of the year, and Lukacs and Szilagyi, the other two defendants, bought the stock of goods. On the expiration of the license year, a new license was procured in North's name, but the owners of the stock paid the license taxes. Their predecessor had paid $35 a month as rent for a single room. North enlarged the building, more than doubling its length, and added a second story, and the new firm paid him $100 a month for the ground floor for a while, and later $125 a month for the entire building. Checks used in payment of bills rendered by the plaintiffs bore "Old Miners Saloon" as the firm name, and were signed for a while, "Old Miners Saloon, by Steve Lukacs, M. Szilagyi," and later, "Old Miners Saloon, by Lukacs & Szilagyi." On checks used in the business from August, 1913, to January, 1914, and possibly longer, these parties styled themselves "proprietors." During some portions of their career, they styled themselves "managers," on their stationery. The plaintiffs had no direct dealings nor even any conversation or correspondence with North. It did not appear that any of them, or any representative of theirs, knew him or had ever seen him. Their salesman saw his name in the posted license, and was told by Lukacs he was interested. On the subject of that representation, the salesman testified, in part, as follows: "I looked around and saw the license of C. P. North's name, and I says to Mr. Lukacs, 'Is Mr. North interested in this business with you?' and he said, 'Yes, Mr. North got the license for us; he owns the building, and we can't own a license, for we are not citizens of the United States; we have no credit, and we don't know anybody,' or words to that effect." Though North's place of business was just across the street from the saloon, and he could have been seen at almost any time, no inquiry was made of him as to whether he was a partner in the business. On the information the salesman obtained at the saloon, and ascertainment of North's financial rating in the commercial agencies, the plaintiffs sold the firm liquors and other goods, and now claimed the right to hold North for a balance due, amounting to about $1,150. Though the bills were not always promptly paid, no demand was ever made upon North for payment until after the bankruptcy of the firm. In some instances, the salesman immediately drew the cash on checks for as much as $400 and $500, from the local bank on which they were drawn. In others, he had the bank certify the checks before he remitted them. The court said: "North cannot be held merely because the license was in his name. No statute expressly made him liable, and protection of creditors of a retail dealer

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in liquors was not within the spirit or purpose of the regulating statutes. As to criminal or civil liability for unlawful sales, North might have been estopped to deny ownership of the business or the agency of the real owners; and the owners may not have been protected by a license in the name of a stranger. Illegality of the business, known to the plaintiffs, might have precluded right of recovery from the real owners, but that would not have rendered North liable. Their own violation of law would have estopped them from resort to him for payment. Solution of such questions would have turned upon the construction of the statutes and the legislative policy embodied in them. But neither the terms, spirit, nor policy of the statute touched the subject-matter of this controversy. The relation between a retail dealer and his vendor was a matter as to which the legislature had not expressed its will, wherefore it remained subject to general commercial law. The statutes dealt with the selling and disposition of liquors, not purchases thereof. . . . If North permitted himself to be represented or held out to the public or to the plaintiffs as a partner, and the plaintiffs extended credit to him on the faith of the representation, he is liable. Otherwise, he is not. The posted license in his name was a representation of interest, which, unexplained, would likely be sufficient. But if the plaintiffs knew he was not interested, or did not extend credit to him on account of the fact, they cannot hold him for the debt. Authority for the correctness of the court's elimination of the testimony as to the representation of North's interest in the business, made by Lukacs, need not be cited. The representation was not made in North's presence, and there is no evidence that he ever heard of it, after it was made. The checks and testimony of witnesses tending to prove the plaintiffs knew Lukacs and Szilagyi were the only proprietors, and relied only upon their financial ability, and extended credit only to them, were relevant, material, and, therefore, admissible."

III. Liability of licensee on statutory bond.

It has been held that where a liquor tax certificate has been issued or transferred to a person on his application and filing of a bond, he is the principal whom the law will look to during the conduct of the business, and will hold responsible for compliance with the statutory provisions. Hence, whether the licensee takes out or procures a tax certificate for himself or for another, whether he is carrying on the business for his own account, or for that of another, is of no importance on the question of liability on the bond. Lyman v. Kurtz (1901) 166 N. Y. 274, 59 N. E. 903, affirming (1900) 48 App. Div. 634, 62 N. Y. Supp. 1141. H. D. B.

GEORGE ELMER, Appt.,
v.
STATE OF ARIZONA.

Arizona Supreme Court — February 3, 1918.

(— Ariz. —, 178 Pac. 28.)

Evidence — complaint by victim of rape.

1. That a victim of rape made complaint soon after the occurrence may be shown in evidence in a prosecution for the crime, either by the testimony of the victim or by the person to whom the complaint was made.

[*See note on this question beginning on page* 1522.]

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Appeal — erroneous admission of evidence — reversal.

2. If improper and prejudicial evidence upon a vital point has been admitted against one convicted of rape, he is entitled to a reversal of the conviction, although upon the whole record his guilt may be apparent.

Evidence — independent.

3. Testimony of complaint by a victim of rape is not admissible as independent proof of the commission of the crime, but only as corroboration of the victim.

— absence of victim — evidence of complaint.

4. Testimony of complaint by a victim of statutory rape should not be admitted at the trial of accused, where the victim, although available, is not produced as a witness at the trial.

Appeal — admission of erroneous evidence — reversal.

5. That the other evidence in a prosecution for statutory rape is very conclusive against accused does not make nonprejudicial the admission of evidence of complaints by the victim soon after the offense was committed, where she was not produced as a witness at the trial.

— technical error — inadmissible evidence.

6. The erroneous admission of evidence on a vital issue cannot be said to be technical error within the meaning of a constitutional provision, forbidding reversal for technical error where upon the whole record substantial justice has been done.

APPEAL by defendant from a judgment of the Superior Court for Graham County convicting him of rape. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. **F. C. Jacobs** and **Lee N. Stratton**, for appellant:

Evidence of complaint made by the prosecutrix to third persons immediately after the act of intercourse is admissible only in corroboration of direct testimony of the prosecutrix as to such acts by the defendant, and such evidence is never admissible for the purpose of proving the corpus delicti.

Territory v. Kirby, 3 Ariz. 291, 28 Pac. 1134; People v. Mayes, 66 Cal. 597, 56 Am. Rep. 126, 6 Pac. 691; Catlett v. State, — Tex. Crim. Rep. —, 61 S. W. 485; Thompson v. State, 38 Ind. 39; State v. Meyers, 46 Neb. 152, 37 L.R.A. 423, 64 N. W. 697; Mathews v. State, 19 Neb. 337, 27 N. W. 234; Hannon v. State, 70 Wis. 448, 36 N. W. 1; Hornbeck v. State, 35 Ohio St. 277, 35 Am. Rep. 608; Huey v. State, 7 Ga. App. 398, 66 S. E. 1023; Weldon v. State, 32 Ind. 81; People v. Graham, 21 Cal. 261; People v. Lambert, 120 Cal. 170, 52 Cal. 307; 3 Greenl. Ev. § 2131; Roscoe, Crim. Ev. § 23; 2 Bishop, Crim. Proc. 963; 1 Phillips, Ev. 184; People v. Tierney, 67 Cal. 54, 7 Pac. 37; Reddick v. State, 35 Tex. Crim. Rep. 463, 60 Am. St. Rep. 56, 34 S. W. 274.

Evidence of declarations, statements, and admissions of the defendant are not admissible in evidence until after independent proof of the corpus delicti.

People v. Eldridge, 3 Cal. App. 648, 86 Pac. 832; People v. Simonsen, 107 Cal. 345, 40 Pac. 440; People v. Frank, 2 Cal. App. 283, 83 Pac. 578; People v. Vertrees, 169 Cal. 404, 146 Pac. 890; People v. Tapia, 131 Cal. 647, 63 Pac. 1001; People v. Frey, 165 Cal. 140, 131 Pac. 127.

Mr. **Wiley E. Jones**, Attorney General, for the State.

Baker, J., delivered the opinion of the court:

The defendant was informed against, tried, and convicted of the crime of rape, alleged to have been committed upon his own daughter, a young girl under the age of eighteen years. He appeals from the judgment of conviction and the order denying a new trial.

The crime charged is a revolting one to any decent man, and the defendant, if guilty, justly deserved the punishment inflicted upon him; nevertheless, it remains our duty, under the assignments of error, to examine the record and determine if the defendant has been convicted in accordance with the rules of criminal procedure made applicable alike in the trial of one who is guilty as well as one who is innocent. If improper and prejudicial testimony upon a vital point has been admit-

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ted as against the defendant, he is entitled to a reversal of the judgment of conviction, although upon the whole record his guilt may be apparent. In People v. Hulse, 3 Hill, 316, Bronson, J., after citing the admonitory remarks of Lord Hale on the ease with which the accusation of rape may be made, and the difficulty of defense by the party charged, adds: "Cases of this character do not call for any relaxation of the rules of evidence for the purpose of supporting the accusation. . . . There is much greater danger that injustice may be done to the defendant in cases of this kind than . . . in prosecutions of any other character."

Appeal—erroneous admission of evidence—reversal.

It is assigned as error that the trial court permitted several witnesses for the prosecution, including the wife of the defendant, to testify that the young girl, soon after the alleged unlawful occurrence, made complaint of the wrong done her by the defendant. The young girl was not prosecutrix in the case; that is, she did not appear as a witness and testify in the case. It does not appear that she was too young to understand the nature of an oath, or that she was imbecile or otherwise incapacitated as a witness. It does appear, however, that at the time of the trial she was about sixteen years of age, and resided in the county where the case was tried, and that she was available as a witness if the prosecution desired to call her. The rule is well established that the fact that the victim of a rape made complaint soon after the occurrence may be shown in evidence, either by the testimony of the victim or by the person to whom the complaint was made. However, such testimony is not admissible as independent proof of the commission of the crime, but is only to be received in corroboration of the victim or prosecutrix. 22 R. C. L. § 47; 33 Cyc. 1463.

Evidence—complaint by victim of rape.

—independent evidence.

This rule has received the sanction of the court in this jurisdiction: "The evidence of the complaint is not admitted as a part of the res gestæ, nor as evidence of the guilt of the defendant, but merely in corroboration of the prosecuting witness, in the sense that it removes from her testimony a suspicion that might otherwise rest upon it, unless it were shown that she did what would naturally have been done by a chaste woman under like circumstances, viz., made known the fact of the injury done her." Territory v. Kirby, 3 Ariz. 291, 28 Pac. 1134.

But it is obvious that this rule has no application in the present case, for the reason that the young girl was not called and did not testify in the case, and therefore the testimony of complaints made by her should have been excluded as unsatisfactory and incompetent hearsay evidence.

—absence of victim—evidence of complaint.

Mr. Wigmore, in discussing the admissibility of complaints made by the injured female, says: "Since the only object of the evidence [complaint] is to repel the supposed inconsistency between the woman's present testimony and her former silence, it is obvious that, if she has not testified at all, there is no inconsistency to repel, and therefore the evidence is irrelevant." 2 Wigmore, Ev. § 1136, subd. 2.

Greenleaf positively declares that "where she is not a witness in the case, it [complaint] is wholly inadmissible." 3 Greenl. Ev. § 213. "But where the facts and circumstances do not form part of the res gestæ, that is, they are not so intimately connected with the complaint as to spring with the act itself, they can be given in evidence only in corroboration, but even then are not admissible where the injured woman does not testify." 1 Whart. Crim. Ev. p. 520, note.

The adjudicated cases fully sustain these text-writers. People v. Graham, 21 Cal. 268; State v.

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Wheeler, 116 Iowa, 212, 93 Am. St. Rep. 238, 89 N. W. 978; Matthews v. State, 19 Neb. 330, 37 N. W. 234; People v. McGee, 1 Denio, 19.

It is said, however, that, although it was error to permit the witnesses for the prosecution to testify to the complaints made by the young girl, such testimony was not prejudicial, because other evidence in the case established the guilt of the defendant. We cannot agree with this contention. Conceding that the other evidence is very conclusive as establishing the guilt of the defendant, this will not justify a holding that illegal evidence upon the vital issue in the case was not prejudicial to the accused. He was a witness at the trial in his own behalf, and stoutly denied his guilt. The question of fact was one for the jury, and the defendant had the right to have the issue submitted to the jury free from the objectionable and dangerous hearsay testimony.

Appeal—admission of erroneous evidence—reversal.

This is not a case where it can be consistently said that the error in admitting the hearsay testimony was "technical," in the sense of § 22, article 6, of the Constitution, forbidding the reversal of any cause for technical error where, upon the whole record, substantial justice has been done.

—technical error—inadmissible evidence.

Complaint is made in other assignments that the trial court erred in permitting the defendant's wife to become a witness for the prosecution and testify to communications between the husband and wife. Furthermore, that the trial court erred in permitting evidence to be introduced in behalf of the prosecution concerning extrajudicial confessions made by the defendant. In the rulings challenged by these assignments we find no reversible error, but, owing to the final disposition of the case, we do not feel that these assignments require any extended discussion. The one prejudicial error is that several witnesses for the prosecution were permitted to testify to complaints made by the young girl when she was not called as a witness; it not being shown that at the time of the trial she was under any disability as a witness by reason of her youth or on account of imbecility. 33 Cyc. 1468; People v. Figueroa, 134 Cal. 159, 66 Pac. 202.

The judgment is reversed and the cause remanded for a new trial.

Cunningham, Ch. J., and **Henry D. Ross**, J., concur.

ANNOTATION.

Evidence of complaint by victim of rape who is not a witness.

I. Where victim is dead, or, although competent, is not a witness, 1522.
II. Rule where victim is incompetent to testify, 1523.
III. Admissibility as res gestæ, 1525.

The hearsay rule, excluding statements made out of court, and not in the accused's presence, because of the lack of the safeguard of an oath and an opportunity to cross-examine, has been asserted as a ground for the exclusion of complaints, and details of complaints, made by victims of rape. Exceptions to this rule, however, now generally recognized, have grown up, apparently based upon necessity, under which evidence of the victim's complaint has been admitted where she was a witness, not as original or independent evidence, but for the purpose of confirming or corroborating her testimony. A distinction has been made in some jurisdictions between mere complaints and details of the complaint, it being held that the details are admissible in a case in which she is a witness, only after her credibility as to the particulars has been assailed.

I. Where victim is dead, or, although competent, is not a witness.

In harmony with the statement in

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the introduction as to complaints, it will be observed that in the reported case (ELMER v. STATE, ante, 1519) where it did not appear that the victim was incapacitated as a witness, but she did not testify, her complaints were excluded, the court stating that such evidence was admissible, in rape cases, only in corroboration of the victim's testimony.

And the rule excluding the victim's complaint where she was not a witness was also adopted in the following cases, in which she was dead, or a competent witness: Huey v. State (1909) 7 Ga. App. 398, 66 S. E. 1023 (where the victim was dead); People v. Lewis (1911) 252 Ill. 281, 96 N. E. 1005 (where the victim was dead); State v. Wheeler (1902) 116 Iowa, 212, 93 Am. St. Rep. 236, 89 N. W. 978 (dicta); Reg. v. Guttridge (1840) 9 Car. & P. (Eng.) 471.

In People v. Lewis (1911) 252 Ill. 281, 96 N. E. 1005, supra, the court said: "In a prosecution for rape, where the prosecutrix herself testifies, it may be proved by third persons that the prosecutrix made complaint to them, provided such complaint was made without inconsistent or unexplained delay. This constitutes an exception to the general rule that hearsay evidence is inadmissible, and is allowed on the supposition that a woman thus assailed will avail herself of the first opportunity to tell of the wrong which has been done her. The proof of such statements is admissible, however, only upon the theory that it tends to corroborate the testimony of the prosecutrix, given upon the trial. It is not proper to make such proof for the purpose of showing the commission of the offense itself, and this proof cannot be made at all if the prosecutrix is not a witness. . . . As Mrs. Weller died prior to the trial, this testimony became incompetent, and it was error to admit it."

In Messel v. State (1911) 176 Ind. 214, 95 N. E. 565, however, where the victim was dead, it was held competent to prove that she made a complaint, although she was not a witness, the court stating that this was the rule where the victim was dead or incompetent to testify,—citing People v. Figueroa, which is set out in the following subdivision.

There is also a statement in Reg. v. Megson (1846) 9 Car. & P. (Eng.) 421, where the victim was dead, to the effect that her complaint might be admissible; but the actual decision in that case was that the particulars of her complaint, which were sought to be introduced as independent evidence, were inadmissible, the court stating that such evidence, in a case in which the victim was a witness, was admissible only to show her credit, and the accuracy of her recollection.

II. Rule where victim is incompetent to testify.

Apparently because of the possibility of the miscarriage of justice, in some cases where the victim was incapacitated from testifying, the ordinary rules, excluding the victim's complaints except to support or corroborate her testimony, have been dispensed with, and an exception to these rules has been allowed, to the extent of admitting testimony that she made a complaint. Such evidence was held admissible in the following cases:

—People v. Barney (1896) 114 Cal. 554, 47 Pac. 41, where the testimony of the seven-year-old victim was stricken out, and evidence that she made a complaint to her mother shortly after the alleged occurrence was received, the court relying, however, on cases in which the victim was a witness;

—People v. Figueroa (1901) 134 Cal. 159, 66 Pac. 202, where the victim was too young to testify, and complaints made by her shortly after the commission of the offense were received, the court relying on People v. Barney (Cal.) supra;

—People v. Bianchino (1907) 5 Cal. App. 633, 91 Pac. 112, where a complaint made by a victim too young to testify, apparently some weeks after the alleged offense, and when she was found to be inflicted with a venereal disease, was admitted, on the authority of the preceding case;

—Reg. v. Nicholas (1846) 2 Car. & K. (Eng.) 246, where the victim was too young to testify, and the fact that

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she made a complaint to her aunt was admitted.

The court in People v. Figueroa (Cal.) supra, said: "It is now argued by appellant that evidence as to the complaints of an outraged woman is admitted only as corroborating or sustaining her testimony, and that, when she does not appear as a witness, even the fact that she made complaint, however recently after the injury, is not admissible. Many authorities are cited to sustain this position, but on examination they are found to relate, for the most part, to adults who were competent to testify, but were for some reason absent. The few authorities that relate to children incompetent to testify, and other incompetents, seem to go no further than to exclude their declarations as to what occurred, leaving out the question as to whether the fact that complaint was made by them may be shown. We think that the evidence that the child complained to her mother so soon after the injury is admissible, for the same reason that the fact of her crying was admissible. Taken in connection with her extreme youth, and the fact that she doubtless possessed no understanding of the sexual act, the fact of her complaining tended to show that she had been hurt and injured. If she had not been hurt, not understanding the defendant's conduct, she probably would not have made any complaint. The fact of her complaining after the criminal act was accomplished, and after the defendant had fled, is perhaps not admissible as a part of 'the res gestæ of the crime,' as that expression is usually understood and applied, but it may be treated rather as tending to show her physical condition at the time of the utterance of the complaint, just as groans or other evidences of pain and suffering are received in evidence to illustrate the condition, when that condition is the subject of inquiry. Of course, any narrative of the child as to what the defendant did would not be admissible."

And this doctrine was impliedly, at least, approved in Huey v. State, which is set out under the preceding heading.

And in Territory v. Godfrey (1888) 6 **Dak.** 46, 50 N. W. 481, where the victim, who was six years of age, was apparently not a witness, testimony by her mother that the child made an immediate complaint after the assault was held competent. The ground of admission, however, is not indicated.

And in State v. Jerome (1891) 82 **Iowa,** 749, 48 N. W. 722, the complaint of the four-year-old victim, made in the accused's presence, was held admissible, for the reason, if for no other, that it directed attention to the condition of her body.

In Holst v. State (1887) 23 **Tex. App.** 1, 59 Am. Rep. 770, 3 S. W. 757, the victim was too young to testify, although the court, in holding her complaint admissible, but excluding the particulars of the complaint, does not seem to have considered this fact.

Failure to observe the distinction between cases in which it was sought merely to show that a complaint was made, and those in which it was attempted to prove the details and particulars of the complaint, apparently has sometimes led to a misconstruction of certain decisions.

In the following cases, in which the victim was incapacitated from testifying, her statements and declarations as to the details and particulars of the occurrence were held inadmissible: Weldon v. State (1869) 32 **Ind.** 81 (child too young to testify); State v. Meyers (1895) 46 **Neb.** 152, 37 L.R.A. 423, 64 N. W. 697 (victim an imbecile); People v. Quong Kun (1895) 9 **N. Y.** Crim. Rep. 531, 34 N. Y. Supp. 260 (five-year-old child); Hornbeck v. State (1879) 35 **Ohio** St. 277, 35 Am. Rep. 608 (imbecile); State v. Tom (1879) 8 **Or.** 177 (victim not possessed of sufficient intellect to testify); Smith v. State (1874) 41 **Tex.** 352 (child too young to testify); Rex v. South (1903) 39 **Can. L. J.** 639 (child incompetent).

And even in those jurisdictions in which evidence of a complaint has been admitted, where the victim was incompetent to testify, evidence of the details of the complaint have been excluded. People v. Graham (1862) 21 **Cal.** 261; People v. Barney (1896) 114 **Cal.** 554, 47 Pac. 41; People v. Figueroa (1901) 134 **Cal.** 159, 66 Pac. 202;

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Reg. v. Nicholas (1846) 2 Car. & K. (Eng.) 246.

And in People v. McGee (1845) 1 Denio (N. Y.) 19, where evidence of signs and motions made by the victim, who was of weak intellect and could not talk, immediately after the alleged offense, were excluded, where she was incompetent to testify, the court said: "It is insisted, on the part of the people, that when persons are excluded from being witnesses for want of understanding, whether it arises from immaturity or defect of intellect, evidence may be given of their declarations as to the offense charged. It is said (1 Chitty, Crim. Law, Riley's ed. 481; Rex v. Powell (1775) 1 Leach, C. L. (Eng.) 110; Rex v. Brazier (1779) 1 Leach, C. L. (Eng.) 199, 1 East, P. C. 443): 'It was once thought that, when the party immediately injured was an infant of tender years, the parents of the child might be admitted to state the account he had given of the transaction, immediately after it had taken place, and that the infant might be examined, though not sworn (and so is the authority of 2 Hale, P. C. 278, 279, Bull. N. P. 293), but both these ideas are now rejected, and it is fully established that, if the infant is of competent discretion, he may be sworn, however young; and if not, no evidence whatever can be given respecting his assertions.' That being the true rule in case of a person immature in intellect, I cannot see why the reason of the rule does not apply with as much force to exclude all evidence of the declarations, assertions, or signs made, supposed to communicate ideas, by a person who is incompetent to be sworn as a witness, by reason of idiocy or weakness of intellect for any cause, as evidence of the commission of the offense, or to affect the credit of any other witness. I do not understand the objection as going against any evidence of the appearance and condition of the female at the time, but only as against communications made by her to the witness, by which she informed him of particular injuries inflicted upon her, tending to prove forcible sexual connection, or from which it could properly be inferred."

And in Rex v. Brazier (Eng.) supra, where the five-year-old victim was incompetent to testify, her complaints and statements to her mother immediately after coming home were held inadmissible, the court stating that no hearsay evidence could be given of the declarations of a child who was without capacity to be sworn. The case of Rex v. Tucker (1808) MS. is cited in 1 Phillips, Ev. 11, to the same effect.

In State v. Washington (1900) 104 La. 57, 28 So. 904, where the victim, who was only three years old, was incompetent to testify, it was held that the defendant could not have been prejudiced by an answer of "Yes" to a question whether the victim made a complaint, since he was not charged with an offense either by the question or answer.

III. Admissibility as res gestæ.

Declarations admitted as res gestæ constitute original evidence, and are not admitted as corroborative of a witness, but on the theory that they are verbal acts connected with the transaction, and calculated to illustrate its character. Under this theory, therefore, although the victim of rape is not a witness, both her complaints, and the details thereof, are admissible, where the circumstances are such that they constitute a part of the res gestæ.

Thus, in the following cases, the victim's statements were held admissible as a part of the res gestæ, notwithstanding the fact that she was not a witness:

—Kenney v. State (1903) — Tex. Crim. Rep. —, 65 L.R.A. 316, 79 S. W. 817; Croomes v. State (1899) 40 Tex. Crim. Rep. 672, 51 S. W. 924, 53 S. W. 882, where the victims were too young to testify, and their statements, made immediately after the alleged offense, were offered;

—Com. v. Bardino (1911) 20 Pa. Dist. R. 473, where the seven-year-old victim was incompetent to testify, and her statements to her mother within a few minutes after the alleged offense were offered;

—Turner v. State (1913) 66 Fla.

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404, 63 So. 708, where the victim, who was about ten years old, apparently did not testify, and her complaint and statement to her father within an hour or two after the alleged assault was offered;

—Thomas v. State (1905) 47 Tex. Crim. Rep. 534, 84 S. W. 823, where the six-year-old victim's statement, made about twenty minutes after the occurrence, was offered;

—Watkins v. State (1915) 78 Tex. Crim. Rep. 65, 180 S. W. 116, where the victim, who was under fifteen, made a statement an hour or an hour and a half after the offense was committed;

—McMath v. State (1875) 55 Ga. 303, where complaint and statement of the seven-year-old victim to her mother was made upon her return from a trip with the accused.

And in People v. Figueroa (1901) 134 Cal. 159, 66 Pac. 202, the court, in admitting complaints made by a victim too young to testify, shortly after the alleged commission of the offense, relied, in part at least, on the res gestæ theory.

And there is an obiter statement in State v. Washington (1900) 104 La. 57, 28 So. 904, that complaints are admissible where they are a part of the res gestæ, although the victim was not a witness.

And in Snowden v. United States (1893) 2 App. D. C. 89, 9 Am. Crim. Rep. 449, where the five-year-old victim was held competent to testify, but apparently did not do so, her complaint and statements made to her grandmother, with whom she lived, shortly after the assault, and while she was lying on the floor, suffering from her injuries and crying, were admitted as part of the res gestæ. The court stated that in criminal cases, especially rape cases and cases of abuse of female children, the principle of what is called the res gestæ has been, from the necessity of the case, extended beyond the limits that generally obtain in civil cases.

And in Philpot v. Com. (1884) 5 Ky. L. Rep. 862, in an abstract it is stated that the declarations of the victim, made immediately after the commission of the alleged offense, are admissible to prove that it was committed, although she was incompetent to testify, on account of immature age, idiocy, or other mental defect, the decision, apparently, being on the ground that they were a part of the res gestæ.

It was recognized in Simmons v. State (1913) 105 Miss. 48, 61 So. 826, that the outcry or complaint of the victim would be admissible, if a part of the res gestæ, but that, in order to be admitted on this ground, they must have formed part of the transaction, or have been immediate, and statements of the eleven-year-old victim in that case, who was not a witness, made to a physician five and seven days after the offense, were excluded, as clearly not being a part of the res gestæ.

In Smith v. State (1874) 41 Tex. 352, where the victim was too young to testify, and her statements to her parents immediately after the alleged offense, as to the details of the occurrence, were excluded, their admissibility as res gestæ was apparently not considered. J. T. W.

RE PETITION OF AUDITOR GENERAL.

TRIANGLE LAND COMPANY, Appt.,

v.

CITY OF DETROIT et al.

Michigan Supreme Court — September 27, 1918.

(— Mich. —, 170 N. W. 549.)

Tax — delinquent — purchase by city before sale — effect.

1. The purchase by a municipal corporation as a site for a fire house,

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of land upon which taxes are delinquent, does not prevent a sale for the taxes and the acquisition of title to the property by a purchaser at the sale.

[*See note on this question beginning on page* 1535.]

— power of city to remit.

2. A city has no power to cancel a tax for state and county purposes after the property has been sold for the tax and has been bid in by the state, although it has charter authority, if the tax has not been collected, to vacate assessments in whole or in part if it shall appear that they are unjust or based upon property not owned by the person to whom it is assessed.

— notice to redeem — inclusion of illegal claim.

3. That the notice by one who has purchased state tax land to the owner, to redeem the land, includes in the statement of amount due a sum which has been paid the state as a condition of purchase for a tax which was illegally assessed, does not invalidate the notice.

(Brooke and Kuhn, JJ., dissent.)

APPEAL by plaintiff from a decree of the Circuit Court for Wayne County, in Chancery, denying its petition for a writ of assistance to obtain possession of a certain piece of land sold for delinquent taxes. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. **Albert De Camp** and **Frederick E. De Camp** for appellant.

Messrs. **Walter Barlow** and **Harry J. Dingeman**, for appellees:

The public property of the city is used by it for the benefit of the state, and the state cannot lawfully sell such property for taxes.

Graham v. Detroit, 174 Mich. 538, 44 L.R.A.(N.S.) 836, 140 N. W. 949; Lancy v. Boston, 186 Mass. 128, 71 N. E. 302; Warren v. San Francisco, 150 Cal. 167, 88 Pac. 712.

As a municipal corporation, a city is the mere naked trustee of governmental powers, with precisely the same relations to individuals within its boundaries and jurisdiction as are held by the state to the people at large.

37 Cyc. 878; State ex rel. Lakey v. Garton, 32 Ind. 1, 2 Am. Rep. 315.

The city of Detroit is the governmental agent of the state.

28 Cyc. 121, 258; Detroit v. Blackeby, 21 Mich. 84, 4 Am. Rep. 450; Nicholson v. Detroit, 129 Mich. 246, 56 L.R.A. 601, 88 N. W. 695.

The state will not itself impose taxes upon its own public or governmental agencies or instrumentalities, or those of its municipal corporations, or a municipality tax such agencies or instrumentalities of a state.

37 Cyc. 883; Penick v. Foster, 129 Ga. 217, 12 L.R.A.(N.S.) 1159, 58 S. E. 773, 12 Ann. Cas. 346; Com. v. Newport & C. Bridge Co. 32 Ky. L. Rep. 196, 105 S. W. 378.

The property of a municipal corporation which is exempt from taxation is such as is owned and held by it in its capacity as an integral part of the state government, or which is necessary to enable it to administer those powers of local self-government, or to perform those public functions which have been intrusted to its care.

37 Cyc. 876; Owensboro v. Com. 105 Ky. 344, 44 L.R.A. 202, 49 S. W. 320; Com. v. Paducah, 126 Ky. 77, 102 S. W. 882; Erie County v. Erie, 113 Pa. 360; Frankfort v. Com. 29 Ky. L. Rep. 699, 94 S. W. 648.

Plaintiff was chargeable with notice that the premises were owned by the city of Detroit, and that it had erected a large building thereon for the use of its fire department, and therefore they were exempt from taxation and sale for taxes at the time plaintiff so purchased said tax titles on said premises from the state.

37 Cyc. 1525; Mitchell v. Minnequa Town Co. 41 Colo. 367, 92 Pac. 678; State Finance Co. v. Beck, 15 N. D. 374, 109 N. W. 357.

The building erected by defendant for the use of its fire department was not included in the assessment of said lands for taxes for the year 1907, and therefore cannot be sold with said lands for said taxes.

Richards v. Wapello County, 48 Iowa,

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507; 37 Cyc. 1485, 1486; Graham v. Detroit, 174 Mich. 543, 44 L.R.A.(N.S.) 836, 140 N. W. 949; Klotz v. Sloan, 160 Mich. 485, 125 N. W. 359.

The writ of assistance in tax proceedings is only a discretionary writ, and may be either granted or denied in the discretion of the court.

Chiodo v. Williams, 180 Mich. 367, 147 N. W. 492; Flint Land Co. v. Grand Rapids Terminal R. Co. 147 Mich. 627, 111 N. W. 192.

Where the purchaser at a tax sale applies for a writ of assistance or otherwise seeks to gain possession of the premises, the owner may file a petition in such proceeding to vacate the sale.

37 Cyc. 1373; Jenkinson v. Auditor Gen. 104 Mich. 34, 62 N. W. 163.

An illegal demand was made by plaintiff upon the city as a condition upon which redemption of the lands from the tax sales might be had.

37 Cyc. 1402; Closser v. McBride, 182 Mich. 594, 148 N. W. 756; Teal Lake Iron Min. Co. v. Olds, 178 Mich. 335, 144 N. W. 845; Rogers v. Davison, 188 Mich. 522, 154 N. W. 571; John Duncan Land & Min. Co. v. Rusch, 145 Mich. 1, 108 N. W. 494.

Steere, J., delivered the opinion of the court:

Supplemental to a decree of the Wayne county circuit court in chancery, rendered on petition of the auditor general for sale of lands delinquent for taxes in the year 1907, the Triangle Land Company filed this petition in the circuit court of Wayne county under §§ 72 and 137 of the General Tax Law (1 Comp. Laws 1915, §§ 4069 and 4135), for a writ of assistance to obtain possession of a piece of land sold pursuant to such decree, located on South Lafayette boulevard, Detroit, described as lot 3 and the westerly one half of lot 2 in block 55, Woodbridge farm addition, as divided by commissioners in partition in 1864. The petition was denied by the trial court, and appeal taken by plaintiff to this court for review.

The land in question was sold for delinquent taxes of both the years 1907 and 1908. It is conceded that the property was not subject to taxation in 1908, and the deed given by the auditor general on the sale for that year is invalid, as a deed. The facts are undisputed, and have been fully stipulated by counsel Concisely stated, so far as material here, they are as follows: Prior to May 22, 1907, the property in question belonged to Maud Spencer Ledyard and Elizabeth Cass Goddard, to whom it was assessed for taxes in the year 1907, the assessment roll being finally reviewed and confirmed by the common council of the city of Detroit on May 2, 1907. On May 22, 1907, it was purchased by the city of Detroit from the abovenamed owners, who conveyed it to the city by a properly executed warranty deed of that date, which was recorded in the office of the register of deeds of Wayne county on July 20, 1908. The city took possession immediately following the purchase, and by its board of fire commissioners erected a building upon the premises during that year at a cost of about $20,000, for the accommodation of ladder company No 12 of its fire department, and has since continued to occupy and use the property for that purpose.

The state and county taxes of the year 1907 assessed against said land remained unpaid and were returned delinquent by the county treasurer of Wayne county to the auditor general of the state, in the regular course of proceedings under the tax law. In manner and time prescribed by statute, steps were taken by the auditor general to foreclose the lien of the state for delinquent taxes of 1907 and said land was included in his petition filed in the chancery court of Wayne county for decree of foreclosure and sale of lands delinquent for taxes for that year. Pursuant to a decree rendered upon such petition the delinquent lands of 1907 were sold at the annual tax sale of May, 1910, and this property was bid in by the state. Lot 3 was thereafter purchased from the state by Lillie B. De Camp and the west half of lot 2 by the Triangle Land Company, appellant herein. Tax

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deeds were subsequently issued by the auditor general to each of them for the description purchased. The statutory notice of tax purchase and conditional right of owner to reconveyance was served by plaintiff on the city of Detroit, as the last owner in the recorded chain of title and occupant of the land, on January 16, 1912, and return of personal service by the sheriff was duly filed with the clerk of Wayne county. Lillie B. De Camp had served such notice of her tax purchase on November 7, 1911, followed by filing the sheriff's return of personal service.

The common council of the city of Detroit at its session held on the 9th day of August, A. D. 1910, passed a resolution purporting to cancel the taxes assessed on said premises for the years 1907 and 1908. The taxes were never repaid out of the contingent fund, no deposit was ever made by the city of Detroit with the register in chancery of Wayne county, or tender made to the owners of the tax deeds, nor attempt made in any manner to redeem and secure reconveyance. Over six months after filing with the county clerk proof of service of her notice upon said city, Lillie B. De Camp deeded lot 3 to plaintiff. Over six months after both of these notices had been served upon the city and filed with the county clerk, and after lot 3 had been deeded to it by Lillie B. De Camp, plaintiff made proper demand for possession of said premises, which was refused, and notice was then given that if such demand was not complied with proceedings would subsequently be commenced to obtain possession. In time thereafter to protect its rights against the applicable five-year Statute of Limitations plaintiff filed this petition.

It cannot be seriously questioned that upon their face all steps taken by the auditor general to foreclose the state's lien, if any existed, and by plaintiff to perfect its tax title by notice, etc., are in compliance with requirements of applicable provisions of the General Tax Law. Chapter 83, 1 Comp. Laws 1915, beginning on page 1500. Defendant's position is that the land was not subject to taxation, that the state had no lien thereon for delinquent taxes to enforce, and all proceedings to that end were idle, and of no validity.

The trial court was of opinion that upon this petition and answer it was proper to and the court should "open for reconsideration and adjustment" the original decree rendered on petition of the auditor general, directing sale of lands for the state and county general taxes for the year 1907, and, being "satisfied that the decree would have been denied," as to the land in question, had the court been advised of the facts as shown in this proceeding, the court accordingly "adjudged and decreed that the original decree heretofore filed and entered herein on April 23, 1910, in so far as it relates to the order to sell the particular property in question herein, is annulled, set aside, and held for naught; . . . that a sale of said lands for state and county taxes assessed thereon for the year 1907 be and the same hereby is denied," etc., concluding by declaring plaintiff's tax deeds void and its petition dismissed. Whatever may be said of the method by which the result was reached, plaintiff's petition can be said to have been denied on the indicated ground that the land was not subject to taxation for 1907 because owned by a municipality and devoted to a public purpose during a portion of that year, which is the ground urged by defendant here, and was open to consideration there on plaintiff's petition and defendant's answer.

It is plaintiff's contention that this question is foreclosed in its favor by the rule stated in Public Schools v. O'Connor, 143 Mich. 35, 108 N. W. 426, which has been accepted as the settled law upon that proposition, and since followed by

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assessing officers and state departments in assessments and cancelation of taxes. In that case the school board of Iron Mountain filed its petition against the tax title owner and auditor general of the state to set aside a sale of land delinquent for taxes for the year 1901, which it had purchased for school purposes on July 1st of that year, and claimed was exempt from taxation, alleging that it had no knowledge of the levy of the tax or sale of the land for taxes until shortly before filing its petition. The land was assessable when the supervisor listed it upon his assessment roll in April, and when the board of review passed upon and approved the roll in May, 1901. The petition was denied because, the land having become liable, the taxes of that year so remained, although subsequently acquired for a purpose rendering it exempt, the court saying in part: "There must be some definite period when the purchaser, whose property is generally exempt, must purchase it subject to the tax levied or to be levied thereon. It seems reasonable to hold that that time is when, by law, there is no power to correct the roll by adding property to or taking any from it."

Of this it is urged by counsel for defendant that the common council of Detroit, under special provision of its city charter, does have power to correct the roll and vacate any assessment or tax levy on property located within the city whenever it appears the same is unjust or illegal, which it did in this case by its resolution of August 9, 1910, canceling the taxes assessed on said premises for the years 1907 and 1908, acting under authority of consecutive § 199 of the Detroit city charter of 1914–16, p. 134 (§ 63 of chapter 7), which provides: "The said common council shall also have power, when it shall appear that any tax or assessment is unjust, or is based upon any property not owned by the person to whom it is assessed, by a two-thirds vote of all the members elect, to repay the same out of the contingent fund, if collected, or, if not collected, to vacate the assessment in whole or in part, in the manner and with like effect as is provided for in cases of illegal taxes and assessments in this chapter."

This chapter (No. 7 of the charter) provides how the common council shall be constituted, and defines its powers and duties relative to municipal affairs, including various local improvements to be paid for by taxation, which the council is authorized to provide by specified proceedings. Following a section devoted to construction of sidewalks and manner of levying and collecting taxes to defray the necessary cost of the same, § 58 of the chapter authorizes the common council to "provide and ordain by ordinance, that whenever it shall appear that any taxes or assessments have been illegally assessed or collected, the common council may, by a vote of two thirds of all members elected, direct and cause the amount so collected to be refunded out of the contingent fund, or, in case it has not been collected, to vacate the assessment, and fix upon an amount, to be received in full of such tax or assessment, and no such action on the part of the council, under such ordinance, shall in any way affect or invalidate any other tax or assessment assessed, levied or collected in said city."

Whether it appeared to the council that those taxes were unjust, or, when assessed, were based upon property not owned by the person to whom it was assessed, over three years before this resolution was adopted, is not disclosed; but they are shown to have been spread on an assessment roll passed upon and approved by the common council acting as a board of review, and, in the regular course of proceedings which the city itself had initiated, this land was returned delinquent for taxes, had been regularly advertised, offered at the annual tax sale, and bid in by the state

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for such delinquent taxes at the time this resolution was passed. The state purchased the land and held it in like manner as an individual. A state tax bid, transferred to a private purchaser, is in his hands in all respects like a title bid off by himself originally. 1 Comp. Laws 1915, § 4082; People ex rel. Auditor Gen. v. Monroe County, 36 Mich. 70; Haney v. Miller, 154 Mich. 337, 117 N. W. 71, 745. In any aspect of the question the delinquent tax had passed into the hands of the state authorities, the common council had no further control over these tax proceedings at that time, and the resolution purporting to cancel those state and county taxes was of no validity.

Tax—power of city to remit.

It is further claimed that plaintiff's tax deeds are void under the ruling of this court in Graham v. Detroit, 174 Mich. 538, 44 L.R.A. (N.S.) 836, 140 N. W. 949, because they cover lands which had been acquired by the municipality, and were in use for a public purpose before they had been purchased for delinquent taxes from the state. The Graham Case was an action in ejectment against the city for a portion of a public street, the easements for which had been acquired for highway purposes by condemnation proceedings. Defendant had given notice under its plea of the general issue that it did not own or claim to own the lands in question, and asserted they were in use as part of a highway for public travel under an easement acquired for that purpose, and the right of the public to so use them could not be determined in ejectment. It was held that the municipality neither owned the easements nor held the property in exclusive possession, the court saying: "The easement in the lands in question for the purposes of public travel belonged to the state at the time it purchased such lands at the tax sales. A municipality in its control of these highways acts for the state, and has no right to the possession or use of these easements other than the public generally. It takes the burden of maintaining such easements fit for public travel. Lynch v. Rutland, 66 Vt. 573, 29 Atl. 1015. These easements belong to the state, and were in use as public highways at the time they were bid in to the state for delinquent taxes."

And it was held the auditor general could not issue deeds in the name of the state for lands in which the state had then acquired easements for public use as a part of its highways devoted to public travel.

The obstacle to applying that rule in the instant case is that the state had no right, title, easement, or interest in, or control over these lands. The city had bought them from private owners for municipal purposes, and was not acting for the state in its exclusive possession and control of the property for a municipal purpose. To hold that the city was acting as an agent of the state in the ownership and control of property devoted exclusively to one of its local municipal activities would be to overturn the doctrine for which cities have strenuously and successfully contended, under the ægis of home rule and right of local self-government, since early in the history of the state. Education, and highways for the use of the people of the state at large, are held to be matter of general state concern and control, while the fire departments and other purely local functions of municipalities are not. The distinction is pointed out and the rule well settled in Detroit v. Corey, 9 Mich. 165, 80 Am. Dec. 78; People ex rel. Le Roy v. Hurlbut, 24 Mich. 44, 9 Am. Rep. 103; People ex rel. Park Comrs. v. Detroit, 28 Mich. 228, 15 Am. Rep. 202; Milwaukee v. Milwaukee, 12 Wis. 94; Davidson v. Hine, 151 Mich. 294, 15 L.R.A. (N.S.) 575, 123 Am. St. Rep. 267, 115 N. W. 246, 14 Ann. Cas. 352; Simpson v. Paddock, 195 Mich. 581,

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161 N. W. 898, and cases there cited.

So far as the city's rights under the sale of these lands for delinquent state and county taxes is concerned, there is no legal distinction in this controversy between defendant and any other negligent owner. The published notice of the auditor general's petition, order of hearing, etc., were, under the law, equivalent to a personal service upon it of notice of all proceedings in and by order of the chancery court, leading up to and including the public sale of these lands at the annual tax sale for that year. The abortive attempt of the common council to wipe out those state and county delinquent taxes, which were beyond its control, but indicates it had actual notice as early as August 9, 1910. The lands could then have been redeemed and the whole matter adjusted by simply paying the tax of 1907 to the county treasurer, and applying to the auditor general for cancelation of that of 1908. In the prescribed course of proceedings, when taxes are returned delinquent, as done by the county treasurer in this case, the property is sold to satisfy the taxes, and deeds therefor given. The matter was again called to the attention of the city by personal notice of the outstanding tax titles and of its right to redeem and obtain reconveyance on payment of the taxes and prescribed penalty within six months, as the law provides. This added provision in the law for collecting the revenue of the state was passed for the benefit of the defaulting taxpayer. Following all prior demands, opportunities, and legal proceedings to induce payment, it again offers him relief "by giving him a last chance to save his land, it apparently being thought that, by requiring notice and giving an opportunity to repurchase, there would be little excuse for an owner losing his land through inatten-

—delinquent—purchase by city before sale—effect.

tion." Haney v. Miller, 154 Mich. 338, 117 N. W. 71, 745. The provisions of the Tax Law as to the rights and duties of the respective parties in interest after a valid tax sale have been fully discussed and construed in the following cases, and others to which they refer: Ball v. Ridge Copper Co. 118 Mich. 7, 76 N. W. 130; Gustin v. Fitzpatrick, 182 Mich. 640, 148 N. W. 742; Huron Land Co. v. Lobdell-Churchill Mfg. Co. 183 Mich. 45, 148 N. W. 753; Rousseau v. Riihiniemi, 186 Mich. 653, 153 N. W. 23; and Haney v. Miller, supra.

No steps were taken by the city to secure a determination of any legal questions which personal service of notice to redeem from a tax deed, from the auditor general, upon its property, suggested, no offer or tender of payment was made, and the notices were ignored during the time for reconveyance, and until this petition was filed. The contention that this neglect puts defendant in a more advantageous position than the fee owner in the Iron Mountain Case, because there the question of loss of public property was not involved, is not tenable. It was involved, and such loss inevitable, had that municipality treated the notice as in the instant case; otherwise the decision is a nullity, and it was folly for Iron Mountain to act in the matter, either by litigation or redemption, when, by its doing nothing until the expiration of the six-month notice to redeem had expired, the tax deed would automatically become a nullity and the tax lien, to collect which the land was sold by the state, liquidated.

In a supplemental brief, filed after this case was submitted, counsel raises the point that the notice to redeem served upon it was invalid because it included the amount paid the auditor general for the taxes of 1908, which were concededly illegal, reference being made to the notice to redeem, which is among the exhibits in the case. The

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notice contains, separately stated, the amount for each year, showing plainly the description of the land upon which it was paid.

As to this proposition, it is expressly stipulated in the record that "notice of its (petitioner's) tax title, in conformance with the provisions of Act No. 229 of the Public Acts of 1897 and acts amendatory," was served on defendant by the sheriff of Wayne county, and his return duly filed with the county clerk. No question was raised as to its sufficiency in defendant's pleadings before the trial court, so far as shown, nor in the former briefs or oral argument in this court. Apparently in reliance upon the stipulation, it is not discussed in plaintiff's brief. But, even conceding that there was no waiver of the question, and the stipulation is a "scrap of paper," we are not impressed that this belated objection is tenable. This is a purchase from the auditor general of state tax land for delinquent taxes of previous years, made under § 84 of the Tax Laws (1 Comp. Laws, 1915, § 4082), and it is not questioned that the notice states truly the exact amount the purchaser was required to pay the auditor general as a condition of the purchase, specifying clearly years, amounts, and descriptions. By § 141 of the Tax Laws (1 Comp. Laws 1915, § 4139) the fee owner desiring to redeem shall have a right to do so "by paying to the purchaser, or his grantee, or to the register in chancery of the county in which the lands lie, on certificate of the auditor general or his deputy, all sums paid as a condition of such purchase," together with the statutory additions thereto imposed as a condition for reconveyance. The notice given in this case fully advises what amount is required to redeem in accordance with the provision of the statute. The requirements of those decisions cited by counsel, holding that the notice must specify the exact amounts paid by the purchaser of the tax title, with years, descriptions, and amounts for each year on each description, and that a demand for any excess invalidates the notice, have not been violated. This subject has been somewhat discussed in Cheever v. Flint Land Co. 134 Mich. 604, 96 N. W. 933, where it is held that a purchaser of state tax lands, under § 84, is compelled to pay as a condition of purchase a claim held by the state under a sale which, at the time of purchase, was subject to redemption. In Haney v. Miller, supra, it was claimed that the taxes assessed for a certain year were illegal, unlawfully returned and sold, and the auditor general was therefore not authorized to require their payment as a condition of purchase; that if the defendant saw fit to comply with such unlawful requirement and paid them, he did so at his peril, and must remit the sum so paid by him, to be eliminated in the computation of the amount he was entitled to receive under the statute. Holding that this claim was not well founded, the court, in construing § 84 with related provisions of the Tax Law, said in part: "It seems obvious that the legislature intended to sell these state tax lands only upon condition that its pre-existing claim for taxes against the land sold, regular or irregular, valid or invalid, could be closed out at par."

From the foregoing we are constrained to conclude that plaintiff has shown a compliance with requirements of the Tax Law, establishing legal rights which it is entitled to maintain by this proceeding, as the statute authorizes. The rights of these parties are purely statutory, and, as said in Rousseau v. Riihiniemi, supra, "can be neither enlarged nor limited by the court."

—notice to redeem—inclusion of illegal claim.

The decree of the trial court is therefore reversed, with costs, and the case remanded for such further

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proceedings as may be in harmony with this opinion.

Ostrander, Ch. J., and **Bird**, **Moore**, and **Stone**, JJ., concur with **Steere**, J.

Fellows, J.:

I agree with the result reached by Justice Steere. I do not think the question of the sufficiency of the notice is before us. South Arm Lumber Co. v. Silverthorne, 138 Mich. 465, 101 N. W. 1132; Lake Erie Land Co. v. Chilinski, 197 Mich. 214, 163 N. W. 929.

Brooke, J., dissenting:

I find myself unable to agree with the conclusion reached by my Brother Steere in this case. The contention is made broadly on behalf of the defendant that the tax deeds were illegally issued by the auditor general of the state for the reason that the city of Detroit, the owner of the premises described in the deeds, is a municipality of the state and therefore a state agency. For this reason the auditor general is without authority to sell the property of the city, devoted by it to municipal purposes, for taxes due the state. The principle involved is stated in 37 Cyc. 878, as follows: "The necessary independence of the Federal and state governments imposes a limitation upon the taxing power of each. Neither can so exercise its own power of taxation as to curtail the rightful powers of the other, or interfere with the free discharge of its constitutional functions, or obstruct, embarrass, or nullify its legitimate operations, or destroy the means or agencies employed by it in the exercise of those powers and functions"—citing cases in note 42.

Further (37 Cyc. 883): "Nor, as in the case of public property generally, will the state itself impose taxes upon its own public or governmental agencies or instrumentalities, or those of its municipal corporations, or a municipality tax such agencies or instrumentalities of a state."

Again (37 Cyc. 876): "The property of a municipal corporation which is thus exempt from taxation is such as is owned and held by it in its capacity as an integral part of the state government, or which is necessary to enable it to administer those powers of local self-government, or to perform those public functions, which have been intrusted to its care. This will include property held and used for city halls, courthouses, jails, public schools, and the like, and engine houses and other property used by the fire department, public ferries, wharves or bridges, public markets, public parks, poorhouses, pauper cemeteries and other property devoted exclusively to public charities, public dispensaries, and generally all such property as is used solely for legitimate municipal purposes." Cases cited in note 20.

My brother holds that the case of Public Schools v. O'Connor, 143 Mich. 35, 108 N. W. 426, controls the case at bar. I am of the contrary opinion. This court has consistently held that education is not a matter of local concern, but belongs to the state at large. Board of Education v. Detroit, 30 Mich. 505; Atty. Gen. ex rel. McRae v. Thompson, 168 Mich. 511, 134 N. W. 722; Collins v. Detroit, 195 Mich. 330, 161 N. W. 905. An examination of the briefs and records in that case will show that the question of the power of the state to sell the property of one of its municipal agencies for taxes was not presented to this court. In that case the question of the loss of the public school property of the city of Iron Mountain to the school district was not involved. It appears that the case was argued and submitted in this court on February 8, 1906, and was decided on February 13, 1906. Proof of service of the notice to redeem the school property from the tax sale was filed on August 17, 1905, and the redemption period expired six months later, on February 17, 1906. The brief of counsel for the public schools called the

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attention of the court to necessity of a decision before February 17, 1906, the date of the expiration of the time in which the school property might be redeemed from the tax sale. Four days of the redemption period remained after the case was decided by this court. There was therefore before the court no question of the forfeiture of public property involved.

In the stipulation of facts counsel for defendant agree that the redemption notice served on the defendant city was served in conformance with the provisions of the statute, but as a part of the stipulation the notice of redemption is referred to as an exhibit, and it seems to me in a case of this kind it should be open to scrutiny. That notice demands from the defendant payment of the taxes for the year 1908 as well as for the year 1907. The city of Detroit became the owner of the property on May 22, 1907, and it was thereafter exempt from all taxation. 1 Comp. Laws 1915, § 4001, subd. 3. The statute requires the redemption notice to contain a description of the property sold for taxes, and the amount paid therefor by the purchaser, as well as the year in which the taxes were assessed against the property. 1 Comp. Laws 1915, § 4138. In my opinion, by including in the redemption notice taxes for the year 1908, when the property was clearly nontaxable, the plaintiff made an illegal exaction against the defendant city. This court has consistently held that the redemption notice be required to inform the owner of the premises of the amount he will be required to pay in order to effect redemption; that it be clear and explicit, and disclose the exact amount legally due to the tax title purchaser, otherwise the notice is held to be invalid. John Duncan Land & Min. Co. v. Rusch, 145 Mich. 1, 108 N. W. 494; Teal Lake Iron Min. Co. v. Olds, 178 Mich. 335, 144 N. W. 845; Closser v. McBride, 182 Mich. 594, 148 N. W. 756. While this defect in the notice of redemption is, under the authorities, fatal to plaintiff's contention, if open to review under the stipulation, and I hold it to be so reviewable, the broader and more important question involved is the power of the state to sell for taxes due it, property used for municipal purposes by one of its own municipal agencies. This should not be, and I think, under the authorities cited, may not be permitted.

The decree should be affirmed.

Kuhn, J., concurs with **Brooke, J.**

Petition for rehearing denied.

ANNOTATION.

Validity of tax sale of land acquired by public corporation after levy and before sale.

Generally, it may be said that questions involving the sale of land for taxes may arise as to private individuals, as to corporations or individuals whose property has been exempt from taxes, and as to public corporations whose property is not subject to taxation.

As to private individuals whose property is subject to taxes, there is no question as to such property being subject to whatever penalty may be imposed for delinquency in the payment of taxes. As to corporations or individuals whose property is exempt from taxation, the exemption is a privilege which may be asserted, and, if not effectually raised and asserted before the tax is finally fixed, the exemption does not avail, and the failure to allow the exemption does not affect the regularity of the tax proceedings. As to public corporations, however, whose property is not subject to taxation, a more serious question is presented as to the validity of the pro-

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ceedings for the purpose of taxing or enforcing a tax upon such property. In such case the question is raised as to whether or not the tax proceedings are not arrested and without force and effect from the time title vests in the corporation.

A well-considered case on this point and one very similar to the reported case (TRIANGLE LAND CO. v. DETROIT, ante, 1526), and which reaches a conclusion to the contrary, is Gachet v. New Orleans (1900) 52 La. Ann. 813, 27 So. 348. In this case the city acquired property and took the same, subject to the state taxes for a designated year. These taxes had been assessed, but were not due and exigible at the time title was acquired by the city, nor did such taxes become delinquent until after this time. In holding that the subsequent sale of the property for these taxes, and the acquirement of the title by a third person, did not affect the title of the city, the court said: "The moment public ownership of the lot attached, the moment it passed from the hands of . . . to the city, developing liability to taxation was arrested, and in point of fact and law the state taxes for 1885 on the lot, under the assessment made in the name of the . . . vendor, never reached the point of maturity. The tax never became due, nor delinquent, and the lot could not be sold for taxes until delinquency had ensued. It follows that the tax collector was without authority to proceed as he did in the attempt to enforce payment of taxes claimed to be due the state for 1885, and that his action in the premises was void. Neither the adjudication made of it by him to the state, nor his later transfer of the state's title to . . . can be adjudged to have had any effect; . . . acquired no title and could convey none to the plaintiff herein. 'The tax law of a state,' says Desty, in his work on Taxation, vol. 1, p. 48, 'applies to persons only, and not at all to political bodies like municipal corporations, which exercise in different degrees the sovereignty of the state.' Hence it is that, when property upon which state taxes are assessed is acquired by a political subdivision of the state, like the city of New Orleans, to which certain powers of sovereignty and government have been delegated by the state, which property is acquired for purposes of public utility coming within the scope of the powers so delegated, and is immediately dedicated or applied to such purposes of public utility, the taxes so assessed in favor of the state upon the same cease to be exigible. It pertains to the public policy of the state not to exact taxation on property so held and used. Within the scope of the powers delegated to it the city stands for the state, and property acquired by the city in the due execution of its mandate from the state stands in consimili casu with property owned by the state itself, and taxes assessed in favor of the state upon such property must be held abated. It is a commingling of the qualities of debtor and creditor in such way that there arises a confusion of right, extinguishing the obligation."

This distinction is also clearly made in Foster v. Duluth (1913) 120 Minn. 484, 48 L.R.A.(N.S.) 707, 140 N. W. 129, in holding that property of the city could not be sold for taxes which were a lien upon the land at the time the city acquired it. The court said: "After its purchase by the city in July, 1905, the property was devoted to public uses, and became public property. It was not thereafter subject to taxation. This is conceded by plaintiff. It is technically inaccurate to say that it was exempt from taxation, for the term 'exemption' rather presupposes a liability removed by some constitutional or statutory provision. The property is 'exempt,' not because of any such provision declaring it exempt, but because of its character as public property devoted to a public use. The property of the state and of its political subdivisions, arms, or agencies, such as cities within its borders, when used exclusively for public purposes, is not subject to taxation, in the absence of constitutional or statutory provisions making public property subject to the tax laws of the state. This is the undisputed rule; but it is

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no better established than is the proposition that proceedings for the assessment of taxes against public property, or for their collection by judgment and sale, are absolutely void. This is not only because the property was exempt from taxation, but because it was public property. A reason for the rule is that a sale of the property to enforce collection of taxes assessed against it would destroy its character as public property, to the public injury. The distinction is clear between property exempted from taxation by constitutional or statutory provisions when such property would be subject to taxation in the absence of such provisions, as, for example, church property, institutions of public charity, or the property of corporations which pay a gross earnings tax, and public property used exclusively for public purposes, which would not be subject to taxation, though the Constitution had not so provided. In the one case, the property exempted is private property, which, for good reason, it is deemed wise or just to relieve from the burden of taxes that it would otherwise be obliged to sustain; in the other case, the property is owned by the state, or by its agencies, is devoted to a public use, and is not subject to taxation for reasons that are different in character, among which may be suggested the fact that the taxation of public property owned by the state or its municipal divisions would mean that the state would be taxing itself in order to raise money to pay over to itself, and the reason, before suggested, that the collection of such taxes might result in destroying the public character of the property."

To the same effect is State v. Snohomish County (1912) 71 Wash. 320, 128 Pac. 667, holding that, where taxes are, by statute, made a lien on land against which the same are assessed from and including the 1st day of March, such tax lien is not enforceable as to lands acquired by the state in August of the same year, and that hence tax certificates issued against said land are null and void. The court, after stating the general rule hereafter referred to that the general tax laws of the state are presumed to operate upon private and not upon public property, said: "It seems equally plain that the creation of a valid tax implies the existence of a susceptible subject of taxation at every stage of the process of such creation. Since, on general principles of public policy and by both constitutional declaration and statutory enactment, lands while held in public ownership are exempt from taxation, the land here in question was not, during any step in the proceedings creating the tax after August 9, 1907, when it passed to the state, a susceptible subject of taxation. It follows that at that time the developing process of imposing the tax as a valid creation was arrested."

Another well-reasoned case on this point is Smith v. Santa Monica (1912) 162 Cal. 221, 121 Pac. 920, which holds that, where a city acquires title to land after the land has been sold to the state in foreclosure of a lien for taxes, the state cannot enforce a collection of the tax by a sale of the land to a private individual, and such a sale is invalid. The court said: "The state does not tax the property of a municipality for state and county purposes, because this would be a taxation of its own property. For the same reason, when the property has come into the ownership of a municipal corporation, it will not attempt to enforce the tax by the sale of the property. The absurdity of its so doing would be apparent in the case where a county had acquired such property under the circumstances here present, and the state should sell it. To do what? To retain a portion of the tax in its own treasury and to pay to the county a portion of the money derived from the sale of the county's own land. It may safely be said that when a municipal corporation acquires property under such circumstances, the title which the state takes by the tax collector's deed is merged into the larger title which the municipality holds under the trusts, both for the public as distinguished from the state, and also for the state as the supreme sovereign."

It has been held that the sale by a

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state through her officers, of land for delinquent taxes, which partly accrued after she became the owner of the land, is invalid. Reid v. State (1881) 74 Ind. 252.

Under a statute providing that all lands exempted from taxation, including lands of any school district, shall not be affected by any sale made for taxes, etc., the sale of land acquired by a school district by condemnation is invalid, although the land was assessed and the tax for which it was sold was levied before title had been acquired by the district. Independent School Dist. v. Hewitt (1898) 105 Iowa, 663, 75 N. W. 497.

In Bannon v. Burnes (1889) 39 Fed. 892, involving an action of ejectment for land sold for taxes after title had been acquired by the Federal government for a postoffice and other purposes, it was held that the tax proceedings and the deed based thereon were null and void.

In Lancy v. Boston (1904) 186 Mass. 128, 71 N. E. 302, it is held that a sale of land for taxes assessed before the filing of a copy of a decree condemning the land for highway purposes is invalid, and in so holding the court remarked that the various provisions as to taxation of real estate and the collection of taxes are inapplicable to property held for such a public use.

In Gasaway v. Seattle (1909) 52 Wash. 444, 21 L.R.A.(N.S.) 68, 100 Pac. 991, it is held that, where a city acquired land by condemnation, the county could not sell the land for taxes levied against it at the time title vested in the city. In this regard, however, the court apparently distinguishes between property acquired by purchase and that acquired by eminent domain proceedings. The rule is asserted that, "the city having taken the full title, the county had nothing to sell under its foreclosure proceedings. Its right was limited to the sale of the interest of the owner. At that time he had no interest. No one can obtain an interest in the land sold that the defendant in a tax suit never held or owned." The court distinguishes Puyallup v. Lakin (1907) 45 Wash. 368, 88 Pac. 578, which holds that personal property acquired by a city by purchase was levied upon for a tax which had been assessed before the city acquired its title. The ground of distinction made by the court was that in Gasaway v. Seattle the land was acquired by eminent domain proceedings, while in Puyallup v. Lakin the property was acquired by contract. The more tenable distinction, however, is that the latter case involved an action by the municipality to set aside the assessment. In this regard it is to be noted that the cases which hold that the land of a municipality cannot be sold for taxes which had been assessed against it at the time the municipality acquired the property are not authority for the holding that such taxes are not a valid claim against the municipality, which may be enforced in the same manner as any other claim against public corporations. See State v. Snohomish County (Wash.) supra.

This point is made in United States v. Pierce County (1912) 193 Fed. 529, which holds that, after the title to land had vested in the Federal government, further proceedings to enforce a tax standing against the property at the time title vested in the government cannot be taken under the tax laws of the state. The court said that "the determinative question in the present controversy, therefore, is whether the taxes in question were imposed before or after the acquisition of the property by the United States. If they were imposed before, they would continue to constitute a valid lien on the premises, though even in such case the acquisition of the property by the general government would withdraw it from the jurisdiction of all state officers, and resort for the enforcement of any lien thereon would have to be had to the tribunals of the United States. A subsequent tax sale by state officers, even for a valid tax, would be void."

But in Public Schools v. O'Connor (1906) 143 Mich. 35, 108 N. W. 426, it is held that, where land was acquired by a school district after it had been assessed and the board of review had passed upon and approved of the

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assessment, the fact that the title thereafter vested in the school district did not render invalid the subsequent proceedings for the collection of the tax, including the sale of the property. It is pointed out in the dissenting opinion to the reported case (TRIANGLE LAND CO. v. DETROIT, ante, 1526) that the applicability of the tax laws to property owned by a school district was not questioned in Public Schools v. O'Connor, and hence the assumption in that case of the power to sell the property of a school district for taxes was not binding on the court as a precedent. A. G. S.

EX PARTE EMMA HARDCASTLE.

Texas Court of Criminal Appeals — January 22, 1919.

(— Tex. Crim. Rep. —, 208 S. W. 531.)

Habeas corpus — arrest of one suspected of having contagious disease.

1. Habeas corpus lies to inquire into the legality of the detention of one who has been arrested on warrant of a health officer without a hearing, as being suspected of being afflicted with a contagious disease.

[*See note on this question beginning on page* 1542.]

Constitutional law — quarantine — arrest and detention of suspects.

2. The legislature under the police power has authority to authorize the establishment of quarantine regulations for the protection of the public against contagion from those persons whose condition is such as to spread disease, and, incident thereto, to authorize the arrest and detention of such person.

Arrest — right to hearing.

3. The law denies to no one restrained of his liberty without a hearing the right to prove in some tribunal that the facts justifying his restraint do not exist.

Health — detention of one afflicted with contagious disease.

4. Where a health officer has statutory authority to arrest one afflicted with a contagious disease and detain him to prevent contagion, his jurisdiction depends upon the existence of those facts, and power of detention ceases if the facts do not exist.

APPLICATION for a writ of habeas corpus to inquire into the legality of relator's detention by the chief of police under order of the city health officer, because suspected of a contagious disease. *Writ granted.*

The facts are stated in the opinion of the court.

Messrs. F. N. Cowen and Leonard Brown for relator.

Messrs. B. F. Looney, Attorney General, E. B. Hendrix, W. A. Keeling, C. M. Cureton, Assistant Attorneys General, D. A. McAskill, and George M. Thurmond, for the State:

Among all the objects sought to be secured by governmental laws, none is more important than the preservation of the public health; and an imperative obligation rests upon the state, through its proper instrumentalities or agencies, to take all necessary steps to promote this object. This duty finds ample support in the police power which is inherent in the state, and which it cannot surrender.

Blue v. Beach, 155 Ind. 121, 50 L.R.A. 64, 80 Am. St. Rep. 195, 56 N. E. 89; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; 12 R. C. L. 1264, 1265, and notes.

For the protection of the health of the community, the most extensive powers may be conferred on local health officers, whether state or local.

12 R. C. L. 1268; State ex rel. Freeman v. Zimmerman, 86 Minn. 353, 58 L.R.A. 78, 91 Am. St. Rep. 351, 90 N. W. 783; Aaron v. Broiles, 64 Tex. 316, 53 Am. Rep. 764; Blue v. Beach, 155 Ind. 121, 50 L.R.A. 64, 80 Am. St. Rep. 195, 56 N. E. 89; Board of Health v. Kollman, 156 Ky. 351, 49 L.R.A. (N.S.) 354, 160 S. W. 1052.

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All rules or regulations reasonably calculated to preserve health are valid, and may be established by health authorities.

12 R. C. L. 1276, note 5.

The power of the legislature to prevent the introduction and spread of infectious and contagious diseases cannot be questioned, and, accordingly, health authorities are usually empowered to take such action as may be considered expedient to prevent the outbreak of epidemic and communicable diseases.

12 R. C. L. 1285 et seq.; Blue v. Beach, 155 Ind. 121, 50 L.R.A. 64, 80 Am. St. Rep. 195, 56 N. E. 89; Zucht v. San Antonio School Bd. — Tex. Civ. App. —, 170 S. W. 840; McSween v. Ft. Worth, 60 Tex. Civ. App. 270, 129 S. W. 206.

The power to make quarantine regulations is one of the most important conferred upon health authorities, and such regulations constitute a proper exercise of police power.

12 R. C. L. 1289, 1290, notes 9–11; Wilson v. Alabama G. S. R. Co. 77 Miss. 714, 52 L.R.A. 357, 78 Am. St. Rep. 543, 28 So. 567; State v. Racskowski, 86 Conn. 677, 45 L.R.A.(N.S.) 580, 86 Atl. 606, Ann. Cas. 1914B, 410; Tiedeman, Pol. Power, §§ 42, 102, 103; Black, Const. L. 3d ed. p. 399; Hurst v. Warner, 47 Am. St. Rep. 533 and note, 102 Mich. 238, 26 L.R.A. 484, 60 N. W. 440; Morris v. Columbus, 102 Ga. 792, 42 L.R.A. 175, 66 Am. St. Rep. 243, 30 S. E. 850.

Generally, what laws are necessary to protect public health and secure public comfort is a legislative question, and measures to these ends are not subject to judicial review.

12 R. C. L. 1273; Blue v. Beach, 155 Ind. 121, 50 L.R.A. 64, 80 Am. St. Rep. 195, 56 N. E. 89; Anable v. Montgomery County, 34 Ind. App. 72, 107 Am. St. Rep. 173, 71 N. E. 272; Naccari v. Rappelet, 119 La. 272, 13 L.R.A.(N.S.) 640, 44 So. 13; Summerville v. Pressley, 33 S. C. 56, 8 L.R.A. 854, 26 Am. St. Rep. 659, 11 S. E. 545; State v. Speyer, 67 Vt. 502, 29 L.R.A. 573, 48 Am. St. Rep. 832, 32 Atl. 476; State Bd. of Health v. St. Johnsbury, 82 Vt. 276, 23 L.R.A. (N.S.) 766, 73 Atl. 581, 18 Ann. Cas. 496.

The judgment of the court should not be substituted for the judgment of the health authorities, in favor of whose action every reasonable presumption should be indulged.

12 R. C. L. 1273; Naccari v. Rappelet, 119 La. 272, 13 L.R.A.(N.S.) 640, 44 So. 13; State ex rel. Krittenbrink v. Withnell, 91 Neb. 101, 40 L.R.A.(N.S.) 898, 135 N. W. 376; Miles City v. State Bd. of Health, 39 Mont. 405, 25 L.R.A. (N.S.) 589, 102 Pac. 696; State v. Taft, 118 N. C. 1190, 32 L.R.A. 122, 54 Am. St. Rep. 768, 23 S. E. 970; Blue v. Beach, 80 Am. St. Rep. 213, note; State ex rel. Cedar Rapids v. Holcomb, 68 Iowa, 107, 56 Am. Rep. 853, 26 N. W. 33; Kirk v. Board of Health (Kirk v. Wyman) 83 S. C. 372, 23 L.R.A. (N.S.) 1188, 65 S. E. 387.

Local health authorities are not usually required to give a hearing to any person before they exercise their jurisdiction for the public welfare.

12 R. C. L. 1274; Miles City v. State Bd. of Health, 39 Mont. 405, 25 L.R.A. (N.S.) 589, 102 Pac. 696; People ex rel. Copcutt v. Board of Health, 140 N. Y. 1, 23 L.R.A. 481, 37 Am. St. Rep. 522, 35 N. E. 320; State ex rel. Nowotny v. Milwaukee, 140 Wis. 38, 133 Am. St. Rep. 1060, 121 N. W. 658; State ex rel. McBride v. Superior Ct. — Wash. —, 174 Pac. 973.

Morrow, J., delivered the opinion of the court:

This is a habeas corpus proceeding in which the relator is held under an order of the city health officer of San Antonio, by virtue of quarantine regulations established in accord with chapter 85 of the Acts of the Fourth Called Session of the Thirty-fifth Legislature, under a statement of the order of arrest that, according to the information of the health officer, relator is affected with gonorrhea.

The form of the order is not involved, the agreed statement of facts containing the following: "It is further agreed that the sole issue in the case is whether or not the decision of the proper health officer is final, or whether the same can be inquired into by writ of habeas corpus."

Constitutional law—quarantine—arrest and detention of suspects.

The legislature, under the police power, has authority to authorize the establishment of quarantine regulations for the protection of the public against contagion from those persons whose condition is such as

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to spread disease, and, incident thereto, to authorize the arrest and detention of such persons; and such, we understand, is the purpose of the statute in question. Under its terms, the proper health officer may issue a warrant by virtue of which a lawful arrest may be made without, preliminary thereto, affording the person affected a hearing; but if, after arrest, such person challenges the right of the authorities to continue the detention, the fundamental law accords him the right to have the legality of his detention inquired into by a proper court in a habeas corpus proceeding. The law denies to no one restrained of his liberty without a hearing the right to prove in some tribunal that the facts justifying his restraint do not exist. 6 R. C. L. p. 435, § 449. The health authorities causing the arrest of relator derive their power to do so from the alleged existence of the fact that the relator is affected with the disease mentioned, and that her detention is required in the public interest, to prevent contagion. If those facts do not exist, the officer has no jurisdiction to continue the restraint, and the court in the habeas corpus proceeding has authority to inquire whether the facts essential to jurisdiction exist. Ex parte Degener, 30 Tex. App. 566, 17 S. W. 1111.

Habeas corpus—arrest of one suspected of having contagious disease.

Arrest—right to hearing.

Health—detention of one afflicted with contagious disease.

The decision of the supreme court of Washington (State ex rel. McBride v. Superior Ct. — Wash. —, 174 Pac. 973), to which we have been referred as illustrating an exception to this rule, does not, we think, extend so far as to support the contention of the respondent that the decision of the health officer who ordered the arrest of the relator is conclusive against her right to an inquiry in a habeas corpus hearing, touching the existence of the facts upon acted. The Wa construed a statu special provision o of that state, aut tablishment of boa such powers as th direct." Const. a statute enacted u did not make the i rest conclusive, bu board of health a peal, and specially decision reviewing officer should be fi

Our Constitutio the state of Wash no special provisio but the power to tine, as existent un tion, is an incide power vested in th der the general po Our statute does the initial order o conclusive; nor d any tribunal to wh under an order of the health officer n hearing. The fair interpretation of th which relator is he that which accords the power to order detention, leaving t tained the right to cision of the establi bunals of the stat raised, either of f volving the validity tion.

We conclude that of the legislature i relator had the rig on writ of habeas co in to prove the non facts necessary to au tinued detention, a tain release. Facts termine whether should not be held able in this court, it the writ of habeas for be granted, and ferred for hearing t B. Minor, Judge of th Judicial District of T

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ANNOTATION.

Right of one detained pursuant to quarantine to habeas corpus.

The few cases which have considered the subject annotated recognize the right of one detained by order of a health officer, on the ground that he is afflicted with a contagious disease, to have such determination reviewed on habeas corpus, except in one jurisdiction, where, by statute enacted under constitutional sanction, the opinion of the health officer is subject to final review by the executive officer of the state board of health, or his appointee.

In the reported case (EX PARTE HARDCASTLE, ante, 1539), a person detained under an order of arrest issued by a city health officer, by virtue of quarantine regulations established in accordance with an act of the legislature, which order states that according to the information of the health officer the relator is affected with a contagious venereal disease, is held entitled to a hearing on a writ of habeas corpus for the purpose of raising questions, either of fact or law, involving the validity of his detention.

The fact that a person is carrying on a general express business in a district in which many cases of smallpox have existed does not show that he has been exposed to that disease, so as to justify his detention in quarantine until he consents to be vaccinated, and he should be discharged from custody after hearing on writ of habeas corpus. Re Smith (1895) 146 N. Y. 68, 28 L.R.A. 820, 48 Am. St. Rep. 769, 40 N. E. 497.

In People ex rel. Copcutt v. Board of Health (1893) 140 N. Y. 1, 23 L.R.A. 481, 37 Am. St. Rep. 522, 35 N. E. 320, a proceeding to review by certiorari the determination of a municipal board of health, that certain dams in a river were nuisances and directing their removal, the court states, arguendo, that an attempt to make a finding of the board of health conclusive, without a hearing, would violate the right to due process of law, secured to every person by the Constitution, before his property or personal rights or liberty can be interfered with.

But in State ex rel. McBride v. Superior Ct. (1918) — Wash. —, 174 Pac. 973, the power of the legislature, authorized by the Constitution to establish boards of health and define their powers, to make the determination of a health board that a person was afflicted with an infectious venereal disease final and binding upon the courts, was upheld as against a contention that to deny a petitioner a review of the finding of health officers is to suspend the writ of habeas corpus, and that the exercise of such a summary power ought not to be sustained. The court considered that a doctrine which authorized a judicial review in such a case would be unsound, since it would make the exercise of the police power a judicial function. This decision, while viewing the two preceding cases as rightly decided upon the law of the case, does not regard them as controlling so far as they intimate that the acts of a board of health cannot be upheld unless a state of facts is shown that will warrant the restraint imposed by them.

State ex rel. McBride v. Superior Ct. (Wash.) supra, is distinguished in the reported case (EX PARTE HARDCASTLE, ante, 1539), on the ground that the Washington statute, enacted under a constitutional provision authorizing the establishment of boards of health with such powers as the legislature may direct, did not make the initial order of arrest conclusive, but established the board of health as a forum of appeal, and specially provided that its decision reviewing that of the health officer should be final, whereas, under the Texas Constitution, the power to establish quarantine is an incident of the police power vested in the legislature under the general power to pass laws, and the Texas statute neither declares that the initial order of arrest shall be conclusive,

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nor designates any tribunal to whom one detained under an order of arrest issued by the health officer may appeal for a hearing.

In Com. ex rel. McCarty v. Cairns (1911) 46 Pa. Super. Ct. 96, and Com. ex rel. Ogden v. Cairns (1911) 48 Pa. Super. Ct. 265, it was held that an appeal from an order refusing a writ of habeas corpus on behalf of persons detained in smallpox quarantine will be dismissed, on the ground that an actual controversy no longer exists, where, before the appeal was taken or before the return day of the appeal, the quarantine had been removed and the relators were no longer deprived of their liberty. A. W. R.

B. B. INMAN and Wife, Appts.,
v.
HOME TELEPHONE & TELEGRAPH COMPANY, Respt.

Washington Supreme Court (Dept. No. 1) —January 10, 1919.

(— Wash. —, 177 Pac. 670.)

Telephone — use by licensee — injury — liability.

1. A telephone company is not, in the absence of wilfulness, wantonness, or malice, liable for injury by electric shock to one who, by permission of a neighbor, is attempting to use the latter's rented phone in a private residence.

[*See note on this question beginning on page* 1546.]

Negligence — res ipsa loquitur — licensee.

2. The mere happening of an accident is not, under the doctrine, res ipsa loquitur, sufficient to make a prima facie case in favor of a mere licensee.

Telephone — liability for negligence.

3. The contract between a telephone company and one of its subscribers for house purposes gives its protection to all persons who are intended to be benefited by it; it assures a right of recovery for mere negligence to the family of the subscriber, its servants, guests, persons working about the house for the benefit and at the request of the owner, and all persons who can be said to be, in the contemplation of the company and the subscriber, liable to make use of the telephone in the reasonable, ordinary, and customary conduct of a home such as that of the subscriber.

Negligence — licensee — who is.

4. One using, through permission of a subscriber, a telephone in a private residence, for purposes of his own, and not in the interest of the owner of the house, or as a member of his household, either permanently or temporarily, is a mere licensee so far as the question of the liability of the telephone company for injury to him is concerned.

APPEAL by plaintiff from a judgment of the Superior Court for Spokane County in favor of defendant in an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **Robertson & Miller** and **Rosenhaupt & Grant** for appellants.

Messrs. **Post, Russell, & Higgins**, for respondent:

As plaintiff was a trespasser so far as the defendant is concerned, and there is no proof of wanton or wilful negligence, there can be no liability.

M'Neill v. Durham & C. R. Co. 132 N. C. 510, 67 L.R.A. 227, 95 Am. St. Rep. 641, 44 S. E. 34; Illinois C. R. Co. v. Messina, 240 U. S. 395, 60 L. ed. 709, 36 Sup. Ct. Rep. 368, reversing 109 Miss. 143, 67 So. 963; Thomp. Neg. § 946; Cumberland Teleg. & Teleph. Co. v. Martin, 116 Ky. 554, 63 L.R.A. 469,

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105 Am. St. Rep. 229, 76 S. W. 394, 77 S. W. 718; 14 Enc. Pl. & Pr. 331; Shearm. & Redf. Neg. 6th ed. § 8; Brennan v. Front Street Cable R. Co. 8 Wash. 363, 36 Pac. 272; Jones v. Spokane, 75 Wash. 266, 134 Pac. 925; Brucker v. Gainesboro Teleph. Co. 125 Ky. 92, 100 S. W. 240; Pioneer Teleph. & Teleg. Co. v. Tulsa Vitrified Brick Co. — Okla. —, 159 Pac. 477; Larmore v. Crown Point Iron Co. 101 N. Y. 391, 54 Am. Rep. 718, 4 N. E. 752; Stevens v. Nichols, 155 Mass. 472, 15 L.R.A. 459, 29 N. E. 1150; Woolwine v. Chesapeake & O. R. Co. (Manning v. Chesapeake & O. R. Co.) 36 W. Va. 329, 16 L.R.A. 271, 32 Am. St. Rep. 859, 15 S. E. 81; Benson v. Baltimore Traction Co. 77 Md. 535, 20 L.R.A. 714, 39 Am. St. Rep. 436, 26 Atl. 973; Cusick v. Adams, 115 N. Y. 55, 12 Am. St. Rep. 772, 21 N. E. 673; Mathews v. Bensel, 51 N. J. L. 30, 16 Atl. 195; Graves v. Washington Water Power Co. 44 Wash. 675, 11 L.R.A.(N.S.) 452, 87 Pac. 956; Cumberland Teleg. & Teleph. Co. v. Martin, 116 Ky. 554, 63 L.R.A. 469, 105 Am. St. Rep. 229, 76 S. W. 394, 77 S. W. 718; Lewinn v. Murphy, 63 Wash. 360, L.R.A.1917E, 198, 115 Pac. 740, Ann. Cas. 1912D, 433; Abrams v. Seattle, 60 Wash. 356, 140 Am. St. Rep. 916, 111 Pac. 168.

Mackintosh, J., delivered the opinion of the court:

J. W. Fortune had in his residence a telephone installed by the defendant, which owned the wiring, instrument, and equipment, and furnished the ordinary telephone service. The plaintiffs were neighbors, living about a block distant from Fortune, and were not telephone subscribers. The plaintiff wife was injured while using the telephone, all the testimony in regard to the matter being the following:

Q. Were you at the Fortune home on September 5, 1916? A. Yes, sir.

Q. Did you try to use the telephone on that day? A. Yes.

Q. Had you frequently used that phone before? A. Yes, sir.

Q. I will ask you if you had permission to use the phone? A. Yes, sir.

Q. On this date? A. Mr. Fortune told me I could use the phone at any time.

Q. How does it come you were using Mr. Fortune's phone on this day? A. Mr. Fortune gave me permission to use it.

Q. When? A. He told me—we were next door to him there; he said to "come and use our phone any time you want to;" I went in and asked Frances if I could use the phone, and she said, "Yes."

Q. What happened? A. I took the receiver and held it to my ear; no one answered; I stood there, it seems to me, it must have been like about five minutes; there was two little girls standing out in the hall; I made the remark, "It is funny central does not answer;" I no more than said that than there was a report went off, and then smoke flew out, and it threw me back against the wall.

At the close of the plaintiffs' case the court sustained a challenge to the sufficiency of the evidence. Our view, which we are about to express, of the law applicable to the facts of this case, renders it unnecessary to pass upon the question of whether in any event the plaintiffs were entitled to have their case presented to the jury on the doctrine of Res ipsa loquitur. That doctrine would only supply for the plaintiffs the proof of negligence, which is not sufficient to render the defendant liable to them if the plaintiff wife was, while using the telephone, a trespasser or bare licensee. If that was the relationship between the parties, the defendant must be proved to have been guilty of more than mere negligence, and to become liable the injury must have been proved to have been wilful, wanton, or malicious; and bare proof of the happening of the accident would not suffice to make a prima facie case. Apparently without precedent, this case, on principle, discloses the plaintiff wife at best in the position of a mere licensee. The plaintiffs were not subscribers for telephone service and had no contractual relationship with the company. The only obligation owing them came through the use

Negligence—res ipsa loquitur—licensee.

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of Fortune's telephone, by his permission, but without the defendant's knowledge; and he was not the owner of the telephone, but only a purchaser of telephone service. His contract with the company gave him no agency for it.

The telephone, unlike other electrically operated instruments, is not highly dangerous, in that its wires do not carry a dangerous current, so we have eliminated from our consideration those cases of liability of conveyers of high electric current for injuries to trespassers, licensees, children, etc., and have only to determine the rights under the Fortune contract. Cumberland Teleg. & Teleph. Co. v. Martin, 116 Ky. 554, 63 L.R.A. 469, 105 Am. St. Rep. 229, 76 S. W. 394, 77 S. W. 718; Brucker v. Gainesboro Teleph. Co. 125 Ky. 92, 100 S. W. 240. That contract gave its protection to all persons who were intended to be benefited by it; it assured a right of recovery for mere negligence to the Fortune family, its servants, guests, persons working about the house for the benefit and at the request of the owner, and all persons who could be said to have been in the contemplation of the company and the subscriber as liable to make use of the telephone in the reasonable, ordinary, and customary conduct of a home such as the one involved. Fish v. Waverly Electric Light & P. Co. 189 N. Y. 336, 13 L.R.A.(N.S.) 226, 82 N. E. 150; Union Light, Heat & P. Co. v. Arntson, 87 C. C. A. 1, 157 Fed. 540; Southern Bell Teleph. & Teleg. Co. v. McTyer, 137 Ala. 601, 97 Am. St. Rep. 62, 34 So. 1020, 14 Am. Neg. Rep. 511; Reagan v. Boston Electric Light Co. 167 Mass. 406, 45 N. E. 743, 1 Am. Neg. Rep. 78; Anderson v. Seattle-Tacoma, Interurban R. Co. 36 Wash. 387, 104 Am. St. Rep. 962, 78 Pac. 1013, 17 Am. Neg. Rep. 727; Bradley v. Sobolewsky, 91 Conn. 492, ante, 1387, 99 Atl. 1067, 15 N. C. C. A. 313. But as to all persons outside the contemplation of the contract, the company, in order to be liable for their injury, must be shown to have been more than merely negligent. The plaintiffs were accustomed to use this telephone; and Fortune had established, in effect, for them a free telephone service. This he could not do, for no such use of this telephone was reasonable or anticipated by the company when it was installed, or sanctioned thereafter.

Telephone—liability for negligence.

It may be that in public or business places such use is taken into consideration when telephones are placed there, and that the company is liable to such users as to subscribers; but the private residence, in the absence of agreement to that effect, is not supposed to be a public telephone station. Those using such telephones for purposes of their own, and not in the interest of the owner of the house, and for their own convenience, and not casually, and not as members of the household, either permanently or temporarily, are at best, as far as the company is involved, bare licensees. Greenville v. Pitts, 102 Tex. 1, 14 L.R.A.(N.S.) 979, 132 Am. St. Rep. 843, 107 S. W. 50; State use of Stansfield v. Chesapeake & P. Teleph. Co. 123 Md. 120, 52 L.R.A.(N.S.) 1170, 91 Atl. 149; Cumberland Teleg. & Teleph. Co. v. Martin, 116 Ky. 554, 63 L.R.A. 469, 105 Am. St. Rep. 229, 76 S. W. 394, 77 S. W. 718. As between Fortune and the plaintiff wife, she was entitled to the exercise of ordinary care for her safety. Hanson v. Spokane Valley Land & Water Co. 58 Wash. 6, 107 Pac. 863. But as between the parties to this suit, she was no more than a mere licensee, and, no proof having been presented of wilful injury, the plaintiffs were not entitled to recovery. Jones, Teleg. & Teleph. Co. 2d ed. § 218; Minneapolis General Electric

Negligence—Licensee—who is.

Telephone—use by licensee—injury—liability.

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Co. v. Cronon, 20 L.R.A.(N.S.) 816, 92 C. C. A. 345, 166 Fed. 651.

Judgment affirmed.

Main, Ch. J., and Mitchell, Tolman, and Chadwick, JJ., concur.

Petition for rehearing denied.

ANNOTATION.

Liability for injury to one while using another's telephone.

An interesting question is presented in the reported case (INMAN v. HOME TELEPH. & TELEG. Co. ante, 1543) as to the liability of a telephone company to a nonsubscriber, who was injured by an electric current while using a telephone in a private residence with the subscriber's permission. It will be observed that the view is there taken that the person injured did not come within the contemplation of the company as one liable to use the telephone under its contract with the subscriber, and that, at most, she was a bare licensee, to whom the company would be liable only in case of a wilful injury.

The court calls attention to the fact that under its contract the company assumed liability for negligence to the subscriber's family, its guests, those working about the house at the request of the owner, and all persons who could be said to be within the contemplation of the company and the subscriber as liable to make use of the telephone in the reasonable and customary conduct of such a home as that involved. It is further stated that it might be that in public or business places use by nonsubscribers is taken into consideration when telephones are put into such places, and that the company would be liable for an injury to such a user.

It has been held that a telephone company which has installed an instrument in a place of business is liable for an injury resulting from its negligence to an employee of the establishment while using the telephone. Southwestern Teleg. & Teleph. Co. v. Abeles (1910) 94 Ark. 254, 140 Am. St. Rep. 115, 126 S. W. 724, 21 Ann. Cas. 1006; Warren v. Missouri & K. Teleph. Co. (1917) 196 Mo. App. 549, 196 S. W. 1030. The employee in such a case, of course, comes clearly within the class of persons who would be expected to use such a telephone. The reported case (INMAN v. HOME TELEPH. & TELEG. Co.), however, seems to be one of first impression as to the company's liability to a licensee.

J. T. W.

WASHINGTON UNION COAL COMPANY, Appt.,

v.

THURSTON COUNTY et al., Respts.

Washington Supreme Court (Dept. No. 1) — January 10, 1919.

(— Wash. —, 177 Pac. 774.)

Tax — prospective mines — assessable value.

1. An added value may be given real estate for purposes of taxation because of prospective mines beneath the surface, where the property surrounds a proved mine and was purchased by a mining company after prospecting, including some drilling, and outcropping of mineral, and the opinions of expert witnesses indicate that there are minerals beneath the surface.

[*See note on this question beginning on page* 1550.]

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— qualification of assessors.

2. The assessor need not be a mining expert or employ mining experts properly to assess as a mining prospect property bought by a mining company surrounding a proved mine, and showing outcroppings of mineral on the surface.

Evidence — burden of proof — valuation of property.

3. Clear and convincing evidence is necessary to overcome the valuation placed for taxing purposes upon real estate by the cc board of equalizati

— sufficiency of ev assessment.

4. The presumpt assessment of a n taxation is not ove that the owner hac investigation of the ness would have to and spend money be tomer to purchase mining purposes.

APPEAL by plaintiff from a judgment of the Superior C County dismissing an action brought to enjoin the col taxes and to recover back taxes paid under protest. *Affi*

The facts are stated in the opinion of the court.

Messrs. A. C. Spencer, Frank C. Owings, and John F. Reilly, for appellant:

The addition in 1908 to the assessed value of plaintiff's real and personal property, of $10 per acre for supposed coal values, was arbitrary, fraudulent, illegal, and void.

Weyerhaeuser Timber Co. v. Pierce County, 97 Wash. 534, 167 Pac. 35; Whatcom County v. Fairhaven Land Co. 7 Wash. 101, 34 Pac. 563; Spokane & I. E. R. Co. v. Spokane County, 82 Wash. 24, 143 Pac. 307; Consolidated Gas Co. v. Baltimore, 101 Md. 541, 1 L.R.A.(N.S.) 263, 109 Am. St. Rep. 584, 61 Atl. 532; First Thought Gold Mines v. Stevens County, 91 Wash. 437, 157 Pac. 1080.

The valuation for coal placed upon plaintiff's property in 1915 was no assessment in law, and no tax could be legally based upon it.

Cooley, Taxn. 3d ed. p. 597; Waller v. Hughes, 2 Ariz. 114, 11 Pac. 122; People v. Hastings, 29 Cal. 450; Woodman v. Auditor Gen. 52 Mich. 28, 17 N. W. 227; Abbott v. Lindenbower, 42 Mo. 162; Granger v. Parsons, 2 Pick. 391; Burnham v. Barber, 70 Iowa, 87, 30 N. W. 20; Weyerhaeuser Timber Co. v. Pierce County, 97 Wash. 534, 167 Pac. 35.

The assessment upon plaintiff's property is excessive to the extent of the sum added for coal value.

First Thought Gold Mines v. Stevens County, 91 Wash. 437, 157 Pac. 1080; Simpson Logging Co. v. Chehalis County, 80 Wash. 245, 141 Pac. 344; Case v. San Juan County, 59 Wash. 222, 109 Pac. 809.

The assessments are also void because the assessor criminated against because it is a coal

Spokane & E. Tr County, 70 Wash. 48 Cas. 1914B, 641; St Parmenter, 50 Was (N.S.) 707, 96 Pac. v. Pierce County, 37 617; Andrews v. Kin 46, 22 Am. St. Rep. Rockhill Iron & C County, 204 Pa. 44,

Mr. Thomas L. O'I ents:

Mining property w pect stage, merely, given an assessed va of its mineral value.

First Thought Go ens County, 91 Wa 1080.

A county has no au a coal mining expert to get one who has t a deputy county asse willing to work at assessor's salary.

Northwestern Impr 98 Wash. 1, 167 Pac.

The burden of s valuation made by the the property owner, the correctness of t termination of valu dence of the most cl ing character before that there has been structive fraud upo rights as a taxpayer.

Heuston v. King C 200, 155 Pac. 773; No v. Pierce County, 55

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Pac. 178; Northwestern Improv. Co. v. Pierce County, 97 Wash. 528, 167 Pac. 83; Templeton v. Pierce County, 25 Wash. 377, 65 Pac. 553.

Mitchell, J., delivered the opinion of the court:

In the fall of 1907 and the spring of 1908, appellant, a coal mining company, purchased 5,044.49 acres of land and the right to explore, mine, and take coal from beneath the surface of 255.5 other acres of land, all situate in Thurston county, and lying within a territory about 7 miles east and west and 3 miles north and south. The property consists of about ten detached tracts, the greater portion of the land lying in one parcel, situated in the south central part of the territory mentioned. Near the center of the largest tract appellant, since about 1908, has been and is now actively engaged in the operation of a coal mine, known as the Tono coal mine, for commercial purposes.

Early in the year 1908, the county assessor, pursuant to advice from the state Tax Commission, instructed his field deputy assessor that where lands had been taken as coal lands, and he was satisfied there was coal, to make assessments therefor. It appears that no such assessments had been made on the property involved for the year 1907. The deputy assessor for that year, confessedly without any knowledge or experience as to values of coal mines and prospects, though well acquainted with many property owners and others who for years had prospected for and mined coal in this field, went into the field and gathered information from twenty to thirty present and former owners, prospectors and coal miners of years of experience on some of the lands now owned by appellant, as well as other lands immediately adjacent and within the territory. Thereupon the deputy assessor assessed the lands of appellant (whether it had yet taken title or not), and much or nearly all of the other lands in this field, at $10 per acre for coal values, and taxes were levied thereon for that year. Thereafter, from year to year until 1915, some of the parties other than the appellant, owning property interspersed with appellant's lands, procured whole or partial relief from coal assessments from the county board of equalization. Appellant paid its taxes without protest until 1915, when, after the assessment had been made for that year, it claims to have learned for the first time that its assessments had for years included coal values. In the meantime—the proof does not show when—the assessments for coal values in this field had been changed from the uniform sum of $10 to different amounts per acre. The county assessor for the year 1915 continued the assessments of appellant's property as they were last assessed. In doing so he testified that he considered former tax payments without protest; he knew of the Tono mine and its operation; he had been on plaintiff's lands, and was acquainted with the soil in places; knew that some of it had coal outcroppings; that coal had been taken out of other mines on this or adjacent lands; he knew the people in that community burned coal right along, taken from the lands in the vicinity; and that, among other things, for the purpose of fixing coal values, he checked up with the Pierce county assessor as to values placed on coal lands in that county. The assessments now objected to, for the year 1915, range from $5 to $15 per acre for coal values, except 288.55 acres, which are free from any such assessment.

Appellant applied to the board of equalization in 1915 for a reduction of its assessments to the extent of all coal values, except as to 871.92 acres immediately surrounding the mine. The board refused to change the assessments. After the levy and prior to delinquency, appellant tendered to the county treasurer, in full payment of its taxes for the year 1915, an amount which equaled its taxes, eliminating all coal values on its lands other than the 871.92 acres referred to. It is to be no-

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ticed that by the tender appellant took the position that it was not chargeable with any tax on its subsurface mineral rights in 255.5 acres, which was its contention before the board of equalization. The county treasurer refused the money. Appellant then paid under protest the taxes on the subsurface mineral rights in the 255.5 acres, and afterwards brought this action to recover back that amount, and to enjoin the collection of all other taxes based on coal values other than in the 871.92 acres. Upon trial the action was dismissed by the superior court.

Appellant's first argument is as follows: "The addition in 1908 to the assessed value of appellant's property of $10 per acre for supposed coal values (from which the 1915 assessment was copied) was arbitrary, fraudulent, illegal, and void."

It is said by counsel that no court has ever countenanced assessments of this sort. The strength of their argument in this respect is shown by that portion of their brief as follows: "This court itself has consistently held, beginning with the case of Whatcom County v. Fairhaven Land Co. 7 Wash. 101, 34 Pac. 563, a case in which there was evidence of a blanket assessment being placed without investigation on the property owner's land: 'An arbitrary assessment of property, without the exercise of the assessor's judgment based on knowledge or information, is an illegal assessment, and is a fraud upon the property owner, and may be taken advantage of by the latter in some manner.' "

Such argument and authority are not in point here, because the deputy who made the assessment in 1908 did make an investigation on the land, and exercise his judgment based thereon, and on information gained from present and past owners, miners, and prospectors. A number of those persons testified at the trial of this case to facts identical with those of which the deputy assessor had been informed. As to the suggestion of arbitrariness by reason of the uniformity of $10 per acre, it is not found in the assessment of 1915, now complained of, for the assessments range from $5 to $15 per acre for coal values, and were placed on the property by the assessor upon exercising his judgment, based not only on the records for years showing these to be coal lands, but also upon knowledge and investigation, in the year 1915, of an active coal mine, of the soil and coal outcroppings, former mining on these and adjacent lands, residents using coal taken from these or contiguous lands, and inquiry of the assessor's office and examinations of the records in an adjoining county as to coal land values. As shown by the protest to the board of equalization and the tender to the county treasurer, appellant contends that all assessments for coal values other than in lands just around its mine are baseless and void, upon the theory, as we understand, that the county has not demonstrated that the lands contained workable commercial bodies of coal, and that the assessors are not scientists and experts.

Appellant, a coal mining company, after prospecting, including some drilling, purchased all of these lands about the same time. Manifestly, it was persuaded by supposed hidden values. It must have been satisfied of sufficient and tempting prospects. It has since developed and proved a mine, and is now engaged in operating it for commercial purposes, since which time it has done a very little drilling to further determine the value of its holdings. Bought as and partially proved by appellant to be coal lands, we are not advised if there has been any depreciation in the coal values of these lands. Mining property such as this, surrounding a proved mine, although in the prospective stage, may be given an assessed valuation as such, not as a mine, but as a prospect, where there is reason for the assessing officers to find and believe that the property

Tax—prospective mines—assessable value.

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has coal values. First Thought Gold Mines v. Stevens County, 91 Wash. 437, 157 Pac. 1080. For such purpose the county assessor and the board of equalization are not required to be mining experts, nor to employ experts to properly and legally assess it.

—qualification of assessors.

As to the reasonableness of valuations placed on property for the purpose of taxation, the well-established rule favors and supports the county assessor and board of equalization, and one who challenges such valuations assumes a task not measured or accomplished with less than clear and convincing proof. Templeton v. Pierce County, 25 Wash. 377, 65 Pac. 553; Northern P. R. Co. v. Pierce County, 55 Wash. 108, 104 Pac. 178; Heuston v. King County, 90 Wash. 200, 155 Pac. 773.

Evidence—burden of proof—valuation of property.

In the present case we find, in addition to the presumption in favor of the assessments, active examination and investigation by and knowledge on the part of the assessor, together with due consideration by the board of equalization, to support the assessment and taxes complained of. To overcome this presumption of fairness of the assessment, appellant furnished, in effect, the testimony of its superintendent in the mine, who admits he has never made any personal investigation of any of the property outside of sections 20 and 21 (the Tono mine), for the purpose of seeing whether or not coal lies under the surface, and no investigation of that character has been made by the company since he has been superintendent, and the testimony of appellant's mining engineer in charge at the mine, who says he did the prospecting work for appellant before the purchase of these lands, and has been with appellant at all times since, that only two diamond drill holes had been made on any of appellant's property outside of the immediate vicinity of the mine, since the property was purchased, and that the company has not made any thorough investigation of the property; and finally, on cross-examination, he said that if he were asked by a prospective purchaser whether any other seams of coal, outside of sections 20 and 21, could be mined at a profit, he would want to make further investigation and spend money for that purpose before giving his opinion. Such proof is not sufficient to overcome the presumption in favor of the assessment upon which rest the taxes sought to be avoided.

—sufficiency of evidence to overcome assessment.

Lastly, it is claimed appellant has been discriminated against because other lands in the community are free from such assessments. It is true that some of appellant's lands, as well as other tracts intermingled therewith, are not assessed for coal values, and that still other properties are so assessed, but the proof fails to show lack of foundation for those differences in the opinion and judgment of the assessing officers.

Judgment affirmed.

Main, Ch. J., and Tolman, J., concur.

Petition for rehearing denied.

ANNOTATION.

Taxes: valuing undeveloped mining property as prospect.

The present annotation treats merely the question whether or not undeveloped underlying minerals may be taken into consideration by assessors in valuing property as a whole for purposes of taxation. This excludes the question of taxation of minerals and mineral rights separately from the land itself, where the title thereto has been severed from the title to the surface.

While the right to tax is purely of

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lying coal. We find no support for this theory, either in the statutes or in the decisions of the courts, or in reason. It is true, of course, that until the coal is severed by conveying to another party, the owner of the soil is assessed with the value of the entire estate, including the coal; but this does not mean that in determining the value of the estate in land the coal is to be considered of no value. All elements of value affecting the selling price of the tract as a whole, including the incumbent and superincumbent strata, the improvements, location, and availability for either agricultural or commercial uses, should be given due consideration by the taxing authorities in determining the assessable value. Where the coal is unsevered, the land is the subject of taxation as real estate; and its value is what the law contemplates shall be assessed. We fully agree that the only standard of valuation recognized by law in making assessments is market value, as distinguished from actual value; or, more accurately expressed, actual value limited and defined by market value. . . . Any element of value tending to affect selling price may be taken into consideration by the assessor, or other taxing authorities, in arriving at a proper valuation for assessment purposes. If underlying the surface there is a seam of coal, and the coal has a market value, the value of the whole estate in the land is necessarily increased thereby. Why should not such an element of value be considered in fixing a valuation upon the whole tract? No good reason for eliminating such a material element of value has been given, and, as we view it, none can be suggested. The fact that a tract of land is underlaid with a valuable seam of coal, having a market value, would influence the mind of a probable purchaser; and we have frequently said that anything that would add value to a property in the mind of one contemplating a purchase should be considered. . . . In the assessment of farm land underlaid with coal there should be no separate assessment of the coal as such, but a valuation should be placed upon the whole tract as land. In such cases the coal can only be considered as an element tending to appreciate the value of the land." This case was expressly followed and relied upon in Washington County v. Wieneke (1912) 233 Pa. 560, 82 Atl. 759; Washington County v. Cunningham (1912) 233 Pa. 560, 82 Atl. 759, and Washington County v. Scott (1912) 233 Pa. 561, 82 Atl. 759. And see also Lehigh & W. B. Coal Co. v. Luzerne County (1909) 225 Pa. 267, 74 Atl. 67; Mineral R. & Min. Co. v. Northumberland County (1911) 229 Pa. 436, 78 Atl. 991; Mineral R. & Min. Co. v. Northumberland County (1911) 229 Pa. 457, 78 Atl. 999; Philadelphia & R. Coal & I. Co. v. Northumberland County (1911) 229 Pa. 460, 79 Atl. 109; Lehigh & W. B. Coal Co. v. Luzerne County (1911) 231 Pa. 481, 80 Atl. 1093, and Lehigh Valley Coal Co. v. Luzerne County (1916) 255 Pa. 17, 99 Atl. 223. In Philadelphia & R. Coal & I. Co. v. Northumberland County (1911) 229 Pa. 460, 79 Atl. 109, it was held that in determining the selling price of lands which contained undeveloped coal veins, for the purpose of assessment for taxation, the taxing authorities should take the selling price, provided there had been a recent bona fide sale; but if there had been no such sale, and there was no general asking or selling price in the neighborhood, the assessor must use his best judgment, consulting, if necessary, persons having knowledge and experience on the subject, and, considering all matters affecting probable selling price, such as location, condition, improvements, quality of land or coal, and any other elements that would be likely to influence the mind of the purchaser, fix the assessment.

So, in Indiana, under statutes providing that "all property within the jurisdiction of this state, not expressly exempted, shall be subject to taxation," and that "for the purpose of taxation, real property shall include all lands within the state," and "appurtenances thereto," without regard to another provision applying to mines and minerals, it has been held (Greene

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County v. Lattas Creek Coal Co. (1913) 179 Ind. 212, 100 N. E. 561) that where there has been no severance of title, the owner of the fee holds the land taxable for the entire value thereof, including that of the underlying undeveloped minerals. In reaching this conclusion, and in effect reversing the decision of the Indiana appellate court, which held that hidden undeveloped coal or other minerals were not subject to taxation, the court said: "We cannot overlook the fact that land in the vicinity of mines may have very little value for agricultural purposes, but by reason of underlying minerals may have a market value greater than that of the best agricultural lands. It is contemplated by our Constitution and statutes that taxes shall be levied on all lands of the state in proportion to their true values, and such end cannot be attained by permitting mineral lands to escape the burden of all values, except agricultural ones." It was also further held that coal or other minerals in place are not rendered nontaxable merely because of lack of legislative method and regulation for determining their value, and that, in fixing value, the assessor may examine the owners under oath regarding borings, if any, and purchase price, and may consider the development, if any, of near-by mines, and sales of mineral rights, or other facts constituting elements of value. And these holdings apply to assessments against the owners of the fee of highways and railroad rights of way, for removable minerals lying thereunder, notwithstanding the statutes provide that lands occupied by such roads shall not be assessed against the abutting owners, since such prohibitions apply only to land surfaces. Greene County v. Lattas Creek Coal Co. (Ind.) supra.

And in Oklahoma, under a statute providing, "Real property for the purpose of taxation shall be construed to mean the land itself," and improvements and privileges, "and all mines, minerals, quarries and trees on or under the same," it seems that undeveloped minerals may be considered in assessing the land under which they lie. At least, in Re Indian Territory Illuminating Oil Co. (1914) 43 Okla. 307, 142 Pac. 997, it was held that, if taxed at all prior to being reduced to possession, oil and gas, while lying in the strata of the earth, constituted a sort of subterraneous feræ naturæ, and must be taxed as real property to the owner of the land under which they lie.

And that, under a Virginia statute, "if the surface of the land and the coal, iron, minerals, mineral waters, gas, or oils under the surface be owned by the same person, the commissioner shall ascertain the fair cash value of the land, inclusive of the coal, iron, minerals, mineral waters, gas, or oils, and assess the same at such ascertained value," see Interstate Coal & I. Co. v. Com. (1905) 103 Va. 586, 49 S. E. 974.

But that minerals are not "land," and subject to taxation within the meaning of the Alberta Town Act, see Coleman v. Head Syndicate (1917) 11 Alberta L. Rep. 314, 1 West. Week. Rep. 1074, as set out in Can. Ann. Dig. (1917) col. 579.

Of course, an assessment of land cannot be materially increased over that of other lands of the same surface value, on the theory that there are underlying undeveloped minerals therein, where it clearly appears that such minerals are not present in workable quantities, and that the lands have no value as mineral lands. This was the ruling in Rockhill Iron & Coal Co. v. Fulton County (1902) 204 Pa. 44, 53 Atl. 530, where it appeared that, while the lands in question contained thin seams of coal, they were not "coal lands," and had no value as such. Nor should minerals be taken into consideration in assessing property for taxation, either where the land is undeveloped and it is not known whether it is underlaid with minerals, or where the existence of mineral in the land is purely conjectural. Berwind White Coal Min. Co. v. Clearfield County (1889) 18 Pa. Co. Ct. 545.

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FREDERICK K. DAY
v.
OLD COLONY TRUST COMPANY.

Massachusetts Supreme Judicial Court — February 27, 1919.

(232 Mass. 207, 122 N. E. 189.)

Bank — paying incompetent's deposit to executor — liability.

1. A bank cannot relieve itself from liability to the conservator of an incompetent person for a deposit standing in the name of such conservator, by turning it over to the executor of the incompetent without authority from the conservator or order of court.

[*See note on this question beginning on page* 1557.]

Witness — testimony — binding effect.

2. Testimony of a vice president of a bank as to the history of an account in the bank is binding upon the bank.

Incompetent person — transfer of fund by conservator to executor.

3. To enable an executor of an incompetent to secure possession of a bank account standing in the name of the conservator of such incompetent, the conservator must settle his account in the probate court and turn over to the executor the balance found to be due.

Notice — trust relation of bank depositor.

4. A bank is charged with notice of the trust nature of an account standing in the name of a conservator of an incompetent, and of the conservator's fiduciary relation to it.

EXCEPTIONS by plaintiff to rulings of the Superior Court for Suffolk County made during the trial of an action brought to recover the amount of a deposit subject to check which plaintiff had with the defendant bank, which resulted in a verdict for defendant. *Sustained.*

The facts are stated in the opinion of the court.

Messrs. **Channing & Frothingham** and **John P. Jackson, Jr.**, for plaintiff:

The fact that there was no evidence whatsoever that Miss Meeker ever had an account with defendant trust company necessarily implied that the contract was made with Mr. Day.

First Nat. Bank v. Mason, 95 Pa. 113, 40 Am. Rep. 632; Nolting v. National Bank, 99 Va. 54, 37 S. E. 804; Second Nat. Bank v. Gibboney, 43 Ind. App. 492, 87 N. E. 1064.

The title to the deposit was in Miss Allen, not in Miss Meeker, and defendant never had any relations with the latter.

Day v. Old Colony Trust Co. 228 Mass. 225, 117 N. E. 252.

The credit given Mr. Day on defendant's books as the result of the deposit of this check is equivalent to payment to him in cash of the amount of the check.

Bryan v. First Nat. Bank, 205 Pa. 7, 54 Atl. 480; Levy v. Bank of United States, 4 Dall. 234, 1 L. ed. 814.

Plaintiff had title to the deposit and the right of possession, and therefore is entitled to recover the amount of the account from defendant.

Thacher v. Dinsmore, 5 Mass. 299, 4 Am. Dec. 61; Rollins v. Marsh, 128 Mass. 116; Brewster v. Seeger, 173 Mass. 281, 53 N. E. 814; Walker v. State Trust Co. 40 App. Div. 55, 57 N. Y. Supp. 525; Shepard v. Creamer, 160 Mass. 496, 36 N. E. 475; Carr v. Leahy, 217 Mass. 438, 105 N. E. 445.

Plaintiff is entitled to have the account paid over to him.

Foster v. Bailey, 157 Mass. 160, 31 N. E. 771; Slaymaker v. Farmers' Nat. Bank, 103 Pa. 616; Sibbs v. Philadelphia Sav. Fund Soc. 153 Pa. 345, 25 Atl. 1119; Kuntz's Estate, 230 Pa. 557, 79 Atl. 755.

Defendant entered into the contract of deposit with plaintiff, and not with

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his ward, and no payment made by the defendant to the executor, unless by consent of the plaintiff or upon his order, could impair the obligation of the defendant to the plaintiff.

Hemmerich v. Union Dime Sav. Inst. 144 App. Div. 413, 129 N. Y. Supp. 267; Boone v. Citizens' Sav. Bank, 84 N. Y. 83, 38 Am. Rep. 498; Fuller v. Randall, 1 Gray, 608; Randall v. Way, 111 Mass. 506; Heath v. New Bedford Safe Deposit & T. Co. 184 Mass. 481, 69 N. E. 215; Reed v. Mattapan Deposit & T. Co. 198 Mass. 306, 84 N. E. 469.

Mr. S. M. Child for defendant.

Rugg, Ch. J., delivered the opinion of the court:

This case was before the court in 228 Mass. 225, 117 N. E. 252. The facts as disclosed on this record are much amplified and quite different from those presented by the earlier record. It now appears, by testimony of a vice president of the defendant, and hence binding upon it, that the history of the account in question was this: On April 5, 1906, a checking account was opened in this form: "Mary E. Allen, attorney for Anna W. Meeker." The pass book issued by the defendant showed that it was "Old Colony Trust Company Boston in account with Mary E. Allen, atty. for Anna W. Meeker." That account stood on the books of the defendant under the alphabetical classification "A," which indicated Allen as the depositor, and not under "M," which would have indicated Meeker as depositor. In October, 1906, Day presented to the defendant, a certificate of his appointment as conservator of the estate of Anna W. Meeker, together with a check for $320.55, being the amount then due on the account, drawn by "Mary E. Allen, atty. for Anna W. Meeker," "to the order of Frederick K. Day, conservator." The check was indorsed: "Received on the within check three hundred twenty 55/100 dollars. Fredk. K. Day, Conservator," and was perforated by the defendant as sign of its cancelation. Thereafter "Frederick K. Day, conservator," was substituted for "Mary E. Allen, atty.," on the books of the defendant and the account was transferred to the alphabetical classification "D," signifying Day as depositor. Otherwise no change was made. Statements were issued monthly showing the form of the account and of the deposit as thus described. On October, 1913, the balance due on this account, being $18,254.84, was paid to John L. Nichols, executor of the will of Anna W. Meeker, without any order from Day. This evidence was, in substance, all in writing, and there was no further documentary evidence. There was oral testimony of the vice president of the defendant to the effect that Anna W. Meeker had a checking account with the defendant, that is to say, the account opened in the name of "Mary E. Allen, atty. for Anna W. Meeker;" that the meaning of the transaction manifested by the check signed by her to the order of "Frederick K. Day, conservator," was that it was paid to Day as conservator and an account opened by him with that check, and that, although there was no transfer of money, there was a change from the letter "A" to the letter "D" on the ledger of the defendant, and that Day could have taken the money and put it in any other bank if he had desired to do so; that where an account stood "in the name of a conservator or guardian it was always considered the property of the person who had the original account, . . . the principal, always." This we understand to mean that it was considered as the property of the ward. There was no evidence that this opinion of the witness was ever brought to the attention of Day. He did not testify. This, in substance, was all the material evidence.

Witness—testimony—binding effect.

The judge refused to order a verdict for the plaintiff and submitted two questions to the jury, as follows: "(1) Did the account in question on October 10, 1906, and

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on October 20, 1913, stand in the name of 'Frederick K. Day, conservator for Anna W. Meeker?' (2) Was the fund in question deposited by Frederick K. Day to the credit of 'Frederick K. Day, conservator for Anna W. Meeker?'" The jury answered "Yes" to the first question and "No" to the second question, whereupon a verdict was ordered for the defendant.

The case presented, so far as appears on this record, is the ordinary one of a person holding a trust appointment under the law from the probate court, who has kept his trust funds separate and distinct, has administered his trust with fidelity, and is ready to account promptly according to law upon the termination of his trust. It is not a case where the probate court has made any special order as to the transfer of the funds or securities to a new appointee or to the owner. The law under such circumstances was settled in this commonwealth, after elaborate discussion and review of authorities, in Foster v. Bailey, 157 Mass. 160, 31 N. E. 771. That was a case of one administrator de bonis non succeeding another. It there was said (page 163 of 157 Mass.) that "although, on the death of Frothingham [the first administrator de bonis non] and the appointment of the plaintiff [as the second administrator de bonis non of the same estate], the title to all the property of the two Larkin estates which had been in his possession vested in the plaintiff, yet he took the title subject to all liens or rights of retainer."

It was held that the second appointee could not maintain a bill in equity to secure possession of the trust estate from the one whose term had expired, until after the settlement of his accounts by the latter in the probate court. Whatever might be the respective rights of the plaintiff and the executor of the will of Anna W. Meeker as between themselves, the defendant had no relations with anybody save the plaintiff. There would be great incongruity in holding that the executor could not maintain a suit in equity directly against Day to secure possession of the deposit (as was decided in Foster v. Bailey, supra), and yet could rightfully secure possession of it from a depositary, surreptitiously and without the knowledge or consent of the plaintiff. The orderly procedure is for the conservator forthwith to prepare and present his account to the probate court, and procure its allowance. Then, having settled his account there, at once to turn over to the executor the balance due on the accounting. As was said when the case was here before: "Although the particular funds when deposited became the property of the defendant trust company . . . if they were not deposited to the ward's credit, but were in the name of 'Frederick K. Day, conservator for Anna W. Meeker,' the defendant became indebted to the plaintiff. Under these circumstances it agreed to hold the funds subject to his order and to pay on his demand; the title was in him, not in Anna W. Meeker, and on the defendant's refusal he could bring an action to recover the amount of the deposit. . . . While the death of the ward ended the authority of the conservator, . . . the title to the deposit, if it stood in his name, belonged to the plaintiff; he was a creditor of the defendant and continued so after the ward's death. The defendant could not legally deprive him of the money or pay it to another without his consent."

Incompetent person—transfer of fund by conservator to executor.

The defendant was charged with notice of the trust nature of the account, and of Day's fiduciary relation to it. But it was not for the defendant to ignore its relations with the plaintiff, and of its own motion, without order of court, recognize a stranger to it as

Notice—trust relation of bank depositor.

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entitled to the fund. The words quoted from the earlier opinion are decisive of the case as now presented. There was no evidence to support any other conclusion than that the deposit was in the name of "Frederick K. Day, conservator for Anna W. Meeker," or than that it was deposited to the credit of "Frederick K. Day, conservator for Anna W. Meeker." This was the inevitable inference from the facts conceded by the defendant. There is nothing inconsistent with this conclusion in Lawrence v. Wright, 23 Pick. 128, McKim v. Mann, 141 Mass. 507, 6 N. E. 740, Richmond v. Adams Nat. Bank, 152 Mass. 359, 25 N. E. 731, or in City Nat. Bank v. Charles Baker Co. 180 Mass. 40, 61 N. E. 223.

Bank—paying incompetent's deposit to executor—liability.

It follows that the first prayer directing a verdict for the plaintiff for the sum confessedly due on the account should have been granted.

Exceptions sustained.

ANNOTATION.

Right of bank to pay out deposit directly to beneficiary without the order of the trustee or fiduciary in whose name it was made.

It seems clear that a bank cannot pay a deposit directly to a beneficiary without first either obtaining the consent of the trustee or fiduciary in whose name the deposit was made, or having been ordered to do so by a competent court. This was the holding in the reported case (DAY v. OLD COLONY TRUST CO. ante, 1554), wherein the decision was based upon the theory that since neither the beneficiary nor his personal representative could have maintained a suit against the fiduciary to secure the deposit, until settlement of the latter's account in court, the depositary had no right to voluntarily pay the same out directly without the consent of the fiduciary.

And support for the position taken in the DAY CASE is afforded by Hemmerich v. Union Dime Sav. Inst. (1911) 144 App. Div. 413, 129 N. Y. Supp. 267, affirmed in (1912) 205 N. Y. 366, 98 N. E. 499, Ann. Cas. 1913E, 514, wherein it was held that a depositary of a trust fund could not be compelled to pay the fund over to the beneficiary during the lifetime of the trustee in whose name the fund had been deposited, at least, without either obtaining his consent or making him a party to the suit. The court said that the bank's obligation was to the trustee as the depositor, and that no disposition of the fund could be made so long as he continued as such, at least, without notice to him and an opportunity to be heard, or, in other words, that the trust could not "be destroyed in the absence of the creator thereof," and that to compel the bank "to do otherwise would be to subject it to subsequent attacks by the original depositor." It also said: "The deposit is in the name of the trustee. The bank book is issued to the trustee. It follows that the bank is under contract to pay over the deposit only to the trustee while he is alive. This obligation the bank must not violate."

And in Slaymaker v. Farmers' Nat. Bank (1883) 103 Pa. 616, where a bank, after the death of an administrator and before the settlement of his account as such, paid the balance of a deposit account which he had opened in his representative capacity to the administrator de bonis non of his intestate, it was held that the executor of the deceased administrator could recover such balance from the bank, the court maintaining that the payment of the deposit to the administrator de bonis non constituted no defense to the action against the bank by the executor of the depositor.

However, a different rule prevails in some jurisdictions as to trusts after the death of the depositor of the trust account. For instance, many banks have regulations providing that, in case of the death of a depositor of a

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trust account, the account shall be paid to the person for whom the deposit was made, and, in the event of the death of both the trustee and the beneficiary, to the legal representative of the latter (the bank involved in Hemmerich v. Union Dime Sav. Inst. (N. Y.) supra, had a regulation of this kind). And in New York, at least, the Banking Law expressly provides that deposits in trust may be paid, in the event of the death of the trustee, to the person for whom the deposit was made. See § 144 of the Banking Law (Consol. Laws, 1909, chap. 2). And in Bishop v. Seaman's Bank (1898) 33 App. Div. 181, 53 N. Y. Supp. 488, without reference to any bank regulation or controlling statutory provision, it was held that a savings bank which, upon presentation of the pass book, paid a trust account directly to the administrator of the beneficiary, was protected as against the administrator of the deceased trustee. The court proceeded upon the theory that the making of the unexplained deposit of the money in trust operated to transfer the beneficial interest to the beneficiary, that had the beneficiary survived the trustee he would have had an absolute right to have claimed the money, even as against the trustee's administrator, and that his administrator was entitled to equal rights, the administrator of the trustee having made no demand upon the depositary previous to its making the payment to the beneficiary's administrator. G. J. C.

L. N. FRANTZ, Appt.,

v.

MILLIA LESTER et al.

JAMES H. MILLER et al., Appts.

West Virginia Supreme Court of Appeals — April 23, 1918.

(— W. Va. —, 95 S. E. 945.)

Infant — sale of property — subsequent appointment of guardian.

1. Under Code 1913, chapter 83, §§ 12–17, the court in which such a sale has been made has power and jurisdiction to ratify and confirm it, upon a bill filed for the purpose, by the person upon whose petition it was made, upon his having subsequently qualified under a due and regular appointment as guardian for the infant; and, if the sale is proved upon such bill to have been necessary to the welfare of the infant, fair, reasonable, just, and advantageous to his interests, it is the duty of such court to ratify and confirm it.

[*See note on this question beginning on page* 1565.]

— sale of real estate.

2. A sale of the real estate of an infant made in a summary proceeding authorized by §§ 12 to 17, inclusive, of chapter 83 of Code 1913 (§§ 3972–3977), at the instance of a person claiming to be his guardian and acting as such, but whose appointment and qualification, if any, were not recorded nor otherwise evidenced by any writing, at the time, upon a petition averring his due and legal appointment and qualification, is irregular and voidable, but not void.

— purchase by judge.

3. A purchase of an interest in part of the land so sold, by the judge of the court in which the proceeding was instituted, does not invalidate the sale, if the sale was authorized, ordered, and confirmed by special judges, in his absence from the court, nor is it sufficient ground or cause for denial

Headnotes 1–4 by POFFENBARGER, P.

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of ratification and confirmation thereof, upon a bill properly filed therefor.

Judge — qualification.

4. A judge interested in the subject-matter of litigation pending in his court is competent to enter merely preliminary and formal orders in the cause.

Guardian and ward — sale of lands — construction of statute.

5. A statute providing for the sale and conveyance by a guardian, of the real estate of infants, is remedial, and should be liberally construed.

Pleading — allegation of guardianship.

6. In the absence of demurrer an allegation that on a blank day of a specified month and year one had been duly and legally appointed guardian, and had qualified, and a purported exhibition of a duly certified copy of appointment, is a sufficient allegation of status and capacity as guardian.

Evidence — absence of proof.

7. Failure to prove an allegation of a petition does not render void a judgment or decree founded thereon.

APPEAL by plaintiff and certain claimants from a decree of the Circuit Court for Wyoming County in favor of cross complainants in a suit brought to establish and quiet title to certain land. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. M. P. Howard, E. W. Worrell, T. N. Read, Sanders, Crockett, & Kee, for appellants:

The affirmative relief prayed for in the answer in the nature of a cross bill of the infant defendants could not be granted against any of them because there was no prayer for process against them, and no process was served on any of them to answer said cross bill, and, therefore, they were not made parties thereto, and, as to said cross bill, not given a day in court.

Goff v. Price, 42 W. Va. 385, 26 S. E. 287.

Where one has been duly and legally appointed as guardian for infants, and has duly and legally qualified as such guardian, and in pursuance thereof institutes summary proceedings for the purpose of selling the infants' lands, the fact that the appointment of the guardian was not noted in the county clerk's office, and no memorandum of it was made therein, will not vacate said proceedings and will not be grounds for setting aside sales and deeds made under and in pursuance thereof.

Foster v. Woodfin, 65 N. C. 29; Sprague v. Litherberry, 4 McLean, 442, Fed. Cas. No. 13,251; Read v. Cassidy, 7 Ky. L. Rep. 295; Raymond v. Wyman, 18 Me. 385; Sullivan v. Hume, 4 Cal. Unrep. 161, 33 Pac. 1121; Waterman v. State, 116 Ind. 51, 18 N. E. 63; State v. Pearce, 14 Ind. 426; Long v. State, 56 Ind. 133; Chamberlain v. Evansville, 77 Ind. 542; Bartlett v. Lang, 2 Ala. 161; Barefield v. Bryan, 8 Ga. 463; Knowlton v. Dolan, 151 Ind. 79, 51 N. E. 97; Christisen v. Bartlett, 78 Kan. 401, 84 Pac. 530, 85 Pac. 594; Miller v. Zeigler, 44 W. Va. 484, 67 Am. St. Rep. 777, 29 S. E. 981; Alexander v. Barton, — Tex. Civ. App. —, 71 S. W. 71; Tomblin v. Peck, 73 W. Va. 336, 80 S. E. 450; Clinchfield Coal Corp. v. Osborne, 114 Va. 13, 75 S. E. 750.

Equity has jurisdiction, at the instance of one who has the title and is in the actual possession of the property, to remove a cloud therefrom and to quiet the title.

Smith v. O'Keefe, 43 W. Va. 172, 27 S. E. 353; Hitchcox v. Morrison, 47 W. Va. 206, 34 S. E. 993; Glenn v. West, 103 Va. 521, 49 S. E. 671; Virginia Coal & I. Co. v. Kelly, 93 Va. 332, 24 S. E. 1020, 18 Mor. Min. Rep. 395; Loring v. Downer, 1 McAll. 360, Fed. Cas. No. 8,513; Low v. Staples, 2 Nev. 209; Blair v. Hemphill, 111 Iowa, 226, 82 N. W. 501; Blight v. Banks, 6 T. B. Mon. 192, 17 Am. Dec. 136; Loring v. Hildreth, 170 Mass. 328, 40 L.R.A. 127, 64 Am. St. Rep. 301, 49 N. E. 652; Hunt v. Lambertville, 6 N. J. L. J. 343; Gamble v. St. Louis, 12 Mo. 617.

The contesting infants filed an answer by their duly appointed guardian ad litem, and were thus before the court in the mode prescribed by law.

Comstock v. Crawford, 3 Wall. 396, 18 L. ed. 34; Simmons v. Saul, 138 U. S. 439, 34 L. ed. 1054, 11 Sup. Ct. Rep. 369; McNitt v. Turner, 16 Wall. 352, 21 L. ed. 341.

The circuit court of Wyoming county, being a court of record, if the record states that the court acqui jurisdiction of the defendant, or

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if it is silent on the subject, jurisdiction will be presumed.

Freeman, Judm. §§ 131, 132, 134; Freeman, Void Judicial Sales, § 3, p. 8; Bank of Colfax v. Richardson, 34 Or. 518, 75 Am. St. Rep. 668, 54 Pac. 359.

The confirmation of the sales of lands by the court directing sales in the summary proceedings cured the defects, if any, and certainly cured the defects which were induced by the sworn statement of the guardian in the petition that she had, on a certain date, qualified as guardian and given bond.

Durrett v. Davis, 24 Gratt. 309; Walker v. Page, 21 Gratt. 645; Parker v. McCoy, 10 Gratt. 594; Hughes v. Johnston, 12 Gratt. 479; Hull v. Hull, 26 W. Va. 1; Hull v. Hull, 35 W. Va. 155, 29 Am. St. Rep. 800, 13 S. E. 49; Lancaster v. Barton, 92 Va. 615, 24 S. E. 251; Cooper v. Hepburn, 15 Gratt. 561; Pennybacker v. Switzer, 75 Va. 671; 21 Cyc. 126, 127.

The infant defendants still holding and owning the Wayne county farm of 133 acres, even if the court should hold the summary proceedings irregular and the sales thereunder void, the purchase money paid for the Lester lands should be restored to the purchasers, or, at least, the Wayne county farm should be decreed to them.

Freeman, Void Judicial Sales, p. 170, § 50; Woodstock Iron Co. v. Fullenwider, 87 Ala. 584, 13 Am. St. Rep. 73, 6 So. 197; 21 Cyc. 146, note 10.

While there may be some doubt as to whether or not an infant can ratify a sale until after he becomes of lawful age, yet, if he proceeds by affirmative action to ask the court to set aside an alleged void sale, the infant is put upon his election at the time, or unless he does so elect, or someone properly authorized elects for him, all affirmative relief must be postponed until his majority.

Freeman, Void Judicial Sales, p. 182, §§ 50 et seq.; Goodman v. Winter, 64 Ala. 410, 38 Am. Rep. 13; Com. v. Shuman, 18 Pa. 343; Jacoby v. McMahon, 174 Pa. 133, 34 Atl. 286; Lathrop v. Doty, 82 Iowa, 272, 47 N. W. 1089; Decker v. Fessler, 146 Ind. 16, 44 N. E. 657; Marshall v. McDermitt, 79 W. Va. 245, L.R.A.1917C, 883, 90 S. E. 834.

Messrs. **Marcum & Marcum** for appellees.

Poffenbarger, P., delivered the opinion of the court:

The decree brought up by this appeal disposes of issues raised by a bill of review in the nature of an original bill and an answer in the nature of a cross bill, adversely to the claims and interest of the plaintiff in the bill of review and numerous other persons similarly situated, and favorably to the interests and claims of the cross bill plaintiffs. The numerous appellants are claimants of title to several parcels of real estate sold and conveyed as the property of infants, under summary proceedings instituted by their mother, acting as their guardian, pursuant to the provisions of §§ 12 to 17 of chapter 83 of the Code. If, at the dates of the sales, the mother had been appointed guardian of the infants, no record of her appointment had been made in compliance with the requirements of law. This defect having been discovered long after the sales had been made, she caused herself to be regularly appointed guardian, and then filed her bill praying confirmation of the sales, making the purchasers parties thereto, which bill was dismissed on final hearing. Part of the land had been sold and conveyed to a trustee, and a purchaser from him filed this bill for review of the decree of dismissal and for relief upon all the facts and circumstances disclosed, styling it a bill of review in the nature of an original bill, and making all interested persons parties thereto, including the infants. Seven of the infants demurred to the bill, and filed a joint and separate answer, praying annulment of all the decrees of sale and the deeds made thereunder. The decree appealed from granted the relief prayed for in the cross bill answer.

By her petition filed in the circuit court of Wyoming county, May 24, 1909, Millia Lester, widow of Elisha Lester, representing herself to be the guardian of their nine infant children, averred that said Elisha Lester had died seised and pos-

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sessed of nine separate parcels of real estate, but that the children had no estate except their interests in the land, that she had no means for their support and education, and that she believed it would be to their interests to have the land sold and the proceeds thereof applied to their support and maintenance. Guardians ad litem were appointed, and parcels Nos. 3, 5 and 7 were sold to Levi Lusk, as guardian and in his own right, Drucilla Lusk, and others, for the sum of $4,000. This sale was confirmed and the property conveyed to the Lusks, and, by the decree confirming it and directing a conveyance, the guardian was authorized and empowered to invest about $3,000 of the proceeds of the sale in a tract of land containing 42½ acres, known in this record as "Skin Fork Land," then owned by Levi Lusk and others, the same persons to whom the Lester property was sold. By a decree entered March 10, 1910, the sale of two town lots to D. D. Moran at the price of $300 each was authorized, and they were sold and the sale confirmed and a deed executed. By a decree entered by Special Judge J. J. Swope, November 1, 1910, sale of parcel No 2 was authorized, and by a decree entered by Special Judge Marvin T. Bowman, November 28, 1910, a report of a contract of a sale thereof to E. W. Worrell, trustee, was received and filed, and on the next day, the same special judge being on the bench, the sale was confirmed and the execution of a deed authorized. In the same order, the guardian was authorized to invest $3,000 of the proceeds of the sale, the cash payment, in a tract of land in Wayne county, containing 133 acres and known as the James P. Billups farm. The guardian filed her petition November 1, 1910, for permission and authority to sell the Skin fork tract of land, obtained from Levi Lusk and others, and sale thereof, at $50 per acre, to E. E. Cook, was authorized and finally consummated. A portion of the proceeds of this sale was invested in the Wayne county farm, under permission granted by the court. The quantity of the Lusk tract of land turned out, on a resurvey, to be 69.89 acres, making the proceeds of the sale thereof nearly $3,500.

L. N. Frantz, the plaintiff in the bill of review in the nature of an original bill, claims title under E. W. Worrell, trustee, the purchaser of parcel No. 2, containing 28.69 acres, after elimination from the area of the tract, as defined by its boundaries of portions of the bed of the Guyandotte river and certain railroad rights of way. Worrell took the title for himself, J. Wellman, Harvey Ewart, M. P. Howard, and James H. Miller. They seem to have divided the tract, or a portion of it, into town lots, and Ewart and Worrell, trustee, by their deed dated November 1, 1912, conveyed to Frantz a portion thereof, describing it as lot No. 27 in section D of the town of Welton. By another deed dated April 1, 1912, they conveyed to George W. Graham lot No. 17 in block C of said town. Moran conveyed to Henry L. Thurman the lots he purchased from the guardian, and Thurman conveyed them to Grover C. Worrell.

The bill of Millia Lester alleges her verbal appointment as guardian to have been made by A. M. Stewart, clerk of the county court of Wyoming county, in the month of March, 1909, and her qualification in pursuance of the appointment. It also charges the failure of the clerk, by oversight, to make any memorandum of the appointment and qualification and to report the same to the court for confirmation. The bill in this cause repeats the allegation, and attributes the failure of the clerk to record and report the appointment and qualification to his sudden death thereafter. Mrs. Lester was duly appointed by another clerk of the county court of said county April 8, 1914, her appointment was confirmed by the court June 18, 1914, and she

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brought her suit to have the sales validated or confirmed May 24, 1914. The cause was matured and heard, and a decree of dismissal entered July 14, 1914. The process on this bill of review was issued January 30, 1915.

The decree dismissing the bill of Millia Lester is based upon the application of the rule of strict construction to the statute authorizing sales of the real estate of infants, and it is fully sustained by some decisions rendered in other jurisdictions. Higginbotham v. Thomas, 9 Kan. 328; Harrison v. Miller, 87 Kan. 48, 123 Pac. 854; Dickey v. Beatty, 14 Ohio St. 389; Young v. Dowling, 15 Ill. 482. But in this state the statute has always been held to be remedial in character and liberally construed. Faulkner v. Davis, 18 Gratt. 651, 669, 98 Am. Dec. 698. In Garland v. Loving, 1 Rand. (Va.) 396,

Guardian and ward—sale of lands—construction of statute.

the court asserted the existence of judicial power, under the statute, to ratify and confirm a sale of real estate of infants already made without authority, upon finding it to have been reasonable, fair, just, and clearly advantageous to the infants. Loving had conveyed his real estate to trustees for the support of himself and his wife and children, and, after his death, for the children in fee. Lofftus having offered $10,000 for the property, Garland and Whitehead, guardians of the children of Loving, and the trustees accepted the offer, and filed their bill and an amended bill in equity, praying ratification of the contract of sale. These bills were dismissed, and on an appeal it was held that the trial court had the power to ratify and confirm the sale, although made without any authority, as regarded the estates of the infants. Mason and Vaughn were equal owners of property in Richmond. They entered into an agreement reciting their ownership and the probability of the causes for sale thereof, due to death or other circumstances, and providing for mutual and reciprocal options of purchase, as conditions precedent to the right to make individual sales of their interests and for effectuation of the agreement by their executors or administrators in case of death. An indorsement upon the agreement provided for a public sale to the highest bidder, after sufficient notice, in case either of the parties should wish the premises sold, and not want to make an offer of purchase, after rejection of his offer of sale. Vaughn having died, Mason procured a sale to be made to Goddin, by an auctioneer, and the purchaser refused to comply with his contract, because he doubted the validity of the sale as to the interests of the Vaughn heirs. Upon a bill filed by the executrix of the will of Vaughn, the court decreed specific performance of the contract, after having ratified Mason's sale of the property, including the interests of the heirs of Vaughn. Goddin v. Vaughn, 14 Gratt. 102. It is to be remembered that Vaughn's agreement to a sale by Mason was conditional. He had the right to keep his property, by purchase of the interest of Mason. This right descended to his heirs, wherefore it cannot be said the agreement between Vaughn and Mason extinguished the Vaughn estate or prevented the beneficial interest therein from descending to the heirs. They had the right to buy as well as to sell. In the opinion delivered, the court reaffirmed and applied the doctrine enunciated in Garland v. Loving, saying it had been decided in that case "that if the court should be satisfied the interest of the infants manifestly required a sale, and that the one that had been made was advantageous to them, it might confirm it instead of requiring a new sale to be made under its decree." In neither

Infant—sale of property—subsequent appointment of guardian.

of these cases had there been a perfect sale. In the former, the guard-

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lans had made a sale without any authority. In the latter, there had been no sale by the guardian. He merely joined in the bill of the executrix, for ratification and enforcement of the sale made by Mason. Further applications of the doctrine will be found in Daniel v. Leitch, 13 Gratt. 195, and Faulkner v. Davis, cited.

Upon the bill of Mrs. Lester full and clear proof of the necessity of the sales and their advantageous character as regards the interest of the infants was submitted, and neither of the hypotheses was in any way controverted or questioned. At that time, about four years after the sales, it clearly appeared that the town lots sold and the Skin fork tract of land were not worth any more, respectively, than the prices obtained for them. The other tract purchased by Worrell, trustee, was not well suited to agricultural uses or any other immediately productive purpose, and its value was largely dependent upon the commercial and industrial growth and development of the community in which it was situated. It lay about 3 miles distant from the town of Mullens, consisted of hillsides and small tracts of bottom land, and was cut into at least four parcels by the Guyandotte river. The Skin fork tract of land lay about 15 miles from the nearest railway station. The Wayne county farm in which proceeds of the sales were invested was nearly all cleared, well improved, in a good state of cultivation, and situated near a railroad.

Only one circumstance is relied upon as tending to prove inadequacy of price or disparity in values, and that pertains to the lots practically traded to the Lusks for the Skin creek farm. Though Lusk testified he had offered to take $2,500 for the farm, he testified in equally positive terms that he had offered to take the same amount for the town lots. Considered in the light of the fact that Mrs. Lester soon afterwards sold the former for more than $3,500 and lack of proof that the town lots were really worth more than $2,500, this testimony is wholly insufficient to disprove an advantageous sale and purchase or exchange, whichever it may have been.

Two circumstances are pointed out as tending to cast imputations upon the good faith of the transactions, the judge's interest in the sale to Worrell and the encouragement of the sales by other persons, two of whom became interested in the sale. The judge of the court did not preside at the entry of any of the orders of sale and confirmation, relating to the tract in which he became interested. On these occasions, the court was presided over by special judges elected by members of the bar. An interested judge may properly enter preliminary and formal orders necessary to the maturing of the cause, such as the filing of the petition and the appointment of a guardian ad litem in these proceedings. Findley v. Smith, 42 W. Va. 299, 26 S. E. 370. Although made upon a single petition, the several sales were separate and independent, each standing upon its own facts and circumstances for legal justification. In the proceedings heard by the regular judge, he had no occasion to consider or pass upon those set up as ground for sale of the tract in which he became interested. Moreover, he testifies positively that he had no interest in the tract, until perhaps a year after the sale had been made. Since all of the sales were made for adequate considerations and were clearly advantageous to the infants, it is immaterial that Ball, Wellman, and Cook rendered the widow assistance in the disposition of the property. In all of these transactions, she had the advice and protection of other friends, her counsel, the guardian ad litem, and disinterested judges.

—purchase by judge.

Judge—qualification.

The conclusion foreshadowed by

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the observation here made does not proceed upon the theory of absolute invalidity of the decrees in question. That they are merely voidable necessarily results from their susceptibility of ratification by the acquiescence of the infants, with full knowledge of all the facts, after having obtained their majorities. That would bind them. Scott v. Freeland, 7 Smedes & M. 409, 45 Am. Dec. 310; Schur v. Schwartz, 140 Pa. 53, 21 Atl. 249; Brazee v. Schofield, 124 U. S. 495, 31 L. ed. 484, 8 Sup. Ct. Rep. 604. The collateral nature of the defect makes it a mere irregularity in procedure, inefficacious to render the decrees wholly void. Though it did not disclose the manner of her appointment, the petition represented Millia Lester to be the guardian of the children, naming all of them. It alleged that on the —— day of December, 1907, she had been duly and legally appointed guardian, and had qualified and purported to exhibit a duty certified copy of the appointment. If appointed by Stewart at all, the date of the appointment is shown by the evidence to have been in March, 1909. In the absence of a demurrer, this was a sufficient allegation of her status and capacity as guardian. Jacobs v. Williams, 67 W. Va. 377, 67 S. E. 1113. Gartin v. Draper Coal & Coke Co. 72 W. Va. 405, 78 S. E. 673. Failure to prove an allegation does not render void a judgment or decree founded thereon. "Although a purchaser at a judicial sale may be required to see to the regularity of the proceedings upon which the jurisdiction of the court is founded, he is not bound to investigate the truth of the matters stated in the bill and deposed to by the witnesses touching the estate owned by the infant. The title cannot be affected because the case made by the record happens not to be warranted by the facts." Durrett v. Davis, 24 Gratt. 302, 308. Under the statute, the court does not merely grant a general authority or power to the guardian, to sell the real estate of the ward. It makes the sale itself through the guardian acting as its agent, or otherwise, and adopts adequate measures prescribed by the statute, for preservation of the fund arising therefrom. The guardian seems to be vested with the sole power of initiation, but in all other respects the court is in full control of the proceeding. There is a cause of action, whenever the interests of the ward require a sale. In this respect, a proceeding of this kind, erroneously initiated, is unlike the proceedings in Hull v. Hull, 26 W. Va. 1, and Hoback v. Miller, 44 W. Va. 635, 29 S. E. 1014, in neither of which was there a possible cause of action of the kind alleged, wherefore the lack of jurisdiction appeared on the face of the record. Here, there was an apparent jurisdiction, the court was one of general jurisdiction, and it carried its powers, not those of the petitioner, into execution. Such a decree cannot be collaterally assailed, and one that cannot be wholly disregarded is not absolutely void. St. Lawrence Boom & Mfg. Co. v. Holt, 51 W. Va. 352, 41 S. E. 351; Tomblin v. Peck, 73 W. Va. 336, 80 S. E. 450; Durrett v. Davis, 24 Gratt. 302, 316; Fisher v. Bassett, 9 Leigh, 119, 33 Am. Dec. 227.

Infant—sale of real estate.

Pleading—allegation of guardianship.

Evidence—absence of proof.

For the reasons stated, the decree entered in this cause, August 28, 1917, and the decree entered in the chancery cause of Millia Lester, Guardian, v. Levi Lusk et al., July 14, 1914, will be reversed, and a decree entered here, ratifying and confirming the said several sales made under the decrees in the summary proceedings mentioned and described in the bills and proceedings in said two causes, and awarding costs in this court to the appellants against Susie, John C., Lillie B., Amoris, William, Augusta, and

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Ida May Lester; and this cause will be remanded for such further proceedings as may be necessary to full effectuation of the rights of the purchaser in said sales, as herein ascertained and declared.

ANNOTATION.

Subsequent appointment of guardian as curing invalidity of prior sale of ward's property.

When a sale, supposed to be a guardian's sale of his ward's property, is found to be invalid for the reason that there is no record of the guardian's appointment, the question arises as to whether the invalidity may be cured by the appointment as guardian of the same person who made the sale, conceding, of course, that if the appointment had been made at the proper time the sale would be valid. While there are no cases other than the reported case (FRANTZ v. LESTER, ante, 1558) in which the court was required to pass directly upon this particular question, there are two or three cases that throw some light upon it. Mock v. Chalstrom (1903) 121 Iowa, 411, 96 N. W. 909; Higginbotham v. Thomas (1872) 9 Kan. 328; McKee v. Thomas (1872) 9 Kan. 343; Harrison v. Miller (1912) 87 Kan. 48, 123 Pac. 854.

In Mock v. Chalstrom (Iowa) supra, it was not the appointment of the guardian that was lacking in the original proceedings, but proper notice of the application to sell was not served upon the wards, and the guardian's deed had not been presented to and approved by the court as the statute provided. There may be some difference between the defect caused by these omissions and the defect caused by a lack of a legal appointment of a guardian, yet the case may have some value in the consideration of the question. After an action by the grantee of the purchaser at the guardian's sale had been commenced, the then guardian made application to the probate court for an order authorizing him to make a conveyance to perfect the title in the purchaser, which order was granted and the deed delivered. It was held that this proceeding had cured the defects after the commencement of the suit, and deprived the plaintiff of all grounds for complaint.

In Higginbotham v. Thomas (1872) 9 Kan. 328, supra, the defect was caused by a failure to have the guardian appointed in the state where the real estate was situated, by the court that ordered the sale, although it seems that he had been appointed in another state. The question of curing the defect by a subsequent appointment was squarely raised, but, unfortunately for the present purposes, the court found it unnecessary to decide the question. The court said: "This nunc pro tunc order is the only one that shows that Williams was authorized in this state to act as guardian. There is a succession of orders in the probate court, some of which are referred to above, showing that he assumed to act as guardian, and that his acts therein were recognized by the court. But before he could assume to act in the matter of disposing of the real estate of a minor, he must actually have had the authority. This position is not questioned. It is asserted that he had the authority, but by oversight the same had not been formally entered upon the record, and that the court had authority to make the record show the fact by the nunc pro tunc order above recited. The principle asserted is a very grave one, and not free from doubt. It is certainly a wide reach of power to authorize a probate court, more than ten years after such an order is claimed to have been made, to enter an order that shall reach back and cover the actions of the intermediate years, affecting the rights to property, the liability of sureties on a bond, and all the relations of the minor during that period. But great and perilous as is the power thus claimed, it is not necessary in this case to decide upon its existence. It is enough for us to say that if the power exists it does not,

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in this case, grow out of § 178, page 294, Gen. Stat., for that section only permits the 'immediate successor' of an ex-officer to complete the records of his predecessor. The record shows that several persons had held the office of probate judge of Leavenworth county, between the time when this order is claimed to have been made and the entry of the nunc pro tunc order in December, 1869. Nor do we think the proceeding could have been justified under § 201, page 471, Gen. Stat., for it can hardly be claimed that a memorandum, not filed or signed, and which is incomplete and imperfect in itself, can be considered as one of the papers of the court, such as will authorize the court to go back more than ten years and declare it a record for all that time, and on his own motion, without notice, make it a record. Such a power is not found in the language of the section referred to; and to strain its language, by giving it such a construction in this case, would lead to endless confusion and great wrong. It is not doubted that the power of the court to enter a nunc pro tunc order without express statutory provision exists. It is only the power to make the record disclose the truth in a matter in which right and justice may demand it. This power is, however, subject to such limitations and restrictions as experience has shown were necessary to prevent its abuse. Whether such an order was proper in the present case need not be determined. Such an order, vitally affecting the rights of others, should never be made without notice to those to be affected thereby. In England such orders are made only upon a rule. (Tidd, Pr. 489, 532, 533; Fishmongers Co. v. Robertson (1847) 3 C. B. 970, 136 Eng. Reprint, 389, 4 Dowl. & L. 656, 16 L. J. C. P. N. S. 118), and we have found no case in this country where such orders are made without a rule, or upon due notice, except in those cases where there has been an appeal, and pending the appeal, where the case has been held under advisement, if either party die, then the judgment is entered nunc pro tunc, 'that the delay arising from the act of the court may not turn to the prejudice of the party.' Tidd, Pr. 932. In all the other cases referred to by counsel for plaintiff in error, where such an order has been made, notice was given and an opportunity offered to contest the action of the court, and to take an appeal. The principle and the reason of it are stated by Chief Justice Hornblower in New Jersey Turnp. Co. v. Hall (1839) 17 N. J. L. 337, as follows: 'Whenever a court, or any person acting under legal authority, is to act judicially, or exercise a discretion in a matter affecting the rights of another, the party thus to be affected is to have reasonable notice of the time and place when and where such act is to be done, to the end that he may be heard in defense, or for the protection of those rights.' The authorities cited by the defendant in error show the application of the rule in almost every kind of proceeding. It would be difficult to imagine a case where, in common justice, a notice was more imperatively required than in this order. More than ten years had elapsed since it is claimed the proceedings were had. The guardian had long ceased to be such in Missouri, had never given any bond in this state, the ward had become of age, and had long before commenced the action in which the order was to be read in evidence. It would be a grave injustice to sanction such action by holding it valid, for, however much we may desire to so rule in this particular case as to promote what seems to us the equity of the case, we cannot forget that we are also fixing rules for a large class of cases. To allow the probate court to make nunc pro tunc orders, ex parte, without restriction as to the character of the order, or the time in which it may be made, and with no one present but the interested attorney, would inevitably open the door to a practice dangerous to the great interest confided to that court. We cannot do it in the face of reason and authority. Perhaps no better illustration of the danger of such a cause could be suggested than the record discloses: On the 22d of July, 1862, John W. Williams

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and his attorney appeared in the probate court, and procured an order to be made, making Williams the guardian, from the 5th of July, 1859, of the person and estate of Alice A. Clark. Thus, without a bond or notice, a man was appointed to a position of great trust, and from the nature of the appointment the sureties on the bond in Missouri would not be liable. It is not claimed that this appointment had any validity. There was much evidence as to notice, but it is so plain that no notice was given that the question is not open to doubt. On the evening before the order was made, one of the attorneys for the plaintiff in error in this case told one of the attorneys for the defendant in error that an application would be made the next morning, but was then informed that the attorney was not employed by defendant in error in that matter; and this is shown to be true in the evidence. This was no notice to anyone, much less to Mrs. Thomas." This case ruled the case of McKee v. Thomas (1872) 9 Kan. 343, supra, which case was decided at the same time upon practically the same facts.

In Harrison v. Miller (1912) 87 Kan. 48, 123 Pac. 854, supra, there had been no effort made to cure the defect caused by failure to appoint a guardian in the state, and the court said: "If the record does not speak the truth, the place to correct it is in the court that made it." The two earlier Kansas cases were cited, and quoted to the point that a guardian's deed is void if the record does not show affirmatively the appointment of a guardian.

It thus appears that the holding in the reported case (FRANTZ v. LESTER, ante, 1558), that the subsequent appointment of the guardian by the court that should have made the appointment prior to the sale cures the defect caused by the omission, receives some support from earlier decisions, in which the exact point was not decided. J. W. M.

E. E. SCHROYER et al., Appts.,
v.
JOSIAH V. THOMPSON et al.

Pennsylvania Supreme Court — July 17, 1918.

(262 Pa. 308, 105 Atl. 274.)

Principal and surety — release of surety — agreement between principals.

1. An agreement between the principals, varying the terms of a contract in a material part without the consent of the surety, will relieve him from liability on the contract.

[*See note on this question beginning on page* 1569.]

— agreement to pay compound interest.

2. The indorsement upon a note of an agreement to pay compound interest does not release a surety from liability on the instrument, if there is no extension of time for paying interest and no other consideration for such agreement.

Contract — consideration — forbearance to sue.

3. Mere forbearance to sue without an agreement to forbear or a request to do so by the debtor is not a consideration for a promise to pay compound interest.

APPEAL by plaintiffs from an order of the Court of Common Pleas for Fayette County discharging rule for judgment for want of sufficient affi-

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davit of defense, in an action brought to recover the amount alleged to be due on two promissory notes. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. W. J. Sturgis and S. J. Morrow, for appellants:

The sureties are not released from liability because of the indorsement on the backs of the notes by the principal, of agreements to pay compound interest.

Miller v. Reed, 27 Pa. 244, 67 Am. Dec. 459; Neff v. Horner, 63 Pa. 327, 3 Am. Rep. 355; Cambridge Sav. Bank v. Hyde, 131 Mass. 77, 41 Am. Rep. 193; Bucklen v. Huff, 53 Ind. 474; 1 Brandt, Suretyship & Guaranty, 3d ed. § 396; Claiborne v. Birge, 42 Tex. 98.

Messrs. W. J. Johnson, F. P. Rush, Sterling, Higbee, & Matthews, Umble, Robinson, McKean, & Williams, and Crow & Shelby for appellees.

Frazer, J., delivered the opinion of the court:

Plaintiffs' action is founded on two demand notes signed by one defendant as principal and the others as sureties, and assigned by the payees to plaintiffs. The sureties each filed an affidavit of defense, alleging release from liability, owing to a memorandum indorsed on the back of the notes, subsequent to their execution and without consent of the sureties, stating: "All overdue int. to bear int. to be compounded semiannually." A rule for judgment for want of a sufficient affidavit of defense was discharged, and plaintiffs appealed.

It is not denied the agreement to pay interest on interest is a material alteration, affecting the sum payable for interest, within the meaning of the 125th section of the Negotiable Instruments Act of May 16, 1901 (P. L. 194). Plaintiffs contend, however, the memorandum is without effect so far as the sureties are concerned, because not on the face of the instrument, and consequently not an alteration of its terms, but merely a separate agreement between maker and payee. Discussing or deciding this question is unnecessary, since, under the view we take of the case, the decree of the court below must be reversed for a different reason.

Principal and surety—release of surety—agreement between principals.

A surety has a right to require strict performance of the contract, and an agreement between the principals, varying its terms in a material part without the consent of the surety, will release him from liability. Bensinger v. Wren, 100 Pa. 500; Nesbitt v. Turner, 155 Pa. 429, 26 Atl. 750; Robbins v. Robinson, 176 Pa. 341, 35 Atl. 337. It must be conceded that an agreement between the principals, having the effect of altering the written terms of the contract, must be based upon a sufficient consideration, that is, must be a valid and enforceable contract.

—agreement to pay compound interest.

The affidavits of defense filed contained no averment of an extension of time for payment of interest, nor do they set up other facts capable of being construed as a consideration for the agreement to pay compound interest. No consideration appears in the memorandum unless it be an extension of the time for payment of interest, implied by the recognition of nonpayment from time to time, by reason of the provision that it should bear interest. Nothing is said specifically as to extension of time, or concerning an agreement not to enforce payment of interest for a definite or indefinite period. While forbearance to sue has always been recognized as an adequate consideration for a promise made in reliance thereon, there must be an agreement to that effect; mere forbearance without an agreement has been held not a good consideration, because of there being nothing to prevent the bringing of suit at any time. Clark v. Russel, 3 Watts, 213, 27 Am. Dec. 348; Sidwell v. Evans, 1 Penr. & W. 383, 21 Am. Dec. 387; Cobb v. Page, 17 Pa. 469; Saalfield v. Man-

Contract—consideration—forbearance to sue.

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row, 165 Pa. 114, 30 Atl. 823. While it has been said that actual forbearance at the instance of a defendant may also be sufficient (Clark v. Russel, supra), yet, in such case, the burden is on the one relying thereon to show by clear and satisfactory proof that the request to forbear was, in fact, the inducing cause of the act of forbearance. Ibid.

In the present case the court below, in discussing this question, stated there was an actual forbearance in the enforcement of the payment of interest for a period of nearly four years, and such forbearance was sufficient consideration for the agreement to pay compound interest. The difficulty with this view of the case is that the record fails to show the delay of four years in collecting the interest was pursuant to a request or promise made by the payee to the maker. Under the circumstances, there was no valid agreement to pay compound interest, the sureties are not prejudiced, and there is nothing to effect their discharge from liability.

The judgment is reversed, and the record remitted to the court below, with directions to enter judgment against defendants for such sum as to right and justice may belong, unless other legal or equitable cause be shown to the court below why such judgment should not be entered.

ANNOTATION.

Agreement by principal to pay compound or additional interest, as releasing surety.

The general principle that there must be a consideration for the agreement to pay compound or the higher rate of interest is held to govern in the reported case (SCHROYER v. THOMPSON, ante, 1567), and, there being no consideration, the agreement in question was held to be nudum pactum, and the surety not released. That there must be a consideration for the agreement is held also in Claiborne v. Birge (1875) 42 Tex. 98.

That an agreement to pay a higher rate of interest furnishes a consideration for an agreement to extend time, which, if for a definite period, releases a surety, is well sustained by the authorities. Huff v. Cole (1873) 45 Ind. 300; Callihan v. Tanner (1842) 3 Rob. (La.) 299; Eaton v. Waite (1877) 66 Me. 221 (dictum); McDowell v. Reese (1888) 10 Ohio Dec. Reprint, 303; Casey-Swasey Co. v. Anderson (1904) 37 Tex. Civ. App. 223, 83 S. W. 840; First Nat. Bank v. Harris (1893) 7 Wash. 139, 34 Pac. 466.

The giving of a new note, due one day after date and bearing a higher rate of interest than that borne by the original note, is a sufficient consideration for the promise of the creditor to extend time of payment, and releases an indorser. Shaw v. Nolan (1853) 8 La. Ann. 25. The note in this case had been protested at maturity for nonpayment, and more than two years after its maturity, part of the amount called for in the note had been paid on account, and for the balance the new note or new bill was given, payable one day after date.

An indorser is released by an extension of time, in consideration of the maker's agreement to pay a higher rate of interest. Kittle v. Wilson (1878) 7 Neb. 76; Arthur v. Lier (1858) 8 U. C. C. P. 180; Farrell v. Oshawa Mfg. Co. (1859) 9 U. C. C. P. 239.

So, an agreement to pay compound interest is a consideration for an extension of time. Thus, the giving of a note for the interest due, which note itself bears interest, thereby in effect providing for compound interest, is a valid consideration for the promise of the creditor to extend the time of payment, and releases the surety, where the extension is for a definite period. Bugh v. Crum (1901) 26 Ind. App. 465, 84 Am. St. Rep. 307, 59 N. E. 1076. But an agreement to pay com-

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pound interest on a note, in a way prohibited by statute, is no consideration for the promise of the holder of the note to extend the time of payment thereon, so as to relieve the surety. Moore v. Macon Sav. Bank (1886) 22 Mo. App. 684.

While this discussion does not deal generally with the effect of actual payment of a higher rate of interest, or of compound interest, it may be stated that it has been held that an indorser of a promissory note is released by the receipt by the creditor, from the debtor, of an increased rate of interest, in advance, on the note, in accordance with a parol promise which was unenforceable, and pursuant to the creditor's promise to extend the time of payment, as such receipt is a consideration for the promise. Smith v. Pearson (1877) 52 Cal. 339. The actual payment of what amounts to compound interest is a consideration for an extension of time which will release a surety, although the agreement to pay such interest may not be enforceable. Commercial Bank v. Wood (1893) 56 Mo. App. 214.

As stated above, in order that an extension of time shall work the release of a surety, it must be for a definite period. It has accordingly been held, in cases in which there was no definite extension, that there was no discharge of the surety, and the effect of the agreement to pay increased interest has not been considered. Bearse v. Lebowich (1912) 212 Mass. 344, 99 N. E. 175. It is stated in this case, however, that, if a loss finally resulted from the increase in the rate of interest, the liability of the surety would be diminished to that extent.

The foregoing cases have had to do with the binding effect of the agreement. Assuming that the agreement to pay compound or the higher rate of interest is a binding one, there arises the question whether, by such an agreement, the surety is discharged. Some courts adhere to the theory that an agreement of the principal to pay a higher rate of interest may be treated as an independent agreement of the principal, which does not necessarily discharge a surety. Huff v. Cole (1873) 45 Ind. 300, s. c. subsequent appeal in Bucklen v. Huff (1876) 53 Ind. 474; Moore v. Macon Sav. Bank (1886) 22 Mo. App. 685; Knapp v. Mills (1857) 20 Tex. 123; Tremper v. Hemphill (1837) 8 Leigh (Va.) 623, 31 Am. Dec. 673.

It may be suggested that there is no scope for the application of this view, if the consideration relied on is a mere indulgence or an agreement to extend time, since in the former case the agreement to pay additional interest would not be binding upon the principal, for lack of consideration, and in the latter case the agreement to extend the time for a definite period, being supported by a consideration, i. e., the agreement to pay the higher rate of interest, would itself amount to an alteration of the contract which would release the surety.

An indorsement upon the back of a note, of an agreement to pay a higher rate of interest, has been held not to be an alteration which, of itself, will discharge a surety. Huff v. Cole (1873) 45 Ind. 300, approved upon subsequent appeal in Bucklen v. Huff (1876) 53 Ind. 474. The court, in the original opinion, says: "We do not regard the contract by the principal in the note, shown by the indorsement, as of itself sufficient to change, alter, or supersede the contract evidenced by the face of the note. It was the agreement of the principal to pay a higher rate of interest than that mentioned on the face of the note. It does not purport to be an alteration of the contract evidenced by the face of the note, but only an additional stipulation to which the principal and the creditor only are parties. Had it been upon a separate paper, it would hardly have been supposed to be an alteration of the note. We do not think that the doctrine relating to the alteration of contracts has any application to the case." In affirming this decision, the court in the subsequent opinion says: "We see no reason to change the conclusions then arrived at. There are reasons which we think are conclusive that the new contract did not merge or abrogate the old, in respect

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to payment of interest. If the new contract merged the old in respect to the payment of interest, that result was effected the moment the indorsement was made on the note. If that result was not then brought about, it was not afterwards by the actual extension of time. But we have seen that the plaintiff did not stipulate for any definite extension of time. She might have brought her action at once, upon the notes falling due, and have recovered in accordance with its terms; for in that case she would not have granted the contemplated extension, which was to be the sole consideration for the new agreement. If she might have then brought her action upon the note, and have recovered according to its terms, because the old agreement as to interest was not merged in the new, she may do it now. No event has occurred, subsequent to the indorsement, that would effect such merger of the old contract in the new." It will be noticed that, in the subsequent opinion, the court relies more upon the fact that there was no consideration for the agreement to pay the higher rate of interest than upon the theory that it was an independent contract.

The case of Bucklen v. Huff is cited with approval in Moore v. Macon Sav. Bank (1886) 22 Mo. App. 685, holding that the indorsement on the back of a promissory note, of an agreement, "Compound interest to be allowed on the within every six months," is not a material alteration of the note which will discharge a surety. The court states that the indorsement on the instrument was only a memorandum of the agreement between the payee and the principal maker of the note, and that it purported to bind only the principal maker; that it in no way purported to alter the meaning and language of the note, or to be a part thereof; that it showed for itself that it was separate and apart from the note, and comes within the rule that, "if the new writing is a mere memorandum outside of the note, it is not an alteration."

In adhering to the theory that the surety is not discharged by such an agreement, the court in Knapp v. Mills (1857) 20 Tex. 123, states that the principal debtor, who was expected to discharge the obligation, might for a valuable consideration, "so far as he was concerned, contract to pay a larger rate of interest than his sureties would be liable for." A default judgment was accordingly rendered against the principal and sureties, for the principal sum and interest at the legal rate, and an additional judgment against the principal for the higher rate agreed to be paid by him. This judgment was affirmed upon an appeal by the principal debtor.

An additional sealed obligation executed by the principal debtor alone, written below a principal sealed obligation, in which additional obligation the principal debtor agreed that the principal obligation, which was without interest, should bear interest from date, has been held not to release the sureties. Tremper v. Hemphill (1837) 8 Leigh (Va.) 623, 31 Am. Dec. 673. Parker, J., states that the additional agreement "neither amounted to a payment of the bond, nor offered a legal excuse for not paying it. The supplemental paper was no release to the principal, and consequently, at law, was no release to the surety. It cannot be pretended that the principal, by indorsing on the bond a promise to pay interest from the date, was discharged from his previous obligation. Then it was no discharge of the surety; for I conceive that, at law, nothing which does not discharge the principal can discharge the surety, unless it affects the obligation itself, by erasure or alteration in a material part, with the consent of the principal, but without the consent of the surety."

The payment by the principal debtor of a higher and usurious rate of interest, in accordance with an agreement entered into prior to the giving of the note, is held not to release the sureties, in Brown v. Fountain (1893) 3 Tex. Civ. App. 227, 22 S. W. 129.

It has been held that the guarantors of liabilities which a principal had incurred, or might incur, to a bank to which the guaranty was given, to the extent of a specified amount at 7

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per cent, "which it is agreed the same shall bear," are not released by an agreement to pay a higher rate of interest than the bank could lawfully charge, nor by the actual payment of some interest at the higher rate. The court states that, while the excess was a mere voluntary payment which the debtor could not recover, in so far as such payments exceeded 7 per cent they did "not bind the guarantors, in a statement as against them of the debtor's account." Egbert v. National Crown Bank [1918] A. C. (Eng.) 903, 35 Times L. R. 1.

Some cases, in denying that a surety is released by an agreement to pay a higher rate of interest, which is usurious, expressly base the decision upon the invalidity of the agreement, and hold that it is but an honorary undertaking not binding in law. Richmond v. Standclift (1842) 14 Vt. 258.

It thus appears that the view is supported in a number of cases that the agreement to pay compound or a higher rate of interest does not discharge the surety. On the contrary, other courts treat an agreement to pay a higher rate of interest as a material one, which discharges a surety. It has been held in a jurisdiction in which an agreement to pay a higher rate of interest, although usurious, is not wholly void, but voidable to a certain extent only, that an agreement between the principal and payee for a higher (and usurious) rate of interest, in consideration of an extension of time, an agreement which was executed by the debtor's paying the interest in advance and the creditor's extending the time, released the surety. McDowell v. Reese (1888) 10 Ohio Dec. Reprint, 303. The note involved bore 8 per cent interest; the agreement was to pay 12 per cent. The fact that, under the law of this state, the usurious agreement may have reduced the rate of interest collectable to 6 per cent, was held not to prevent the change from releasing the surety. The court states: "In any event, the contract is changed, and it makes no difference whether the new contract is better for the surety than the one he made, or worse; whether the rate of interest is higher or lower; he can truly say, This is not the contract I made, and the contract I did make having been changed, there is no contract existing that I did make."

In Bristol & W. of E. Land, Mortg. & Invest. Co. v. Taylor (1893) 24 Ont. Rep. 286, a mortgagee who occupied the relation of a surety after an assignment of the mortgage by him, was held to be released by an agreement between the assignee and the mortgagor, extending the time for the payment of the mortgage and increasing the rate of interest; an agreement which, it was stipulated, should be read and construed along with the mortgage, and treated as a part thereof. The court states that not only was the alteration in the time of payment material, but also the alteration in the rate of interest.

It has been held that an addendum written below the signatures, on a sealed note bearing interest at 7 per cent, saying: "The above note is to be accounted for, with interest at 8 per cent per annum," and signed by the principal obligor on the note, constitutes a material alteration, which will avoid the note as against a surety thereon who did not consent to the alteration. Sanders v. Bagwell (1890) 32 S. C. 238, 7 L.R.A. 743, 10 S. E. 946. Upon a subsequent appeal, the surety was held not released, because he had consented to the addendum. (1892) 37 S. C. 145, 15 S. E. 714, 16 S. E. 770.

Changing the rate of interest in a note from 6 to 7 per cent has been held to be a material alteration, which, when made without the surety's consent, discharges him. Harsh v. Klepper (1876) 28 Ohio St. 200. This, however, is a question of alteration of instruments, which is not considered herein. W. A. E.

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PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES, Trustee, etc., of Mary J. Miles, Deceased,

v.

CITY OF PHILADELPHIA, Appt.

Pennsylvania Supreme Court — October 23, 1918.

(262 Pa. 439, 105 Atl. 630.)

Witness — expert — compelling testimony.

1. A witness cannot be compelled against his objection to testify as an expert in favor of a private litigant.

[*See note on this question beginning on page* 1576.]

— testimony for public.

2. The state or the United States may, in the exercise of its sovereign power, call upon its citizens to testify as experts in matters affecting the common weal.

— testimony in favor of criminal.

3. The state may, in its sovereign capacity, exercise its power to compel one of its citizens to testify as an expert in favor of another citizen charged with crime.

Contract — breach — undertaking to testify as expert.

4. An action for breach of contract lies for breach of an undertaking to testify as an expert in favor of a litigant.

Statute — special — what is.

5. A statute providing interest in case of an exercise by municipal corporations of the right of eminent domain is special.

Constitutional law — special laws — rate of interest.

6. A statute providing that the damages caused by the exercise by a municipal corporation of the right of eminent domain shall bear interest at a specified rate, from date of taking, violates a constitutional provision against special laws fixing the rate of interest.

Damages — eminent domain — diminution.

7. The damages to be allowed for an exercise by a municipal corporation of the right of eminent domain must, if claimed for a time during a portion or all of which the owner is deriving an income from the property or occupying it, be diminished by the amount of net income received or the rental value of the occupation.

APPEAL by defendant from a judgment of the Court of Common Pleas, No. 3, for Philadelphia County, awarding damages to plaintiff for the taking of its property by defendant, in opening up a certain street. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. John P. Connelly and Glenn C. Mead, for appellant:

A real estate expert's opinion of market value is not a "confidential communication."

Philadelphia v. McManes, 17 Phila. 75; 40 Cyc. 2392; Holmes v. Comegys, 1 Dall. 439, 1 L. ed. 213; Sargeant v. Johns, 206 Pa. 386, 55 Atl. 1051; Seip's Estate, 163 Pa. 423, 43 Am. St. Rep. 803, 30 Atl. 226.

Expert witnesses may be required to testify from the knowledge which they have.

Rogers, Expert Testimony, 2d ed. ¶ 188; Larimer County v. Lee, 3 Colo. App. 177, 32 Pac. 841; Dixon v. People, 168 Ill. 179, 39 L.R.A. 116, 48 N. E. 108; Ex parte Dement, 53 Ala. 389, 25 Am. Rep. 611; Meyer v. Standard Life & Acci. Ins. Co. 8 App. Div. 74, 40 N. Y. Supp. 419; People v. Montgomery, 13 Abb. Pr. N. S. 207; Summers v. State, 5 Tex. App. 365, 32 Am. Rep. 573; Dawson v. Pittsburgh, 159 Pa. 317, 28 Atl. 171.

The Interest Act of June 1, 1915, P. L. 685, is unconstitutional.

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Union Pass. R. Co.'s Appeal, 81 *Pa. 91; Re Road, 109 Pa. 44; Provident Life & Trust Co. v. Hammond, 230 Pa. 407, 79 Atl. 628.

All property holders whose property is affected by the exercise of the right of eminent domain should be treated alike, no matter who happens to exercise that right; there should be no discrimination and no unnecessary restriction of the class benefited.

Chalmers v. Philadelphia, 250 Pa. 251, 95 Atl. 427; Ayars's Appeal, 122 Pa. 266, 2 L.R.A. 577, 16 Atl. 356; Chalmers v. Philadelphia, 250 Pa. 251, 95 Atl. 427; Com. v. Casey, 231 Pa. 170, 34 L.R.A.(N.S.) 767, 80 Atl. 78; Com. ex rel. Brown v. Gumbert, 256 Pa. 531, 100 Atl. 990; Re Ruan Street, 132 Pa. 257, 7 L.R.A. 193, 19 Atl. 219; Scowden's Appeal, 96 Pa. 422; Com. ex rel. Wait v. Schumaker, 255 Pa. 67, 99 Atl. 214; Ashworth v. Pittsburg R. Co. 231 Pa. 539, 80 Atl. 981; Re Wyoming Street, 137 Pa. 494, 21 Atl. 74; Com. v. Clark, 14 Pa. Super. Ct. 435; Wood v. Philadelphia, 46 Pa. Super. Ct. 573; Beltz v. Pittsburg, 26 Pa. Super. Ct. 66; Com. v. Mintz, 19 Pa. Super. Ct. 283.

A legal exemption from a demand is a vested right which the legislature may not interfere with.

Lewis v. Pennsylvania R. Co. 220 Pa. 317, 18 L.R.A.(N.S.) 278, 69 Atl. 821, 13 Ann. Cas. 1142; Kay v. Pennsylvania R. Co. 65 Pa. 269, 3 Am. Rep. 628; Richards v. Citizens' Natural Gas Co. 130 Pa. 37, 18 Atl. 600; Klages v. Philadelphia & R. Terminal Co. 160 Pa. 386, 28 Atl. 862; Philadelphia Ball Club v. Philadelphia, 192 Pa. 632, 46 L.R.A. 724, 73 Am. St. Rep. 835, 44 Atl. 265; Wayne v. Pennsylvania R. Co. 231 Pa. 512, 80 Atl. 1097; Hoffman v. Philadelphia, 250 Pa. 1, 95 Atl. 322.

The charge does not correctly state the measure of damages.

Schuylkill Nav. Co. v. Thoburn, 7 Serg. & R. 411; Shano v. Fifth Ave. & H. Street Bridge Co. 189 Pa. 245, 69 Am. St. Rep. 808, 42 Atl. 128; Pennsylvania Schuylkill Valley R. Co. v. Cleary, 125 Pa. 442, 11 Am. St. Rep. 913, 17 Atl. 468; Re Sixty-second Street, 214 Pa. 137, 63 Atl. 426; Dawson v. Pittsburgh, 159 Pa. 317, 28 Atl. 171; Reyenthaler v. Philadelphia, 160 Pa. 195, 28 Atl. 840; Struthers v. Philadelphia & D. C. R. Co. 174 Pa. 291, 34 Atl. 443.

Mr. Maurice Bower Saul for appellee.

Simpson, J., delivered the opinion of the court:

Plaintiff recovered a verdict and judgment for the value of its property taken under the right of eminent domain. The property is situated within the lines of the improvement referred to in our opinion in Re Philadelphia Parkway, 250 Pa. 257, 95 Atl. 429. Defendant appeals.

At the trial defendant called two real estate men as expert witnesses. They were objected to on the ground that they had been previously employed by plaintiff in relation to the same matter, had made reports to plaintiff, and had not been released from that employment. On being examined preliminarily, they testified that they had been subpœnaed by the city, but objected to testifying for her because of their employment by and report to plaintiff, from which employment they had not been released. It appeared from the offers of proof that the reason plaintiff had not called them, and why defendant wished to do so, was because their estimates of damage were below that fixed by plaintiff's other witnesses, and were more nearly in accord with the damages as testified to by defendant's witnesses. The court below sustained the objection "on the ground that the witness still maintains a confidential relation" with plaintiff.

We think it unnecessary to decide whether or not the reason for sustaining the objection is a sound one, in view of the fact that the witnesses themselves objected to being required to testify as experts. The process of the courts may always be invoked to require witnesses to appear and testify to any facts within their knowledge; but no private litigant has a right to ask them to go beyond that. The state or the United States may call upon her citizens to testify as experts in mat-

Witness—expert—compelling testimony.

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ters affecting the common weal, but that is because of the duty which the citizen owes to his government, and is an exercise of its sovereign power. So also where the state or the United States, in her sovereign capacity, charges the citizen with crime, she may, if need be, lend her power in that regard to the accused; for she is vitally interested, as such sovereign, that public justice shall be vindicated within her borders. Perhaps, also, under like circumstances, she may also lend her power in civil cases. But the private litigant has no more right to compel a citizen to give up the product of his brain than he has to compel the giving up of material things. In each case it is a matter of bargain, which, as ever, it takes two to make, and to make unconstrained. If it be true, as suggested at the argument, that one or both of the witnesses was under some obligation to the city in this matter, such witness would be liable for his breach of contract, as in other cases. The first, second, third, and fourth assignments of error are overruled.

—testimony for public.

—testimony in favor of criminal.

Contract—breach—undertaking to testify as expert.

The fifth assignment alleges error in charging the jury as follows: "In addition to that the plaintiff would be entitled under the Act of June 1, 1915 (P. L. 685), to 6 per cent interest upon that value from 1906 to the present time."

This act (P. L. 685) provides "that in all cases where private property is taken, injured, or destroyed by municipal corporations invested with the privilege of taking private property for public use, the damages caused by such taking, injury, or destruction shall bear interest, at the rate of 6 per centum per annum, from the date of such taking, injury, or destruction thereof."

Defendant alleges that said act is unconstitutional for several reasons, only one of which need be considered. Article 3, § 7, of the Constitution of the state provides that "the general assembly shall not pass any local or special law . . . fixing the rate of interest."

That the Act of 1915 is special follows from the fact that it applies to municipalities only, and not to all public and quasi public corporations invested with the power of eminent domain. That it fixes the rate of interest, quoad property taken, injured, or destroyed by municipalities, is evident from the reading of it.

Statute—special—what is.

Plaintiff, however, in answer to this conclusion, invokes the right of the legislature to classify the subjects of legislation, and to legislate for each class separately, wheresoever real distinctions exist between the classes; and points to the fact that municipalities have the right to plot streets over private property, without then taking it, and if thereafter they do take it, they will be liable only for the improvements which were on it at the time of the plotting. Unquestionably that is a real distinction between municipalities, in the matter of plotting streets, and other corporations invested with the power of eminent domain. Unhappily for plaintiff, however, the distinction is not made by the Act of 1915. It applies to municipalities taking land for all purposes, not merely for the location of streets; and it applies not to the location, but only "from the date of the taking, injury, or destruction," a matter necessarily applicable in every case of eminent domain. We must hold, therefore, that the alleged distinction is not a real one, that the above-quoted provision of the Constitution applies, and the act is unconstitutional.

Constitutional law—special laws—rate of interest.

It is not necessary to consider the

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other assignments of error, but in order to prevent an abuse of our decisions, particularly that in the Philadelphia Parkway Case, supra, we deem it wise to add a further word in regard to the damages allowable for delay. Damages mean just what the word implies, and no more. If, therefore, they are claimed from a time during all or a portion of which plaintiff is actually deriving an income from the property, the damages he would otherwise be entitled to receive must necessarily be reduced by the amount of the net income, as of the date that net income was received. Under like circumstances, if plaintiff occupies the property, the damages must be reduced by the amount of the net rental value thereof during such period.

Damages—eminent domain—diminution.

The fifth assignment of error is sustained, the judgment is reversed, and a venire facias de novo awarded.

ANNOTATION.

Power to compel expert to testify.

This note, as indicated in its title, is confined to the power of the court to compel an expert to testify, or the duty of the expert to appear in obedience to process and testify, and is not concerned with the right of the witness to recover compensation from the party calling him, though some cases in which that was the actual question have been cited because of their bearing on the question under consideration.

It has been said, generally, that the rule that any person may be obliged to appear and testify to any matter of fact within his knowledge, which bears upon the matter in controversy in a litigation, applies to expert witnesses, in Dixon v. People (1897) 168 Ill. 179, 39 L.R.A. 117, 48 N. E. 108; Walker v. Cook (1899) 33 Ill. App. 561; Buchman v. State (1877) 59 Ind. 1, 26 Am. Rep. 75, 2 Am. Crim. Rep. 187; United States v. Howe (1881) Fed. Cas. No. 15,404a; United States ex rel. Rock Creek Park v. Cooper (1893) 21 D. C. 491; Betts v. Clifford (Eng.) Warwick Lent Assizes, 1858, cited in Rogers on Expert Testimony, p. 437; Butler v. Toronto Mutoscope Co. (1905) 11 Ont. L. Rep. 12, 6 Ont. Week. Rep. 527, 5 Ann. Cas. 992.

It was, however, held in Vanriper v. Vanriper (1885) 3 Lanc. L. Rev. (Pa.) 155, that an attachment will not be allowed against a physician, who is regarded as a going witness; but his deposition should be taken.

It has been sought to draw a distinction between the testimony of an expert witness who is acquainted with the facts about which he testifies, and an expert witness who is called upon to give his opinion in reply to a hypothetical question, without any knowledge of the facts; the obligation to testify being conceded in the former case, but denied in the latter. Lord Campbell declared in Betts v. Clifford (Eng.) Warwick Lent Assizes, 1858, cited in Rogers on Expert Testimony, p. 437, that a scientific witness or expert was not bound to attend upon being served with a subpœna, and that he ought not to be subpœnaed. If the witness, however, knew any question of fact he might be compelled to attend, but he could not be compelled to attend to speak merely to matters of opinion.

Similarly, in Webb v. Page (1843) 1 Car. & K. (Eng.) 23, upholding the right of an expert witness to demand compensation before testifying, the decision was placed upon the ground that there is a distinction between the case of a man who sees a fact and is called upon in a court of justice to prove it, and that of one who is selected by a party to give his opinion on a matter with which he is peculiarly conversant from the nature of his employment in life. A physician who has attended a person who was injured may be required to disclose on the witness stand such facts as are within

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his knowledge, but is not obliged to express an opinion as a physician until his fees therefor have been paid. Marquis v. Robidoux (1900) 3 Quebec Pr. Rep. 433.

There is, perhaps, a question whether the decision in the reported case does not fall within the principle upon which the distinction rests, although the opinions which were sought to be elicited from the witnesses, if expressed, would apparently have been based, in part at least, on familiarity with the particular property in question.

The question whether an expert witness could be compelled to testify at all upon questions of a scientific character, observes the court in United States v. Cooper (1893) 21 D. C. 491, was at first one of difficulty, which was solved in favor of his obligation to do so upon payment of reasonable fees. The subject-matter of the testimony there under consideration was the presence and value of gold deposits upon certain property, and, as in the reported case, the witnesses were familiar with the particular property involved.

The power of the court to compel the attendance of a professional or skilled witness who has no actual personal knowledge of the facts of the particular case, and can testify only to opinions, is intimated in Flinn v. Prairie County (1895) 60 Ark. 204, 27 L.R.A. 669, 46 Am. St. Rep. 168, 29 S. W. 459; Barrus v. Phaneuf (1896) 166 Mass. 123, 32 L.R.A. 619, 44 N. E. 141; Le Mere v. McHale (1883) 30 Minn. 410, 15 N. W. 682.

The earlier cases on the subject annotated affirm the obligation of an expert witness to testify, where his reasonable fees beyond the common witness fees have been tendered him. Buchman v. State (1877) 59 Ind. 1, 26 Am. Rep. 75, 2 Am. Crim. Rep. 187; Dills v. State (1877) 59 Ind. 15; United States v. Howe (1881) Fed. Cas. No. 15,404a; United States v. Cooper (D. C.) supra.

In consonance with these decisions, and based, like them, upon the theory that a private litigant cannot avail himself gratuitously of the skill and professional experience of experts, the reported case (PENNSYLVANIA Co. v. PHILADELPHIA, ante, 1573) upholds the right of a witness to refuse to testify as an expert, as to a matter of opinion, in the absence of a contract to do so.

The court will not compel the attendance, merely for the ordinary witness fees, of an interpreter or expert who has failed to obey a subpœna, unless in case of necessity. Re Roelker (1854) 1 Sprague, 276, Fed. Cas. No. 11,995.

The decisions denying the right to compel expert professional and scientific witnesses to testify, without compensation in addition to the ordinary fees of witnesses, were doubtless influenced by the English cases, based on a custom exempting professional witnesses from coerced attendance on the same terms as other witnesses, such as Webb v. Page (1843) 1 Car. & K. (Eng.) 23; Clark v. Gill (1854) 1 Kay & J. 19, 69 Eng. Reprint, 351, 2 Eq. Rep. 1108, 2 Week. Rep. 652, 23 L. J. Ch. N. S. 711; Re Working Men's Mut. Soc. (1882) L. R. 21 Ch. Div. (Eng.) 831, 51 L. J. Ch. N. S. 850, 47 L. T. N. S. 645, 30 Week. Rep. 938; Wiltshire v. Marshall [1866] W. N. (Eng.) 80, which uphold the right of expert witnesses, before testifying, to demand compensation for loss of time.

The weight of authority inclines to the view that an expert witness is not entitled to demand extra compensation before testifying to facts within his knowledge, although it may have required professional study, learning, or skill to ascertain them.

Alabama.—Ex parte Dement (1875) 53 Ala. 389, 25 Am. Rep. 611.

Arkansas.—Flinn v. Prairie County (1895) 60 Ark. 204, 27 L.R.A. 669, 46 Am. St. Rep. 168, 29 S. W. 459.

California.—People v. Conte (1912) 17 Cal. App. 771, 122 Pac. 450, 457.

Colorado.—Larimer County v. Lee (1893) 3 Colo. App. 177, 32 Pac. 841.

Georgia.—Dixon v. State (1912) 12 Ga. App. 17, 76 S. E. 794.

Illinois.—Dixon v. People (1897) 168 Ill. 179, 39 L.R.A. 117, 48 N. E. 108; North Chicago Street R. Co. v. Zeiger (1899) 182 Ill. 9, 74 Am. St. Rep. 157, 54 N. E. 1006.

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Minnesota.—State v. Teipner (1887) 36 Minn. 535, 32 N. W. 678.

Missouri.—Burnett v. Freeman (1907) 125 Mo. App. 683, 103 S. W. 121, on subsequent appeal in (1908) 134 Mo. App. 709, 115 S. W. 488; State v. Bell (1908) 212 Mo. 111, 111 S. W. 24.

Ohio.—State ex rel. O'Neall v. Darby (1886) 9 Ohio Dec. Reprint, 725.

Texas.—Summers v. State (1879) 5 Tex. App. 365, 32 Am. Rep. 573.

Canada.—Butler v. Toronto Mutoscope Co. (1905) 11 Ont. L. Rep. 12, 6 Ont. Week. Rep. 527, 5 Ann. Cas. 992. The reported case (PENNSYLVANIA Co. v. PHILADELPHIA, ante, 1573) is not opposed to this view, if the distinction previously referred to between the testimony of an expert as to facts observed, and the expression of an opinion, is to be admitted.

This conclusion is supported, arguendo, in Main v. Sherman County (1905) 74 Neb. 155, 103 N. W. 1038, denying the right to additional compensation of one testifying as an expert, in the absence of a special contract.

A physician called as a witness, who states without objection the condition of a patient whom he had visited professionally, cannot then refuse to give his opinion as to the cause of the symptoms he had discovered unless a professional fee is paid or secured to him, on the ground that a professional opinion was called for, as the opinion asked for was pertinent to the subject about which he had testified voluntarily. Wright v. People (1884) 112 Ill. 540.

A physician who attended the deceased and is sworn as a witness at the coroner's inquest is legally bound to answer, without expert compensation, questions as to the effect of the medicines administered to the deceased, and as to her condition and symptoms when he first saw her. Com. v. Higgins (1889) 5 Kulp (Pa.) 269. The question whether a physician or surgeon may refuse to give his professional opinion upon the witness stand, unless he is compensated therefor, did not necessarily arise in this case. While of the opinion that the witness was obliged to answer both questions propounded, the court said: "As to the latter, there can be no doubt. He was simply asked to state what he saw."

In Fonda v. Bolton (1883) 6 N. J. L. J. 240, the court, in denying the right of a civil engineer to recover compensation, in the absence of a special agreement, for services as an expert witness concerning the results of a survey which the party calling him had employed him to make, states that if a person attends court under a subpœna as a witness, he is bound to testify under the direction of the court as to what he knows, however he procures the knowledge, and that a refusal to testify as to special knowledge acquired by him would be a question for the consideration of the court.

The power of the court to compel a witness to make a study of the case beforehand, or to pay attention to the body of the evidence introduced by the parties, with a view to forming an opinion thereon, was doubted or denied in Flinn v. Prairie County (1895) 60 Ark. 204, 27 L.R.A. 669, 46 Am. St. Rep. 168, 29 S. W. 459; People v. Conte (1912) 17 Cal. App. 771, 122 Pac. 450, 457; Schofield v. Little (1907) 2 Ga. App. 286, 58 S. E. 666; Barrus v. Phaneuf (1896) 166 Mass. 123, 32 L.R.A. 619, 44 N. E. 141; People v. Montgomery (1872) 13 Abb. Pr. N. S. (N. Y.) 207.

Philler v. Waukesha County (1909) 139 Wis. 211, 25 L.R.A.(N.S.) 1040, 131 Am. St. Rep. 1055, 120 N. W. 829, 17 Ann. Cas. 712, recognizes the rule that a professional witness cannot be required, without reasonable compensation, to make preliminary preparation or perform professional services for the purpose of qualifying himself to give expert testimony.

So, a physician who inspects a dead body or holds a post mortem examination is entitled to reasonable compensation for his services. Clark County v. Kerstan (1895) 60 Ark. 508, 30 S. W. 1046; Larimer County v. Lee (1893) 3 Colo. App. 177, 32 Pac. 841; Fairchild v. Ada County (1898) 6 Idaho, 340, 55 Pac. 654; Gaston v. Marion County (1852) 3 Ind. 497;

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Summers v. State (1879) 5 Tex. App. 365, 32 Am. Rep. 573.

In Allegheny County v. Watt (1846) 3 Pa. St. 462, holding that a physician who makes a post mortem examination at a coroner's inquest, and upon an order of such official, is entitled to reasonable compensation, the court said: "The coroner might have compelled him to swear to his opinion on a superficial view of the body; but he could not have compelled him to touch it or do the more nauseous or dangerous work of opening it." This statement is quoted with approval in St. Francis County v. Cummings (1892) 55 Ark. 419, 18 S. W. 461, where the reason for it is said to be, "because such an act is not within the office of a witness.

In Ex parte Dement (1875) 53 Ala. 389, 25 Am. Rep. 611, upholding the right of the court to compel a physician to testify in a murder trial as to the nature and character of the wound received by the deceased, and its probable effect, the court states that the question whether the physician or surgeon could be punished as for a contempt, for refusing, unless paid therefor, to make a post mortem examination or undertake any other operation requiring skill or professional training, in order to qualify himself, when ordered by the court so to do, to testify in a cause, is not before it, and that nothing in the opinion is intended to support that proposition.

But it is held in Summers v. State (1879) 5 Tex. App. 365, 32 Am. Rep. 573, that where a medical expert has made a post mortem examination, he can be compelled to disclose the result of that examination without extra compensation.

It would seem that one who is summoned as an expert would perform all that the court could require of him, if he testifies to such opinions as he might have or gives proper impromptu answers to such questions as might be put to him. Barrus v. Phaneuf (1896) 166 Mass. 123, 32 L.R.A. 619, 44 N. E. 141; People v. Montgomery (1872) 13 Abb. Pr. N. S. (N. Y.) 207.

A. W. R.

ANNA CORCORAN, Appt.,

v.

B. O. JERREL.

Iowa Supreme Court — February 19, 1919.

(— Iowa, —, 170 N. W. 776.)

Libel — testimony before commissioners on insanity — privilege — absence of notice to accused.

1. Testimony before commissioners convened to inquire into the sanity of a person does not lose its privilege because notice of the proceedings was not served upon accused, if the statute does not provide for such notice.

[*See note on this question beginning on page* 1582.]

Evidence — presumption of regularity of official action.

2. Where one alleged to be insane is not brought before the commissioners for hearing, as required by statute "unless they shall be of opinion that to do so would probably be injurious," the presumption is that the board found the fact of probable injury, although the record does not affirmatively show such finding.

APPEAL by plaintiff from a judgment of the District Court for Mahaska County in favor of defendant in an action brought to recover damages for publication of an alleged libel by defendant. *Affirmed.*

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Statement by Stevens, J.:

This is an action for damages claimed to have resulted from the publication of alleged libelous statements. The court at the close of the evidence sustained defendant's motion for a directed verdict, and plaintiff appeals.

Messrs. C. W. Prince, E. A. Harris, J. N. Berry, W. E. Westfall, and Malcolm & True for appellant.

Messrs. Burrell & Devitt and Dutcher, Davis, & Hambrecht, for appellee:

The alleged libel was uttered in a judicial proceeding before the commissioners of insanity, of which proceeding the commissioners had jurisdiction, and it was, therefore, privileged.

25 Cyc. 381; Rainbow v. Benson, 71 Iowa, 301, 32 N. W. 352; Hess v. McKee, 150 Iowa, 409, 130 N. W. 375; 17 R. C. L. §§ 82, 87; Perkins v. Mitchell, 31 Barb. 461.

If the court did not have jurisdiction of the person, but did have jurisdiction of the subject-matter, the defendant's testimony was privileged.

Lee v. Brooklyn Union Pub. Co. 209 N. Y. 245, 103 N. E. 155; 25 Cyc. 378; Usill v. Hales, 14 Cox, C. C. 61, 47 L. J. C. P. N. S. 323, L. R. 3 C. P. Div. 319, 38 L. T. N. S. 65, 26 Week. Rep. 371; Rainbow v. Benson, 71 Iowa, 301, 32 N. W. 352; Francis v. Wood, 75 Ga. 648; Perkins v. Mitchell, 31 Barb. 461.

No notice is required in proceedings before the commissioners of insanity.

Chavannes v. Priestley, 80 Iowa, 316, 9 L.R.A. 193, 45 N. W. 766.

The presence of the person against whom the information is filed may be required, but if the commissioners shall be of the opinion that such course would probably be injurious to such person, or attended with no advantage, they may dispense with such presence.

Ibid.; Re Dowdell, 169 Mass. 387, 61 Am. St. Rep. 290, 47 N. E. 1033.

The fact that a person has the right to institute judicial proceedings to determine the necessity and propriety of his confinement is a sufficient protection to the liberty of the person to meet the constitutional requirements.

Chavannes v. Priestley, supra; Black Hawk County v. Springer, 58 Iowa, 417, 10 N. W. 791; Re Dowdell, 169 Mass. 387, 61 Am. St. Rep. 290, 47 N. E. 1033.

The statutes of Iowa make ample provision for instituting judicial proceedings to determine the necessity and propriety of the confinement of a person adjudged insane.

Chavannes v. Priestly, 80 Iowa, 321, 9 L.R.A. 193, 45 N. W. 766; Black Hawk County v. Springer, 58 Iowa, 417, 10 N. W. 791.

Stevens, J., delivered the opinion of the court:

On November 2, 1914, Daniel Corcoran, a brother of plaintiff, caused an information, addressed to the commissioners of insanity, to be filed in the office of the clerk of the district court of Mahaska county, alleging that plaintiff was insane and a fit subject for custody and treatment in the state hospital. A warrant was issued and delivered to the sheriff of said county, commanding him to take her into custody and bring her before the commissioners. The return of the sheriff is not dated, but certifies that he took plaintiff into custody. She was not, however, taken before the commissioners. Dr. J. C. Darranger, a practising physician, was appointed by the board for that purpose, and made a personal examination of plaintiff, and certified in writing to the commissioners that, in his opinion, she was a fit subject for custody and treatment at the hospital. The defendant, Dr. Jerrel, who had previously been employed as her physician, was subpœnaed, sworn, and examined upon the trial before the commissioners. His testimony was reduced to writing and signed by him. He testified that, in his judgment, plaintiff was insane and should be sent to the hospital for proper care and treatment. All of the above proceedings were had on the day the information was filed. On the following day plaintiff was taken by the sheriff to the hospital at Mt. Pleasant, where she was confined for a period of about five months, when she was paroled to her mother, and later she was discharged as cured. Plaintiff in her petition demands damages in a large sum, alleging that the statements uttered and signed by him before

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the commissioners were false, malicious, and libelous. The principal defense relied upon by counsel for appellee is that the statements complained of were made as a witness under oath upon the trial, and therefore privileged.

Plaintiff seeks to avoid the plea of privilege upon the ground that no notice was served upon plaintiff of the proceeding before the commissioners, and that same was wholly void. It is conceded that no notice of the proceeding before the commissioners was served upon plaintiff, and that she was not taken before them. The statute does not require notice of the filing of an information alleging insanity, or of trial thereon, to be served upon the person whose sanity is to be investigated. Section 2265 of the Code provides that the accused shall be taken before the commissioners, unless they shall be of the opinion that to do so would probably be injurious, or attended with no advantage to the person alleged to be insane, in which case the hearing may be conducted without his presence. Any citizen of the county or relative of the person alleged to be insane may appear and resist the application in person, or by counsel.

The record does not disclose an affirmative finding by the board that the condition of plaintiff was such that it would be injurious for her to be present at the trial, or that same would not be of advantage to her, but presumptively such was the judgment and finding of the commissioners. While the legislature has not made provision for notice of the hearing before the commissioners, it has made ample provision for safeguarding persons thus accused. Section 2267 of the Code provides for an appeal from the finding of the commissioners to the district court, and § 2268 requires that the accused be discharged from custody, pending such appeal, unless the commissioners find that his condition is such that he cannot with safety be allowed to go at large. Section 2304 provides that, upon petition to a district judge, a commission may be appointed to examine a person confined in a hospital and determine whether he is insane, and this proceeding may be repeated every six months. Section 2306 also provides, in substance, that all persons confined as insane shall be entitled to the benefit of a writ of habeas corpus, and that the question of insanity shall be decided at the hearing thereon.

Evidence—presumption of regularity of official action.

As we understand the contention of counsel for appellant, it is not claimed that the statements of defendant would not have been privileged if due notice of the proceedings had been served upon plaintiff. We held in Chavannes v. Priestley, 80 Iowa, 316, 9 L.R.A. 193, 45 N. W. 766, that the statute does not require the service of notice, and that the proceedings are not invalid without notice. In that case, the court said: "We assume, of course, that no importance is attached to an idle form of notice in such a case, as where it would not be understood because of the infirmity, or the notice for any reason be merely formal. The law sometimes provides for these formal notices, but it is in anticipation of results not to be contemplated in this class of proceedings with the precautionary provisions of the statute under which they are conducted. The law requires that a physician shall visit the person, and examine him, and shall confer with relatives upon the subject; so that in every case there is actual notice to relatives who may be present, and would be likely to take an interest in behalf of the person. Any citizen of the county, or relative, may appear and resist the application, and a full and free inquiry is permitted. The law and the courts are so jealous of the rights of persons, both as to liberty and property, that they view with distrust any proceedings that may affect such rights in the absence of notice; and to our minds this same

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jealousy pervades the statute in question, and the ruling consideration in allowing these proceedings, in the absence of the party and without notice, is personal to him, and designed for his interest. It is not a case in which he is adjudged at fault, or in default, and for which there is a forfeiture of liberty or property, but only a method by which the public discharges its duty to a citizen. The misfortunes of citizens sometimes place them where, for their care and preservation, restraints are necessary, and such restraints are even justified at the hands of private persons. They are not in such cases 'deprived of liberty,' within the meaning of the Constitution; and plaintiff bases his claim in this respect upon the constitutional provision that 'no person shall be deprived of life, liberty or property without due process of law.'"

We held in Black Hawk County v. Springer, 58 Iowa, 417, 10 N. W. 791, that "the inquest of lunacy by a board of commissioners is in no sense a criminal proceeding. The restraint of an insane person is not designed as punishment for any act done. The insane are, by the law, taken into the care and custody of the state, for treatment for their unfortunate infirmity. In our opinion, whatever may be thought of the power of the legislative department of the state to provide a special tribunal for the examination of persons alleged to be insane, the safeguards and limitations provided by our laws for the correction of any abuse which may arise from the acts of the commissioners are ample for the protection of the citizen."

There is nothing in the record to indicate that defendant was actuated by improper motives, or that he acted in bad faith toward plaintiff. He was subpœnaed, sworn, and examined as a witness, and his testimony was corroborated by that of other witnesses. Whether an action for libel could be maintained against him, if the proceedings had been for some reason invalid, we need not determine, as that question is not before us. The proceedings before the commissioners were, so far as the record discloses, in all respects regular and valid, and all of the statements made by the defendant were clearly privileged.

Libel—testimony before commissioners on insanity—privilege—absence of notice to accused.

There is no error in the record, and the judgment of the court below is affirmed.

Ladd, Ch. J., and **Gaynor** and **Salinger**, JJ., concur.

ANNOTATION.

Statement or testimony in lunacy proceeding as privileged within law of libel and slander.

The general rule that statements in pleadings or testimony in a judicial proceeding are privileged (see 17 R. C. L. title, Libel & Slander, §§ 82–87) has been applied in the few cases of action for defamation by a petition or testimony in a proceeding to commit an alleged lunatic to the asylum. Comfort v. Young (1897) 100 Iowa, 627, 69 N. W. 1032; Reycraft v. McDonald (1916) 194 Mich. 500, 160 N. W. 836; Perkins v. Mitchell (1860) 31 Barb. (N. Y.) 461. And see the reported case (CORCORAN v. JERREL, ante, 1579).

In Perkins v. Mitchell (N. Y.) supra, it appeared that two physicians filed with a justice of the peace a sworn statement that they had examined a certan person, and that he was, in their opinion, insane. On this statement a warrant for the commitment of the person mentioned was issued. It was held that the statement was privileged absolutely, provided the justice had jurisdiction.

In Reycraft v. McDonald (1916) 194 Mich. 500, 160 N. W. 836, it appeared that the defendant made to the judge of probate in his office a statement

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that the plaintiff was insane, whereupon the judge prepared a proper petition for commitment, which the defendant signed and verified. The defendant was not authorized to make such a petition, not being of the class of persons who were authorized by statute to petition for the commitment of an alleged lunatic. In an action for slander based on the statements made prior to the signing of the petition, it was held that an absolute privilege attached. The court said: "Undoubtedly the authority of the probate court to commit a person to an asylum on the ground of insanity is purely statutory, and it is conceded that defendant did not belong to any of the classes of persons authorized to make the petition. But does this fact make his communication to the probate judge any less privileged? . . . We think defendant's communication to the probate judge in this case was equally a matter of absolute privilege. It was made for the purpose of instituting legal proceedings, and to a court having jurisdiction of the subject-matter."

In Comfort v. Young (1897) 100 Iowa, 627, 69 N. W. 1032, it appeared that an information was filed with the board of commissioners for the insane, charging that a person named was a fit subject for custody and treatment in the state insane asylum. It was held that the charge was privileged conditionally, but that the issue of actual malice should be left to the jury.

In the reported case (CORCORAN v. JERREL) it is held that the testimony of a physician before a lunacy commission is privileged, though no notice of the lunacy proceeding has been given to the alleged lunatic.

As bearing collaterally on the question under discussion, it has been held in several cases that a person on whose complaint or testimony a person is committed to an insane asylum is not liable for false imprisonment, in the absence of malice or negligence. Hewlett v. George (1891) 68 Miss. 703, 13 L.R.A. 682, 9 So. 885; Bacon v. Bacon (1898) 76 Miss. 458, 24 So. 968; Force v. Probasco (1881) 43 N. J. L. 539; Higenbotam v. Green (1881) 25 Hun (N. Y.) 214; Hurlehy v. Martine (1890) 56 Hun (N. Y.) 648, 31 N. Y. S. R. 471, 10 N. Y. Supp. 92.

W. A. S.

WELCH LUMBER COMPANY, Plff. in Err.,

v.

CARTER BROTHERS & BIRD et al.

(Two cases.)

West Virginia Supreme Court of Appeals—March 21, 1916.

(78 W. Va. 11, 88 S. E. 1034.)

Garnishment — privilege — waiver.

1. Exemption of public corporations from process of garnishment is not a personal privilege which may be waived by them, by appearance and answer, but one based on principles of public policy, and which cannot be waived.

[*See note on this question beginning on page* 1586.]

— public corporation.

2. Municipal corporations or other public corporations, on principles of public policy, are not liable to garnishee process.

Statute — construction — public corporations.

3. Statutes relating to attachment and garnishment, and making corporations, as other persons, amenable to legal process, and defining the word "person" to include corporations, are generally construed not to include public corporations.

Headnotes by MILLER, J.

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ERROR to the Circuit Court for McDowell County to review a judgment quashing defendants' suggestions on separate judgments with respect to money in the hands of the board of education, garnishee, and awarding costs. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **Anderson, Strother, Hughes, & Curd**, for plaintiff in error:

A board of education is subject to garnishment in this state.

1 Dill. Mun. Corp. 4th ed. § 101; Rodman v. Musselman, 12 Bush, 354, 23 Am. Rep. 724; Waples, Attachm. & Garnishment, 312; Portsmouth Gas Co. v. Sanford, 97 Va. 124, 45 L.R.A. 246, 75 Am. St. Rep. 778, 33 S. E. 516; Bray v. Wallingford, 20 Conn. 416; Newark v. Funk, 15 Ohio St. 462; Hicks v. Roanoke Brick Co. 94 Va. 741, 27 S. E. 596.

Messrs. **G. W. Howard** and **Sanders, Crockett, & Kee** for defendants in error.

Miller, J., delivered the opinion of the court:

Plaintiff, a judgment creditor of defendants, in two several judgments obtained in Mercer county, sued out writs of fieri facias thereon, and by proper proceedings in McDowell county caused the board of education of Brown's creek district, in that county, to be summoned in each case to answer, as garnishee, the suggestion that it was indebted to the defendants, and that by virtue of the said writs of fieri facias, and the lien thereof, there was a liability upon it for the amounts thereof.

The board of education, duly summoned, appeared and answered, admitting liability to the judgment debtor as suggested, and the Union Bank & Trust Company, and E. E. Carter, claimants of the funds or liability so proceeded against, by summons served upon them, were required to appear before the circuit court of McDowell county, and state the nature of their claim and maintain or relinquish the same, and in the meantime further proceedings in said actions were stayed.

By consent and agreement of all the parties the two cases were heard together. The claimants of the money in the hands of the garnishee moved the court to quash the said suggestions, and, so far as the record shows, interposed no other plea or defense thereto.

At a subsequent term thereof, held July 31, 1915, the circuit court pronounced the judgment now complained of, that said motion to quash said suggestions be sustained and the same dismissed, assigning therein as a ground therefor that "said board of education of Brown's creek district of McDowell county is not subject to garnishment," and adjudging also that the defendants recover from plaintiff their costs in and about their defense to said suggestions, in that behalf expended, including an attorney's fee of $10 in each case, and it is to this judgment that the Welch Lumber Company obtained the present writ of error.

Two points of error are assigned and relied on: First, the quashing of the suggestions in each case; second, the judgment for costs in favor of the defendants in said actions.

On the first point it is contended that the board of education, summoned as garnishee, was alone entitled to challenge its liability to garnishee process, and, not having specifically done so, the claimants of the money owing by it to the judgment debtors and in its hands were not entitled to be heard on motions to quash the process against them, and especially so without complying with the process against them, to appear and state the nature of their claims and maintain or relinquish them.

Garnishment—public corporation.

By the great weight of authority, a municipal corporation, or other public corporation, on principles of public policy, is not liable to garnishee process. 1 Dill. Mun. Corp. 5th ed. § 249, and cases cited; Waples, Attachm. & Garnishment, 313; 2 Wade, Attachm. § 345.

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But the authorities are by no means uniform on this question. Among the cases cited to the contrary are Portsmouth Gas Co. v. Sanford, 97 Va. 124, 45 L.R.A. 246, 75 Am. St. Rep. 778, 33 S. E. 516, and Hicks v. Roanoke Brick Co. 94 Va. 741, 27 S. E. 596. Many of the cases referred to in the text books are reviewed, but the question not decided, in our case of Brown v. Gates, 15 W. Va. 131. The Virginia decisions are not binding upon us, and were evidently influenced by a recent statute of that state respecting public officers, and regarded as having changed the rule of public policy in that state.

Counsel for plaintiff, in support of their contentions, present an argument based on the provisions of our statute relating to attachment and garnishment, and the effect, as a lien, of the writ of fieri facias, and authorizing such corporation to be sued, etc., and defining the meaning of "person" to include corporations, etc. But according to the weight of authority statutes such as these, unless by express words, are construed not to include public corporations. 14 Am. & Eng. Enc. Law, 2d ed. 812, and cases cited.

Statute—construction—public corporations.

While there are some decisions holding to the contrary, we are disposed to adopt the rule which best accords with the weight of authority, and to hold that a municipal or other public corporation is not liable to the process of garnishment.

But it is suggested that the exemption from process of garnishment is a personal privilege of the corporation, and that the board of education, by appearance and answer admitting liability, waived this privilege, and submitted itself to the judgment of the court. Here again we find the authorities in conflict. A number of the text-writers would seem to affirm this proposition. 2 Shinn, Attachm. & Garnishment, § 502 (c); Drake, Attachm. 6th ed. § 516b; 3 Abb. Mun. Corp. § 1153. But the weight of authority, we think, is opposed to this view also. Where the question depends upon principles of public policy, as in most states, and not upon some statute, as in Iowa and, perhaps now, in Virginia, it is not perceived that such exemption from process based on public policy is one which can be waived. The public policy which would forbid the process in the first instance, it seems to us, would preclude the right of waiver. 14 Am. & Eng. Enc. Law, 2d ed. 813, and notes. Such is the reasoning of the supreme court of Utah, in one of the cases cited. Van Cott v. Pratt, 11 Utah, 209, 39 Pac. 827. And such is the conclusion reached by the other members of the court. If uninfluenced by them, this being a case of first instance in this state, I would be inclined to follow the opinion of the great text-writers on the subject, as being founded on the better reason. I see little merit in the argument based on consideration of public inconvenience, etc. The rules now adopted, I fear, are liable to be made the instruments of fraud and imposition by unconscionable contractors of public buildings and other public works.

Garnishment—privilege—waiver.

On the question of costs presented we see no error. The judgment for costs is not in favor of Carter and the Union Bank & Trust Company alone. That judgment is in favor of the defendants generally.

These conclusions result in affirmance of the judgment.

Petition for rehearing denied, June 2, 1916.

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ANNOTATION.

Right of municipal corporation to waive immunity from garnishment.

In some jurisdictions the right to garnish municipal corporations is upheld. In these, of course, the question of a waiver of the right or privilege of exemption does not arise.

It will be observed that in the reported case (WELCH LUMBER CO. v. CARTER BROS. ante, 1583) it was held that the exemption of the municipality from garnishment could not be waived, the view being taken that the public policy which forbade the process in the first instance precluded a waiver.

This case is supported by other decisions, but a conflict exists on the question.

In Van Cott v. Pratt (1895) 11 Utah, 209, 39 Pac. 827, it was held that the exemption of a municipality from garnishment was not a mere privilege, but a legal right, which inured to the benefit of the public, and that an ordinance attempting to waive the right was void. The court said: "Counsel for appellant insist that exemption from process of garnishment is a privilege which the respondent may waive at its option, and cite several cases which appear to sustain their view; but we think the weight of authority is to the effect that a municipality cannot waive such exemption, and especially is this true where the exemption is based on the grounds of public policy, and is not effected by statute. This court, in the case of Chamberlain v. Watters (1894) 10 Utah, 298, 37 Pac. 566, held that § 3455, Utah Comp. Laws 1888, authorizing garnishment of corporations, did not apply to a municipal corporation, and that such a corporation could not be subjected to such proceedings upon any principle of public policy. If, then, as this court has held, the process of garnishment is without statutory authority, and in violation of public policy, when it is sought to be enforced against a municipality, how can such municipality waive the exemption? Such exemption is not a mere privilege, as claimed by counsel for the appellant. It is a legal right, which inures to the benefit of the public. It is not upheld for the benefit of the public officer, but because the public must not be inconvenienced or harassed by such proceedings, in suits in which it has no interest, and have the management of its affairs and the efficiency of its officers interfered with for the benefit of the private individual. The question of the liability of municipal corporations to process of garnishment at the suit of a private party has often been before the American courts, and, while their decisions are not uniform, still it seems that a large majority of the cases hold that no such liability exists; and the reason of the rule declared by those cases appears to rest upon that public principle which exempts members of the legislature, foreign ministers, ambassadors, and other functionaries, while in the public service, from civil arrest or other legal embarrassment, at the suit of a private person. The exemption is granted from public necessity, in order that the business of the municipality may be transacted by its officers, without interference arising from suits in which the public is not interested; and a municipal corporation cannot waive such a right by ordinance or by previous agreement. Courts will disregard all agreements or arrangements made in contravention of public policy."

Some courts have taken the view that the immunity is jurisdictional in its character.

Thus, in Porter & B. Hardware Co. v. Perdue (1894) 105 Ala. 293, 53 Am. St. Rep. 124, 16 So. 713, it was held that garnishment was a statutory remedy, over which the courts were without jurisdiction to grant relief unless parties were within the terms of the statute, and that public corporations were not within the purview of the Alabama garnishment statute, so that no court could acquire jurisdiction over them, even although they at-

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tempted to consent, or waive the exemption.

And in Taylor v. Knipe (1870) 2 Pearson (Pa.) 151, it was decided that the delay of a board of school control, in failing to move to set aside an attachment of a claim against the public corporation for about nine months after the appearance was entered, did not give the court power to proceed, as the want of power was jurisdictional, and could not be waived.

The position has been taken in some cases that the immunity belonged to the creditor of the municipal corporation, and could not, therefore, be waived by the latter.

Thus, in School Dist. v. Gage (1878) 39 Mich. 484, 33 Am. Rep. 421, it was held not consistent with public policy to subject the wages of school-teachers to garnishment, or to allow public corporations to be brought needlessly into litigation; and that the right of exemption of the wages of a teacher belonged to him, and that the school district could not waive it by appearing and answering in a garnishment proceeding.

And in Sherman v. Shobe (1900) 94 Tex. 126, 86 Am. St. Rep. 825, 58 S. W. 949, where it was sought to garnish a county for money due on account of the care of smallpox patients, it was held that it was the interest of the creditor whose right was involved, and that the garnishee could not, as against him, waive the right of exemption. The court said: "The claim that a county could waive the want of a law to subject it to the process of garnishment, when brought to its last analysis, amounts to the assertion that a debtor may elect to pay his debt to the creditor of his creditor, rather than to the creditor himself. On the contrary, the rule is that the garnishee cannot, as against the defendant in the judgment or in the original proceeding, even accept or waive service of the writ."

As before stated, a conflict exists as to the right of a municipal corporation to waive the right of immunity.

In Las Anamas County v. Bond (1877) 3 Colo. 411, the court stated that the exemption of a county from garnishment might be waived by appearance and submission to liability, but held that there was no waiver in that case, as the county had entered no appearance.

This case was cited in Stermer v. La Plata County (1895) 5 Colo. App. 379, 38 Pac. 839, as holding that a county's exemption from garnishment might be waived by appearance and submission to liability, but it was held that no waiver resulted in the case at bar, by reason of the county clerk's having filed an answer and supplemental answer, as he had no authority to do so; nor by reason of a filing of a motion to dismiss by the county attorney, as this was not a submission to, but a denial of, liability.

The right to waive the immunity has also been recognized in Iowa. Thus, in Clapp v. Walker (1868) 25 Iowa, 315, it was held that the privilege of exemption, given by a statute providing that a municipal corporation should not be garnished, was one which such a corporation might insist upon, or waive, as it deemed best; and it was held that the privilege was waived, where a school district which was garnished filed an answer, admitting indebtedness to a certain amount, and the garnishor filed a replication, claiming a greater indebtedness, and a trial was had on this issue, resulting in the garnishor's favor; whereupon the garnishee moved for a new trial, but did not set up its right of exemption, and failed to assert it until the second trial was in progess.

And in Tone Bros. v. Shankland (1900) 110 Iowa, 525, 81 N. W. 789, in a proceeding in the nature of garnishment against a municipality, the court stated, in answer to the contention that a city could not be garnished, that only the garnishee could plead the exemption, and that it had not done so; apparently taking the view that the municipality might waive its right of exemption.

And in Dollman v. Moore (1892) 70 Miss. 267, 19 L.R.A. 222, 12 So. 23, where the proceeding was an attachment in equity, praying that a board of school trustees be directed to pay over funds in their hands, due for

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building a school, and the trustees answered, admitting the indebtedness, it was held that the objection to holding the municipality liable in such a proceeding, not being jurisdictional, could be, and was, waived, and that the creditor of the municipality could not raise the objection.

The municipal corporation in Dollar v. Allen-West Commission Co. (1900) 78 Miss. 274, 28 So. 876, objected to garnishment proceedings against it, and on this ground it was distinguished from Dollman v. Moore (Miss.) supra; but the court stated that while the matter was not jurisdictional in the discretion of the court, so as to prevent a decree, where the municipality submitted itself to the jurisdiction the courts must always entertain and sustain its objection; that the municipality, and not the court, was the judge whether the proceeding would hamper or restrict it in the performance of public functions.

In Baird v. Rogers (1895) 95 Tenn. 492, 32 S. W. 630, it was held, citing Clapp v. Walker (Iowa) and Las Anamas County v. Bond (Colo.) supra, that a municipality may waive its privilege of exemption, and that the municipality in the case at bar had done so, it having answered, admitting its indebtedness, and expressing its willingness to pay to either party.

The decision in Clapp v. Walker (Iowa) supra, was also relied upon in Switzer v. Wellington (1888) 40 Kan. 250, 10 Am. St. Rep. 196, 19 Pac. 620, but it was held that in the case at bar there had been no waiver by the city of its right of exemption, by reason of an answer filed by the mayor in the garnishee proceedings, where it asserted its right to exemption as soon as an action was brought against it to recover the amount of the indebtedness.

And in Jenks v. Osceola Twp. (1877) 45 Iowa, 554, the court held that a township had not waived its right to claim its exemption from garnishment, by failing to assert its claim before a commissioner appointed to take its answer as to the indebtedness; but that the question was raised in time, where it was asserted at the same term that the commissioner's report was filed.

In Des Moines County v. Hinkley (1883) 62 Iowa, 637, 17 N. W. 915, where a county filed an answer in a garnishment suit, claiming exemption, and subsequently brought an action against the garnishor and others in relation to the money due the creditor, in which it stated that it was indebted to the latter, and expressed its readiness to pay, the court doubted whether, by so doing, it had waived its right to exemption, but found it unnecessary to determine the question.

In First Nat. Bank v. Ottawa (1890) 43 Kan. 294, 23 Pac. 485, where the city answered various garnishee proceedings, admitting its indebtedness, but, in another proceeding by another creditor, admitted its indebtedness, but set up the other garnishee proceedings, and prayed that all claimants to the fund be brought into court and their rights determined, the court stated that each claimant had the right to contest the liens of the others; that it could not be permitted that a city should waive considerations of public policy, by answering garnishee process in favor of one party, and insist on the observance of these considerations by refusing to answer the attempted garnishment of another party. J. T. W.

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MISSOURI PACIFIC RAILWAY COMPANY, Plff. in Err.,
v.
STATE OF KANSAS.

United States Supreme Court — January 7, 1919.

(248 U. S. 276, 63 L. ed. —, 39 Sup. Ct. Rep. 93.)

Congress — passing bill over veto — two-thirds vote.

A two-thirds vote in each house of Congress of the members present, there being a quorum, is all that is required to pass a bill over the President's veto, by U. S. Const. art. 1, § 7, cl. 2, providing that in case a bill passed by Congress is disapproved by the President, "he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal and proceed to reconsider it. If, after such reconsideration, two thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall be likewise reconsidered, and if approved by two thirds of that house, it shall become a law."

[*See note on this question beginning on page* 1593.]

ERROR to the Supreme Court of the State of Kansas to review a judgment affirming, in part, a judgment of the District Court for Cherokee County, enforcing certain penalties against defendant for bringing intoxicating liquors from another state into Kansas. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **William P. Waggener** and **J. M. Challiss** for plaintiff in error.

Messrs. **James P. Coleman, Wayne B. Wheeler,** and **S. M. Brewster,** Attorney General of Kansas, for defendant in error.

Mr. Chief Justice **White** delivered the opinion of the court:

To avoid penalties sought to be imposed upon it for illegally carrying intoxicating liquors from another state into Kansas, the defendant railroad, plaintiff in error, asserted as follows: (1) That the state law was void as an attempt by the state to regulate commerce and thus usurp the authority alone possessed by Congress; (2) that if such result was sought to be avoided because of power seemingly conferred upon the state by the act of Congress known as the Webb-Kenyon Law (Act of March 1, 1913, chap. 90, 37 Stat. at L. 699, Comp. Stat. 1916, § 8739, 4 Fed. Stat. Anno. 2d ed. 593), such act was void for repugnancy to the Constitution of the United States because in excess of the power of Congress to regulate commerce and as a usurpation of rights reserved by the Constitution to the states; (3) because, even if the Webb-Kenyon Law was held not to be repugnant to the Constitution for the reasons stated, nevertheless, that assumed law afforded no basis for the exertion of the state power in question, because it had never been enacted by Congress conformably to the Constitution, and therefore, in legal intendment, must be treated as nonexisting.

It is conceded that the ruling of this court, sustaining the Webb-Kenyon Law as a valid exercise by Congress of its power to regulate commerce (Clark Distilling Co. v. Western Maryland R. Co. 242 U. S. 311, 325, 61 L. ed. 326, 338, L.R.A.1917B, 1218, 37 Sup. Ct. Rep. 180, Ann. Cas. 1917B, 845), dis-

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poses of the first two contentions and leaves only the third for consideration. In fact, in argument it is admitted that such question alone is relied upon. The proposition is this: that as the provision of the Constitution exacting a two-thirds vote of each house to pass a bill over a veto means a two-thirds vote, not of a quorum of each house, but of all the members of the body, the Webb-Kenyon Act was never enacted into law, because after its veto by the President it received in the Senate only a two-thirds vote of the Senators present (a quorum), which was less than two thirds of all the members elected to and entitled to sit in that body.

Granting the premise of fact as to what the face of the journal discloses, and assuming, for the sake of the argument (Flint v. Stone Tracy Co. 220 U. S. 107, 143, 55 L. ed. 389, 410, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; Rainey v. United States, 232 U. S. 310, 317, 58 L. ed. 617, 620, 34 Sup. Ct. Rep. 429), that the resulting question would be justiciable, we might adversely dispose of it by merely referring to the practice to the contrary which has prevailed from the beginning. In view, however, of the importance of the subject, and with the purpose not to leave unnoticed the grave misconceptions involved in the arguments by which the proposition relied upon is sought to be supported, we come briefly to dispose of the subject.

The proposition concerns clause 2 of § 7 of article 1 of the Constitution, providing that, in case a bill passed by Congress is disapproved by the President, " . . . he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal and proceed to reconsider it. If, after such reconsideration, two thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall be likewise reconsidered, and if approved by two thirds of that house, it shall become a law. . . ."

The extent of the vote exacted being certain, the question depends upon the significance of the words, "that house;" that is, whether those words relate to the two houses by which the bill was passed and upon which full legislative power is conferred by the Constitution in case of the presence of a quorum (a majority of the members of each house; § 5, art. 1), or whether they refer to a body which must be assumed to embrace, not a majority, but all its members, for the purpose of estimating the two-thirds vote required. As the context leaves no doubt that the provision was dealing with the two houses as organized and entitled to exert legislative power, it follows that to state the contention is to adversely dispose of it.

Congress—passing bill over veto—two-thirds vote.

But, in addition, the erroneous assumption upon which the contention proceeds is plainly demonstrated by a consideration of the course of proceedings in the convention which framed the Constitution, since, as pointed out by Curtis (History of the Constitution, vol. 2, p. 267, note), it appears from those proceedings that the veto provision as originally offered was changed into the form in which it now stands after the adoption of the article fixing the quorum of the two houses for the purpose of exerting legislative power, and with the object of giving the power to override a veto to the bodies as thus organized. A further confirmation of this view is afforded by the fact that there is no indication in the constitutions and laws of the several states existing before the Constitution of the United States was framed that it was deemed that the legislative body which had power to pass a bill over a veto was any other than the legislative body organized conformably to law for the purpose of enacting legislation, and hence that the majority fixed as necessary to override a veto was the required

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majority of the body in whom the power to legislate was lodged. Indeed, the absolute identity between the body having authority to pass legislation and the body having the power, in case of a veto, to override it, was clearly shown by the Constitution of New York, since that Constitution, in providing for the exercise of the right to veto by the council, directed that the objections to the bill be transmitted for reconsideration to the senate or house in which it originated; "but if, after such reconsideration, two thirds of the senate or house of assembly shall, notwithstanding such objections, agree to pass the same, it shall be . . . sent to the other branch of the legislature, where it shall also be reconsidered, and, if approved by two thirds of the members present, shall be a law,"—thus identifying the bodies embraced by the words, "senate" and "house," and definitely fixing the two-thirds majority required in each as two thirds of the members present.

The identity between the provision of article 5 of the Constitution, giving the power by a two-thirds vote to submit amendments, and the requirements we are considering as to the two-thirds vote necessary to override a veto, makes the practice as to the one applicable to the other.

At the first session of the first Congress, in 1789, a consideration of the provision authorizing the submission of amendments necessarily arose in the submission by Congress of the first ten amendments to the Constitution, embodying a Bill of Rights. They were all adopted and submitted by each house organized as a legislative body pursuant to the Constitution, by less than the vote which would have been necessary had the constitutional provision been given the significance now attributed to it. Indeed, the resolutions by which the action of the two houses was recorded demonstrate that they were formulated with the purpose of refuting the contention now made. The Senate Record was as follows:

"Resolved: That the Senate do concur in the resolve of the House of Representatives on 'Articles to be proposed to the legislatures of the states as amendments to the Constitution of the United States,' with amendments; two thirds of the Senators present concurring therein." 1st Cong., 1st Sess., Sept. 9, 1789, Senate Journal, 77.

And the course of action in the House and the record made in that body is shown by a message from the House to the Senate, which was spread on the Senate Journal as follows:

"A message from the House of Representatives. Mr. Beckley, their clerk, brought up a resolve of the House of this date, to agree to the . . . amendments proposed by the Senate to 'Articles of amendment to be proposed to the legislatures of the several states as amendments to the Constitution of the United States,' . . . two thirds of the members present concurring on each vote; . . ." 1st Cong., 1st Sess., Sept. 21, 1789, Senate Journal, 83.

When it is considered that the chairman of the committee in charge of the amendments for the House was Mr. Madison, and that both branches of Congress contained many members who had participated in the deliberations of the convention or in the proceedings which led to the ratification of the Constitution, and that the whole subject was necessarily vividly present in the minds of those who dealt with it, the convincing effect of the action cannot be overstated.

But this is not all, for the Journal of the Senate contains further evidence that the character of the two-thirds vote exacted by the Constitution (that is, two thirds of a quorum) could not have been overlooked, since that Journal shows that at the very time the amendments just referred to were under consideration there were also pending other proposed amendments,

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dealing with the treaty and lawmaking power. Those concerning the treaty-making power provided that a two-thirds vote of all the members (instead of that proportion of a quorum) should be necessary to ratify a treaty dealing with enumerated subjects, and exacted even a larger proportionate vote of all the members in order to ratify a treaty dealing with other mentioned subjects; and those dealing with the lawmaking power required that a two-thirds (instead of a majority) vote of a quorum should be necessary to pass a law concerning specified subjects.

The construction which was thus given to the Constitution in dealing with a matter of such vast importance, and which was necessarily sanctioned by the states and all the people, has governed as to every amendment to the Constitution submitted from that day to this. This is not disputed, and we need not stop to refer to the precedents demonstrating its accuracy. The settled rule, however, was so clearly and aptly stated by the speaker, Mr. Reed, in the House, on the passage in 1898 of the amendment to the Constitution providing for the election of Senators by vote of the people, that we quote it. The ruling was made under these circumstances: When the vote was announced, yeas, 184, and nays, 11, in reply to an inquiry from the floor as to whether such vote was a compliance with the two-thirds rule fixed by the Constitution, as it did not constitute a two-thirds vote of all the members elected, the speaker said:

"The question is one that has been so often decided that it seems hardly necessary to dwell upon it. The provision of the Constitution says 'two thirds of both houses.' What constitutes a house? A quorum of the membership, a majority, one half and one more. That is all that is necessary to constitute a house to do all the business that comes before the House. Among the business that comes before the House is the reconsideration of a bill which has been vetoed by the President; another is a proposed amendment to the Constitution; and the practice is uniform in both cases that if a quorum of the House is present, the House is constituted, and two thirds of those voting are sufficient in order to accomplish the object. . . ." Hinds, Precedents of the House of Representatives, vol. 5, pp. 1009, 1010.

This occurrence demonstrates that there is no ground for saying that the adherence to the practice settled in both houses in 1789 resulted from a mere blind application of an existing rule; a conclusion which is also clearly manifested, as to the Senate, by proceedings in that body in 1861, where, on the passage of a pending amendment to the Constitution, as the result of an inquiry made by Mr. Trumbull relative to the vote required to pass it, it was determined by the Senate by a vote of 33 to 1 that two thirds of a quorum only was essential. 36 Cong., 2d Sess., March 2, 1861, Senate Journal, 383.

In consequence of the identity in principle between the rule applicable to amendments to the Constitution and that controlling in passing a bill over a veto, the rule of two thirds of a quorum has been universally applied as to the two-thirds vote essential to pass a bill over a veto. In passing from the subject, however, we again direct attention to the fact that in both cases the continued application of the rule was the result of no mere formal following of what had gone before, but came from conviction expressed, after deliberation as to its correctness, by many illustrious men.

While there is no decision of this court covering the subject, in the state courts of last resort the question has arisen and been passed upon, resulting in every case in the recognition of the principle that, in the absence of an express command to the contrary, the two-thirds vote of the house required to pass a bill over a veto is the two thirds of a

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quorum of the body as empowered to perform other legislative duties. Farmers' Union Warehouse Co. v. McIntosh, 1 Ala. App. 407, 56 So. 102; State v. McBride, 4 Mo. 303, 29 Am. Dec. 636; Southworth v. Palmyra & J. R. Co. 2 Mich. 287; Smith v. Jennings, 67 S. C. 324, 45 S. E. 821; Green v. Weller, 32 Miss. 650. We say that the decisions have been without difference, for the insistence that the ruling in State ex rel. Eastland v. Gould, 31 Minn. 189, 17 N. W. 276, is to the contrary, is a wholly mistaken one, since the decision in that case was that, as the state Constitution required a vote of the majority of all the members elected to the house to pass a law, the two-thirds vote necessary to override a veto was a two-thirds vote of the same body.

Any further consideration of the subject is unnecessary, and our order must be, and is, judgment affirmed.

ANNOTATION.

Vote necessary to pass bill over veto.

It will be observed that in the reported case (MISSOURI P. R. Co. v. KANSAS, ante, 1589), it is held that the requirement of "two thirds of that house" in the United States Constitution, relating to the passing of bills over the President's veto, is satisfied by a vote of two thirds of the members present of that house, there being a quorum present, the Constitution providing that "a majority of each [house] shall constitute a quorum to do business."

The same was held as to the similar provisions in the Constitution of South Carolina in Smith v. Jennings (1903) 67 S. C. 324, 45 S. E. 821, holding that a vote of sixty to twenty-five was sufficient to override the governor's veto, eighty-five being present out of a house of 124.

The "two thirds of that house" necessary to override a veto of the governor of a territory was held in Brown v. Nash (1872) 1 Wyo. 85; Union P. R. Co. v. Carr (1872) 1 Wyo. 96, to require a vote of two thirds of the members present, so that a vote of two thirds of those voting is not sufficient, where it is not large enough to be two thirds of those present. The act organizing the territory seems not to contain any provision as to a quorum, but there seems to have been a rule of the house in question that "a majority of the house shall constitute a quorum."

In State ex rel. Eastland v. Gould (1883) 31 Minn. 189, 17 N. W. 276, cited in the reported case (MISSOURI P. R. Co. v. KANSAS) the question was as to whether a law establishing a new court was enacted by the constitutional "two-thirds vote," and the court considered the question to be the same as if upon a vote to pass a bill over a veto, and held that as the state Constitution required, to pass a law, a vote of the majority of all the members elected to each branch of the legislature, the two-thirds vote required to establish a new court was two thirds of all the members of each house.

Of the cases cited by the court in the last paragraph but one of the opinion in the reported case (MISSOURI P. R. Co. v. KANSAS) only Smith v. Jennings (1903) 67 S. C. 324, 45 S. E. 821, supra, related to the passage of a bill over a veto. The others relate to other laws, viz.: Farmers Union Warehouse Co. v. McIntosh (1911) 1 Ala. App. 407, 56 So. 102; Southworth v. Palmyra & J. R. Co. (1851) 2 Mich. 287; Green v. Weller (1856) 32 Miss. 650; and State v. McBride (1835) 4 Mo. 303, 29 Am. Dec. 636, all hold that a bill requiring a vote of two thirds is satisfied by a vote of two thirds of a quorum, where the Constitution provides that a majority of each house shall constitute a quorum to do business. State ex rel. Eastland v. Gould (Minn.) is referred to supra.

Where to pass a city ordinance over a veto required a vote of two thirds of

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all the members of the council, a veto was not overriden by a vote of four in a council of seven, one being absent, one voting to sustain the veto and one refraining from voting because of interest. Quinn v. Sea Isle City (1909) 77 N. J. L. 428, 71 Atl. 1118.

The number of votes necessary to pass a city ordinance over a veto, under a statute providing that such passage required a vote of two thirds of all the members elected to the council, must be based on the total number elected, although at the time of the vote one member has died and one resigned. Pollasky v. Schmid (1901) 128 Mich. 699, 55 L.R.A. 614, 92 Am. St. Rep. 560, 89 N. W. 1030. So, where the passage over a veto required two thirds of the members of the common council elected, and one of the council had died. State, Stanton, Prosecutor, v. Hoboken (1889) 52 N. J. L. 88, 18 Atl. 685.

It may be noted that where a bill requiring the unanimous vote of all members of a city council present received the vote of the nine members of the council, was then vetoed by the mayor, and thereafter again passed by a vote of 8 to 1, it was held that this was sufficient under the charter provision, declaring that if such vetoed bill "be again passed by the affirmative vote of not less than two thirds of all the members elected, the president of the council shall certify the fact on the bill, and when so certified the bill shall become an ordinance, with like effect as if it had not been disapproved by the mayor." State ex rel. Independent Asphalt Paving Co. v. Gill (1915) 87 Wash. 201, 151 Pac. 498. B. B. B.

H. A. WHITE AUTO COMPANY, Appt.,
v.
J. T. COLLINS, Sheriff.

Arkansas Supreme Court — September 23, 1918.

(— Ark. —, 206 S. W. 748.)

Sale — condition — illegal use — forfeiture.

One selling an automobile on credit, retaining title as security, cannot recover the machine in case it is forfeited by the public because used for the illegal transportation of intoxicating liquor, although he had no notice that it was to be used for an unlawful purpose.

[*See note on this question beginning on page* 1596.]

APPEAL by plaintiff from a judgment of the Circuit Court for Mississippi County in favor of defendant in an action brought to recover possession of an automobile. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. W. D. Gravette and E. L. Westbrooke, for appellant:

Plaintiff, who had no knowledge of the use being made of the car by Jones when the sheriff seized it, was not a party to transporting the whisky, and to sustain the judgment appealed from would be to uphold the taking of property without right or reason—pure confiscation without compensation.

Moody v, McKinney, 73 S. C. 438, 53 S. E. 543; Skinner v. Thomas, 171 N. C. 98, L.R.A.1916E, 338, 87 S. E. 976; Healey v. Cockrill, 133 Ark. 327, L.R.A. 1918D, 115, 202 S. W. 229.

Messrs. John D. Arbuckle, Attorney General, and T. W. Campbell, Assistant Attorney General, for appellee.

Smith, J., delivered the opinion of the court:

Prior to October 8, 1917, the appellant company sold to one Jones, in Memphis, Tennessee, an automo-

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bile for jitney and taxi service, retaining the title to the car until the purchase price had been paid. But the payment had not been made on the date aforesaid. After purchasing the car, Jones, without the knowledge or consent of appellant, fitted the car with copper tanks having an aggregate capacity of 70 to 80 gallons of liquid, and, with the car thus camouflaged, proceeded to transport intoxicating liquor from Caruthersville, Missouri, into and through Mississippi county, Arkansas, in violation of the laws of this state. The sheriff of that county arrested the occupants of the car, who were fined for their violation of the law, and an order of the court was made confiscating the car.

Appellant brought replevin against the sheriff to recover the car, and the cause was heard upon an agreed statement of facts, containing, in addition to the above recitals, the statement that appellant was not a party to any of the procedure above outlined, and had no knowledge of the tanks or of the use to which they were put, but, on the contrary, had no reason to believe the car was being used for any purpose other than that for which it was sold to Jones, to wit, for taxi and jitney service.

Appellant has prosecuted this appeal to reverse the judgment of the court refusing to award it the possession of the car.

The car was confiscated under the provisions of § 6 of Act No. 13 of the Acts of 1917, vol. 1, p. 41, prohibiting the shipment of intoxicating liquors into this state, and otherwise restricting the sale or transportation of intoxicating liquors. The relevant portions of the section referred to are as follows: "That no property rights of any kind shall exist in the liquors mentioned in section 1 of this act, . . . or in any vessel, fixture, furniture, implements, or vehicles, when the said liquors or other property mentioned are kept, stored or used for the purpose of violating any law of this state, nor in any such liquors, bitters and drinks when received, possessed, kept or stored at any forbidden place; and in all such cases the liquors, bitters and drinks aforesaid, and said property herein named are forfeited to the state of Arkansas and may be seized, or searched for and seized, under the laws of this state and ordered to be destroyed in the manner and under the rules prescribed by law respecting contraband liquors, or by order of the judge or court after a conviction. . . ."

Appellant cites and relies upon the case of Moody v. McKinney, 73 S. C. 438, 53 S. E. 543. That was a suit to recover the possession of a horse and buggy which had been used in the transportation of liquor, in violation of a statute of South Carolina which provided as follows: "Any wagon, cart, boat, or any other conveyance, together with horses, mules, or other animal or animals and harness, accompanying the same, transporting liquors at night, other than regular passenger or freight steamers and railway cars, shall be liable to seizure and confiscation. . . ." S. C. Crim. Code 1902, § 594.

In that case, however, the violator of the Liquor Laws had possession of the horse and buggy without the knowledge or consent of the owner thereof, and the supreme court of that state held that the statute quoted did not apply under the facts stated.

Without expressing an opinion as to what our holding would be under similar facts, it suffices to say that we have here a different case. The purchaser of the car had the possession thereof with the knowledge and consent of the appellant company. Indeed, the sale itself gave this right of possession, and the violation of the law was committed under the possession thus conferred.

There are a number of cases in the Federal courts, upholding the right of seizure and confiscation of property used for an unlawful pur-

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pose, under statutes forfeiting property rights in property so used.

In the case of United States v. One Black Horse (D. C.) 129 Fed. 167, it was held that a vehicle and horse owned and let by a liveryman, used in smuggling liquor across the line into the United States, was subject to seizure and forfeiture, though the liveryman, who owned them, had no knowledge of the purpose for which the team and vehicle were to be used.

And in the case of United States v. Two Bay Mules (D. C.) 36 Fed. 84, it was said: "When property becomes liable to forfeiture under the positive provisions of a statute, owners who have in no way participated in the frauds which caused the forfeiture must seek redress from the wrongdoers who unlawfully used the property with which they were intrusted; or they can apply to the officers of the government invested with the authority to remit forfeitures."

The case of Dobbins's Distillery v. United States, 96 U. S. 395, 24 L. ed. 637, gives support to the view that one may forfeit his property by permitting another to have its use and possession who devotes it to an unlawful purpose without the owner's knowledge or consent.

A statute similar in principle to the one here under consideration was construed in the case of United States v. Distillery, 11 Blatchf. 255, Fed. Cas. No. 14,963, in which the court said that it is expected that the owner of property will see to the use made of it, at his peril.

The case of Dobbins's Distillery v. United States, supra, is annotated in 10 Rose's Notes to United States Supreme Court Reports, p. 193, and numerous cases are there cited which support judgments similar to the one here assailed. See also Daniels v. Homer, 139 N. C. 219, 3 L.R.A.(N.S.) 997, 51 S. E. 992.

There appears to be no question about the constitutionality of statutes similar to our own. Indeed, under the common law, property thus illegally used would be forfeitable, ipso facto, without a statute.

We conclude, therefore, that, as the appellant company had voluntarily parted with the possession of the car, it cannot complain against the judgment of confiscation rendered against it because of the unlawful use made of it by persons who were in possession of it with the appellant's knowledge and consent.

Sale—condition—illegal use—forfeiture.

Judgment affirmed.

ANNOTATION.

Forfeiture by innocent vendor of article sold conditionally and used by vendee in violation of law.

It will be observed that the statute governing the reported case (WHITE AUTO CO. v. COLLINS, ante, 1594) is unqualified.

In State ex rel. Robertson v. New England Furniture & Carpet Co. (State ex rel. Robertson v. Lane) (1914) 126 Minn. 78, 52 L.R.A.(N.S.) 932, 147 N. W. 951, Ann. Cas. 1915D, 549, it was held that an owner of personal property covered by a contract of conditional sale, executed prior to the enactment of a statute providing for the sale of movable personalty used in conducting or maintaining a bawdyhouse, etc., has no vested right, contractual or otherwise, to allow it to be used in connection with the maintenance of a bawdyhouse after the passage of the act, even if prior thereto such sale and use were not unlawful; and such owner cannot complain of the statutory provision that to save his property he must prove innocence "to the satisfaction of the court" of knowledge of said use thereof, and also inability to have acquired such knowledge by reasonable

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care and diligence; every defendant being presumed to have known the general reputation of the place.

But the interest of an innocent vendor of an automobile, sold conditionally, is not liable to forfeiture for illegal use of the vehicle in transporting liquor, where the statute provides that the vehicle shall be sold should it appear that it was "so used with the knowledge of the owner or lessee," and this is true although only a part of such interest is evidenced by written instrument of record, the balance not being represented by writing. Whites v. State (1919) — Ga. App. —, 98 S. E. 171, where the court said: "Clearly the state occupied no better position with respect to the portion of the purchase price not covered by any written instrument of record than a third person would occupy who had extended no credit, parted with no rights, and suffered no injury by reason of the apparent ownership by the vendee of property in fact owned by someone else." This decision is mainly based on Shrouder v. Sweat (1918) 148 Ga. 378, 96 S. E. 881, where it was similarly held in case of one who sold an automobile on credit, taking a note secured by mortgage for the purchase price.

While not strictly within the scope of this note, reference may be here made to Skinner v. Thomas (1916) 171 N. C. 98, L.R.A.1916E, 338, 87 N. E. 976, where the owner sold an automobile, taking back a mortgage for the price, and it was held that a statute providing for forfeiture of the interest in a vehicle used for transporting intoxicating liquor intended for illegal use, of a defendant convicted of its illegal possession, does not apply to the interest of an innocent mortgagee.

It may be noted that it was held in Parker-Harris Co. v. Tate (1916) 135 Tenn. 509, L.R.A.1916F, 935, 188 S. W. 54, that the lien given by statute upon an automobile for injury done by it, whether done by the owner, his agent, or any other person using the same by loan, hire, or otherwise, has no precedence on the rights of a conditional vendor of the machine.

B. B. B.

HENRIETTA D. UPTON, Appt.,
v.
TRAVELERS' INSURANCE COMPANY, Respt.

California Supreme Court (Dept. No. 1) — February 13, 1919.

(— Cal. —, 178 Pac. 851.)

Insurance — accident — expiration on holiday — effect.

1. An accident insurance policy does not cover an accident occurring the day after its expiration, although it expires on a holiday.

[*See note on this question beginning on page* 1601.]

— effect of statute.

2. An accident is not an act provided by law to be done, within a provision of a statute declaring that the time in which an act is provided by law to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded, so as to extend an accident insurance policy to cover an accident occurring after the date of the expiration, which proves to be a holiday.

— act to be performed by contract.

3. An accident is not within the operation of a statute providing that whenever any act of a secular nature is appointed by contract to be performed upon a particular day which falls upon a holiday, it may be performed upon the next business day, so as to cause an accident policy to cover an accident occurring the day after the expiration of the policy.

— effect of option to renew.

4. That an accident policy gives an

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option for renewal does not extend the policy to cover an accident occurring the day after its expiration, although the latter day is a holiday, under a statute providing that an act appointed by contract to be performed on a certain day which falls on a holiday may be performed the next day; especially if no attempt is ever made to renew the policy.

Option — effect after expiration of time.

5. An option is a mere offer, and unless it is accepted within the time limited, it is of no force for any purpose.

Insurance — waiver of delay in payment — effect on future payments.

6. Although receipt by an insurance company of a renewal premium with knowledge that it had been collected by its agent after the expiration of the policy may waive failure to pay within the time specified as to that payment, it will not abrogate the condition as to time of payment with respect to future renewals.

— practice of agent — effect.

7. The practice of an insurance agent to give personal credit to an insured for renewal premiums without knowledge of the insurer does not waive a condition that renewal premiums must be paid before expiration of the policy to keep it in force.

— promise of agent to call for premiums.

8. The holder of an accident insurance policy which requires payment of renewal premiums before expiration of the policy has no right to rely on the promise of the agent to call at his residence for premiums, so as to estop the insurer from claiming a forfeiture if the premium is not paid in time.

APPEAL by plaintiff from a judgment of the Superior Court for Los Angeles County in favor of defendant in an action brought to recover the amount alleged to be due on an accident insurance policy. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. George P. Cary and Frank C. Dunham, for appellant:

Insured had until noon of October 13th to pay the renewal premium that, under the terms of the policy, fell due at noon of October 12th, which was a legal holiday.

Northey v. Bankers' Life Asso. 110 Cal. 547, 42 Pac. 1079; Bliss, Life & Acci. Ins. 2d ed. 317; Hammond v. American Mut. L. Ins. Co. 10 Gray, 306; Ætna L. Ins. Co. v. Wimberly, — Tex. Civ. App. —, 108 S. W. 778; Page v. Shainwald, 169 N. Y. 246, 57 L.R.A. 173, 62 N. E. 356; Weeks v. Hull, 19 Conn. 376, 50 Am. Dec. 249.

The agent of defendant in Pasadena had power to waive the provision for prompt payment and to extend credit.

Farnum v. Phœnix L. Ins. Co. 83 Cal. 246, 17 Am. St. Rep. 233, 23 Pac. 869; Cayford v. Metropolitan L. Ins. Co. 5 Cal. App. 715, 91 Pac. 266; Belden v. Union Cent. L. Ins. Co. 167 Cal. 740, 141 Pac. 370; Raulet v. Northwestern Nat. Ins. Co. 157 Cal. 213, 107 Pac. 292; Iverson v. Metropolitan L. Ins. Co. 151 Cal. 746, 13 L.R.A.(N.S.) 866, 91 Pac. 609.

An insurance company will be estopped to insist upon a forfeiture for the nonpayment of a premium if, by the adoption of a custom or a course of conduct, it has led the insured honestly to believe that he may rely upon said custom or course of conduct.

Sweetser v. Odd Fellows Mut. Aid Asso. 117 Ind. 97, 19 N. E. 722; New York L. Ins. Co. v. Eggleston, 96 U. S. 572, 24 L. ed. 841; Goedecke v. Metropolitan L. Ins. Co. 30 Mo. App. 601; Thompson v. St. Louis Mut. L. Ins. Co. 52 Mo. 469; Tenant v. Travelers Ins. Co. 31 Fed. 322; Winindger v. Globe Mut. L. Ins. Co. 3 Hughes, 257, Fed. Cas. No. 17,874; Runbeck v. Farmers & B. L. Ins. Co. 96 Kan. 186, 150 Pac. 586; Pacific Mut. L. Ins. Co. v. McDowell, 42 Okla. 300, L.R.A.1918E, 391, 141 Pac. 273; Fenn v. Northwestern Nat. L. Ins. Co. 90 Kan. 34, 133 Pac. 159; Knarston v. Manhattan L. Ins. Co. 140 Cal. 57, 73 Pac. 740; Price v. North American Acci. Ins. Co. 28 Idaho, 136, 152 Pac. 805; Berliner v. Travelers' Ins. Co. 121 Cal. 451, 53 Pac. 922; Cornell v. Travelers' Ins. Co. 120 App. Div. 459, 104 N. Y. Supp. 999; Standard Acci. Ins. Co. v. Friedenthal, 1 Colo. App. 5, 27 Pac. 88; May, Ins. 4th ed. § 361; Owens v. Travelers' Ins. Co. 99 Neb. 560, 156 N. W. 1078.

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Messrs. O'Melveny, Stevens, & Millikin and Walter K. Tuller, for respondent:

The fact that October 12th was a legal holiday did not extend the insurance beyond the time when the parties had expressly and specifically provided it should cease.

Penn Plate Glass Co. v. Spring Garden Ins. Co. 189 Pa. 255, 69 Am. St. Rep. 810, 42 Atl. 138; Rosenplaenter v. Provident Sav. Life Assur. Soc. 91 Fed. 729.

The mere fact that the insured was given an option to renew the insurance could not extend the insurance beyond the time when the policy provided it should cease. In order to renew the insurance, the option must have been exercised.

Matthews v. Continental Casualty Co. 78 Ark. 81, 93 S. W. 55.

Defendant is not estopped from setting up the fact that the insurance ceased at 12 o'clock noon October 12th, the time fixed in the policy itself.

Clarke v. Huber, 25 Cal. 593; Chapman v. Hughes, 134 Cal. 641, 66 Pac. 982, 60 Pac. 974; Burk v. Santa Cruz, 163 Cal. 807, 127 Pac. 154; Delger v. Jacobs, 19 Cal. App. 206, 125 Pac. 258.

Mr. Good was simply the local soliciting agent of the company in Pasadena, and as such would not have had authority to extend the time for payment of premiums even in the absence of the express limitation of the policy.

Elliott v. Frankfort Marine Acci. & Plate Glass Ins. Co. 172 Cal. 261, 266, L.R.A.1916F, 1026, 156 Pac. 481; Cayford v. Metropolitan L. Ins. Co. 5 Cal. App. 715, 91 Pac. 266; Belden v. Union Cent. L. Ins. Co. 167 Cal. 740, 141 Pac. 370; Sharman v. Continental Ins. Co. 167 Cal. 117, 52 L.R.A.(N.S.) 670, 138 Pac. 708; Matthews v. Travelers' Ins. Co. 73 Or. 278, 144 Pac. 85.

Shaw, J., delivered the opinion of the court:

The plaintiff appeals from the judgment.

The action was upon a contract to insure the plaintiff against accidents. The policy was issued on April 12, 1912, and bore that date. It contained the provision that "this policy is issued for a term of six months, beginning at 12 o'clock noon, standard time, on the 12th day of April, 1912, and ending at the same hour, but it may be renewed, subject to all its provisions, from term to term thereafter by payment of the premium in advance."

It was renewed from time to time, the last renewal taking place on April 12, 1914.

The accident causing the injury for which plaintiff seeks recovery in this action occurred on October 13, 1914. This was one day after the policy had expired, and consequently the defendant is not liable. The fact that October 12th was a legal holiday does not aid the plaintiff. —Insurance—accident—expiration on holiday—effect.

The policy expired by its terms on the 12th day of October at noon. The accident does not come within the provisions of §§ 10 or 11 of the Civil Code, or the corresponding provisions of the other Codes. Section 10 declares that the time in which any act is provided by law to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded. The accident, of course, was not an act provided to be done by any law, or by the policy. Therefore this section has no application. —effect of statute.

Section 11 provides that whenever any act of a secular nature is appointed by law or contract to be performed upon a particular day, which day falls upon a holiday, it may be performed upon the next business day with the same effect as if it had been performed upon the day appointed. —act to be performed by contract.

The policy did not appoint the accident as an act to be performed at any time, or at all; consequently that act does not fall within this section.

The fact that the policy contained an option to the plaintiff to renew the policy, and that this option continued in force by the terms of the policy until October 12, 1914, does not extend the policy so as to cover an accident which —effect of option to renew.

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happened on the following day. Section 11 does not purport to do more than to extend the time for exercising the option where it expires on a holiday. As a matter of fact, there was never any exercise of the option nor any attempt to exercise it. Consequently, such extension of the time for exercising it could have no effect whatever after the extension had expired, even if the accident did happen before that time. An option is a mere offer, and, unless it is accepted within the time limited, it is of no force for any purpose. The mere existence of such unexercised option, extending beyond the period of insurance specified in the policy, cannot operate to extend the period of insurance so as to cover an accident which happens between the expiration of the insurance and the termination of the option. The only thing extended by the statute is the time for exercising the option, not the time of insurance against the happening of an accident.

Option—effect after expiration of time.

It is also claimed that by the conduct of its agent, V. W. Good, and by the acceptance of previous renewal premiums after the time had expired, the defendant company had waived the requirement that the premium for renewal on October 12, 1914, must be paid before the prior renewal time expired. The policy was issued to Samuel W. Upton and was made payable to his wife, the plaintiff. They resided in Pasadena. Mr. Good had his office in Pasadena. It was the custom of the company to send renewal notices for this policy to Good in Pasadena some time before the expiration of the current term, whereupon Good would send a notice thereof to Mr. Upton. It had been the habit of Good to call at the residence of Upton to collect the renewal premium, and he had promised Upton that he would continue to do so. Sometimes it would be paid only in part, and he would deliver the renewal receipt of the company and personally trust Mr. Upton for the balance until a time beyond the current renewal term. He had done this at the renewal in April, 1914. This, it is insisted, constituted a waiver by the company of the condition for payment in advance, and operated to continue the policy in force, notwithstanding its positive terms to the contrary.

It may be conceded that the receipt of the premium by the company from its agent, after the time had expired, with knowledge of the fact that it had not been paid to the agent until after such expiration, would operate as a waiver, for the purpose of that renewal, of the condition that payment must be made in advance. It is difficult to perceive any sound reason for holding that this would abrogate the condition as to future renewals. Here there was no proof that Good had any authority, except to collect the renewal premiums and deliver the renewal receipts prepared, signed, and sent to him by the proper officers of the company. No attempt was made to prove that the general or managing agents of the company were informed or knew that the premiums in question were not paid in advance, or that Good had promised to call at Upton's residence for the payment. The policy declared that "no agent has power to waive any condition of this policy." Under these circumstances, no estoppel was created against the company to prevent it from refusing acceptance of a renewal premium offered after the time expired, and there was no waiver of the condition as to payment in advance. Upton had no right to rely on Good's promise to call at his house to

Insurance—waiver of delay in payment—effect on future payments.

—practice of agent—effect.

—promise of agent to call for premiums.

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demand payment. It devolved on Upton to exercise his option if he desired to renew the policy. The company owed him no duty to request such exercise.

The court below properly directed the jury to return a verdict for the defendant.

The judgment is affirmed.

We concur: Sloss, J.; Melvin, J.

Petition for rehearing denied March 13, 1919.

ANNOTATION.

Expiration of policy of insurance on Sunday or holiday.

The exact question involved in the reported case (UPTON v. TRAVELERS' INS. CO. ante, 1597) appears to be one of first impression, and is therefore of especial interest and value. It will be observed that the accident policy there involved provided that it was issued for a term of six months, beginning at 12 o'clock noon on the 12th day of April, and ending at that same hour, and it was decided that the policy expired on the 12th day of October, notwithstanding the fact that that day was a legal holiday, it being held that that circumstance did not operate to extend the term of the policy for another day; and the court further decided that a section of the Code had no application which provided that the time in which any act is provided by law to be done is computed by excluding the first day and including the last, unless the last day is a holiday, when it is also excluded, and decided likewise that another section was inapplicable which provided that whenever any act of a secular nature is appointed by law or contract to be performed on a particular day, which day falls upon a holiday, it may be performed upon the next business day with the same effect as if it had been performed upon the day appointed, the court stating with reference to the first section that the accident was not an act provided to be done by any law or by the policy, and as to the second section, that the policy did not appoint the accident as an act to be performed at any time. It will also be observed that it was decided that the last section did no more than to extend the time for exercising the option given by the policy to renew where it expired on a holiday, and that as there was never any attempt to exercise the option, the extension for exercising it had no effect whatever after the extension had expired, even if an accident did happen before that time.

J. T. W.

ALVAH CROCKER et al., Trustees,
v.
JOHN F. MALLEY, Collector of Internal Revenue.

United States Supreme Court — March 17, 1919.

(249 U. S. —, 63 L. ed. —, 39 Sup. Ct. Rep. 270.)

Internal revenue — income tax — associations — trust.

1. The income from a common-law trust under which the trustees are to collect rents and income of such property as may be in their hands, and pay over to the holders of trustees' receipt certificates what they shall determine to be fairly distributable net income, with the right to apply any funds in their hands for the repair or development of the property held by them, or the acquisition of other property pending conversion and

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distribution, the receipt holders having no joint action or interest and no control over the fund,—is not taxable to the trustees as an association without any deductions in respect to dividends received from a corporation that itself pays an income tax by reason of the provisions of the Income Tax Act of October 3, 1913, § II. G (a), imposing a tax upon the income of every corporation, joint stock company, or association, "no matter how created or organized;" and it is immaterial whether the individual receipt holders are entitled (as seems to be the practical construction) to the income of the fund subject to an unexercised power in the trustees, in their reasonable discretion, to divert it to the improvement of the capital, or whether they are not entitled to the income as such until they receive it.

[*See note on this question beginning on page* 1606.]

— recovery back of excessive tax — retention of amount justly due.

2. The collector of internal revenue, who unlawfully, but with probable cause, assessed for income-tax purposes the trustees in a common-law trust as an association, may retain out of the sum received by him the amount of the tax that they should have paid as trustees, since any recovery for the excess will, under U. S. Rev. Stat. § 989, be from the United States, and if the United States retains from the amount received by it the amount that it should have received, it cannot recover that sum in a subsequent suit.

PETITION for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit to review a judgment which, reversing a judgment of the District Court for the District of Massachusetts, ordered judgment in favor of defendant in a suit to recover certain income taxes as improperly assessed. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. **Felix Rackemann** and **Harrison M. Davis**, for petitioners:

No claim can properly be made in this case of any association on the partnership theory.

Mayo v. Moritz, 151 Mass. 481, 24 N. E. 1083; Williams v. Milton, 215 Mass. 1, 102 N. E. 355; Meehan v. Valentine, 145 U. S. 611, 36 L. ed. 835, 12 Sup. Ct. Rep. 972; Bartlett v. Slater, 211 Mass. 334, 97 N. E. 991; Tyrrell v. Washburn, 6 Allen, 466; Hoadley v. County Comrs. 105 Mass. 519; Whitman v. Porter, 107 Mass. 522; Cook v. Gray, 133 Mass. 106; Gleason v. McKay, 134 Mass. 419; Phillips v. Blatchford, 137 Mass. 510; Ricker v. American Loan & T. Co. 140 Mass. 346, 5 N. E. 284; Cunniff v. McDonnell, 196 Mass. 7, 81 N. E. 879; Quimby v. Tapley, 202 Mass. 601, 89 N. E. 167; Williams v. Boston, 208 Mass. 500, 94 N. E. 808; Smith v. Anderson, L. R. 15 Ch. Div. 273, 50 L. J. Ch. N. S. 39, 43 L. T. N. S. 329, 29 Week. Rep. 21; Crowther v. Thorley, 50 L. T. N. S. 43, 32 Week. Rep. 330, 48 J. P. 292; Re Siddall, L. R. 29 Ch. Div. 1, 54 L. J. Ch. N. S. 682, 52 L. T. N. S. 114, 33 Week. Rep. 509; Re Thomas, L. R. 14 Q. B. Div. 379, 54 L. J. Q. B. N. S. 336, 51 L. T. N. S. 602, 33 Week. Rep. 583; Taylor v. Davis (Taylor v. Mayo) 110 U. S. 330, 28 L. ed. 163, 4 Sup. Ct. Rep. 147; Re Associated Trust, 222 Fed. 1012; Eliot v. Freeman, 220 U. S. 178, 55 L. ed. 424, 31 Sup. Ct. Rep. 360; Ward v. Brigham, 127 Mass. 24.

In the interpretation of statutes levying taxes, it is the established rule not to extend their provisions by implication beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government and in favor of the citizen.

Gould v. Gould, 245 U. S. 151, 153, 62 L. ed. 211, 213, 38 Sup. Ct. Rep. 53.

A suit against a collector of internal revenue to recover taxes claimed to have been illegally exacted is not a suit against the United States.

United States v. Emery, 237 U. S. 28, 31, 59 L. ed. 825, 827, 35 Sup. Ct. Rep. 499.

In suits of this kind plaintiff, if suc-

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cessful, recovers interest. Interest cannot be recovered in an action against the United States.

Kinney v. Conant, 92 C. C. A. 410, 166 Fed. 720; Treat v. Farmers' Loan & T. Co. 108 C. C. A. 98, 185 Fed. 760; Schell v. Cochran, 107 U. S. 625, 27 L. ed. 543, 2 Sup. Ct. Rep. 827; National Home v. Parrish, 229 U. S. 494, 57 L. ed. 1296, 33 Sup. Ct. Rep. 944; Gulf Oil Co. v. Lewellyn, 242 Fed. 709, affirmed in (U. S. Adv. Ops. 1918–19, p. 54) 248 U. S. 71, 63 L. ed. —, 39 Sup. Ct. Rep. 35; Klock Produce Co. v. Hartson, 212 Fed. 758.

A suit against a collector to recover taxes paid under protest must be brought against the person to whom, as collector, the taxes were paid, although he ceased to be collector before suit brought.

Philadelphia, H. & P. R. Co. v. Lederer, 155 C. C. A. 268, 242 Fed. 492.

Mr. William L. Frierson, Assistant Attorney General, for respondent:

This trust is a business organization, which properly comes within the meaning of the word "association," as used in the act in question.

Re Associated Trust, 222 Fed. 1012; 4 Cyc. 301.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an action to recover taxes paid under protest to the collector of internal revenue by the petitioners, the plaintiffs. The taxes were assessed to the plaintiffs as a joint-stock association within the meaning of the Income Tax Act of October 3, 1913, chap. 16, § II. G (a), 38 Stat. at L. 114, 166, 172, 4 Fed. Stat. Anno. 2d ed. 245, and were levied in respect of dividends received from a corporation that itself was taxable upon its net income. The plaintiffs say that they were not an association, but simply trustees, and subject only to the duties imposed upon fiduciaries by § II. D. The circuit court of appeals decided that the plaintiffs, together, it would seem, with those for whose benefit they held the property, were an association, and ordered judgment for the defendant, reversing the judgment of the district court. — C. C. A. —, 250 Fed. 817.

The facts are these: A Maine paper manufacturing corporation with eight shareholders had its mills on the Nashua river in Massachusetts, and owned outlying land to protect the river from pollution. In 1912 a corporation was formed in Massachusetts. The Maine corporation conveyed to it seven mills and let to it an eighth, that was in process of construction, together with the outlying lands and tenements, on a long lease, receiving the stock of the Massachusetts corporation in return. The Maine corporation then transferred to the plaintiffs as trustees the fee of the property subject to lease, left the Massachusetts stock in their hands, and was dissolved. By the declaration of trust the plaintiffs declared that they held the real estate and all other property at any time received by them thereunder, subject to the provisions thereof, "for the benefit of the cestuis que trust (who shall be trust beneficiaries only, without partnership, associate or other relation whatever inter sese)," upon trust to convert the same into money and distribute the net proceeds to the persons then holding the trustees' receipt certificates,—the time of distribution being left to the discretion of the trustees, but not to be postponed beyond the end of twenty years after the death of specified persons then living. In the meantime the trustees were to have the powers of owners. They were to distribute what they determined to be fairly distributable net income according to the interests of the cestuis que trust, but could apply any funds in their hands for the repair or development of the property held by them, or the acquisition of other property, pending conversion and distribution. The trust was explained to be because of the determination of the Maine corporation to dissolve without waiting for the final cash sale of its real estate, and was declared to be for the benefit of the eight shareholders of the Maine company, who were to receive certificates subject to trans-

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fer and subdivision. Then followed a more detailed statement of the power of the trustees and provision for their compensation, not exceeding 1 per cent of the gross income unless with the written consent of a majority in interest of the cestuis que trust. A similar consent was required for the filling of a vacancy among the trustees, and for a modification of the terms of the trust. In no other matter had the beneficiaries any control. The title of the trust was fixed for convenience as the Massachusetts Realty Trust.

The declaration of trust on its face is an ordinary real estate trust of the kind familiar in Massachusetts, unless in the particular that the trustees' receipt provides that the holder has no interest in any specific property, and that it purports only to declare the holder entitled to a certain fraction of the net proceeds of the property when converted into cash, "and meantime to income." The only property expressly mentioned is the real estate not transferred to the Massachusetts corporation. Although the trustees in fact have held the stock of that corporation and have collected dividends upon it, their doing so is not contemplated in terms by the instrument. It does not appear very clearly that the eight Maine shareholders might not have demanded it had they been so minded. The function of the trustees is not to manage the mills, but simply to collect the rents and income of such property as may be in their hands, with a large discretion in the application of it, but with a recognition that the receipt holders are entitled to it, subject to the exercise of the powers confided to the trustees. In fact, the whole income, less taxes and similar expenses, has been paid over in due proportion to the holders of the receipts.

There can be little doubt that in Massachusetts this arrangement would be held to create a trust and nothing more. "The certificate holders . . . are in no way associated together nor is there any provision in the [instrument] for any meeting to be held by them. The only act which (under the [declaration of] trust) they can do is to consent to an alteration . . . of the trust" and to the other matters that we have mentioned. They are confined to giving or withholding assent, and the giving or withholding it "is not to be had in a meeting, but is to be given by them individually." "The sole right of the cestuis que trust is to have the property administered in their interest by the trustees, who are the masters, to receive income while the trust lasts, and their share of the corpus when the trust comes to an end." Williams v. Milton, 215 Mass. 1, 10, 11, id. 8, 102 N. E. 355. The question is whether a different view is required by the terms of the present act. As by D, above referred to, trustees and associations acting in a fiduciary capacity have the exemption that individual stockholders have from taxation upon dividends of a corporation that itself pays an income tax, and as the plaintiffs undeniably are trustees, if they are to be subjected to a double liability, the language of the statute must make the intention clear. Gould v. Gould, 245 U. S. 151, 153, 62 L. ed. 211, 213, 38 Sup. Ct. Rep. 53; United States v. Isham, 17 Wall. 496, 504, 21 L. ed. 728, 730.

The requirement of G (a) is that the normal tax thereinbefore imposed upon individuals shall be paid upon the entire net income accruing from all sources during the preceding year "to every corporation, joint-stock company, or association, and every insurance company, organized in the United States, no matter how created or organized, not including partnerships." The trust that has been described would not fall under any familiar conception of a joint-stock association, whether formed under a statute or not. Smith v. Anderson, L. R. 15 Ch. Div. 247, 273, 274, 277, 282, 50

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L. J. Ch. N. S. 39, 43 L. T. N. S. 329, 29 Week. Rep. 21; Eliot v. Freeman, 220 U. S. 178, 186, 55 L. ed. 424, 428, 31 Sup. Ct. Rep. 360. If we assume that the words "no matter how created or organized" apply to "association," and not only to "insurance company," still it would be a wide departure from normal usage to call the beneficiaries here a joint-stock association when they are admitted not to be partners in any sense, and when they have no joint action or interest and no control over the fund. On the other hand, the trustees by themselves cannot be a joint-stock association within the meaning of the act, unless all trustees with discretionary powers are such, and the special provision for trustees in D is to be made meaningless. We perceive no ground for grouping the two—beneficiaries and trustees—together, in order to turn them into an association by uniting their contrasted functions and powers, although they are in no proper sense associated. It seems to be an unnatural perversion of a well-known institution of the law.

We do not see, either, that the result is affected by any technical analysis of the individual receipt holder's rights in the income received by the trustees. The description most in accord with what has been the practice would be that, as the receipts declare, the holders, until distribution of the capital, were entitled to the income of the fund, subject to an unexercised power in the trustees, in their reasonable discretion, to divert it to the improvement of the capital. But even if it were said that the receipt holders were not entitled to the income as such until they got it, we do not discern how that would turn them into a joint-stock company. Moreover, the receipt holders did get it, and the question is what portion it was the duty of the trustees to withhold.

We presume that the taxation of corporations and joint-stock companies upon dividends of corporations that themselves pay the income tax was for the purpose of discouraging combinations of the kind now in disfavor, by which a corporation holds controlling interests in other corporations, which, in their turn, may control others, and so on, and in this way concentrates a power that is disapproved. There is nothing of that sort here. Upon the whole case we are of opinion that the statute fails to show a clear intent to subject the dividends on the Massachusetts corporation's stock to the extra tax imposed by G (a).

Internal revenue—income tax—associations—trust.

Our view upon the main question opens a second one upon which the circuit court of appeals did not have to pass. The district court, while it found for the plaintiffs, ruled that the defendant was entitled to retain out of the sum received by him the amount of the tax that they should have paid as trustees. To this the plaintiffs took a cross writ of error to the circuit court of appeals. There can be no question that, although the plaintiffs escape the larger liability, there was probable cause for the defendant's act. The Commissioner of Internal Revenue rejected the plaintiffs' claim, and the statute does not leave the matter clear. The recovery, therefore, will be from the United States. Rev. Stat. § 989, Comp. Stat. 1916, § 1635, 3 Fed. Stat. Anno. 2d ed. 232. The plaintiffs, as they themselves alleged in their claim, were the persons taxed, whether they were called an association or trustees. They were taxed too much. If the United States retains from the amount received by it the amount that it should have received, it cannot recover that sum in a subsequent suit.

—recovery back of excessive tax—retention of amount justly due.

Judgment of the Circuit Court of Appeals reversed.

Judgment of the District Court affirmed.

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ANNOTATION.

Meaning of "association" as used in Income Tax Act.

The reported case (CROCKER v. MALLEY, ante, 1601), seems to have been the only case to have passed upon the question as to what bodies are included within the term "association," as used in the Federal Income Tax Act of 1913, which imposed a tax on the income of "every corporation, joint-stock company, or association . . . no matter how created or organized, not including partnerships," etc. The decision in this case was to the effect that the trustees of a common-law realty trust, organized in Massachusetts to hold and control certain property for a term of years, and pay over at their discretion the income to the beneficiaries in proportion to the amount of trust certificates held by them, were not an "association," and that the income received by them was not taxable in their hands without any reductions in respect to dividends received from a corporation that itself paid an income tax. This decision reversed (1918) — C. C. A. —, 250 Fed. 817, wherein the holding was upon the theory that since the powers of the trustees resembled those of the directors of a corporation, and as the income could not be regarded as the individual property of the beneficiaries until received by them, it must be regarded as income accruing to a group or body of individuals collectively, so as to render them in effect an association within the meaning of the act. And the conclusion of the circuit court of appeals seems to be directly supported by certain rulings of the Treasury Department. Thus in art. 79 of the Treasury regulations, the term "association" is defined as including associates, real estate trusts, and bodies, by whatever name known, which carry on or do business in an organized capacity, whether organized under and pursuant to state laws, trust agreements, declarations of trust, or otherwise, the net income of which, if any, is distributed or distributable among the members or other owners on the basis of the capital stock which each holds, or, where there is no capital stock, on the basis of the proportionate share of capital which each has invested in the business or property of the organization. So the Treasury Department, by letter dated March 14, 1917, held that a trust created to hold certain lands, and to dispose of same, and to distribute the proceeds to the beneficiaries whose pro rata interests were represented by beneficial certificates issued to them by the trustees in whose names the title to the property stood, and whose sole duty was to carry out the purpose of the trust, partook of the character of an "association," and was subject to the tax as an entity. But, on the other hand, by letter dated February 25, 1914, the Treasury Department ruled that a syndicate formed for the temporary purpose of purchasing securities on joint account and disposing of the same through syndicate managers, where the only obligation of the members was to take and pay for the portion of the securities not disposed of, was not an "association," within the meaning of the Income Tax Law, and that the profits of the syndicate were not taxable in its hands, but in the hands of the individual members according to their respective shares. And under the Federal Corporation Tax Act of 1909 by which an excise tax was imposed upon the doing of business by corporations, joint-stock companies, or associations, "now or hereafter organized under the laws of the United States or of any state or territory," it has been held that a Massachusetts trust is not an association within the meaning of the act, the theory being that such act was intended to embrace only such corporations and joint-stock associations as were organized under statute, and that Massachusetts trusts do not derive any benefit from and are not organized under the statutory laws of Massachusetts. This was the holding in

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Eliot v. Freeman (1910) 220 U. S. 178, 55 L. ed. 424, 31 Sup. Ct. Rep. 360, which involved both a real-estate trust created by deed for the purchasing, improving, holding, or selling lands and buildings for the benefit of shareholders, and a department store trust created by deed for the purpose of purchasing and holding certain real estate and erecting a department store thereon and renting the same. This holding, of course, supports that in the reported case (CROCKER v. MALLEY, ante, 1601), although the statute in the latter case did not limit its application to "associations" organized under a statute, especially if we accept the theory of the United States Supreme Court that trusts of the character under consideration "would not fall under any familiar conception of a joint-stock association, whether formed under a statute or not."

Of interest in connection with the above cases and holdings is the decision in Tide Water Pipe Co. v. State Assessors (1895) 57 N. J. L. 516, 27 L.R.A. 684, 31 Atl. 220, affirmed on opinion below in (1896) 59 N. J. L. 269, 39 Atl. 1114, wherein it was held that "partnership associations," organized under a Pennsylvania statute were invested with the essential characteristics of corporations and could be taxed under the New Jersey Corporation Tax Act. And see also People ex rel. Platt v. Wemple (1889) 117 N. Y. 136, 6 L.R.A. 303, 2 Inters. Com. Rep. 735, 22 N. E. 1046, wherein a company formed and doing business in New York, which was organized by a number of individuals signing articles of agreement, by which the concern was described as a "joint-stock company," and which provided for continuance for a specified period, for a capital stock divided into shares represented by certificates or script, and assignable, and for management by a board of directors, was held to be either a "corporation, joint-stock company, or association" within the meaning of a state statute taxing same, although the articles of agreement contained no reference to any statute under which the company was organized, and the statute providing for such organizations was not in fact passed until after the agreement was prepared. G. J. C.

REINHARDT J. BUSCH, Appt.,

v.

LOS ANGELES RAILWAY COMPANY, Respt.

MARY E. BUSCH, Appt.,

v.

SAME, Respt.

California Supreme Court (Dept. No. 1) — July 17, 1918.

(— Cal. —, 174 Pac. 665.)

Evidence — res ipsa loquitur — collision.

1. The maxim, "Res ipsa loquitur," does not apply to a collision between a street car and an automobile.

[*See note on this question beginning on page* 1610.]

Street railway — operating car on left-hand track — negligence.

2. It is not negligence per se for a street railway company to operate a car in a city street on the left-hand track, when facing in the direction in which the car is moving.

Appeal — verdict on conflicting evidence.

3. A verdict on conflicting evidence is conclusive, upon appeal, on a jury question.

Highway — collision with street car — negligence.

4. One may be found to be negligent

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in driving an automobile against the side of a brightly lighted street car in attempting to pass another automobile standing in the street.

Appeal — sufficiency of plea — first raising question.

5. An objection to the sufficiency of a plea of contributory negligence cannot be raised for the first time on appeal.

Trial — instruction — assumption by motorman.

6. There is no error in an instruction, in an action for injury resulting from a collision between a street car and an automobile, that the motorman might assume that persons using the street will see what is plainly to be seen.

— duty of automobilist.

7. There is no error in an instruction, in an action for injury resulting from a collision between a street car and an automobile, that it is the duty of drivers of automobiles, along a street upon which is laid a street car track, to yield the right of way to the street cars when they can reasonably do so.

Street railway — care required in operating on left-hand track.

8. A motorman operating a street car in the opposite direction from that usually taken on the track on which the car is running is not bound to use special and peculiar care to avoid collision with vehicles going in the opposite direction.

SEPARATE APPEALS from a judgment of the Superior Court for Los Angeles County in favor of defendant, and from an order denying motions for new trial, in consolidated actions brought to recover damages for personal injuries, sustained in a collision between plaintiff's automobile and defendant's street car. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **Blackstock, Gray, Barker, & Bowen** and **Wheaton A. Gray**, for appellants:

The railroad company was negligent in not sounding any alarm while traveling on the wrong track.

Lininger v. San Francisco, V. & N. Valley R. Co. 18 Cal. App. 419, 123 Pac. 235; Lawyer v. Los Angeles Pacific Co. 23 Cal. App. 544, 138 Pac. 920, 161 Cal. 53, 118 Pac. 237.

There was no evidence upon which to base a finding or assumption that either of the plaintiffs was guilty of contributory negligence.

Bailey v. Market Street Cable R. Co. 110 Cal. 320, 42 Pac. 914; Scott v. San Bernardino Valley Traction Co. 152 Cal. 610, 93 Pac. 677.

There is no sufficient plea of contributory negligence to be found in defendant's answer.

Crabbe v. Mammoth Channel Gold Min. Co. 168 Cal. 500, 143 Pac. 714.

The absence or presence of notice and knowledge of the party is material, and therefore any evidence excluded which might tend to illustrate or accentuate the proposition of the absence of notice or knowledge might well tend to the prejudice of the plaintiff's case.

Chicago & A. R. Co. v. Dillon, 123 Ill. 570, 5 Am. St. Rep. 559, 15 N. E. 181; Illinois C. R. Co. v. Slater, 139 Ill. 190, 28 N. E. 830; Crane v. Michigan C. R. Co. 107 Mich. 511, 65 N. W. 527; Raymond v. Glover, 122 Cal. 471, 55 Pac. 398.

Mr. **H. Perk, Jr.**, also for appellants.

Messrs. **Gibson, Dunn, & Crutcher** and **Norman S. Sterry** for respondent.

Shaw, J., delivered the opinion of the court:

The defendant is operating two double-track street railways in the city of Los Angeles; one along Pasadena avenue, and the other on Avenue 20, which crosses Pasadena avenue. Reinhardt J. Busch and his wife, Mary E. Busch, were traveling easterly along the south side of Pasadena avenue in an automobile driven by the said Mary E. Busch and owned by her. A street car operated by the defendant was going westerly on the south track of the Pasadena avenue line between Avenue 21 and Avenue 20, and at a point near Avenue 20 the automobile and the car collided, whereby Reinhardt J. Busch sustained personal injuries and the automobile was materially damaged. To recover these damages the two parties respectively began actions against the defendant. The two causes were consolidated

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and tried together, and resulted in a verdict and judgment for the defendant. From this judgment, and from an order denying their respective motions for a new trial, the two plaintiffs have taken separate appeals to this court.

Plaintiffs' first point is that the railroad company was negligent in its methods of operating its cars and laying its tracks in this: That usually street cars travel on the right-hand track in the direction in which they are going, and that this car was going west on the left-hand track. No law or ordinance is pointed out by appellants which required the defendants to operate its cars in either mode. It was therefore lawful to run them in either direction. Running a car west on the south-side track cannot be said to be negligence in law.

Street railway—operating car on left-hand track—negligence.

It is claimed that the evidence showed that the defendant was negligent in the manner of operating the car in this: That, in as much as the car was going in the opposite direction from that usually taken by cars upon that railroad, it was the defendant's duty to use more than usual care to warn persons of the fact, so as to avoid danger of collision, and that the defendant failed to sound any gong or otherwise give signals of warning. There was evidence that the defendant did sound the gong, and also that the injury occurred about dusk, that the inside car lights were lighted, that a headlight was burning brightly, and that the car was not going more than about 4 miles per hour at the time of the collision. The verdict of the jury having been for the defendant, this evidence must be taken as true. The fact that the plaintiffs' evidence contradicted it is not available for reversal in such a case. It was a question for the jury to determine, and its verdict on that subject is conclusive here.

Appeal—verdict on conflicting evidence.

Plaintiffs further claim that there was no evidence of contributory negligence on the part of Mary E. Busch, who was driving the automobile. There was evidence to show that as she crossed Avenue 20 going east, just before the collision, she observed another automobile near the curb line, going, as she first believed, in the same direction, but which in fact had stopped, or was about to stop; that, seeing this to be so, she undertook to pass the automobile on the left-hand side, being the side next to the street car track; that in doing so she swerved considerably to the left at the instant when the car came opposite to the standing automobile, and thereby she drove her automobile against the side of the street car; that at that time the lights on the street car were burning, so that with ordinary care she could have seen it in time to stop her car, or guide it so as to avoid the collision. A verdict finding the plaintiff guilty of contributory negligence upon these facts cannot be said as a matter of law to be contrary to the evidence.

Highway—collision with street car—negligence.

Plaintiffs further contend that there was no sufficient pleading of the contributory negligence of the defendant in the answer, within the rule stated in Crabbe v. Mammoth Channel Gold Min. Co. 168 Cal. 500, 143 Pac. 714. The Crabbe Case was decided after the answers in this case were filed. The trial was conducted throughout upon the theory that contributory negligence of the plaintiffs was properly alleged, and that the fact was in issue. Under these circumstances the well-settled rule prevails that the parties cannot, on appeal, claim a reversal, on the ground that the plea was insufficient. It is unnecessary to cite cases on the subject.

Appeal—sufficiency of plea—first raising question.

The court instructed the jury as follows: "The fact that there was a collision between the automobile in which the plaintiffs were riding and the street car of the defendant does

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not raise a presumption of negligence against the defendant."

Evidence—res ipsa loquitur—collision.

We see no error in this instruction. The maxim, "Res ipsa loquitur," does not apply in such cases.

Another instruction was to the effect that a motorman, who is operating a street car at a reasonable rate of speed and with due care along and upon a public street, "has a right to assume that other persons who are using the street will exercise ordinary care in doing so, and will see that which is plainly to be seen." The objection made to this instruction is that the evidence showed that it was impossible for the plaintiffs to have seen the street car. On the contrary, as we view the evidence, it would seem to have been impossible for her not to see it, except by shutting her eyes or looking the other way. The instruction does not assume that the car was plainly to be seen, but says that if it was plainly to be seen the motorman had a right to expect that she would see it. The jury were left to determine from the evidence whether or not it was plainly to be seen.

Trial—instruction—assumption by motorman.

There was no error in instructing the jury that it is the duty of drivers of automobiles, along a street upon which there is laid a street car track, to yield the right of way to the street cars when they can reasonably do so.

—duty of automobilist.

The instruction that, when running a car in a direction the opposite to that usually taken on the south track, the motorman must use "special and particular care" to avoid collision with vehicles going in the other direction, was properly refused. Reasonable and ordinary care, under the existing circumstances, is the standard required of a street car company, lawfully operating its cars on the street.

Street railway—care required in operating on left-hand track.

The instructions on all the questions in the case were full and clear. The appellants make other criticisms of instructions given, and complain of the refusal of others. We will not discuss them further. We are satisfied that the rulings were either correct, or that they were not sufficiently prejudicial as to have caused a miscarriage of justice.

The judgment and order are affirmed.

We concur: **Sloss, J., Richards,** Judge pro tem.

ANNOTATION.

Applicability of res ipsa loquitur doctrine where person or vehicle is struck by street car.

I. Introductory, 1610.
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I. Introductory.

It appears from the cases cited in the course of this note that the courts are not entirely in accord as to the applicability of the doctrine of res ipsa loquitur when a person or vehicle is struck by a street car. The rule that, where a person is struck by a street car, no negligence on the part of the owner of the car is to be inferred from the mere happening of the injury, is almost uniformly adhered to. And the greater number of cases seem to support the same rule where a vehicle is struck. There are a number of cases, however, in which it is held that the doctrine is applicable where a vehicle traveling in the same direction as a street car is struck by the latter. So, where a person or vehicle is struck by a derailed car, it is held in the greater

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number of cases that the mere happening of the injury raises the presumption of negligence on the part of the owner of the car. Some states have statutes which create a presumption of negligence on the part of railway companies when persons or property are injured by the operation of their trains, cars, etc. Some of these statutes are applicable to street railway companies by express terms, while others are held by construction to be applicable, or otherwise, depending on the terms and construction of the particular statute.

The present note excludes cases involving the applicability of the doctrine of res ipsa loquitur where the person injured was a passenger.

II. Person struck by car.

In each of the following cases wherein it appeared that a person was struck by a street car, the doctrine of res ipsa loquitur was held to be inapplicable: Tower v. Humboldt Transit Co. (1917) 176 Cal. 602, 169 Pac. 227; Truman v. Wilmington City R. Co. (1908) 7 Penn. (Del.) 192, 78 Atl. 636, affirmed in (1909) 7 Penn. (Del.) 197, 72 Atl. 983, 21 Am. Neg. Rep. 57; Gismond v. People's R. Co. (1911) 2 Boyce (Del.) 577, 83 Atl. 136 (child on street struck by car); Riccio v. People's R. Co. (1911) 3 Boyce (Del.) 235, 82 Atl. 604 (plaintiff struck while working in street); Smith v. Kansas City Elev. R. Co. (1900) 61 Kan. 862, 60 Pac. 1059 (child struck by street car on straight track; alarm not sounded); Garvick v. United R. & Electric Co. (1905) 101 Md. 239, 61 Atl. 138 (plaintiff struck while walking along track with two companions; no warning signal was given by motorman, but companions warned him of approach of car); McGrath v. St. Louis Transit Co. (1906) 197 Mo. 97, 94 S. W. 872 (husband of plaintiff struck by car and killed while working as track repairer at night); Mascheck v. St. Louis R. Co. (1877) 3 Mo. App. 600 (child run over by street car); Tully v. New York City R. Co. (1908) 127 App. Div. 688, 111 N. Y. Supp. 919 (plaintiff struck while crossing track); Carley v. Joline (1913) 159 App. Div. 780, 144 N. Y. Supp. 1018 (street cleaner struck by street car while in performance of duty); Zang v. Joline (1913) 159 App. Div. 885, 143 N. Y. Supp. 858 (infant knocked down by horse drawing street car); Freidman v. Dry Dock, E. B. & B. R. Co. (1886) 3 N. Y. S. R. 557 (old man struck by car while trying to cross tracks at place other than crossing, and where there were accumulations of ice and snow); Fortunato v. Union R. Co. (1918) 172 N. Y. Supp. 119 (pedestrian struck while crossing track).

In Fortunato v. Union R. Co. (N. Y.) supra, the court said: "A pedestrian, crossing a car track, is bound to look out for his own safety, and is not entitled to recover unless he shows that he did not proceed heedlessly across the track, relying upon the carefulness of the motorman to avoid the collision. The mere fact that a collision occurred does not in itself show that the pedestrian exercised care, or that the accident was caused by the negligence of the motorman."

In Oberstock v. United R. Co. (1913) 68 Or. 197, 137 Pac. 195, it appeared that the plaintiff, while riding on horseback diagonally across a street car track at a place where the track veered off to one side of the street, was struck and injured by a car approaching from the rear. An action being brought to recover damages for the injuries, the evidence was held sufficient to support a verdict for the plaintiff, but the court said that the mere proof of an accident did not per se prove negligence.

But where it appeared that the plaintiff was struck by one of the defendant's horse cars while he was engaged in his duty as a flagman at a street crossing in warning traffic of the approach of a train, his position having been plainly visible to the driver of the car for several hundred feet, it was held that an inference of negligence on the part of the defendant could be drawn. D'Oro v. Atlantic Ave. R. Co. (1891) 13 N. Y. Supp. 789.

III. Person struck by fender or other projection.

It has been held in several cases that where a person in the street is struck by the fender of a street car

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the res ipsa loquitur doctrine does not apply.

In Jaquette v. Capitol Traction Co. (1909) 34 App. D. C. 41, 25 L.R.A. (N.S.) 407, it appeared that a person in trying to pass in front of a standing street car tripped on the fender and fell, receiving injuries from which he died. The fender was not defective, and was one of a kind authorized to be used by municipal regulation. In an action to recover damages for his death, it was held that the case was not one for the application of the doctrine of res ipsa loquitur.

In Adams v. Metropolitan Street R. Co. (1903) 82 App. Div. 354, 81 N. Y. Supp. 553, the plaintiff brought an action to recover damages for injuries which he received by walking into and stumbling over a fender attached to the front end of one of the defendant's street cars. He contended that the car was stationary, unlighted, and without anyone in charge, and that the place was so dark that, although he saw the car, he could not see the fender. The plaintiff was the only witness, and he testified that the car was without any light, and that there was no motorman at the front end of the car. His evidence did not show how long the car remained stationary and unlighted, nor did it indicate the cause of its stopping. It was held that the case was not one for the application of the doctrine of res ipsa loquitur, which made it incumbent on the defendant to explain the stopping or the unlighted condition of the car.

In Klyachko v. Central Crosstown R. Co. (1904) 88 N. Y. Supp. 1073, it was held that the mere fact that a person not a passenger was injured by the fall of the fender of a street car belonging to the defendant did not raise a presumption as to the negligence of the defendant.

In Burns v. United R. Co. (1913) 176 Mo. App. 330, 158 S. W. 394, the plaintiff brought an action to recover damages for personal injuries alleged to have been suffered by him by being struck and injured by some object projecting from a car of the defendant, whilst the plaintiff was standing near the defendant's track, on a cinder pathway maintained by the defendant for the use of its patrons. It was held that the mere fact of an injury to the plaintiff did not warrant an inference that the defendant was negligent, but that if something projected from the passing car and struck and injured the plaintiff while she was rightly standing on the defendant's platform, the doctrine of res ipsa loquitur would apply.

IV. Vehicle struck by car.

In each of the following cases it appeared that a street car struck a vehicle, and it was held that the doctrine of res ipsa loquitur was inapplicable:

Arkansas.—Hot Springs Street R. Co. v. Hildreth (1904) 72 Ark. 572, 82 S. W. 245 (boy riding on wagon at invitation of driver thrown therefrom by reason of collision with car).

California.—See the reported case (BUSCH v. LOS ANGELES R. Co. ante, 1607).

Delaware.—Garrett v. People's R. Co. (1906) 6 Penn. 29, 64 Atl. 254 (collision between car and automobile at street crossing); Heidelbaugh v. People's R. Co. (1907) 6 Penn. 209, 65 Atl. 587 (horse frightened by approaching car backed wagon on track where it was struck); McGowan v. Wilmington & P. Traction Co. (1914) 5 Boyce, 281, 92 Atl. 1015 (wagon struck by car traveling in same direction); Igle v. People's R. Co. (1915) 5 Boyce, 376, 93 Atl. 666 (infant plaintiff injured while riding on ice wagon which was struck by car at street crossing).

Illinois.—Feitl v. Chicago City R. Co. (1904) 113 Ill. App. 38, affirmed in (1904) 211 Ill. 279, 71 N. E. 991 (car ran into buggy from rear, causing death of one of occupants).

New York.—Costello v. Forty-Second Street M. & St. N. Ave. R. Co. (1906) 50 Misc. 628, 98 N. Y. Supp. 648 (car struck cab as it was crossing street; driver had seen car approaching at "half speed" before starting to cross); Moore v. Joline (1910) 123 N. Y. Supp. 117 (car struck automobile).

Pennsylvania.—Thilow v. Philadelphia Traction Co. (1894) 4 Pa. Dist. R. 83 (collision between car and wagon); Jones Bros. v. Greensburg, J. &

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P. Street R. Co. (1898) 9 Pa. Super. Ct. 65 (collision between car and wagon approaching from opposite directions).

Texas.—North Side Street R. Co. v. Want (1890) 4 Tex. App. Civ. Cas. (Willson) 237, 15 S. W. 40.

In McGowan v. Wilmington & P. Traction Co. (1914) 5 Boyce (Del.) 281, 92 Atl. 1015, it was said: "The fact of an accident by which injuries are sustained does not, in itself, if not within the control of the defendant or its servants charged with causing the accident, establish the fact that such injuries were caused by negligence. . . . There is no presumption of negligence, either on the part of the plaintiff or on the part of the defendant company, from the mere fact that the injuries complained of resulted from the collision between the car and the team."

In Campbell v. Consolidated Traction Co. (1902) 201 Pa. 167, 50 Atl. 829, the facts were stated by the court as follows: "The plaintiff was seated in a wagon which was standing on the track of the defendant's road. In front of him were two cars, the nearest being about 10 feet in advance of his horses, and a car was back of him close to his wagon. On another track a car stood to his left, and to his right the street was crowded with people, so that he was completely hemmed in. As the second car in front of him moved on an ascending grade, the trolley wheel slipped from the wire, and the car stopped and then slipped backward about 60 feet and struck the car back of it. Either the force of the collision drove the rear car against the plaintiff's horses and wagon, or the motorman of that car moved it backward to avoid a collision." Holding that these facts constituted a prima facie case, the court said: "The proof of these facts established a prima facie case for the plaintiff. He was not bound to go further and show by affirmative evidence that the accident was an avoidable one. He was in a place of apparent safety, and had no reason to apprehend danger from a backward movement of the cars. In the ordinary course of events such a movement was not to be expected. No extraneous cause interfered with the defendant's control of its cars. The loss of control may have been a pure accident, or the result of mismanagement, or of defective appliances. If the slipping of the wheel was an accident which could not have been guarded against, the question would arise whether proper means had been provided to arrest the movement of the car in such an emergency; and if so whether proper use had been made of them. The case was one in which the proof of the accident and the attendant circumstances gave rise to a presumption of negligence, and made it incumbent on the defendant to show that due care had been used."

In Chicago City R. Co. v. Barker (1904) 209 Ill. 321, 70 N. E. 624, affirming (1903) 111 Ill. App. 452, applying the doctrine to the facts stated by the court, it was said: "This is a case for the application of the doctrine, res ipsa loquitur. While Eick was riding west in his wagon upon the north side of the street, as he had a right to do, an electric motor car belonging to and under the management of appellant, and used for sprinkling purposes, with no motorman, or any other person, upon it, or in control of it, ran up from the rear and struck Eick's wagon, and threw him out upon the ground, and inflicted the injuries for which this suit is brought. This collision gives rise to a presumption of negligence on the part of the appellant, and the burden of proof was upon the appellant to rebut that presumption."

Where it appears that a street car approached a wagon from the rear and struck it, the wagon being plainly visible from the front of the street car, the defendant's negligence will be presumed, as the servant of the defendant could not have run down the wagon under any ordinary circumstances without negligence or wilful wrong. O'Connor v. United R. Co. (1914) 168 Cal. 43, — A.L.R. —, 141 Pac. 809; Vincent v. Norton & T. Street R. Co. (1901) 180 Mass. 104, 61 N. E. 822; Richmond Pass. & Power Co. v. Allen (1905) 103 Va. 532, 49 S. E. 656. See

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to the same effect Schafstette v. St. Louis & M. River R. Co. (1903) 175 Mo. 142, 74 S. W. 926 (wherein it appeared that a car ran into the rear of a wagon traveling near the track, its position having been visible for 500 feet); Schilling v. Metropolitan Street R. Co. (1900) 47 App. Div. 500, 62 N. Y. Supp. 403, 7 Am. Neg. Rep. 318; Swift & Co. v. New York & Q. County R. Co. (1909) 136 App. Div. 34, 120 N. Y. Supp. 203 (wherein it appeared that a motorman drove into a wagon in the face of a lighted lantern hanging from the rear axle); J. Samuels & Bro. v. Rhode Island Co. (1917) 40 R. I. 232, 100 Atl. 402. In the case last cited it appeared that the plaintiff's automobile was run into by a runaway horse. The runaway was caused by one of the defendant's street cars striking the rear of the wagon to which the horse was attached. It was held that a charge that, if the defendant did not explain that the collision was not the result of negligence on the part of someone in charge of the car, the jury would be warranted in finding that the collision occurred by reason of the negligence of the defendant corporation, was proper.

In Indianapolis Street R. Co. v. Darnell (1904) 32 Ind. App. 687, 68 N. E. 609, it appeared that one of the defendant's street cars struck the plaintiff's wagon and injured the plaintiff. The plaintiff had stopped his wagon on the defendant's track near a railroad crossing waiting for a train to pass by, when the collision occurred. He was on the right side of the street, but he could not drive to the one side of the track because of obstructions placed there by the defendant, nor on the other side because two teams obstructed the way. The accident occurred at a time of the day when cars ran infrequently. The view of the wagon from the approaching car was clear for 900 feet. The defendant did not offer any evidence as to how the accident occurred, and a verdict was rendered for the plaintiff in the trial court, which was affirmed on appeal. The court said: "The jury had a right to put a construction upon the silence of the appellant. The manner of operating the car was known to its employees; if the injury was due to accident, it was susceptible of easy proof. From the failure of such proof the inference of carelessness, rather than accident, might reasonably be drawn. The presumption of negligence of the railroad company would not arise from the mere fact of the collision, but the jury might reasonably expect (the situation of appellee being apparent) explanation of the failure to stop the car in time to have avoided the collision."

V. Collision caused by derailment of car.

The greater number of the cases passing on the point support the rule that, where a street car leaves the rails and strikes a person or vehicle, the mere happening of the collision is sufficient to justify an inference of negligence on the part of the owners of the street car. Chicago Union Traction Co. v. Giese (1907) 229 Ill. 260, 82 N. E. 232 (trailer left track at curve and struck plaintiff's wagon); Kunkel v. Chicago Consol. Traction Co. (1910) 156 Ill. App. 393 (car left track and struck wagon); Giese v. Chicago Union Traction Co. (1913) 177 Ill. App. 635 (car coming around curve jumped track and struck plaintiff's wagon); Gleason v. Chicago City R. Co. (1914) 187 Ill. App. 431 (plaintiff's wagon traveling on right-hand track struck by car coming from opposite direction on other track, and which was diverted by switch); Kalver v. Metropolitan Street R. Co. (1912) 166 Mo. App. 198, 148 S. W. 130 (car left track and struck plaintiff who was on sidewalk); Baker v. Metropolitan Street R. Co. (1910) 142 Mo. App. 354, 126 S. W. 764 (car left track and struck plaintiff who was on sidewalk); Najarian v. Jersey City, H. & P. Street R. Co. (1909) 77 N. J. L. 704, 23 L.R.A.(N.S.) 751, 73 Atl. 527 (rear end of car turned into switch and struck plaintiff's intestate, who was standing beside track).

In Chicago Union Traction Co. v. Giese (Ill.) supra, the court said: "Experience and observation teach us that with proper care street cars will

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remain on the tracks. If this were not true, municipalities would not license them to use public streets. If, with proper construction and management, street cars cannot be kept upon their tracks, then the safety of the public would require that they be done away with altogether. It is a matter of common knowledge, however, that it is possible, by the exercise of ordinary care, to so construct and operate these conveyances that they will not leave the tracks, and when they do so and inflict an injury upon another who is lawfully in the street and free from contributory negligence, we think that no hardship is imposed upon these corporations to hold that such an injury is within the maxim, 'Res ipsa loquitur,' and that proof of the injury, under the circumstances stated, will justify a verdict, unless such prima facie case is met by proof showing that the company is not at fault."

But the rule that the mere fact that a collision with a person or vehicle is caused by the derailment of a street car does not justify an inference of negligence on the part of the owners of the street car also finds support. Felske v. Detroit United R. Co. (1911) 166 Mich. 367, 130 N. W. 676; Geiser v. Pittsburg R. Co. (1909) 223 Pa. 170, 72 Atl. 351; Livingstone v. Pittsburgh R. Co. (1916) 64 Pa. Super. Ct. 593. Thus, in Geiser v. Pittsburg R. Co. (1909) 223 Pa. 170, 72 Atl. 351, it was held that where a pedestrian on the street was injured by a car which jumped its track at a switch, that the doctrine of res ipsa loquitur was not applicable. The court said: "It is still the rule of law that the happening of the accident, in cases such as this one, is not evidence of itself of negligence, but the quantum of proof necessary to establish negligence, under certain circumstances, need be very slight." And in Livingstone v. Pittsburgh R. Co. (1916) 64 Pa. Super. Ct. 593, it appeared that a trailer attached to one of the defendant's street cars turned off the main track at a switch, instead of keeping on the main track with the car, and struck a wagon in which the plaintiff was riding, thereby injuring the plaintiff. It was held that these facts alone did not make the defendant liable for the injuries. In Felske v. Detroit United R. Co. (1911) 166 Mich. 367, 130 N. W. 676, the facts were briefly stated by the court as follows: "Plaintiff brought this action to recover damages for injuries caused by the derailment of the rear trucks of one of defendant's suburban cars, and the consequent swinging of the car across the street, thereby colliding with the vehicle in which he was riding." It was held that the facts stated did not make a prima facie case.

VI. Statutory presumption of negligence.

The Alabama statute (Code, § 5476) provides that when a person is killed or injured, or property destroyed or damaged, by the locomotive or cars of a railroad, the burden of proof in a suit brought to recover damages therefor is on the railroad company, to show that there was no negligence on the part of the company.

In Appel v. Selma Street & Suburban R. Co. (1912) 177 Ala. 457, 59 So. 164, which was an action to recover damages for personal injuries, and injuries to a wagon and its contents, resulting from a collision between the wagon and a street car, it was held that the statute was inapplicable to a street railway company. That case apparently overruled Birmingham R. Light & Power Co. v. Demmins (1911) 3 Ala. App. 359, 57 So. 404; but was followed in Ex parte Selma Street & Suburban R. Co. (1912) 177 Ala. 473, 59 So. 169, reversing (1911) 2 Ala. App. 537, 56 So. 601, and in Mobile Light & R. Co. v. Drooks (1914) 11 Ala. App. 595, 66 So. 824. In Hamilton v. Birmingham R. Light & P. Co. (1917) — Ala. —, 73 So. 950, the doctrine of res ipsa loquitur was held not to apply, where it appeared that the plaintiff was injured because the trailer of a street car struck a motor cycle traveling in the same direction, and on which the plaintiff was riding, the front end of the car having safely passed the motor cycle, as the accident could not have happened unless the plaintiff allowed the motor cycle to approach the car.

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Under the Florida statute (Gen. Stat. 1906, § 3148), the presumption exists that a person injured by the operation of a railroad was injured by the negligence of the railroad. In Hammond v. Jacksonville Electric Co. (1913) 66 Fla. 145, 63 So. 709, the court assumed that the statute was applicable to street railways, in an action to recover damages for the death of the plaintiff's husband, caused by his being struck by a street car at a crossing. In Farnsworth v. Tampa Electric Co. (1911) 62 Fla. 166, 57 So. 233, it appeared that the plaintiff's automobile was struck by a street car at a crossing, the automobile being damaged and the plaintiff injured. The court, without holding that the statute applied to street railway companies, apparently assumed that it did. In Consumer's Electric Light & Street R. Co. v. Pryor (1902) 44 Fla. 354, 32 So. 797, which was an action to recover damages for injuries to the plaintiff caused by his being struck by one of the defendant's cars at a street crossing, it was said, with respect to a prior statute similar in terms, that it had been regarded by the court as applicable to street railroads. In Jacksonville Electric Co. v. Adams (1905) 50 Fla. 429, 39 So. 183, 7 Ann. Cas. 241, the plaintiff, an infant four years of age, brought an action to recover damages for personal injuries caused by his being struck by one of the defendant's street cars while he was on the street. The court held that the former statute created a presumption against the defendant.

The Georgia statute (Civ. Code, § 2321) makes railroad companies liable for damages done "by the running of the locomotives, or cars, or other machinery of such company, . . . the presumption in all cases being against the company." This statute is applicable to street railway companies. Cordray v. Savannah, T. & I. of H. R. Co. (1903) 117 Ga. 464, 43 S. E. 755; Georgia R. & Electric Co. v. Bailey (1911) 9 Ga. App. 106, 70 S. E. 607. Where it appeared that plaintiff suffered damage by reason of one of the defendant's street cars striking his wagon while he was driving across the defendant's tracks, it was held that the statute was applicable. Cordray v. Savannah, T. & I. of H. R. Co. supra. In Georgia R. & Electric Co. v. Bailey, supra, the court, in its official headnote, said: "As against a railroad company, when the plaintiff proves he was injured by the operation of its cars, and proves his damages, the statutory presumption of negligence completes in favor of the plaintiff a case which, prima facie, entitles him to recover. The presumption extends to all the acts of negligence alleged, and primarily this presumption is sufficient to prove the negligence alleged." And in Georgia R. & Electric Co. v. Carroll (1915) 143 Ga. 93, 84 S. E. 434, it was said in an official headnote: "After the plaintiff in a suit against an electric railway company has shown that he was injured by the running of one of the defendant's cars, a presumption arises that the defendant was negligent, as charged in the plaintiff's petition." In Augusta R. & Electric Co. v. Arthur (1907) 3 Ga. App. 513, 60 S. E. 213, which was an action to recover damages for personal injuries to the plaintiff, caused by her being struck by one of the defendant's street cars, the court, discussing the effect of proof of the injury, said: "While the plaintiff can only recover on the special grounds of negligence alleged, still, when she has shown the injury and that it was caused by the car of the company, all of the allegations of negligence stand proved until they are rebutted by proof in behalf of the defendant." In Murphy v. Georgia R. & Power Co. (1916) 146 Ga. 297, 91 S. E. 108, an action was brought to recover damages for the death of the plaintiff's husband. It appeared that he was killed in a collision of an automobile which he was driving with one of the defendant's street cars. The following charge was held proper: "When personal injury is shown to have been done by the cars of a railroad company, the presumption is against the company, but it may defeat a recovery by establishing, by a preponderance of the evidence, either of the following defenses: That its

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agents have exercised all ordinary care and reasonable diligence to avoid the injury; that the damage was caused by the negligence of the person injured; that he consented to it; or that the person injured, by the use of ordinary care, could have avoided the injury to himself, although caused by the defendant's negligence."

The Mississippi statute (Code 1906, § 1985) provides as follows: "In all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of the locomotives or cars of such company shall be prima facie evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury." This statute does not apply to street railways. Pascagoula Street R. & Power Co. v. Brondum (1909) 96 Miss. 28, 50 So. 97. In that case it appeared that the plaintiff's daughter, who was six years old, was run over by one of the defendant's street cars near a public school building. In Krebs v. Pascagoula Street R. & Power Co. (1918) 117 Miss. 771, 78 So. 753, an action was brought to recover damages for injuries to the plaintiff's automobile, by reason of its being struck by one of the defendant's cars at a place where a highway crossed the defendant's suburban line. The facts explaining how the injury occurred being shown by the testimony, it was held that the statute as amended in 1912 (Laws 1912, chap. 215, Hemingway's Code, § 1645) was not applicable. R. J. B.

G. W. ANDERSON
v.
S. E. ANDERSON, Appt.

West Virginia Supreme Court of Appeals — April 4, 1916.

(78 W. Va. 118, 88 S. E. 653.)

Pleading — divorce — sufficiency of allegation.

1. A bill for divorce on the ground of adultery, specifying the person with whom the alleged act of adultery was committed, and also the time and place, is not bad on demurrer for failure to allege other circumstances of the alleged offense.

[*See note on this question beginning on page* 1621.]

— equity — grounds of demurrer.

2. Section 29, chapter 125, serial § 4783, Code 1913, respecting failure to assign grounds of demurrer, does not apply to equity causes.

Evidence — burden of proof — divorce.

3. In suits for divorce, as in other civil causes, the burden is upon the plaintiff to make out his case by clear, positive, and satisfactory evidence.

— sufficiency.

4. In this case the evidence of the adulterous acts alleged was not sufficient to support the decree a vinculo matrimonii appealed from.

Headnotes by MILLER, J.

APPEAL by defendant from a decree of the Circuit Court for Summers County in favor of plaintiff, in a suit for divorce for alleged adultery. *Reversed.*

The facts are stated in the opinion of the court.

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Messrs. T. J. Lilly and T. G. Mann for appellant.

Mr. E. C. Eagle for appellee.

Miller, J., delivered the opinion of the court:

In a suit for divorce, by husband against wife, upon the ground of adultery, divorce a vinculo was decreed, and defendant has appealed.

The first point of error is that the demurrer to the bill should have been sustained. Grounds of demurrer do not seem to have been assigned in the court below, and none are specifically assigned here, further than to refer the court to the Virginia case of Miller v. Miller, 92 Va. 196, 23 S. E. 232. Counsel for plaintiff answer this point by saying that under our statute, § 29, chapter 125, no grounds being assigned, the demurrer was properly overruled, and that the same cannot be considered upon appeal. But the provision of the statute relied on, as several times decided, does not apply to equity causes. Hays v. Heatherly, 36 W. Va. 613, 15 S. E. 223; Cook v. Dorsey, 38 W. Va. 196, 18 S. E. 468; Depue v. Miller, 65 W. Va. 125, 23 L.R.A.(N.S.) 775, 64 S. E. 740; Wm. James Sons Co. v. Farley, 71 W. Va. 173, 76 S. E. 169.

Pleading—equity—grounds of demurrer.

Looking to the Virginia case cited, and guessing at the point or points relied on, as we have to do, it must be that the charge or charges of adultery are too general, and that the time, place, and circumstances of the alleged acts of adultery are not set forth in the bill.

The bill does contain the general charge that defendant had been guilty of adultery with several men, "most of whose names are to the plaintiff unknown," time, place and circumstances not specified. But it also contains specific charges of adultery (1) in Hinton, West Virginia, with one Goodall, on or about August 1, 1910, and which the bill alleges was then confessed by both; and (2) in the city of Avis, West Virginia, with one Ellison, on or about June 15, 1914, and on various other occasions before and after that time. No other circumstances of these alleged acts of adultery are alleged. In our case of Trough v. Trough, 59 W. Va. 464, 4 L.R.A. (N.S.) 1185, 115 Am. St. Rep. 940, 53 S. E. 630, 8 Ann. Cas. 837, the question whether such certainty in the pleadings is required was mooted by Judge Brannon, but not decided because the demurrer was general, and two grounds, adultery and desertion, being alleged, and as desertion was sufficiently pleaded, the court held the bill good on demurrer.

While the circumstances of the alleged acts of adultery are not set out in the bill with much certainty, we think the bill good on demurrer. The Virginia case of Miller v. Miller, supra, it seems, has been severely criticized. See 4 Enc. Dig. Va. & W. Va. Rep. 746. Moreover, the case of Wood v. Wood, 2 Paige, 113, cited as authority for the holding in that case, does not seem to support the proposition to the full extent claimed. It says: "The adultery must be charged with reasonable certainty as to time and place." True, it is also said that "if they are unknown, that fact should be stated, . . . and the time, place, and circumstances under which the adultery was committed should be set forth." We think the bill in this case answers every requirement of good pleadings in such cases, and that the rule of the Virginia case is too technical. The substantial facts being alleged, the circumstances may be developed by the evidence.

—divorce—sufficiency of allegation.

The next point of error is that the alleged acts of adultery are not supported by the weight and preponderance of the evidence, and that the decree is for this reason erroneous. This point we think well founded in law and fact. The answer of defendant fully and completely denies every material allegation of the bill constituting grounds for relief, thereby putting the plaintiff on proof of his charges.

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With regard to the charge of adultery with Goodall, alleged to have occurred some six years before the present suit was brought, the evidence shows that shortly after that time plaintiff brought a suit against defendant for divorce, for alleged adultery with this man, a minister. He relies on an alleged confession of his wife at that time. He seems never to have prosecuted his former suit, but abandoned it, and she positively denies the fact of adultery, and the confession claimed to have been in writing was not produced or accounted for. And afterwards plaintiff and defendant continued to live and cohabit with each other as man and wife, she conducting an ice cream shop or parlor in the basement of their dwelling house, and in or adjoining which her son also had a tailoring or cleaning and pressing shop, and the plaintiff a barber's chair, where he did some work at barbering. Section 10, chapter 64, serial § 3645, would of course deny to plaintiff a decree of divorce on the ground of adultery with Goodall, even if the fact was proved.

As to the alleged acts of adultery with J. L. Ellison, on June 15, 1914, and "at divers other times before and after that date," positively denied by defendant in her answer and in her sworn testimony, there is not a particle of proof, except the unsupported evidence of a colored woman named Toney, who at one time, for about six months, lived with plaintiff and defendant, and whom the evidence now shows to be a lewd and lascivious person, if not the keeper of a house of prostitution, and whose evidence is impeached as unworthy of belief by nine or ten witnesses, and not a witness offered by plaintiff in support of her reputation for truth and veracity. The only specific date of any act of adultery with Ellison is alleged to have been on June 15, 1914. This witness gives no dates; her evidence is that they occurred while she was living with plaintiff and defendant, "about three years ago." She was testifying in August, 1914. So, her evidence does not support the specific act charged to have been committed on or about June 15, 1914. Moreover, the circumstances detailed by her, in our opinion, render her story highly incredible. Defendant's son, a young man, was living at home; and, according to her story, defendant and Ellison occupied a bed in plaintiff's home, openly and in the witness's presence, at a time when they were liable to be overtaken by the husband or son. And other facts and circumstances shown in the evidence, we think, render her testimony, to say the least, incredible and unworthy of belief. Besides Mrs. Anderson's denial, Ellison denies the charge, and brands the evidence of the Toney woman positively false, and as not having the slightest foundation in fact. An attempt was made to show by the Toney woman that defendant was also guilty of adultery with one L. D. Ellison, not specifically alleged in the declaration, while the Toney woman was living with plaintiff. This accusation was also positively denied by defendant, and was characterized by L. D. Ellison as "every word of it a lie." Besides, the parties lived and cohabited together as man and wife years after this alleged occurrence.

Plaintiff attempted to prove by his own testimony, and the evidence of three other witnesses, Stephenson, Hawkins, and Smith, meetings between defendant and J. L. Ellison, in the daytime and in the nighttime, at Ellison's store, adjoining or across the alley from the residence and place of business of plaintiff and defendant. The one most relied on is said to have occurred on a Sunday morning in the basement of plaintiff's residence, after 7:30 o'clock, and witnessed by plaintiff, and by his witness Stephenson by the former's procurement, looking through a window. Their story is that defendant and Ellison met on this morning, and that she was seen to lie down on her back on a coat,

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and that Ellison was in the act of stooping down over her when a noise from outside drove him away and out of the building. Ellison and Mrs. Anderson positively deny this story, and Stephenson is impeached as unworthy of belief by numerous witnesses, including his own father, who, in effect, says he would not believe him on oath. The fact that this occurred on a Sunday morning, while plaintiff was at home, and actually observing it with Stephenson through a window, and who does not claim to have made any resistance, renders the story very incredible. While Stephenson, in his direct evidence, says Mrs. Anderson on this occasion lay down on her back, on cross-examination says: "No sir, she didn't lay down, she was sitting down on a coat. I guess it was a coat. It looked like one." But this is not all. Ellison, supported by two other witnesses, denies that he was in defendant's house at the time sworn to, and proves that he left home on that morning before the hour named, and was not in town at any time during the day of this alleged occurrence.

Ellison was a merchant doing business on the same street and across the alleyway from plaintiff's and defendant's residence and place of business. Each had occasion to patronize the other, and most of the suspicious facts and circumstances relied on are explained by the parties and their witnesses as incident to their dealings with each other, as merchant and customer. Plaintiff seems to be a man of considerable property, but is evidently of a jealous and suspicious disposition, and inclined to find fault in his wife at every turn, and was prone to magnify every suspicious circumstance in connection with her dealings with Ellison. What the actual facts are, we, of course, know nothing except what may be legally gleaned from the record; but we do not think a case had been proved by the preponderance of the evidence, to entitle plaintiff to a decree of divorce.

Evidence—sufficiency.

True, as argued, it is not necessary, as in criminal cases, to make out the case beyond a reasonable doubt, but it is necessary for the plaintiff to prove his case by a preponderance of the evidence, and this we are satisfied he has failed to do. While some of the cases say not much weight ought to be given to the denial of the defendant and particeps criminis, when the circumstantial evidence is full and satisfactory, nevertheless other cases say that the facts and circumstances must be such as to lead a reasonable and just man to the conclusion of guilt. The evidence must be clear, positive, and satisfactory. And 2 Bishop on Marriage, Divorce & Separation, § 1350, says: "Scandal and an adulterous reputation, however distinctly shown, will not suffice." In this case numerous witnesses give Mrs. Anderson a good name, prove her to be a church member, and of good repute, except for the charges preferred against her by her husband. In the recent case of Huff v. Huff, 73 W. Va. 330, 51 L.R.A.(N.S.) 282, 80 S. E. 846, third point of the syllabus, we said: "Though circumstantial evidence is admissible and sufficient to prove adultery in a suit for divorce, it must be so clear and strong as to carry conviction of the truth of the charge, and, if it does no more than raise a suspicion of chastity, it is insufficient."

—burden of proof—divorce.

Upon these and other considerations presented by the record, we are of opinion to reverse the decree and dismiss the bill, with costs to appellant in this court and in the Circuit Court herein expended.

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ANNOTATION.

Sufficiency of allegation of adultery in suit for divorce.

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I. In general.

"In the conduct of actions," states the court in Freeman v. Freeman (1888) 39 Minn. 370, 40 N. W. 167, "there is no right more clear than that of a party to have the allegations in his adversary's pleading made with such reasonable and practicable definiteness and certainty as to enable him to meet him with counter allegations, and to prepare, so far as the truth of the case will permit, to meet them with proofs. In no class of cases has the sufficiency of pleadings, in this particular, come in question more frequently than in actions for divorce on the ground of adultery."

The broadest statement of the rule which has been laid down in conformity with the principle stated above is, that adultery must be charged with reasonable certainty as to time, place, person, and circumstances. But, as will be observed, the reported case (ANDERSON v. ANDERSON, ante, 1617) denies that an allegation of the circumstances of an act of adultery is an essential requirement.

The rule, as usually stated, requires reasonable certainty of averment as to time, place, and person. But this is subject to various exceptions and limitations. It is intimated that none of these particulars need be averred in case the husband, on his return from a long absence, e. g., two years, finds his wife to be pregnant; or where the proof relied on is the contraction of a venereal disease by the guilty party; or where habitual adultery is alleged. Nor is a statement of these three elements of time, place, and person uniformly insisted upon. If the particulars of place and person are alleged, an averment of a time certain may not be required; and a charge of adultery within specified dates, which are not remote, is said to be sufficient, if the party alleges his inability to make a more definite specification. If the time be alleged, it must not extend over so wide a period as to render it impossible for the party accused to prepare to meet the charge because of its vagueness and indefiniteness. But the same particularity of averment, in respect to time, as is required in criminal cases, is not necessary. And it seems that a party will not be required to furnish a bill of particulars of the times of alleged acts of adulteries, which he shows that he is unable to state, where he intends to establish his cause of action by circumstantial evidence, showing a course of conduct from which an inference of criminal intimacy may be drawn.

Where it has been held that an averment as to the place where the alleged adultery was committed is an essential

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requirement, yet it has not been insisted upon where the circumstances of time and person were definitely alleged. If the person be unknown it is said that the place should be specified with particularity. But a bill of particulars will not be required as to the places of alleged acts of adultery, and of which the party making complaint avers his ignorance, where he intends to prove intimacy and conduct warranting an inference of the commission of the offense.

The name of the person with whom the adultery was committed should be stated, if known; if it is unknown, that fact should be alleged as an excuse for the omission. But it has been said that the name of a known paramour need not be given, especially if reasonable certainty in the pleading can be otherwise attained. It is permissible, but not essential, to describe the person of an unknown paramour.

In determining the sufficiency of allegations of adultery, the courts frequently have considered jointly two or more of the elements of time, place, and person; and, since it is difficult to determine the relative weight accorded each element in the decision, it has not been found practicable to separate them, but similar combinations have been gathered together in separate groups and related to each other by appropriate cross references. It is to be observed, in this connection, that frequently indefiniteness as to one element may be cured by sufficient particularity as to others.

A libel in divorce grounded on adultery, it is said in Weedon v. Weedon (1907) 34 Pa. Super. Ct. 358, partakes of the nature of a criminal proceeding, and the accused has a right to demand the nature and causes of the accusation against him.

A charge of adultery should be stated with such definiteness and certainty as will be sufficient to enable defendant to know what he will be called upon to meet at the trial. Pramagiori v. Pramagiori (1868) 7 Robt. (N. Y.) 302; Wood v. Wood (1830) 2 Paige (N. Y.) 108; Bird v. Bird (1832) Wright (Ohio) 98 (holding adultery must be alleged with convenient certainty, so that it may be met and disproved).

In suits brought for divorce on the ground of adultery, the acts complained of must be specifically stated. Wright v. Wright (1848) 3 Tex. 168; Miller v. Miller (1867) 20 N. J. Eq. 216 (holding facts should be sufficiently stated to identify the act upon which the suit is founded); Ambler v. Ambler (1862) 32 L. J. Prob. N. S. (Eng.) 67, 7 L. T. N. S. 299, 11 Week. Rep. 111 (holding allegation of adultery should be made in distinct terms, rather than by inference); Stokes v. Stokes (1823) 1 Mo. 320 (containing statement to the same effect).

Recriminatory charges of adultery in an answer must be set up in the same manner, and be accompanied with the same allegations, as required when charged in the bill. Morrell v. Morrell (1848) 3 Barb. (N. Y.) 236; Tim v. Tim (1874) 47 How. Pr. (N. Y.) 253, 16 Abb. Pr. N. S. 39; Reid v. Reid (1871) 21 N. J. Eq. 331; Bancroft v. Bancroft (1911) 4 Boyce (Del.) 9, 85 Atl. 561; Wood v. Wood (1830) 2 Paige (N. Y.) 108 (holding recriminatory charge must be averred with certainty).

II. Sufficiency of particular allegations of adultery.

a. As to time.

Averments of adultery have been held too broad as to time, where they were alleged to have occurred, as in Bancroft v. Bancroft (1911) 4 Boyce (Del.) 9, 85 Atl. 561, within a period of two years and upwards; or within five years last past, as in Church v. Church (1807) 3 Mass. 157; or on different days in six specified years; or since the marriage of the parties, which had occurred twenty-eight years before, as in Marsh v. Marsh (1863) 16 N. J. Eq. 391, 84 Am. Dec. 164; or since the marriage of the parties, on many occasions, as in Miller v. Miller (1895) 92 Va. 196, 23 S. E. 232. And it was held in Compton v. Compton (1854) 9 La. Ann. 499, that a plea of the commission of adultery since the marriage, and even since the institution of the suit, was too vague

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to allow the introduction of evidence of any specific act of adultery.

In Marsh v. Marsh (N. J.) supra, the opinion is expressed that, in alleging adultery, it is not necessary, as in criminal cases, to state the day, but the month and year should be stated. This view is repeated in Black v. Black (1876) 27 N. J. Eq. 664, and Scheffling v. Scheffling (1888) 44 N. J. Eq. 438, 15 Atl. 577. But the existence of such a rule is denied in Goodwin v. Goodwin (1872) 23 N. J. Eq. 210, which holds that an allegation of adultery need not be as to a time certain, either as to day, month, or year, since a party is not required to prove the fact of adultery at the time alleged. The court in this case sustained, as against a general demurrer, a bill which stated the two particulars of place and person, but alleged the time to have been within a period of two years and two months before the filing of the bill. This decision was followed in Black v. Black (1875) 26 N. J. Eq. 431, which holds that allegations of adultery during different months of specified years, with designated persons, in certain townships and cities, are sufficiently specific, since a specification of exact time is not required when the name of the person with whom, and the place at which, the offense is alleged to have been committed, are given.

And it may be inferred from Stone v. Stone (1888) — N. J. Eq. —, 13 Atl. 245, which upholds, on demurrer, a petition alleging the commission of adultery on a certain day, in a specified house, with divers unknown persons, that the offense is charged with sufficient certainty if the particulars of time and place only are alleged.

An averment in a complaint as to the times of the commission of alleged acts of adultery, and which are stated to have been on frequent occasions, between different but not very distant dates, is sufficient, where greater precision in the designation of the dates is stated not to be within the ability of the plaintiff. Cardwell v. Cardwell (1877) 12 Hun (N. Y.) 92; Woog v. Woog (1901) 58 App. Div. 620, 69 N. Y. Supp. 555 (holding allegations of adultery during a period of four months sufficient, where it is averred that the precise dates are unknown to the plaintiff).

The following cases consider the sufficiency of allegations as to the time of the commission of an act of adultery, with reference to the date of the commencement of the suit. Hawes v. Hawes (1864) 33 Ill. 286 (holding averment of adultery in a certain year sufficient, if it was alleged that it was before the commencement of the suit); Zorkowski v. Zorkowski (1864) 3 Robt. (N. Y.) 613, 27 How. Pr. 37 (holding complaint in action for divorce on the ground of adultery should allege that the discovery by the plaintiff, of the defendant's criminality, took place within a certain time before the commencement of the action); Kinney v. Kinney (1808) 149 N. C. 321, 63 S. E. 97 (holding North Carolina statute does not require that plaintiff allege that he had knowledge of the adulteries charged for six months prior to the beginning of the suit, but such averments should be made in the affidavit or verification of the pleading); Burdick v. Burdick (1893) 7 Wash. 533, 35 Pac. 415 (holding averment of adultery insufficiently stated under Washington Code, where it is not shown that the last act of adultery was committed within one year before the commencement of the action).

For cases dealing with allegations of time in connection with averments of place, person, and circumstances, see II. d, g, and h.

b. As to place.

A charge of adultery without any place being stated is too uncertain. Smith v. Smith (1834) Wright (Ohio) 643; Horne v. Horne (1873) 1 Tenn. Ch. 259 (intimating that failure to designate place renders bill demurrable).

An allegation of place, as a city within a designated state, is sufficient. Black v. Black (1876) 27 N. J. Eq. 664; an averment that defendant committed an act of adultery within a specified county has also been held sufficiently definite. Hawes v. Hawes (1864) 33 Ill. 286.

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But an issue framed in accordance with an allegation of the complaint, charging the commission of adultery in a specified city "and elsewhere," is so general and indefinite as to place as to make it impossible for defendant to prepare for the trial of the issue, and the words, "and elsewhere," should be stricken out. Bush v. Bush (1905) 103 App. Div. 588, 93 N. Y. Supp. 159.

If the person be unknown, the particular place or locality where the offense occurred, as at a house specified, should be stated. Heyde v. Heyde (1852) 4 Sandf. (N. Y.) 692.

It is not enough to name the street, but the number of the house, or at least the block in which it is situated, should be stated. Pramagiori v. Pramagiori (1868) 7 Robt. (N. Y.) 302.

A charge that acts of adultery were committed at various houses of prostitution or assignation in a specified city is too general, and should be made more definite and certain by stating the places where the misconduct is supposed to have occurred. Cardwell v. Cardwell (1877) 12 Hun (N. Y.) 92.

But where the circumstances of time and person are definitely alleged, it seems that the place need not be particularly stated.

Allegations which, in effect, charge the defendant with a course of adulterous intercourse with a certain person, covering about two and a half months in time, and in four different towns and cities, the particular periods of time in which he was at the several towns or cities being stated within very narrow limits, sufficiently inform him of the identity of the alleged paramour and of the circumstances of the charge made against him to enable him to prepare his defense, although the complaint fails to describe the particular places or houses where the offense was committed. Wilkerson v. Wilkerson (1906) 3 Cal. App. 204, 84 Pac. 784.

A cross bill which charges the complainant with adultery on certain days, with a specified person, in a designated city, is sufficient as to place, although the street and house in the city are not averred. Evans v. Evans (1900) — Tenn. —, 57 S. W. 367.

As to the sufficiency of averments as to place, coupled with allegations as to time, person, or circumstances, see II. d, g, and h.

c. As to person.

It is not indispensably necessary to name the particeps criminis in a libel for divorce, founded on supposed adultery. Garrat v. Garrat (1805) 4 Yeates (Pa.) 244. The court said: In some cases the names of the paramours may be wholly unknown, although the proof of the crime against the party charged may be of the most cogent and unequivocal nature.

If the name of the person with whom the adultery was committed be known, it should be stated; if the name be unknown, that fact should be stated. Wilkerson v. Wilkerson (1906) 3 Cal. App. 204, 84 Pac. 784; Church v. Church (1807) 3 Mass. 157; Choate v. Choate (1807) 3 Mass. 391; Marsh v. Marsh (1863) 16 N. J. Eq. 391, 84 Am. Dec. 164; Morrell v. Morrell (1847) 1 Barb. (N. Y.) 318.

An allegation of a want of knowledge is a sufficient excuse for omitting the name. Holston v. Holston (1863) 23 Ala. 777; Farley v. Farley (1892) 94 Ala. 501, 33 Am. St. Rep. 141, 10 So. 646; Miller v. Miller (1867) 20 N. J. Eq. 216; Germond v. Germond (1822) 6 Johns. Ch. (N. Y.) 347, 10 Am. Dec. 335; Bird v. Bird (1832) Wright (Ohio) 98; Dunlap v. Dunlap (1833) Wright (Ohio) 210; Richards v. Richards (1833) Wright (Ohio) 302; Tim v. Tim (1874) 47 How. Pr. (N. Y.) 253, 16 Abb. Pr. N. S. 39 (holding averment of adultery with person unknown perhaps warranted).

If the name of the accomplice is unknown, the time, place, and circumstances of the alleged adultery must be stated. Wood v. Wood (1830) 2 Paige (N. Y.) 108; Kane v. Kane (1840) 3 Edw. Ch. (N. Y.) 389; Mills v. Mills (1867) 18 N. J. Eq. 444; Miller v. Miller (1867) 20 N. J. Eq. 216. And Miller v. Miller (1895) 92 Va. 196, 23 S. E. 232, goes so far as to say, apparently with reference to whether or not the name is unknown, that the

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name need not be given, but agrees that the time, place, and circumstances should be set forth. Similarly, it is held in Farr v. Farr (1857) 34 Miss. 597, 69 Am. Dec. 406, that, as a general rule, it is sufficient, in alleging adultery, to set forth the time, place, and particular circumstances of the defendant's guilt, without setting forth the name of the person with whom the adultery is alleged to have been committed. In this case adultery was alleged to have been committed with a servant woman, whose name was not given; and, in considering a contention that the name should have been set forth in the bill, the court remarked: "Perhaps in many cases greater certainty would be promoted by observing this practice; but while the practice might, in this instance, have been followed, and the name of the servant given, there are, nevertheless, good reasons why, in most cases, a different rule should prevail. Persons who are strangers to the controversy, and whose characters would suffer more or less, should not be implicated when they have no opportunity to be heard, unless reasonable certainty in the pleading could not be otherwise attained. . . . Reasonable certainty is all that is required, and the court will favor a rule which can attain this end, and at the same time preserve its records from unnecessary scandal."

It is said in Miller v. Miller (1867) 20 N. J. Eq. 216, that if the name of the accomplice is unknown his person may be described. But this is not an essential requirement. This court subsequently held, in Stone v. Stone (1888) (N. J.) supra, that a correct description of the person of a paramour, whose name is alleged to be unknown, is not required to be given in a petition for divorce. It is there stated that "it may be quite as impossible for the petitioner to give a correct description of a paramour as to give his name. One of the most usual arguments or statements of fact, in the discussion of questions arising out of charges of adultery, is that it is a crime committed in secret; it might be added, most frequently in the darkness of the night, and in a condition of absolute seclusion and supposed security from observation, when but slight chances are given to the most watchful to detect the unlawful act, much less to describe the physiognomy or the dress of the paramour."

A mere charge of "adultery with a certain woman" lacks certainty. Mansfield v. Mansfield (1833) Wright (Ohio) 284. So, of an allegation of adultery "with divers women." Windham v. Windham (1863) 32 L. J. Prob. N. S. (Eng.) 89, 9 Jur. N. S. 72.

In a petition for the dissolution of a marriage on the ground of bigamy and adultery, the adultery must be specially pleaded with the woman with whom the respondent went through the bigamous form of marriage, and a general averment of adultery with divers women is not sufficient to entitle the petioner to relief on this ground. Sparrow v. Sparrow (1913) 30 Times L. R. (Eng.) 49.

A petition for divorce which alleges that the defendant wife has been guilty of adultery at divers times and places lacks certainty, where it fails to name the man with whom the adultery was charged to be committed; but is sufficient on demurrer, where it contains a charge of lewdness, made substantially in the language of the statute. Barnett v. Barnett (1901) 23 Ky. L. Rep. 1117, 64 S. W. 844.

Antenuptial incontinence of the respondent cannot be pleaded in a petition for divorce, although the adultery was charged to have been committed with the same person. Fitzgerald v. Fitzgerald (1862) 32 L. J. Prob. N. S. (Eng.) 12, 11 Week. Rep. 85.

As to sufficiency of allegations as to person, in connection with averments as to time and place, see II. e, f, and h.

d. As to time and place.

In charging adultery, there must be reasonable certainty as to time and place. Christianberry v. Christianberry (1833) 3 Blackf. (Ind.) 202, 25 Am. Dec. 96; Farr v. Farr (1857) 34 Miss. 597, 69 Am. Dec. 406; Conant v. Conant (1858) 10 Cal. 249, 70 Am. Dec. 717; Morrell v. Morrell (1847) 1 Barb. (N. Y.) 319; Denison v. Denison (1892) 4 Wash. 705, 30 Pac. 1100.

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In the following cases, allegations as to time and place were held insufficient for want of certainty: Pramagiori v. Pramagiori (1868) 7 Robt. (N. Y.) 302 (holding an allegation of adultery "at divers other times and places in said city" to be insufficient); Trubee v. Trubee (1874) 41 Conn. 36 (holding insufficient averments of adulteries unaccompanied by any allegations as to time, and which are charged to have been committed in three cities and one town with persons named, and others whose names are unknown); Tim v. Tim (1874) 47 How. Pr. (N. Y.) 253, 16 Abb. Pr. N. S. 39 (holding charge of open and notorious prostitution in a certain city, during a period of five years, should be made more definite and certain as to time and place); Strong v. Strong (1865) 3 Robt. (N. Y.) 719, 1 Abb. Pr. N. S. 233 (holding an issue whether plaintiff was guilty of adultery at any time before the commencement of the action with a designated person was properly refused, because the averment is not specific with reference to time or locality); Codd v. Codd (1816) 2 Johns. Ch. (N. Y.) 224 (holding an averment that the defendant has, in numerous instances, both before and since the separation of the parties to the suit, committed adultery within the state and elsewhere, is not sufficiently specific to require that a feigned issue be made up to try the truth of the charge of adultery).

A libel for divorce on the ground of adultery, which specifies the time and place with as much certainty as the party can be reasonably expected to furnish, without setting out his evidence in detail, is sufficient. Gillardon v. Gillardon (1885) 15 W. N. C. (Pa.) 528.

A motion to have the complaint made more definite and certain in an action for divorce should be granted, in the absence of a showing of excuse for the indefiniteness, where the complaint charges that on divers days and times, within a period of over three years, the defendant committed adultery with a certain person at three specified towns in a certain county, thus giving but one particular, to wit, the person, leaving those of time and place practically as much at large as though no attempt were made to specify them. Freeman v. Freeman (1888) 39 Minn. 370, 40 N. W. 167.

A recriminatory charge of adultery on divers days, during stated months, in specified years, at places designated, with some female to defendant unknown, avers places and times with sufficient certainty. Morrell v. Morrell (1847) 1 Barb. (N. Y.) 318.

And an averment of the commission of adultery on a given date, in a certain house, with persons unknown, sufficiently states the offense as against a general demurrer. Stone v. Stone (1888) — N. J. Eq. —, 13 Atl. 245.

It has been held not necessary that the particular locality or time of the commission of the adultery charged should be stated, when there is an averment that they are unknown and that a statement of the specific time and place cannot be made, to permit proof of the commission of adultery to be given under it. Mitchell v. Mitchell (1875) 61 N. Y. 398.

In England, it is held not necessary to specify time and place, where the acts of adultery charged are so alleged as to be capable of proof. Moore v. Moore (1840) 3 Moore, P. C. C. 84, 13 Eng. Reprint, 39.

For averments of time and place in connection with allegations of persons and circumstances, see II. g and h.

e. As to time and person.

A general charge of adultery, without a specification setting forth the time and the person with whom the adultery was committed, is insufficient, where the law requires the causes to be "particularly and specially set forth in the libel." Edwards v. Edwards (1871) 3 Pittsb. (Pa.) 333, 9 Phila. 617.

f. As to place and person.

A reference to take proof was denied in Heyde v. Heyde (1852) 4 Sandf. (N. Y.) 692, where the complaint failed to specify the person with whom, or the place where, the alleged adultery was committed.

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g. As to time, place, and circumstances.

It has been held that adultery must be charged with reasonable certainty as to time, place, and circumstances. Anonymous (1862) 17 Abb. Pr. (N. Y.) 48; Hunter v. Hunter (1903) 38 Misc. 672, 78 N. Y. Supp. 243, reversed on other grounds in (1903) 78 App. Div. 631, 79 N. Y. Supp. 618; Kane v. Kane (1840) 3 Edw. Ch. (N. Y.) 389 (holding time, place, and circumstances of the alleged adultery must be stated, though the names of the persons with whom committed are unknown); Clutch v. Clutch (1831) 1 N. J. Eq. 474 (holding an allegation that the defendant, since his marriage, has committed adultery, without setting forth the time, place, or any of the circumstances, is too general); Randall v. Randall (1875) 31 Mich. 194 (holding a charge of adultery with two persons insufficient, where it does not identify the particular time, place, or occasion of any one act); Dunn v. Dunn (1863) 11 Mich. 284 (recognizing the necessity of securing to the party accused of adultery, such information of time, place, and circumstance as will enable him to meet the charge).

The rule that the time, place, and circumstances of an alleged act of adultery should be averred with reasonable certainty is held sufficiently complied with in White v. White (1917) 121 Va. 244, 92 S. E. 811, where allegations that defendant has committed adultery with a certain man to the complainant unknown, who frequently calls at the complainant's home while the complainant is away following his vocation, and has relations with complainant's wife which are inconsistent with any other presumption except that they have been guilty of acts of adultery, that they retire to the bedroom and remain together for long periods of time, and that complainant's wife commits other acts, all of which tend to strengthen and confirm the belief that she has been guilty of infidelity to the complainant, were held sufficient on demurrer.

But an averment in a bill for divorce that, at various times and upon various occasions during a period of eight years, the defendant has been guilty of repeated acts of adultery with a servant woman, and with other females, is too vague and uncertain as to time, place, and other circumstances to require an answer, and a demurrer should be sustained. Farr v. Farr (1857) 34 Miss. 597, 69 Am. Dec. 406.

A bill charging the commission of adultery is insufficient, where it fails to state the time, place, or circumstances, or the name of the person with whom the act of adultery was committed (Carty v. Carty (1892) 13 Ky. L. Rep. 880 (abstract); Reid v. Reid (1871) 21 N. J. Eq. 331), or to give any excuse for the omission to state such particulars. Hahn v. Hahn (1907) 136 Ill. App. 301.

In Miller v. Miller (1895) 92 Va. 196, 23 S. E. 232, a demurrer to an allegation that the defendant "has been guilty of adultery on many occasions" was held to have been properly sustained, since the bill failed to state time, place, and circumstances. But this decision is criticized in the reported case (ANDERSON v. ANDERSON, ante, 1617), which holds that a bill which contains specific charges of adultery on designated days, at certain places, with persons named, is good on demurrer, although the circumstances of the alleged acts of adultery are not set out. The court also refers to the fact that the question whether such certainty in the pleadings is required was mooted, but not decided, in Trough v. Trough (1906) 59 W. Va. 464, 4 L.R.A.(N.S.) 1185, 115 Am. St. Rep. 940, 53 S. E. 630, 8 Ann. Cas. 837 (holding that, if a bill for divorce charging desertion and adultery be bad as to the latter charge, for failure to name a particeps in the adultery or to give time, place, and circumstances, the defect is not reached by a general demurrer).

General charges of adultery, without any element of time, place, or circumstance, are insufficient to authorize the introduction of testimony, or to serve as a basis for a decree of divorce. Shoemaker v. Shoemaker (1870) 20 Mich. 222.

Even if open and promiscuous pros-

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titution is the foundation of the libel for divorce, time, place, and circumstance may be material, as indicating to the court the propriety of granting or refusing the relief, according to the conduct of the plaintiff. Whittington v. Whittington (1836) 19 N. C. (2 Dev. & B. L.) 64.

Under the Pennsylvania Act of 1815, which merely requires that the causes of complaint be specially set out, an averment that for a considerable time past the defendant had given himself up to adulterous practices, and had been guilty of adultery with a specified female, and divers other persons to the petitioner unknown, is sufficient, although neither time, place, nor circumstances were given. Hancock's Appeal (1870) 64 Pa. 470.

k. As to time, place, and person.

An allegation of adultery should state the time when, the place where, and the name of the person, if known, with whom the offense was committed. Wood v. Wood (1830) 2 Paige (N. Y.) 108; Marsh v. Marsh (1863) 16 N. J. Eq. 391, 84 Am. Dec. 164; Black v. Black (1876) 27 N. J. Eq. 664; Scheffling v. Scheffling (1888) 44 N. J. Eq. 438, 15 Atl. 577; Mills v. Mills (1867) 18 N. J. Eq. 444 (holding that adultery charged in a bill for divorce must be designated, either by the name of the adulterer, or by circumstances, and the time when and place where it was committed).

So it has been said that, in alleging adultery, the time, place, and person must be definitely stated. Wilkerson v. Wilkerson (1906) 3 Cal. App. 204, 84 Pac. 784; Trubee v. Trubee (1874) 41 Conn. 36; Stover v. Stover (1899) 6 Idaho, 493, 56 Pac. 263; Compton v. Compton (1854) 9 La. Ann. 499; Jenkins v. Maier (1907) 118 La. 130, 42 So. 722; Burr v. Burr (1835) 2 Edw. Ch. (N. Y.) 448; Strong v. Strong (1865) 3 Robt. (N. Y.) 719, 1 Abb. Pr. N. S. 233.

In the following cases averments of time, place, and person were held to be stated with sufficient particularity: Freeman v. Freeman (1872) 31 Wis. 238 (recriminatory charge of the commission of adultery in a specified house, between certain dates, with a designated person); Goodwin v. Goodwin (1872) 23 N. J. Eq. 210 (averment that since a certain time, over two years prior to the institution of the suit, the defendant committed adultery with a person named, at a specified house); Marble v. Marble (1877) 36 Mich. 386 (charge of living "in open and notorious adultery" with a designated person, at a certain time and place); Porter v. Porter (1864) 3 Swabey & T. (Eng.) 596, 33 L. J. Prob. N. S. 207, 13 Week. Rep. 108 (allegation that, from a specified year and month up to the present time, the defendant has been habitually visited by a certain person, with whom, on divers occasions and particularly on a specified day, she committed adultery).

Upon the other hand, allegations of time, place, and person were held to be too vague and uncertain in the following cases:

—Conant v. Conant (1858) 10 Cal. 249, 70 Am. Dec. 717, holding averments that the defendant, while plaintiff was living with him, committed adultery at a certain city, "at divers times, with persons to the plaintiff unknown," and that he has committed adultery since plaintiff ceased to live with him, "at the said city, with divers other persons whose names are to the plaintiff unknown," are vague and uncertain, and subject to demurrer;

—Freeman v. Freeman (1888) 39 Minn. 370, 40 N. W. 167, holding an allegation that at divers times within a period of five years, and at divers places in a specified county, but what particular times and places plaintiff is unable more particularly to state, the defendant has committed adultery with men whose names are unknown to the plaintiff, contains no element of certainty, and a motion to have its averments made more definite and certain should be granted, in the absence of a showing of excuse for the indefiniteness;

—Porter v. Porter (Eng.) supra, holding that an allegation that, since a specified date, the defendant has on divers occasions committed adultery, should either be stricken out or

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amended by inserting particulars of the person with whom, dates when, and places where the acts of adultery were committed;

—Whittington v. Whittington (1836) 19 N. C. (2 Dev. & B. L.) 64, holding that when plaintiff relies on adultery committed with a particular person or at a particular time, such person, time, and the place ought to be specifically and plainly charged, instead of averments which state the belief of the petitioner that his wife left him "for the purpose of indulging in criminal intercourse," or that he "has been informed that she indulged in criminal intercourse with both whites and mulattoes."

A cross complaint will not, on motion, be made more definite and certain as to times, places, and persons, where it contained no definite charge of adultery, although it averred facts from which adultery could be inferred, as that complainant at various times remained away from home for weeks at a time, and would give the respondent no information, on her return, as to her whereabouts or as to the persons with whom she associated while gone. Powell v. Powell (1912) 66 Wash. 561, 119 Pac. 1119.

The reason for the rule requiring that the name of the person with whom, the place where, and time when the adultery was committed should be set forth in the pleading, is, that when those particulars are furnished the defendant has the fullest information that can be given him. Pramagiori v. Pramagiori (1868) 7 Robt. (N. Y.) 302.

This degree of certainty is required because, generally, where there is enough to justify alleging the fact of adultery, the party is able to state definitely the circumstances of time, place, and person. Freeman v. Freeman (1888) 39 Minn. 370, 40 N. W. 167.

There may, however, be such a condition of things as will justify a party in alleging the fact of adultery, although he or she may be unable to state some one of the particlars, such as the name of the particeps criminis.

In Horne v. Horne (1873) 1 Tenn. Ch. 259, a bill which averred that defendant had lately and repeatedly committed adultery with a specified colored woman, but which contained no designation of place, was upheld, in the absence of a demurrer, since two of the requisites of the circumstances were set forth "with reasonable certainty," and where all of them were distinctly made by proof. But in Dismukes v. Dismukes (1873) 1 Tenn. Ch. 266, the court refused to go a step further, and, because the person was designated, to dispense with the specifications of time and place. It was there held that the statutory requirement that the cause of divorce must be set forth particularly and specially, with all the circumstances of time and place, with reasonable certainty, is not met by an averment of adultery during specified years, with a certain person, and with divers other persons to the petitioner unknown.

A libel in an action for divorce on the ground of adultery, which sets forth generally the cause of the libellant's complaint, is sufficient to satisfy the requirements of the Pennsylvania act of assembly, although unaccompanied by the particulars of time, place, and person. Realf v. Realf (1874) 77 Pa. 31.

In Mitchell v. Mitchell (1875) 61 N. Y. 398, however, an averment that the defendant had committed adultery within certain dates specified, in a designated city in the state, with a person whose name was unknown, without specifically designating the person, or the time or place, which plaintiff alleged he was unable to state more particularly, was held sufficient to admit proof of the fact so alleged. This decision is based on the fact that the statute authorizes a divorce whenever adultery has been committed, and does not require an allegation that the offense was committed with any designated person, or at any specified time or place.

A bill for divorce on the ground of adultery, which alleges times, places, and persons with as much certainty as the complainant was then able to state, was held sufficient in Noel v. Noel (1873) 24 N. J. Eq. 137.

But a higher degree of certainty was

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required in Bancroft v. Bancroft (1911) 4 Boyce (Del.) 9, 85 Atl. 561, which held that averments in an answer that, "at divers times within the period aforesaid, the plaintiff has committed adultery with divers other persons and at divers places, not as yet fully known to this defendant, and proof of which she has not as yet fully obtained, and is, therefore, unable to state with more particularity at the present time," are insufficient for want of particularity, and should be stricken out on motion.

Similarly, a charge that the defendant committed acts of adultery during specified years, but which does not designate with more particularity the dates, or state the places at which, or the persons with whom, such acts were committed, should be made more definite and certain, where the only excuse given for the failure to do so is that the plaintiff is unable to be more specific "at the present time." Woog v. Woog (1901) 58 App. Div. 620, 69 N. Y. Supp. 555.

There are, however, well-recognized exceptions to the rule requiring a statement of time, place, and person in charging adultery. General allegations are sufficient, when founded on defendant's pregnancy without access of the plaintiff, or venereal disease, or habitual adultery. Carty v. Carty (1892) 13 Ky. L. Rep. 880 (abstract).

In Clark v. Clark (1867) 7 Robt. (N. Y.) 276, an averment that plaintiff in two specified months of a given year committed adultery at certain cities named, and thereby contracted a venereal disease, which he communicated to the defendant some time about the month last named, was held sufficiently specific and well pleaded. The court said: "I am aware of the general rule that the time when, place where, and person with whom the adultery charged was committed should be alleged. But that is matter of form and regularity only, and the rule is not universal. There are many exceptions to it; one of them is where the husband, long after marriage, communicates a venereal disease to his wife. In such case, that fact is prima facie evidence of adultery having been committed, although when, where, or with whom is not proved."

To show the extent to which the modification of the rule may go, the court, in Pramagiori v. Pramagiori (1868) 7 Robt. (N. Y.) 302, remarks arguendo: "Take the case where the husband, long subsequent to the marriage communicates a venereal disease to the wife, or the case where the husband, having been absent two years, returns and finds the wife pregnant. In each of these cases, proof of these particular facts would be sufficient to ground a decree of divorce upon, yet the injured party may be wholly unable to ascertain, and of course unable to state in the pleading, the person with whom, time when, or place where the adultery was committed, except so far as the time and place may be alleged in the most general terms. But the injured party, by reason of this inability to comply with the above general rule, is not to be remediless. A mere general allegation in such cases, that the defendant has committed adultery with persons unknown, at times and places unknown, would be an infringement of the principle [that the charge should be stated with such definiteness and certainty as will be sufficient to enable the defendant to know what he will be called upon to meet by proof at the trial] by which . . . the sufficiency of a pleading is to be tested. This infringement is to be avoided by the pleader, in addition to stating the adultery in general terms, also referring to the peculiar nature of the proof by which the allegation is to be supported. Thus, the defendant is notified of the nature of the charge, sufficiently to enable him to show what he will be called upon to meet by proof at the trial, and the principle is satisfied."

In Graves v. Graves (1842) 3 Curt. Eccl. Rep. (Eng.) 235, a plea of long duration of time, e. g., four months, during which constant and habitual adulterous intercourse took place, was held sufficient without pleading specific facts; but it is stated that, if the plea sets forth circumstances showing that the intercourse was limited or of

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short duration, then the facts should be pleaded specifically.

A charge that the defendant, between the day of his marriage and a specified date one and one half years later, had been guilty of adultery with some female in a designated city, is sufficient whereupon to frame an issue. Ferguson v. Ferguson (1846) 1 Barb. Ch. (N. Y.) 604. In this case the proof of adultery relied on was the implication arising from stains upon the defendant's linen, which were claimed to have had syphilitic origin.

As to sufficiency of general allegations of habitual adultery, see I. i.

i. Other particular allegations.

1. In general.

An averment that defendant is a common prostitute is held sufficient, if established, to make out a charge of adultery. Dismukes v. Dismukes (1873) 1 Tenn. Ch. 266.

A complaint in an action brought by a wife for divorce, which charges that the husband separated from her, but fails to allege that the husband, after such separation, lived in adultery, will not entitle the plaintiff to a divorce, under a statute providing therefor, "if either party shall separate from the other and live in adultery." Morris v. Morris (1876) 75 N. C. 168.

In Richardson v. Richardson (1837) 4 Port. (Ala.) 467, 30 Am. Dec. 538, no attack appears to have been made on the sufficiency of the allegations in the complaint which charge the defendant husband with having formed an adulterous connection, about a specified year, with a common prostitute, whom he brought to the dwelling of the complainant, and for whom he built a house but a short distance from such dwelling, and with whom he has ever since lived in adultery.

An allegation in a bill for divorce that "defendant has, for a considerable time past, given himself over to adulterous practices and is now living an adulterous life," is only an affirmation of a conclusion, and is insufficient. Hahn v. Hahn (1907) 136 Ill. App. 301.

But an averment that respondent practically resides with a specified woman, and continues illicit intercourse with her, is not insufficient as the statement of a mere conclusion, where it follows allegations that complainant "has only recently come into possession of the knowledge of the unfaithfulness of the respondent to his marital vows to her, and has learned that respondent has been and is now guilty of acts of illicit intercourse, or adulterous acts," with the woman named. Lawrence v. Lawrence (1904) 141 Ala. 356, 37 So. 379.

In an action for divorce against a husband who had theretofore obtained a decree of divorce from the plaintiff, but which was held to be null and void, a denial in his answer, in the language of the petition, that his marriage to a specified person since obtaining such decree of divorce "was unlawful and wrongful," and a denial "that he has cohabited with said person at a certain place, and at sundry and divers other places, in a state of adultery," is not a denial of the cohabitation, which stands admitted. Smith v. Smith (1886) 19 Neb. 706, 28 N. W. 296. The court said: The cohabitation is admitted and, as the divorce is a nullity, the adultery is admitted on the pleadings.

An averment in a petition for a judicial separation on the ground of adultery, that the defendant has had two illegitimate children by a certain person, being the issue of an adulterous connection with such person, and which alleges the dates on which the children were born, should be stricken out, on the ground that it pleads merely evidence. Matison v. Matison (1860) 29 L. J. Prob. N. S. (Eng.) 80.

Adultery should be charged in distinct terms. An averment, in a petition for the dissolution of a marriage, that the petitioner is informed and believes that the respondent has committed adultery, is insufficient. Spilsbury v. Spilsbury (1863) 3 Swabey & T. (Eng.) 210, 32 L. J. Prob. N. S. 126, 9 L. T. N. S. 23.

An averment that petitioner "has been informed and believes that respondent has been and is living in adultery, and has been and is committing adulterous practices with di-

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vers women unknown to your petitioner," is insufficient. If intended as a distinct ground of divorce, it should be stated as an absolute fact. Trotter v. Trotter (1899) 30 Pittsb. L. J. N. S. (Pa.) 109.

Leave to amend a petition which contained no direct charge of adultery, but merely alleged that the respondent and corespondent were living and cohabiting together, was granted, in Forman v. Forman (1863) 32 L. J. Prob. N. S. (Eng.) 80, 11 Week. Rep. 401.

Proof of adultery is not admissible under an averment of the statutory ground of divorce of "such misconduct as permanently destroys the happiness of the petitioner, and defeats the purpose of the marriage relation," where adultery is named in the statute as a distinct cause for divorce. Trubee v. Trubee (1874) 41 Conn. 36.

Averments in a complaint in an action for divorce that defendant has broken her matrimonial vows and obligations; that she has committed adultery with divers men to the plaintiff unknown; that she has availed herself of opportunities, during plaintiff's absence, to keep the society of men, at late and unusual hours of the night, with whom she has committed adultery; that she was in the habit of leaving her boarding house privately at late hours of the night, and remaining out all night; that during plaintiff's absence she was in the habit of receiving the vists of men in her chamber at late hours of the night, and the like, —tend to constitute a cause of action and ought not to be stricken out as immaterial, and impertinent. Ingersoll v. Ingersoll (1849) 2 Edm. Sel. Cas. 49, 1 N. Y. Code Rep. 102.

An allegation of bigamy does not imply a charge of adultery. Bonaparte v. Bonaparte (1891) 65 L. T. N. S. (Eng.) 795.

2. Anticipating defenses.

It is not necessary that the complaint in an action for divorce should show that the adultery upon which the action is founded was not condoned, or was not committed by the procurement or with the connivance of the plaintiff, since these are matters of defense. Young v. Young (1872) 18 Minn. 90, Gil. 72; Newton v. Newton (1916) 86 N. J. Eq. 129, 97 Atl. 294 (holding petition need not negative presumption of condonation, arising from a continuation of marital relations after the dates of the offenses charged); Earp v. Earp (1854) 54 N. C. (1 Jones, Eq.) 239 (holding, in a petition for divorce from bed and board where adultery is charged, that the plaintiff need not aver that she did not admit her husband to her conjugal embraces, after discovering his infidelity).

But it was held in Morrell v. Morrell (1848) 3 Barb. (N. Y.) 236, that a recriminatory charge of adultery should allege that it was committed without the defendant's procurement, connivance, privity, or consent, this averment being required by the standing rules of the court of chancery.

An averment of adultery is insufficiently stated, under the Washington Code, where it is not shown that the last act of adultery was unforgiven. Burdick v. Burdick (1893) 7 Wash. 533, 35 Pac. 415.

In Matison v. Matison (1860) 29 L. J. Prob. N. S. (Eng.) 80, the court refused to strike out, on the ground that they were irrelevant, paragraphs alleging that plaintiff had not cohabited with her husband since a specified date, but had occupied a separate bedroom in the same house with him, where she carried on a specified business. The court considered that the circumstances stated might be relevant as showing the reason why the petitioner did not separate from her husband, if he should set up condonation.

In a petition for divorce on the ground of adultery, it is not necessary to allege that the petitioner himself had not been guilty of adultery, since that is a matter of defense. Edwards v. Edwards (1868) 61 N. C. (Phill. L.) 534; Steel v. Steel (1889) 104 N. C. 631, 10 S. E. 707.

The plaintiff, in an action for divorce on the ground of adultery, need not allege that he did not wrongfully abandon the defendant, which is

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matter of defense. Kinney v. Kinney (1908) 149 N. C. 321, 63 S. E. 97.

III. Bill of particulars.

a. In general.

It is competent for the court, in its discretion, to grant a bill of particulars concerning charges of adultery, for the purpose and object of preventing surprise at the trial. Mitchell v. Mitchell (1875) 61 N. Y. 398.

In E. v. E. (1907) 23 Times L. R. (Eng.) 364, the petitioner was given leave to deliver particulars on the charge of adultery, although the respondent did not ask for them and opposed the application.

It may be said, by way of analogy, that a bill praying for a discovery from the defendant whether, since her marriage, she has not committed adultery with any person whatever, and with whom, and at what time and place and under what circumstances, is demurrable, since a party is not bound to accuse himself of a crime, or to furnish any evidence whatever which shall lead to an accusation of that nature. Marsh v. Marsh (1863) 16 N. J. Eq. 391, 84 Am. Dec. 164.

b. When bill of particulars will be ordered.

1. As to time.

A bill of particulars was ordered in Adams v. Adams (1834) 16 Pick. (Mass.) 254, where the libel charged various acts of adultery, committed at divers times, with persons unknown, for a period of eight years.

If the name of the person with whom and the place where the alleged act of adultery was committed are set forth, the complaint is sufficient, on motion for a bill of particulars, although the time is vaguely specified as being at divers times during certain years (Addicks v. Addicks (1894) 1 Marv. (Del.) 338, 41 Atl. 78); or though the dates are somewhat indefinite (Oviatt v. Oviatt (1895) 14 Misc. 127, 35 N. Y. Supp. 654); or where the plaintiff states his inability to specify the times with more particularity than a statement of the months and years (Krauss v. Krauss (1902) 73 App. Div. 509, 77 N. Y. Supp. 203, 11 N. Y. Anno. Cas. 194).

A charge of continuous adulterous practices, from a specified year until the time of the filing of the petition, is sufficiently detailed and specific, and greater particulars, by the service of a bill of particulars, will not be required. Addicks v. Addicks (Del.) supra.

A bill of particulars should not be ordered, of the times at which alleged acts of adultery charged in the complaint were committed, when they are averred to have occurred on various and numerous occasions in certain months, at a specified place, with a designated person, and during certain other months at places indicated, where the plaintiff shows that she is unable to give the exact dates of the different acts of adultery, but that she intends to establish her cause of action by circumstantial evidence, showing a course of conduct between the defendant and the corespondent from which the inference of their criminal intimacy may be drawn. Krauss v. Krauss (N. Y.) supra. The court said: "A cause of action for divorce may be established by facts and circumstances showing inclination, opportunities, and intimacy of relations, from which the inference may fairly be drawn that the parties have committed adultery, without proof of the commission of the act at any specific time and place; and in such case the court is not warranted in confining the plaintiff's evidence, by a bill of particulars specifying times with precision."

For allegations as to time, coupled with averments as to place, person, and circumstances, see III. b. 4–7.

2. As to place.

A bill of particulars should be furnished of acts of adultery set up as a counterclaim in an action for divorce, and which are alleged to have occurred in other towns of a specified county, and in various towns and cities of other states. Yauck v. Yauck (1916) 161 N. Y. Supp. 413.

An issue concerning the commission of adultery which, in conformity

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with the allegations of the complaint, names the corespondent, and specifies the places of the offense as divers places in a specified city, is sufficient, where defendant did not apply for a bill of particulars on an affidavit, showing the necessity of having the issue so framed as to specifically designate the precise places by streets and numbers. Bush v. Bush (1905) 103 App. Div. 588, 93 N. Y. Supp. 159.

For allegations as to place, coupled with averments as to time, person and circumstances, see III. b, 4, 6, 7.

3. As to person.

A complaint which gives the date and place of the alleged adultery, and states that the name of the man with whom the adultery was committed is unknown, is sufficient, on motion for a bill of particulars. Hunter v. Hunter (1903) 38 Misc. 672, 78 N. Y. Supp. 243, reversed on other grounds in (1903) 78 App. Div. 631, 79 N. Y. Supp. 618.

But a bill of particulars should be furnished in regard to an averment alleging adultery with "various women." Yauck v. Yauck (1916) 161 N. Y. Supp. 413.

For averments as to person, coupled with allegations of time and place, see III. b, 5, 7.

4. As to time and place.

A motion for a bill of particulars is the appropriate remedy for a party who seeks to be fully apprised of the particulars of time and place in reference to a charge of adultery during a specified year, in a certain city, with persons unknown. Kelly v. Kelly (1895) 12 Misc. 457, 34 N. Y. Supp. 255. Information as to the dates and places of alleged adulteries with specified persons may be obtained by application for particulars. Hunt v. Hunt (1862) 2 Swabey & T. (Eng.) 574, 31 L. J. Prob. N. S. 163, 6 L. T. N. S. 727.

A count charging the commission of adultery by the defendant during certain months of two succeeding years, at a specified street and number in a given village, with a female whose name is unknown, is sufficiently definite to meet and answer a demand for a bill of particulars; but an allegation charging the commission of adultery by the defendant, at divers times between a certain date and the commencement of the action, and at various places in a specified village and state, but at what particular times and places plaintiff is unable more particularly to state, with a female and with women whose name or names are unknown to the plaintiff, is not sufficiently definite and certain. Gridley v. Gridley (1885) 7 N. Y. Civ. Proc. Rep. 215.

Allegations in a complaint of the commission of adultery with unknown persons, in a certain city or state, during a period of six years up to the commencement of the action, are too general, and a bill of particulars will be required as to the places, giving the streets and numbers if in a city, and the dates of the alleged acts of adultery. Hunter v. Hunter (1903) 38 Misc. 672, 78 N. Y. Supp. 243, reversed on other grounds in (1903) 78 App. Div. 631, 79 N. Y. Supp. 618.

An averment, in an answer in an action for divorce, that plaintiff at various times and places, within and around a specified city, the precise times and places not being known to the defendant, committed adultery and lived in adultery with a specified person, is too indefinite and general, and defendant should be required to serve a bill of particulars, specifying the times and places at which he charges the plaintiff committed adultery. Weis v. Weis (1908) 123 App. Div. 409, 107 N. Y. Supp. 1061.

In an action for a separation, where the defendant sets up a counterclaim alleging the adultery of the plaintiff on a specified day, month, and year, and at a certain street and number in a given city, with a person named, and at various other times in specified years, with such person, at certain other places in the city to the defendant unknown, a bill of particulars will not be directed as to the times and places when and where the alleged acts of adultery were committed in the years specified, where

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the affidavit of defendant alleges that he is ignorant of the particular times and places of the alleged adulteries during such years, and that he did not expect to prove any specific instance of misconduct against the plaintiff, except the one mentioned in the answer, but intended to prove intimacy and conduct on the part of the parties, and admissions and statements which, while they would not indicate the time and place of the commission of the offense, would establish that the plaintiff had been guilty of it. Ketcham v. Ketcham (1898) 32 App. Div. 26, 52 N. Y. Supp. 961. The court said: "The defendant's reliance is on the conduct and admission of the parties. Evidence of that character may be sufficient to warrant a jury in finding that the plaintiff has committed the offense charged, although it would wholly fail to locate with definiteness the time and place of its occurrence. The defendant should not be deprived of the benefit and effect of such testimony, if it is within his power to produce it. The object of a bill of particulars is to prevent surprise to the parties. . . . In this case, it seems to us that the defendant has made his charges as definitely as he can . . . and that the plaintiff will not be subject to surprise on the trial, if the trial is properly conducted."

It seems that a bill of particulars should be granted, of the precise times and places of alleged acts of adultery averred to have occurred at divers times between a specified day and the commencement of the action, some ten months later, and at divers places in a specified city and elsewhere, unless the plaintiff relies upon circumstantial evidence, showing a general course of conduct from which the inference of criminal intimacy may be drawn. Bush v. Bush (1905) 103 App. Div. 588, 93 N. Y. Supp. 159.

5. As to time and person.

A bill of particulars is not furnished as a matter of course, although the complaint does not state the times when, or the name of the party with whom, the alleged acts of adultery were committed. Ansert v. Ansert (1879) 2 Month. L. Bull. (N. Y.) 19.

Whether averments as to time and person were sufficiently definite was considered in De Carrillo v. Carrillo (1889) 53 Hun, 359, 17 N. Y. Civ. Proc. Rep. 220, 6 N. Y. Supp. 305, where a motion for a bill of particulars was directed at an averment of adultery on the part of defendant, between certain dates, with a man whose name was unknown to the plaintiff. The court refused to grant the bill in the absence of an affidavit by the defendant, stating his inability to meet the charge without a more particular description or statement of the facts attending it.

6. As to time, place, and circumstances.

A bill of particulars will be ordered in reference to a charge of adultery without any particulars, where the court rules require a succinct statement of the time, place, and circumstances of the alleged cause of divorce. Shisler v. Shisler (1886) 19 W. N. C. (Pa.) 130.

7. As to time, place, and person.

A libellee charged with adultery in an action for divorce is entitled to a specification, either in the libel, or separately filed in court, stating the particeps and the time and place of committing the offense. Sanders v. Sanders (1853) 25 Vt. 713.

If adultery is charged to have been committed with a specified person and other lewd persons to the libellant unknown, if their names are afterwards known, written notice of them, and of times and places, should be given to the respondent a reasonable time before the trial, without requisition. Garrat v. Garrat (1805) 4 Yeates (Pa.) 244.

A bill of particulars should be ordered where the circumstances of time, place, and person are indefinitely alleged. Geimer v. Geimer (1916) 161 N. Y. Supp. 415 (granting bill of particulars concerning averments of adultery "at various times and places," and "with various individuals);" Furthmann v. Furthmann

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(1913) 155 App. Div. 202, 139 N. Y. Supp. 1055 (holding statement that plaintiff cannot specify time or place with greater particularity no excuse for not limiting the range of his charges, which would admit proof of adultery anywhere, with anyone, within a period of two years); Kirkland v. Kirkland (1902) 39 Misc. 423, 80 N. Y. Supp. 21 (granting bill of particulars concerning indefinite averments as to time, place, and person, although the moving affidavit was made by the attorney, and not by the defendant).

But a bill of particulars was refused in Gridley v. Gridley (1885) 7 N. Y. Civ. Proc. Rep. 215, as to averments of adultery at other times and places, in a certain village, with a designated person, but at what particular times plaintiff is unable to state, where other allegations charge adultery with such person, during specified months, and within inclusive dates, in a designated house in such village.

8. As to allegation of "living in adulterous intercourse"

A bill of particulars was denied in Carpenter v. Carpenter (1891) 62 Hun, 621, 42 N. Y. S. R. 577, 17 N. Y. Supp. 195, in reference to an averment that the defendant was "living in adulterous intercourse." The court said: "Under this allegation it would be manifestly improper to exclude proof of a nature which, though circumstantial, might point to such living in adulterous intercourse, but be wholly unsatisfactory as proof of a particular act of adultery at a particular date or place."

c. Sufficiency of particulars furnished.

If the names of the accomplices are unknown, the times and places and attendant circumstances should be contained in the specification furnished, so as to give the party charged a fair opportunity of defense against the accusation. Garrat v. Garrat (1805) 4 Yeates (Pa.) 244.

In Lord v. Lord (1885) 16 W. N. C. (Pa.) 496, where the libel for divorce charged adultery with a specified person, and other persons to the libellant unknown, a bill of particulars was furnished to the effect that the respondent, on a specified day, month, and year, committed adultery with a certain person, and also with another person designated, at divers times and places; but, on application, a more specific bill of particulars was directed, since no place was specified in respect to the first charge, and neither time nor place in respect to the second charge.

In Harrington v. Harrington (1871) 107 Mass. 329, where the libel charged the commission of adultery by the libellee, at sundry times since the marriage of the parties, and at sundry places to the libellant unknown, the court ordered specifications filed, under which the name of the alleged paramour, and the places and years in which the acts of adultery were committed, were furnished; but the court in its discretion refused to make an order for a further specification, stating, however, that relief should be afforded to the libellee if, in the course of the trial, the evidence offered under the specification should appear to be a surprise to him.

The sufficiency of a specification of particulars in an action for divorce on the ground of adultery was upheld in Realf v. Realf (1874) 77 Pa. 31, where it alleged the commission of adultery by the defendant with a designated person, in specified months of a given year, and that on divers occasions in two certain months of a certain year defendant visted a house of ill fame in a certain alley of a specified city, for the purpose of committing adultery with divers persons unknown to the petitioner.

In Hartopp v. Hartopp (1902) 71 L. J. Prob. N. S. (Eng.) 78, 87 L. T. N. S. 188, particulars were ordered, where the petition alleged that during a period of ten months the respondent was visited almost daily at a certain house by the corespondent, and committed adultery; but particulars to the effect that the respondent and corespondent were constantly meeting during that time, and were in the boudoir and bedroom together,

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were held not a compliance with the order. The court said: The petitioner was bound to take all the necessary steps to enable him to elicit from the witnesses he intends to call in connection with the allegation, and to state something more approaching particulars than those he had furnished.

In Norfolk's Case (1692) 12 How. St. Tr. (Eng.) 833, a statement of particulars was demanded and ordered to be furnished, and which specified the name of the corespondent, and that the times were between certain months of a given year and several times since, specifying places. This charge covered a period of six years, and was objected to as too general, whereupon a further and more definite bill of particulars was furnished, which, while affording the complainant an extensive field for proof, indicated to defendant the periods and occasions concerning which she was called upon to defend herself. A. W. R.

WOODILEE COAL & COKE COMPANY, Limited, Appts.,
v.
M'NEILL, Respt.

House of Lords — October 16, 1917.

([1918] A. C. 43.)

Workman's compensation — assessment — partial incapacity — rise in wages since date of accident.

In assessing the compensation under the Workmen's Compensation Act 1906, payable to a workman in respect of partial incapacity, subject to the statutory limitations as to the amount of compensation, a general rise or fall in the wages of the workman's trade is a factor which the arbitrator is entitled to take into account.

[*See note on this question beginning on page* 1642.]

Present: LORD FINLAY, L.C., VISCOUNT HALDANE, LORD DUNEDIN, LORD ATKINSON, and LORD PARMOOR.

APPEAL from a decision of the Second Division of the Court of Session upon a case stated by the sheriff substitute of Stirling under the Workmen's Compensation Act 1906. *Affirmed.*

The respondent, who was a miner in the employment of the appellants, contracted nystagmus on March 25, 1914, at which date his average weekly earnings were 40s. Under an award of the court he was paid 20s. a week, which in May, 1915, was reduced to 15s. a week by an unrecorded agreement between the parties. On June 7, 1916, he had so far recovered that he was fit for laboring work on the surface, at which he was able to earn 27s. 6d. a week.

Upon an application by the appellants for a review of the weekly payment of 20s. the sheriff substitute found that had it not been for his disablement the respondent would in all probability have continued to work as a miner at the face; that since the date of disablement there had been a general rise in the rate of miners' wages, and that the minimum wage of a miner at the face at the time of the application to review was 10s. per shift; that had the respondent continued to work as a miner at the face he would now have been earning a weekly wage of considerably more than 55s. a week. The appellants

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contended that the compensation payable should be reduced to 6s. 3d., being 50 per cent of the difference between 40s. and 27s. 6d., the amounts earned before and after the accident respectively. The respondent contended that in fixing the amount of compensation for partial incapacity the amount which he would in all probability have been earning had he not contracted nystagmus should be taken into account and that the rate of 15s. a week should be continued.

The sheriff substitute held, on the authority of Bevan v. Energlyn Colliery Co. [1912] 1 K. B. 63, [1911] W. N. 206, 81 L. J. K. B. N. S. 172, 105 L. T. N. S. 654, 28 Times L. R. 27, 5 B. W. C. C. 169, that within the limits of ¶ 3 of sched. 1 he was entitled to take into consideration a rise or fall of wages since the date of disablement, and he awarded the respondent 12s. 6d. a week, being the full amount of the difference between the wage he was earning at the date of the accident and the wage he was earning at the date of the review.

The question for the opinion of the court was whether the general rise in miners' wages was a factor which the arbitrator was entitled to consider in assessing the compensation payable to the respondent in respect of partial incapacity.

The second division (the Lord Justice Clerk, Lord Dundas, and Lord Hunter) answered this question in the affirmative, and affirmed the determination of the sheriff substitute.

Honorable **William Watson**, K.C., of the Scottish bar (with him **F. T. Villiers Bayly**, for Harold W. Beveridge, serving with his Majesty's forces), for the appellants:

A variation in the rate of wages since the date of disablement is not a circumstance of the case within ¶ 3 of sched. 1. The arbitrator might have awarded the 12s. 6 d., as he has done, in as much as the amount does not exceed the statutory limits, but not for the reasons assigned; and the question put to the court in the stated case is not whether the decision of the arbitrator is right, but whether his reasons are right. In Jamieson v. Fife Coal Co. (1903) 5 F. 961, it was held incompetent to take into account a reduction in miners' wages in the district, and James v. Ocean Coal Co. [1904] 2 K. B. 213, 73 L. J. K. B. N. S. 915, 68 J. P. 431, 52 Week. Rep. 497, 90 L. T. N. S. 834, 20 Times L. R. 483, is an English decision to the same effect. Those are decisions under the earlier act, but for the present purpose there is no material difference in the language. The wage basis referred to both in ¶ 1 (b) and in ¶ 3 is the preaccident wage basis, and, in effect, the arbitrator is varying the wage basis and so evading one of the maxima laid down in ¶ 1 (b). Bevan v. Energlyn Colliery Co. [1912] 1 K. B. 63, [1911] W. N. 206, 81 L. J. K. B. N. S. 172, 105 L. T. N. S. 654, 28 Times L. R. 27, 5 B. W. C. C. 169, decides that once the arbitrator is within the statutory limit he may ignore the basis of compensation. That, it is submitted, is wrong.

T. B. Morison, K.C., Solicitor General for Scotland, and **David R. Scott**, of the Scottish Bar, for the respondent, were not called upon.

Lord Finlay, L.C.:

My Lords, this case has been very clearly and very concisely presented to your Lordships, and in my opinion it is not necessary to call upon the other side, for I think the appeal fails.

The question turns on the effect to be given to ¶ 3 of the first schedule of the Workmen's Compensation Act 1906. That paragraph provides thus: "In fixing the amount of the weekly payment, regard shall be had to any payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity, and in the case of partial incapacity the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident, but shall bear such relation to the amount of

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that difference as under the circumstances of the case may appear proper." [6 Edw. VII. chap. 58.] My Lords, the latter part of that paragraph fixes the limits within which compensation may be given, and goes on to provide that within these limits such amount may be given as appears proper under the circumstances of the case. It is not suggested that the arbitrator in the present case has not strictly kept within these limits; he has; but it is said that, in giving the whole amount that the statutory limit under the paragraph which I have read permitted, he allowed himself to be influenced by a consideration of the amount which, if the accident had not taken place, the miner would now be earning; and it is said that he ought to have excluded that from consideration altogether. In support of that contention the case of James v. Ocean Coal Co. [1904] 2 K. B. 213, 73 L. J. K. B. N. S. 915, 68 J. P. 431, 52 Week. Rep. 497, 90 L. T. N. S. 834, 20 Times L. R. 483, is referred to. In my opinion that case has no application. What the arbitrator had done there was to take a starting point for ascertaining the maximum different from that which is prescribed in the schedule to the act, and in doing that he was clearly wrong; and it was so held by the court. The present is a totally different case, and in my opinion the decision in Bevan v. Energlyn Colliery Co. [1912] 1 K. B. 63, [1911] W. N. 206, 81 L. J. K. B. N. S. 172, 105 L. T. N. S. 654, 28 Times L. R. 27, 5 B. W. C. C. 169, was right. The matter is really a very simple one. Limits are fixed; then the question arises, Is the arbitrator to give the whole amount that these limits admit of or is he to cut it down? The paragraph says that he is to consider all the circumstances in fixing the amount, and I am unable to see on what principle it can be said that he is to exclude from his consideration the fact that but for the accident the miner would have been
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weekly earnings of the workman before the accident and the average weekly amount which he is actually earning, occurs in another section of the statute, ¶ 3. But then at the end of that section, these general principles having been laid down, it is enacted that the weekly payment is to "bear such relation to the amount of that difference as under the circumstances of the case may appear proper." Now, my Lords, no limit is enacted by the statute as to the circumstances which are there to be taken into account; they are brought in by a proviso to the principles enacted concerning the maximum, and they seem to me to give the arbitrator a very wide discretion, provided he observes the principles which the statute makes binding on him as to the maximum itself.

My Lords, it has never been the practice of your Lordships' House to review the decision of a sheriff substitute or an arbitrator, under the Workmen's Compensation Act, unless on the face of what he has done either there is apparent an error in principle, such as vitiates the decision, or there was no evidence upon which he could properly act. But here I think that the decision in the case before the English court of appeal was a decision which went on the footing that all that the statute laid down as the law which restricts the decision of the arbitrator had been observed, and that the discretion which the concluding words of ¶ 3 confer upon him was a discretion that he was entitled to exercise freely.

My Lords, I agree with that view, and I have therefore come to the same conclusion as that reached by my noble and learned friend on the woolsack.

Lord Dunedin:

My Lords, I concur. I find that in the case of Bryson v. Dunn (1906) 8 F. 230, I, while sitting in the court of session, said: "I do see this, that under the statute there is no limit to the considerations which arbiters may have before them, and it is not for us here to set up a sort of model code for arbiters as to what they ought to think about."

My Lords, I still adhere to that opinion, but I think it is clear that when you come to the consideration of what the arbiter has held in view here it was a relevant consideration. What is the scheme of the statute? The first section of the statute says that if injury happens during employment and arising out of the employment there shall be compensation paid. Then the schedule proceeds to deal with the compensation, and the schedule says that where total or partial incapacity for work results from the injury a weekly payment shall be made, not exceeding 50 per cent of the average weekly earnings, and not exceeding £ 1. Those are both negative provisos, and leave the amount of the weekly payment undefined. Now the only other matter which bears light on it is the third paragraph, which tells the arbiter what he is to do in fixing the amount of the weekly payment: he is to have regard to what the employer may have paid voluntarily before. Then there is another limit that in no case shall it "exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn . . . after the accident, but shall bear such relation to the amount of that difference as, under the circumstances of the case, may appear proper." Now, your Lordships will observe that still you are not told what the weekly amount is to be, and therefore the weekly amount must be something that represents the compensation.

Now, surely, supposing there had been no provisions as to cutting down by prescribing the maximum, the compensation would obviously have been a payment which should make up to the man for the fact that he is an injured man instead of

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a whole man, and when you put into money what is the difference between an injured man and a whole man you say: "As a whole man he would have been able to earn so much at this moment; as an injured man he can only earn so much;" and the difference is the compensation. So that the question of the actual wages at the time seems to me an absolutely relevant consideration in fixing what compensation is due. It is true that the matter cannot rest there, because the statute comes in and prescribes these various maxima which have been already alluded to by the noble and learned Lord who preceded me; but, provided that those maxima are not infringed, not only, in my opinion, is the arbiter left a free hand as to what are relevant considerations, but when I come to look at this particular consideration which is the de quo quæritur in the present case, I think it is a most relevant consideration, and accordingly I entirely follow the reasoning of the learned judges in the court of appeal in England in the case of Bevan v. Energlyn Colliery Co. [1912] 1 K. B. 63, [1911] W. N. 206, 81 L. J. K. B. N. S. 172, 105 L. T. N. S. 654, 28 Times, L. R. 27, 5 B. W. C. C. 169.

My Lords, I must just say one word more about a case which was cited by Mr. Watson, but which seems to have escaped notice in the discussion before the court of session. I mean the case of Jamieson v. Fife Coal Co. (1903) 5 F. 958. I am sorry to say that I think there was some confusion in the minds of the very learned judges who decided that case as to what they had actually to decide. I have no doubt that the decision in Jamieson v. Fife Coal Co. was right, because it is perfectly clear that what the arbiter there had done was to infringe the rule of the statute as to the maximum. The arbiter says this: "In the course of the proof the agents of the parties agreed that, for the purposes of the case, the appellant's average weekly earnings should be held to be 30s. On advising the case, as there was no note of this agreement in process, I fixed the appellant's average weekly earnings in the light of such evidence as had been led upon the point, and found them to be 27s. 1½d.," and he goes on to explain that in arriving at the 27s. 1½d. he had taken into account things which had happened after the accident, namely, the increase in the wages, and the fact that the man's age was sixty-four. In other words, he had fixed the rate of wages as at the date of the accident in the light of circumstances which happened after the accident, and there he was wrong, and therefore the first division were quite right in going back to the 30s. which the parties had admitted was the actual wage before the accident. Now, if the learned judges had stopped there, I should have had no more to say, but unfortunately they seem to have lost sight of that fact in their judgment and Lord Adam goes on to say as a general proposition that in all fixing of wages it is not relevant to take into account that since the date of the accident there had been a fall in the rate of wages. That proposition of course will not stand with the decision in Bevan's Case, supra, and it is with the decision in Bevan's Case that I agree for the reasons I have already given.

Lord Atkinson:

My Lords, I entirely concur, and especially with some of the remarks which have fallen from my noble friend who has just preceded me.

It has been often laid down in this House that the Workmen's Compensation Act was designed to compensate workmen for the loss of the power to earn. Now, if you separate that question from the maxima-limiting provisions, nothing could be more appropriate, where you have to ascertain the loss sustained by a man's being deprived of the power to earn, than to consider the wages he could have earned had he not been incapaci-

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tated. Therefore it seems to me on the broad question, What is the loss which he has sustained by being deprived of the power to earn—What is the adequate compensation which should be awarded to him by reason of that deprivation? the amount of the wages which he could have earned had he been quite fit during the time the incapacity continues is a most appropriate and proper matter to take into account.

Then come in a number of provisions limiting the maximum and minimum, and of course, if they exclude the consideration of the higher wages the man might have earned, they must have their effect; but it would appear to me that where they do not exclude this consideration it is most right and proper that it should be taken into account. Now, I do not find in this statute anything excluding the consideration of a higher wage from the contemplation of the arbiter in fixing the sum within the statutory limit. Within the statutory limits he is, in my view, perfectly entitled to consider the higher wages, because that is the measure of the loss which the man sustains, presumably because of the incapacity to earn the higher wages. I do not think, therefore, that the arbiter in this case has taken into consideration anything which he ought not to have taken into consideration. He has confined himself within the statutory limits. He has taken the average wage at the time the accident occurred, he has taken the lower wages which the man was earning at the time he made his claim, and he has only given the actual difference between these two sums.

Lord Parmoor:

My Lords, I concur. The question is one of fixing an amount of compensation within a certain defined statutory maximum. I do not think that the arbiter, in assessing the compensation, is limited to considering only the conditions which determine the fixing of the statutory maximum under the act. Unless this restriction is imported, a rise or fall of wages appears to me to be a relevant factor of considerable importance in determining the amount of compensation payable to the workman. If it is relevant, then the amount is solely for the arbiter.

My Lords, I agree in the decision given in the case of Bevan v. Energlyn Colliery Co. [1912] 1 K. B. 63, [1911] W. N. 206, 81 L. J. K. B. N. S. 172, 105 L. T. N. S. 654, 28 Times L. R. 27, 5 B. W. C. C. 169. In my opinion the case of James v. Ocean Coal Co. [1904] 2 K. B. 213, 73 L. J. K. B. N. S. 915, 68 J. P. 431, 52 Week. Rep. 497, 90 L. T. N. S. 834, 20 Times, L. R. 483, has no reference to this case. The error there was that the arbiter took into consideration fluctuating maxima, which is certainly incorrect under the terms of the act.

Interlocutor of the Second Division of the Court of Session in Scotland affirmed and appeal dismissed with costs.

Lords' Journals, October 16, 1917.

Agents for appellants: Beveridge & Co., for W. T. Craig, Writer, Glasgow, and W. & J. Burness, W. S., Edinburgh.

Agents for respondent: C. F. Martelli, for Cormack & Roxburgh, Solicitors, Dumbarton, and Weir & Macgregor, S. S. C., Edinburgh.

ANNOTATION.

Right to take rise or fall in wages since date of accident into account in fixing workman's compensation.

The conclusion reached in the reported case (WOODILEE COAL & COKE CO. v. M'NEILL, ante, 1637), that in assessing the compensation payable to an injured workman in respect of partial incapacity a general rise or fall

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of wages in the workman's trade may properly be taken into account, notwithstanding the fact that the statute fixes, as the basis of allowance, the difference between the amount of his earnings before the accident and the amount which he is earning or is able to earn in some suitable employment or business after the accident, is supported by the other decisions on the question, James v. Ocean Coal Co. [1904] 2 K. B. (Eng.) 213, 73 L. J. K. B. N. S. 915, 68 J. P. 431, 52 Week. Rep. 497, 90 L. T. N. S. 834, 20 Times L. R. 483, and Jamieson v. Fife Coal Co. (1903) 5 F. (Scot.) 958, in so far as they contain intimations to the contrary, being overruled in the reported case, in which the point actually decided therein is pointed out.

Under a statute providing that, in the case of partial incapacity, the payment shall be computed to equal, as closely as possible, 50 per cent of the difference between the amount of the average earnings of the workman before the accident, and the average amount which he is most probably able to earn in some suitable employment or business after the accident, and fixing a minimum of $3 per week for partial disability, such minimum is not to be withheld merely because, before the expiration of the period of partial incapacity, the workman has found other employment, and is earning more wages than before the injury. Dennis v. Cafferty (1917) 99 Kan. 810, 163 Pac. 461.

Under a Workman's Compensation Act providing for compensation for partial disability at the rate of 50 per cent of the "difference between the wages received at the time of the injury and the earning power of the employee thereafter," the fact that the employee after his injury received the same or higher wages than before is not conclusive that his earning power has not been impaired, since a general advance in wages might enable the injured employee to secure the same wages after as before the injury, though partially disabled. Epstein v. Hancock-Epstein Co. (1917) 101 Neb. 442, 163 N. W. 767, 15 N. C. C. A. 1067.

In Foley v. Detroit United R. Co. (1916) 190 Mich. 507, 157 N. W. 45, it is held that it is the "capacity to earn," and not the amount of wages which the employee may be earning after his injury, that determines his right to compensation.

The fact that when he recovered from his injury the workman earned for some time as much as he formerly earned cannot be considered as decisive in fixing his earning capacity. Lariviere v. Girouard (1915) Rap. Jud. Quebec 24 B. R. 154, 24 D. L. R. 532.

An employee, partially incapacitated by an injury from performing his labor, does not lose his right to compensation by remaining in the employment of his master at his former wages. Gailey v. Peet Bros. Mfg. Co. (1916) 98 Kan. 53, 157 Pac. 431.

That an employee is earning larger wages than before his injury is not conclusive that his disability has ceased. Hanley v. Union Stock Yards Co. (1916) 100 Neb. 232, 158 N. W. 939.

In Bevan v. Energlyn Colliery Co. [1912] 1 K. B. (Eng.) 63, [1911] W. N. 206, 105 L. T. N. S. 654, 28 Times L. R. 27, 81 L. J. K. B. N. S. 172, 5 B. W. C. C. 169, it was held that the court, in considering what the workman was earning before the accident and what he was able to earn afterward, must take into consideration a reduction of wages through the operation of an eight-hour law which had gone into effect after the accident.

A workman is not entitled to compensation in respect of the diminution of his earnings after he returned to work, which is due to a general fall in wages, and not to any supervening incapacity. Black v. Merry & Cuninghame [1909] S. C. 1150, 46 Scot. L. R. 812.

Although it is proper for the assessing tribunal to take a fall in the rate of wages since the accident into consideration in awarding compensation, the scope within which it may exercise its discretion is not limited by the amount to which wages have fallen, where the maximum rate of compensation is fixed by the act by reference to the earnings of the workman during the period mentioned in the act prior

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to the accident. James v. Ocean Coal Co. [1904] 2 K. B. (Eng.) 213, 73 L. J. K. B. N. S. 915, 68 J. P. 431, 52 Week. Rep. 497, 90 L. T. N. S. 234, 20 Times L. R. 483; Jamieson v. Fife Coal Co. (1903) 5 F. (Scot.) 958. E. S. O.

MITCHELL-HENRY
v.
NORWICH UNION LIFE INSURANCE SOCIETY, Limited.

English Court of Appeal—April 18, 1918.

([1918] 2 K. B. 67.)

Payment — remittance by post — implied request — registered letter containing Treasury notes.

The defendants sent a written notice to the plaintiff stating that a sum of £48, 5s. 8d., which would shortly become due to them from the plaintiff, should be paid at their office, and asking the plaintiff, "when remitting," to return the notice. The plaintiff sent to the defendants by registered post a packet containing £48 in Treasury notes and a postal order and stamps for 5s. 8d. The packet was stolen before it reached the defendants and they never received the money:—

Held, that by the use of the word "remitting" the defendants had impliedly authorized the plaintiff to pay them by sending the money through the post in the ordinary way in which money was remitted by post, but that it was not usual to send so large a sum as £48 in Treasury notes by post, and that the plaintiff had, therefore, failed to prove that he had paid his debt to the defendants.

[*See note on this question beginning on page* 1646.]

APPEAL from the judgment of Bailhache, J., in an action tried without a jury. [1918] 1 K. B. 123.

The plaintiff, who lived in London, had borrowed £400 from the defendants on the security of a mortgage, repayable by half-yearly instalments of £40, and interest on May 15 and November 15 in each year. On May 9, 1916, the defendants' secretary wrote to the plaintiff that the first instalment of £40, and £8 5s. 8d. for interest, would become due on May 15, and "I shall be obliged by your paying the amount as stated below on that day to our office at 13 Southampton street, Holborn, W.C." The letter added: "Please return this notice when remitting." On June 13 the plaintiff posted to the defendants a letter in an ordinary envelop, registered (for which he paid a registration fee of 3d.), containing £48 in Treasury notes, and the balance in a postal order and stamps. The letter was delivered by the postman to a boy in charge of the lift in the block of buildings in which were the defendants' offices, the boy signing for the letter. The boy, who was not in the service of the defendants, but of the landlord of the premises, did not deliver the letter to the defendants, and stole the money.

A short time after the loss had occurred a marginal note in the following terms was placed on the notepaper in use at some of the defendants' branch offices, including the office at 13 Southampton street: "All checks, money orders, and postal orders should be crossed and made payable to 'Norwich Union Life Insurance Society, or order.'

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Cash, bank notes, and Treasury notes should be sent per prepaid registered post."

The plaintiff claimed a declaration that he had paid the instalment and interest due on May 15, 1916.

Bailhache, J., held that by the use of the word "remitting" the defendants had impliedly authorized the plaintiff to pay them by sending money through the post in the ordinary way in which money was remitted by post, but that it was not usual to send so large a sum as £48 in Treasury notes by post, and that therefore the plaintiff had failed to prove that he had paid his debt to the defendants. He gave judgment for the defendants.

The plaintiff appealed.

Barrington-Ward for the plaintiff.

H. Maddocks, for the defendants, was not called upon.

The arguments for the plaintiff were the same as in the court below. Thairlwall v. Great Northern R. Co. [1910] 2 K. B. 509, 79 L. J. K. B. N. S. 924, 103 L. T. N. S. 186, 26 Times L. R. 555, 54 Sol. Jo. 652, 17 Manson, 247, was referred to in addition to the cases there cited.

Pickford, L.J.:

The question we have to determine is whether the plaintiff has made out that he has paid the instalment and interest amounting to £48, 5s. 8d., which was due on May 15, 1916. With regard to the marginal note which the defendants placed on their notepaper after the loss had occurred, it was not suggested that any such notice was known to the plaintiff when he sent the money, but we may look at it as showing that the defendants told their clients that that was the usual way to send Treasury notes. I agree with Bailhache, J., that that note does not amount to an invitation or direction to their clients to send any amount of money they please in Treasury notes by registered post; it is merely an intimation that where the amount is such that it is ordinarily and reasonably proper to send it by post in Treasury notes it may be sent by registered post. It becomes a question of fact in each case. I am not prepared to lay down a general rule that no sum may be sent in Treasury notes by registered post so as to amount to payment; that is to say, that it is not ordinary and proper to send some sums in that way, if it be in compliance with an invitation or direction to remit by post. On the other hand I am not prepared to lay down a rule that, even looking at the marginal note, it is ordinary and proper to send any amount, however large, in Treasury notes by registered post, and that, if it be done, the debtor has paid his debt.

The sending of Treasury notes has been compared to the sending of Bank of England notes. Banknotes, however, are much more difficult for a person like a lift boy to dispose of than £1 Treasury notes. It is obvious that this is so in the case of bank notes of a large denomination; and even £5 notes are not so easy to dispose of as Treasury notes. Then with regard to registration, it is common knowledge that in London, and I think in most parts of the country, the precaution is not taken, which is taken in foreign countries, when the registered letter is delivered, of obtaining the signature of the person to whom it is addressed. It is well known that anyone who receives a registered letter from the postman signs the receipt for it. I do not know that there was any evidence of that, but it is a fact which every business man knows. Bearing all this in mind, it does not seem to me that it is the ordinary and proper mode of paying so large a sum as £48 to send it in Treasury notes by registered letter. The plaintiff might have sent a check, or a money order, or have paid the amount personally at the defendants' office. Taking all these matters into consideration, I do not feel inclined to differ from Bailhache, J., in his finding on the facts that this sum of £48, 5s. 8d. was not sent in the

Payment—remittance by post—implied request—registered letter containing Treasury notes.

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ordinary business and proper way of sending a sum of that amount, even under the direction or request to send it by post, and that therefore sending it by registered post in that way is not payment. The appeal must be dismissed.

Warrington, L.J.:

I am of the same opinion. The defendants requested the plaintiff to send this sum of £48, 5s. 8d. by post, but that did not amount to a request to send that sum by post in any form which the plaintiff might choose; it only amounted to a request to send that sum by post in such an ordinary way as was appropriate to a sum of that amount. The question thus becomes one of fact: Did the plaintiff send the sum in such an ordinary way as was appropriate to a sum of that amount? The onus of proving that lies upon the plaintiff. He was liable to pay the amount to the defendants, and he must show that he has paid it, though in fact the money never reached the hands of the defendants. Like Pickford, L.J., I am not prepared to say that no sum may properly be sent by registered post in Treasury notes under such a request as this, but in my opinion the plaintiff has failed to make out that the ordinary way of sending so large a sum as £48 is to send it in £1 Treasury notes. For this reason I am not prepared to differ from the judgment of Bailhache, J.

With regard to the marginal note which was subsequently, in July, 1916, placed upon the written requests for payment, it merely means that if the debtor adopts the post for sending cash of such an amount as is usually sent in cash through the post he should send it by registered letter.

Scrutton, L.J.:

I agree. There was a clear request to make a remittance by post. The question seems to me, adopting the language of Lord Kenyon, Ch.J., in Warwicke v. Noakes (1791) 1 Peake, N. P. Cas. 98, 3 Revised Rep. 653, 21 Eng. Rul. Cas. 14, to be whether what the plaintiff did was the usual way of transacting business of this nature. The plaintiff lived near the Haymarket and he had to pay the money at Holborn. He put £48 in Treasury notes in an envelop addressed to the defendants' office in High Holborn, and registered the letter at a postoffice close to the Haymarket. Is that the usual way to transact business of this nature? Bailhache, J., has found that it is not usual to send so large a sum as £48 in Treasury notes by registered post. Using my own judgment and knowledge of what business men do, I agree that remittance by Treasury notes is not a usual way in which to send so large a sum. The judgment therefore must stand.

Appeal dismissed.

Solicitors for plaintiff: Mount, Sterry, & Wheeler.

Solicitors for defendants: Collisson, Prichard, & Barnes.

ANNOTATION.

Request to remit as authorizing payment by post.

It is a general rule that in order to absolve a debtor who transmits money by mail to his creditor for the payment of his debt from the hazard of loss in the transmission, it is necessary that he show authority from the creditor to remit in this manner, or a usage or course of dealing from which such authority may be inferred.

Alabama.—Williams v. Carpenter (1860) 36 Ala. 9, 76 Am. Dec. 316.

Arkansas.—Burr v. Sickles (1866) 17 Ark. 428, 65 Am. Dec. 437.

Georgia.—Morton v. Morris (1860) 31 Ga. 378.

Iowa.—Gaar, S. & Co. v. Taylor (1905) 128 Iowa, 636, 105 N. W. 125.

Massachusetts.—Gurney v. Howe

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(1857) 9 Gray, 404, 69 Am. Dec. 299; Crane v. Pratt (1859) 12 Gray, 348; Morgan v. Richardson (1866) 13 Allen, 410; Buell v. Chapin (1868) 99 Mass. 594, 97 Am. Dec. 58.

New Hampshire.—Currier v. Continental L. Ins. Co. (1873) 53 N. H. 538, (obiter)

New York.—Waydell v. Velie (1870) 1 Bradf. 277.

North Carolina.—Hollowell v. Life Ins. Co. (1900) 126 N. C. 398, 35 S. E. 616.

Tennessee.—Boyd v. Reed (1871) 6 Heisk. 631.

Virginia.—Gross v. Criss (1846) 3 Gratt. 262.

Washington.—Masterson v. Union Bank & T. Co. (1915) 86 Wash. 560, L.R.A.1918A, 531, 150 Pac. 1126.

Wisconsin.—Jung v. Second Ward Sav. Bank (1882) 55 Wis. 364, 42 Am. Rep. 719, 13 N. W. 235.

England.—Thairlwall v. Great Northern R. Co. [1910] 2 K. B. 509, 79 L. J. K. B. N. S. 924, 103 L. T. N. S. 186, 26 Times L. R. 555, 54 Sol. Jo. 652, 17 Manson, 247; MITCHELL-HENRY v. NORWICH UNION L. INS. CO. (reported herewith) ante, 1644.

It has been held that "in regard to the transmission of money by mail there is a distinction between the relation of creditor and debtor and that of principal and agent. A debtor is bound to pay his creditor in person, or his authorized agent, and does not fulfil his obligation by making all reasonable efforts to transmit to the creditor the amount of the debt; and therefore depositing in the postoffice a letter containing the money and addressed to the creditor does not discharge the debt unless, by the creditor's express direction or assent, the usual course of dealing between the parties, or other facts from which such direction or assent may be inferred, the creditor has authorized the money to be thus delivered to him. . . . But an agent employed to collect a debt and remit the proceeds is bound only to use ordinary and reasonable skill and diligence, either in collecting the amount or in sending it to his principal except so far as his discretion is limited by positive instructions." Buell v. Chapin (1868) 99 Mass. 594, 97 Am. Dec. 58.

Where, therefore, the relation of the parties is not that of debtor and creditor, but of agent and principal, the question whether the principal has authorized the transmission of money to himself through the mails is not conclusive of the agent's responsibility for its loss, though the existence of such authority will necessarily exonerate him. In other words, the absence of such authority will not necessarily show a want of reasonable skill and diligence in adopting such mode of remittance.

Thus, an agent who transmits money to his principal by bill of exchange sent through the postoffice is discharged from liability, even in the absence of a direction as to the mode of remittance, where such is the usual mode of transacting business of this nature. Warwicke v. Noakes (1791) 1 Peake, N. P. Cas. 98, 3 Revised Rep. 653, 21 Eng. Rul. Cas. 14.

There is no rule of law that the postoffice established by the government for the purpose of carrying letters is a less safe or appropriate means of forwarding money than a private carrier or banker. Whether it is so in any particular case is a question of fact, depending upon the amount to be sent, the proportionate expense of different modes of transmission, the time and distance intervening, the prevailing usage in similar cases, and other circumstances surrounding the transmission, all of which are proper for the consideration of the jury. Buell v. Chapin (Mass.) supra.

The decisions appear to warrant the statement that a request to "remit" will not of itself imply a direction to remit through the mails, but that whether it will do so will depend on circumstances, such as the existence of other facilities for forwarding money, the custom of trade, and the course of dealing between the parties.

In Morton v. Morris (1860) 31 Ga. 378, it is said to be clear that "to remit does not, ex vi termini, mean to transmit by mail. Its etymological signification is to send by bill, check, or otherwise, from one person to an-

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other, at a distance more or less remote from each other."

A letter requesting the addressees to "remit" does not impliedly authorize the sending of money by mail, but leaves the addressees free to select such a mode as may best serve their convenience and at the same time comport with their interests. Burr v. Sickles (1856) 17 Ark. 428, 65 Am. Dec. 437.

The sending of the sum of $284 in bank bills by registered mail is not warranted by a letter, requesting the addressee to "remit," adding, in a postscript, "Please send us a draft if possible." Morton v. Morris (Ga.) supra.

A request by a creditor to his debtor to remit the amount due, $347.53, without specifying the mode of remittance or the subject to be remitted, does not authorize the debtor to transmit the sum of $96 to the creditor through the mail, at the creditor's risk; and it is not proper to admit evidence of a local usage or understanding to give a different meaning to the terms of the letter. Gross v. Criss (1846) 3 Gratt. (Va.) 262.

On the other hand, in Townsend v. Henry (1856) 9 Rich. L. (S. C.) 318, it was held that although the term, "remit," does not of itself mean "remit by mail," yet when employed in a letter addressed to a correspondent at a place remote from any bank, and from which a safe private conveyance was not likely to be obtained in reasonable time, and from which remittance by mail was usually employed and had proved safe, the remittance of the sum of $297 in bank bills by mail was authorized by a letter wherein the debtor was directed to "remit to us as soon as received," and told that by so doing he would "confer an obligation."

A deputy sheriff to whom a judgment creditor has sent an execution for $50 by mail, with a direction to "collect and remit," is warranted in supposing himself authorized to remit the money in bank bills by mail. Morgan v. Richardson (1866) 13 Allen (Mass.) 410.

An attorney who has received by mail from another attorney, for collection, a note on which the amount due was about $60, and who has received from the owner of the note a letter stating that such note has been "forwarded" and directing the attorney to "deduct the expense of collection . . . and forward me the balance," is warranted in believing that he was authorized to transmit the money in the same manner as that in which the note was sent to him. Buell v. Chapin (1868) 99 Mass. 594, 97 Am. Dec. 58.

The following decisions, though not involving the question forming the subject of this annotation, may, by reason of their close connection therewith, be of interest to the reader:

No authority to remit by the ordinary mail can be inferred from a letter acknowledging the receipt of a letter inclosing $100 and expressing the hope of being shortly favored with the balance, where the writer had previously directed remittance to be made by registered mail. Williams v. Carpenter (1860) 36 Ala. 9, 76 Am. Dec. 316.

A request by the payee of a check on a bank for $100 made by letter inclosing the check, that he be sent the cash therefor, does not authorize its remittance by unregistered mail. Clay City Nat. Bank v. Conlee (1899) 106 Ky. 788, 51 S. W. 615.

The fact that a previous remittance has been made by mail, and the mode of remittance not objected to, is not an authority or direction to adopt that mode at the risk of the person to whom the remittance is made. Burr v. Sickles (1856) 17 Ark. 428, 65 Am. Dec. 437.

No inference that the creditor has impliedly agreed to run the risk of a check being lost in the mail can be drawn from the fact that for a long period of years the sender had been accustomed to pay money due from him to his creditor by sending checks by post, and that the creditor had never objected to being paid that way, especially where at the same time the debtor sent a form of receipt to be filled up by the creditor and returned. Pennington v. Crossley (1897) 77 L. T. N. S. (Eng.) 43.

Default in the prompt payment of an insurance premium sent through

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the mails is not a ground of forfeiture, where the sending of insurance premiums through the mails has been the practice of the person insured, and no objection has been raised by the insurance company, though the risk of safe transmission is, in such case, the sender's. See annotation in 1 A.L.R. 677.

A letter stating: "You will confer a great favor if you send by return of mail or by express the amount of quarterly premium already past due on your policy of insurance, so that I can make my return to home office. The amount is $69,"—warranted the mailing of such amount in currency. Palmer v. Phœnix Mut. L. Ins. Co. (1881) 84 N. Y. 63.

It is for the jury to determine whether a letter from the creditor to his debtor, whose note he held, stating, "If you will forward us the amount, we will send you the note," which was for $700, gave to the debtor such reasonable ground to believe that the creditor desired and expected the money to be remitted by mail; and in forming their judgment, they are to take into consideration the whole correspondence and intercourse between the parties, and the usages of trade in this respect between the district or county in which the debtor resided and the city in which the creditor resided. Selman v. Dun (1856) Fed. Cas. No. 12,648.

A letter from a merchant to a customer, asking for a check, warrants the latter in sending the check by post. Norman v. Ricketts (1886) 3 Times L. R. (Eng.) 182.

A depositor who writes a bank to remit to him the amount which he had on deposit, "by draft or in such manner as you think is best, so that I can draw the money at Frankfort-on-the Main," which, by the rules of the bank, was payable at its counter, assumes the risk of the transmission of the draft in the usual way by mail. Jung v. Second Ward Sav. Bank (1882) 55 Wis. 364, 42 Am. Rep. 719, 13 N. W. 235.

Where the directors of a company in a half-yearly report and statement of accounts recommended the payment of a certain dividend, and gave notice that dividends would be paid on a certain day by means of dividend warrant sent by post to the registered address of the stockholder in each case, and the stockholders authorized the dividend without specifying how it should be paid, their action was equivalent to a request that the dividend should be paid in the manner proposed. Thairlwall v. Great Northern R. Co. [1910] 2 K. B. (Eng.) 509, 79 L. J. K. B. N. S. 924, 103 L. T. N. S. 186, 26 Times L. R. 555, 54 Sol. Jo. 652, 17 Manson, 247.

The inclosure of an addressed envelop, with a request to use it in sending a remittance, authorizes the sending of it through the mail. McCluskey v. National Life Asso. (1894) 77 Hun, 556, 28 N. Y. Supp. 831, affirmed without opinion in (1896) 149 N. Y. 616, 44 N. E. 1126; Kenyon v. National Life Asso. (1899) 39 App. Div. 276, 57 N. Y. Supp. 60.

Where an insurer directed the insured to send his premium by mail, his sending it by mail is sufficient, even though the money is never received. McCluskey v. National Life Asso (N. Y.) supra.

Authority to remit money by registered mail does not warrant its remittance by the ordinary mail, notwithstanding the impossibility of registering letters at the sender's post-office. Williams v. Carpenter (1860) 36 Ala. 9, 76 Am. Dec. 316.

Where an understanding existed between an agent and his principal that money should be forwarded by draft, a remittance by mail of money is at the agent's risk. Kerr v. Cotton (1879) 23 Tex. 411.

A request to a sheriff having an execution in his hands to remit the amount by mail does not warrant him in doing so, where, having negligently failed to levy the execution, he did not receive the money until after the return day; in as much as the money thus remitted was not money received by virtue of the execution, but was money sent on his own account to

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satisfy a demand which the judgment creditor had against him, on account of his breach of duty. Wakefield v. Lithgow (1807) 3 Mass. 249.

A direction to remit by post is not complied with unless the letter is deposited at an authorized place of receipt; delivery to a bellman in the street (Hawkins v. Rutt (1793) 1 Peake, N. P. Cas. (Eng.) 186), or to a messenger who carried mail bags to the postoffice from the cars and back (Davis v. Allen (1858) 25 Ga. 234), is not sufficient. E. S. O.

PEOPLE OF THE STATE OF ILLINOIS EX REL. MRS. JOHN MACMAHON et al., Appts.,
v.
EDWIN S. DAVIS et al.

Illinois Supreme Court — June 20, 1918.

(284 Ill. 439, 120 N. E. 326.)

Office — rescission of approval of appointment.

1. A common council may reconsider its approval of the mayor's appointment of officers, and if, at the meeting at which the appointment was approved, a motion to reconsider is made and laid on the table and taken up at the next meeting, at which the approval is rescinded, the appointment fails, and the fact that the appointees have taken possession of the offices in the meantime is immaterial.

[*See note on this question beginning on page* 1657.]

Appeal — vacation of order — power.

2. Upon appeal from an order vacating an order granting leave to file an information in the nature of a quo warranto, the question of the power of the court to vacate the order is immaterial if it appears from the record that leave to file the information should have been granted.

Municipal corporation — right of council to reconsider vote.

3. A municipal council has a right to reconsider, under parliamentary rules, its votes and actions upon questions rightfully pending before it, and rescind previous actions.

— construction of parliamentary practice.

4. The action of a municipal council must be construed in accordance with general parliamentary rules, and not in accordance with the exceptional usage of the House of Representatives of the United States.

Parliamentary law — motion to lay on table — effect.

5. The adoption of a motion to lay upon the table a motion to reconsider a vote taken by a municipal council is not a final disposition of the motion to reconsider, within the rule of procedure that a motion for reconsideration, having been once made and decided in the negative, shall not be renewed.

— motion placed on table — when allowed.

6. A rule of a common council which has declared that Roberts's Rules of Order shall govern in all cases in which they are not inconsistent with the standing rules of the council to the effect that a motion to take any motion or other proposition from the table may be proposed at the same meeting at which such motion or proposition was laid on the table, by a two-thirds vote, does not prevent the taking of a motion from the table at a subsequent meeting, as provided by such Rules of Order.

(Duncan, Ch. J., and Cartwright and Carter, JJ., dissent.)

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APPEAL by relators from a judgment of the Appellate Court, First District, affirming a judgment of the Circuit Court for Cook County dismissing a petition for leave to file an information in the nature of a quo warranto to oust defendants from the offices of the board of education and install relators therein. *Reversed.*

The facts are stated in the opinion of the court.

Messrs. **Maclay, Hoyne and Donald L. Morrill** for appellants.

Messrs. **Samuel A. Ettelson** and **Chester E. Cleveland,** for appellees:

The averments of the petition were not sufficient to satisfy the court that there was probable ground for the proceeding.

Rolfe v. Rich, 46 Ill. App. 406, 149 Ill. 436, 35 N. E. 352; 32 Cyc. 401.

Appellees were duly and regularly appointed to, and were lawfully in possession of, the offices of the board of education.

People v. Union Elev. R. Co. 269 Ill. 212, 110 N. E. 1.

In hearing and determining the motion to vacate, the court was authorized to exercise discretion, not a personal, arbitrary one, but a sound judicial discretion, resting upon well-established rules of law.

People ex rel. Outman v. Wanmer, 276 Ill. 460, 114 N. E. 1015; People v. Union Elev. R. Co. supra.

The action of the council in approving the appointments of appellees was virtually an election, i. e., a selection of them by the council for these offices.

People v. Ahearn, 196 N. Y. 221, 26 L.R.A.(N.S.) 1153, 89 N. E. 930.

By their induction into their offices appellees acquired the legal right to exercise the functions of such offices until the end of their respective terms, and of this legal right the city council could not deprive them.

State ex rel. Childs v. Wadhams, 64 Minn. 318, 67 N. W. 64; Marbury v. Madison, 1 Cranch, 162, 2 L. ed. 68; Donahue v. Will County, 100 Ill. 94.

Under the circumstances of this case, the city council could not, on June 22, rescind its action of June 18. In approving the appointments the council was performing a specific duty imposed upon it by the statute, and was not acting in its legislative capacity.

28 Cyc. 341; 2 McQuillin, Mun. Corp. § 614; 2 Dill. Mun. Corp. 5th ed. § 529, p. 858; State ex rel. Whitney v. Van Buskirk, 40 N. J. L. 463; People ex rel. Laist v. Lower, 251 Ill. 527, 36 L.R.A.(N.S.) 1203, 96 N. E. 346; State ex rel. Calderwood v. Miller, 62 Ohio St. 436, 78 Am. St. Rep. 732, 57 N. E. 227; State ex rel. Childs v. Wadhams, 64 Minn. 318, 67 N. W. 64; State v. Phillips, 79 Me. 506, 11 Atl. 274; People ex rel. Mosher v. Stowell, 9 Abb. N. C. 456; Re Fitzgerald, 88 App. Div. 434, 84 N. Y. Supp. 1125; State ex rel. Burdick v. Tyrrell, 158 Wis. 425, 149 N. W. 280, Ann. Cas. 1916E, 270; State ex rel. Coogan v. Barbour, 53 Conn. 76, 55 Am. Rep. 65, 22 Atl. 686.

The action of the council on June 22 is no evidence that it had the power to do what it then attempted to do.

2 Lewis's Sutherland, Stat. Constr. 2d ed. § 477, p. 895; Merchants Exch. v. Knott, 212 Mo. 616, 111 S. W. 565.

Leave to file the information having been granted ex parte and without notice to appellees, the circuit court did not err in entertaining their motion to vacate the order granting such leave, and to dismiss the petition and abate the proceeding.

People ex rel. Outman v. Wanmer, 276 Ill. 460, 114 N. E. 1015; People v. Union Elev. R. Co. 269 Ill. 212, 110 N. E. 1; People ex rel. Snelling v. Roberts, 279 Ill. 540, 117 N. E. 68; Atty. Gen. v. Chicago & E. R. Co. 112 Ill. 520.

Dunn, J., delivered the opinion of the court:

The 50th general assembly passed with an emergency clause an act which was approved by the governor on April 20, 1917 (Laws 1917, p. 724), amending all those sections of the School Law which related to boards of education in cities having a population exceeding 100,000. By § 128 it was provided as follows:

"Section 128. Each city having a population exceeding 100,000 inhabitants shall constitute one school district which shall maintain a thorough and efficient system of free schools, which shall be under the charge of a board of education, which shall be a body politic and corporate, by the name of 'board of education of the city of . . .' and by that name may sue and be sued in all courts and places where

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judicial proceedings are had. The said board of education shall consist of eleven members, to be appointed by the mayor, with the approval of the city council, three of whom shall be appointed for the term of one year, two of whom for the term of two years, two of whom for the term of three years, two of whom for the term of four years, and two of whom for the term of five years. Thereafter, at the expiration of the term of any member of said board, his successor shall be appointed in like manner; and all persons thus appointed, and their successors, shall hold office for the term of five years from the first day of May of the year in which they are appointed. Any vacancy that may occur in the membership of said board of education shall be filled through appointment by the mayor, with the approval of the city council, for the unexpired term. If any person so appointed shall fail to qualify within a period of thirty days after his appointment, the office shall be filled by a new appointment for the unexpired term: Provided, however, that in such cities wherein at the time this law shall go into effect there are members of a board of education holding office by appointment, such members shall continue in their office until eleven persons have been appointed and qualified as members of said board of education under this act. No power vested in such board of education, or in any of its officers, agents or employees, shall be exercised by the city council of such city."

Prior to April 20, 1917, the board of education of the city of Chicago consisted of certain persons holding their office by appointment of the mayor. After that date the mayor appointed under the new law two of the former members of the board, and on June 18, 1917, he submitted to the council the names of nine other persons for appointment as members of the board of education. These nine nominees are the appellees. On motion of one of the aldermen to concur in the appointments to membership on the board of education the motion prevailed. The vote by yeas and nays was 44 yeas and 25 nays. Thereupon one of the aldermen voting in the affirmative moved to reconsider the vote. The alderman who made the motion to concur in the appointments moved to lay the motion to reconsider on the table. The motion to lay on the table prevailed and the council adjourned to June 22, 1917, the time fixed for the next regular meeting of the council. On that day a motion was made that the corporation counsel be directed to prepare an opinion as to whether the council had any right to reconsider the vote on concurrence in the appointments to membership on the board of education. Thereupon a motion was made to adjourn and the yeas and nays were demanded on the motion, but the mayor, having put the motion to a viva voce vote, declared that the motion was carried and that the council was adjourned. An alderman appealed from the decision of the chair declaring the motion to adjourn carried, and the mayor thereupon left the council chamber, the aldermen remaining in their seats. On motion of one of the aldermen, another alderman was selected to act as temporary chairman during the mayor's absence, and took the chair. The question was then put on the appeal from the decision of the chair on the motion to adjourn, and resulted in one vote to sustain the decision of the chair and fifty-three against it. The question was then put on the motion to adjourn, and the motion was lost by a vote of one to fifty-one. A committee, having been selected to notify the mayor that the council was in session, reported that they had waited on the mayor and informed him that the council was in session, and that he had answered, he was much obliged, he would talk the matter over with the corporation counsel. A motion was then made to take from the table

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the motion to reconsider the vote on the motion made June 18, 1917, to concur in the appointments to membership on the board of education, which motion had been laid on the table June 18, 1917, and the motion prevailed by a vote of 46 yeas and 22 nays. A motion to lay on the table was held to be out of order. Permission was denied the maker of the motion to reconsider to withdraw it. The motion to adjourn was lost, and the question then being put on the motion to reconsider the vote to concur in the appointments to membership on the board of education, the motion to reconsider prevailed by a vote of 46 yeas and 20 nays, and the question then being put on the motion to concur in the appointments to membership on the board of education made June 18, 1917, the vote was 22 yeas and 45 nays, and the chair thereupon declared that the motion to concur was lost. The members of the board of education prior to April 20, 1917, had continued, after the passage and approval of that act, to transact the business and perform the duties of a board of education until June 19, 1917, since which time they have been prevented by the appellees from performing such duties and transacting such business, and the appellees on and since June 19, 1917, have assumed and pretended to use, exercise, enjoy, and perform the franchises, functions, duties, and powers of office of members of the board of education of the city of Chicago. On June 30, 1917, the relators, who are the members of the board of education prior to April 20, 1917, filed a petition in the circuit court of Cook county for leave to file an information in the nature of quo warranto against the appellees, and the court on a hearing granted leave. Afterward the court, on motion of the appellees, vacated the order granting leave and ordered the petition dismissed. On appeal to the appellate court for the first district the judgment was affirmed, and a certificate of importance and appeal has been granted to this court.

The petition for leave to file the information stated all the facts which have been mentioned. It contained a copy of the records of the city council of the meetings of June 18 and June 22 and set forth the rules adopted by the city council of the city of Chicago, and there was attached as an exhibit a copy of Roberts's Rules of Order, which one of the rules of the city council requires to govern the council in all cases to which they are applicable, and in which they are not inconsistent with the standing rules of the council. The information was, in substance, a copy of the petition for leave to file.

A number of questions of practice have been raised and discussed in the briefs. In the view we take of the case the questions of practice raised are of no importance, for, upon a consideration of the merits as they appear from the record, the relators should have had leave to file the information, and it is therefore immaterial whether the court had power to grant the motion to vacate the order at the time and under the circumstances it did or not. By § 7 of article 3 of the Cities and Villages Act the city council is authorized to determine its own rules of proceeding. A municipal council, like other legislative bodies, has a right to reconsider, under parliamentary rules, its votes and action upon questions rightfully pending before it, and rescind its previous action. Jersey City v. State, 30 N. J. L. 521; Higgins v. Curtis, 39 Kan. 283, 18 Pac. 207; Tuell v. Meacham Contracting Co. 145 Ky. 181, 140 S. W. 159, Ann. Cas. 1913B, 802. The right is recognized by § 14 of said article 3, which provides that no vote of the city council shall be reconsidered or rescinded at a special meeting unless at such special meeting there be

Appeal—vacation of order—power.

Municipal corporation—right of council to reconsider vote.

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present as large a number of aldermen as were present when such vote was taken. In Beckwith v. English, 51 Ill. 147, the board of supervisors of Vermilion county voted to levy a tax to build a bridge, but the next day rescinded the vote and laid the resolution on the table. Nevertheless the clerk extended the tax, and it was held that he had no right to do so. The only important question raised was as to the power of the board of supervisors to reconsider the resolution, and it was held that they had the power and the clerk had no right to extend the tax.

The rule in regard to motions to reconsider adopted by the city council is rule 37, which provides as follows: "A vote or question may be reconsidered at any time during the same meeting or at the first regular meeting held thereafter. A motion for reconsideration having been once made and decided in the negative shall not be renewed, nor shall a vote to reconsider be reconsidered." Rule 52 provided that "the rules of parliamentary practice comprised in Roberts's Rules of Order shall govern the council in all cases to which they are applicable and in which they are not inconsistent with the standing rules of this council." Immediately after the adoption of the motion to concur in the appointments, one of the aldermen who had voted for the motion moved to reconsider the vote. If this motion had been put and failed, the action of the council would have been final. Instead, the maker of the original motion to concur moved to lay the motion on the table and the motion prevailed. The effect of the motion to reconsider is stated in Roberts's Rules of Order to be to suspend all action that the original motion would have required until the reconsideration is acted upon, but if it is not called up, this effect terminates with the session, except in an assembly having regular meetings as often as quarterly, when, if not called up, its effect does not terminate until the end of the next regular session.

Rule 29 of the city council refers to the motion to lay on the table, and is as follows: "A motion to simply lay a question on the table shall not be debatable, but a motion to lay on the table and publish, or any other condition, shall be subject to amendment and debate. A motion to take any motion or other proposition from the table may be proposed at the same meeting at which such motion or proposition was laid upon the table, provided two thirds of the aldermen vote therefor." The object of the motion to lay on the table is stated in Roberts's Rules of Order to be to enable the assembly, in order to attend to more urgent business, to lay aside the pending question in such a way that its consideration may be resumed at the will of the assembly as easily as if it were a new question, and in preference to new questions competing with it for consideration. In legislative bodies, and all others that do not have regular sessions as often as quarterly, questions laid on the table remain there for that entire session unless taken up before the session closes. In deliberative bodies with regular sessions as frequent as quarterly the sessions usually are very short, and questions laid on the table remain there until the close of the next regular session, if not taken up earlier. In ordinary deliberative assemblies a question is supposed to be laid on the table only temporarily, with the expectation of its consideration being resumed after the disposal of the interrupting question, or at a more convenient season. When taken up, the question, with everything adhering to it, is before the assembly exactly as when it was laid on the table.

The practice of the House of Representatives of the United States in regard to the use of the motion to lay on the table is different from that of general parliamentary law. In that body the motion to lay on the table is used only for the pur-

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pose of making a final unfavorable disposition of a matter. 5 Hinds, Precedents of House of Representatives, § 5628, note 1. The usage of the House of Representatives in this respect is recognized as exceptional, and the usage by which the motion to lay on the table has, contrary to general parliamentary law, become the means of a final adverse disposition of a matter is explained in 5 Hinds, Precedents, § 5389. The action of the council must be construed in accordance with general parliamentary law, and not in accordance with the exceptional usage of the House of Representatives. Indeed, counsel for the appellees do not contend otherwise, but they insist that the vote concurring in the appointments was not subject to reconsideration, and that the council's action was in violation of its rules.

Parliamentary law—motion to lay on table—effect.

Municipal corporation—construction of parliamentary practice.

It is argued that rule 29, which has been quoted, limits the right to take any matter from the table to the same meeting at which it was laid on the table, and also requires a two-thirds vote of the aldermen for that purpose. Roberts's Rules of Order is inconsistent with this construction of rule 29, for under those rules the question may be taken from the table at the same or the next meeting. The rules are not, however, really inconsistent, for the only effect of rule 29 is to restrict the right to take a question from the table to the meeting at which it was laid on the table. Where a question has been laid on the table by a majority vote, and thus postponed to other business, it cannot be again brought up for consideration at the same meeting except by a two-thirds vote, though the majority may take it up at a later meeting.

Parliamentary law—motion placed on table—when allowed.

It is insisted that the council has no power to reconsider an election of officers by it; that the confirmation of an appointment is virtually an election to office; that the same rule applies to confirmations as to elections, and that the weight of judicial authority denies to deliberative assemblies the power to reconsider the election of an officer which it was authorized to make. This is not, however, the case of an election, — a choice between two or more candidates. The council does not, in any sense, choose the appointee. The question before it is the approval of an executive act of the mayor. Its action is discretionary and deliberative. No good reason is apparent why the council may not establish rules in such cases for the government of its own procedure in arriving at its final judgment, as well as in other cases. Orderly procedure requires some rules for the proper despatch of business and deliberation in its conduct. The confirmation of executive appointments should be deliberately considered, and the rules applicable to ordinary questions to secure such deliberation may well be applied.

The question of the power of the senate to reconsider its action in advising and consenting to an appointment by the governor of a member of the board of state tax commissioners arose in Michigan and was decided in Atty. Gen. ex rel. Dust v. Oakman, 126 Mich. 717, 86 Am. St. Rep. 574, 86 N. W. 151. The senate having adopted a resolution confirming the appointment, a motion to reconsider the vote was made at the same executive session and prevailed. The question then recurring on the original resolution was decided in the negative. In an action to determine the appointee's title to the office the court stated the question to be whether the senate, at the same session and before any action based upon the first vote had been taken, might reconsider the vote by which it had advised and consented to the nomination of the governor. The reasons given by the court in deciding the case, and the authorities cited in the opinion, completely answer the contentions

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of the appellees. The court said (p. 721): "It is contended by the respondent that the senate, in consenting to an appointment by the governor, is performing an executive and not a legislative duty, and that when it has once given its consent it has exhausted its power; and it is further contended that rule 40 has no application. It is conceded by relator, and has been held by this court, following Marbury v. Madison, 1 Cranch, 137, 2 L. ed. 60, that when the appointing power has once exercised its functions it has no power to recall an appointment. See Speed v. Detroit, 97 Mich. 198, 56 N. W. 570. The question recurs whether, where an appointment or concurrence in an appointment is a subject of action by a deliberative body, that body may by rules of its own, or acting under usual parliamentary rules, cast a vote upon the subject which is subject to reconsideration; for if such course is permissible the appointment is not complete beyond recall until the power to reconsider has been cut off by the lapse of time. Fortunately, authorities bearing upon this subject are not wanting, and it only remains to apply them. In Wood v. Cutter, 138 Mass. 149, the school committee of a town had authority to elect a superintendent. The committee voted to elect relator. At the same meeting a motion to reconsider was made and carried, and the respondent was elected. The language of Holmes, J., is pertinent to this case: 'It begs the question to say that the board had once definitively voted in pursuance of the instructions of the town meeting, and therefore was functus officio, and could not reconsider its vote. The vote was not definitive if it contained the usual implied condition that it was not reconsidered in accordance with ordinary parliamentary practice, and it must be taken to have been passed subject to the usual incidents of votes, unless some ground is shown for treating it as an exception to common rules.' The ruling in the case cited was reaffirmed in the case of Reed v. Deerfield School Committee, 176 Mass. 473, 57 N. E. 961. The case of State v. Foster, 7 N. J. L. 101, is a leading case on this question. The power to appoint a clerk for the county of Gloucester was vested in a joint meeting of the legislative council and general assembly. At such a session a vote was taken and a majority voted for relator, but the presiding officer failed to declare the election under the mistaken view that a majority of all members elect was required, and that a majority of a quorum was not enough to elect. The joint meeting then proceeded to elect respondent. The court determined the case distinctly upon the ground 'that all deliberative assemblies, during their session, have a right to do and undo, consider and reconsider, as often as they think proper, and it is the result, only, which is done.' It was further said: 'So long as the joint meeting was in session they had a right to reconsider any question which had been before them, or any vote which they had made.' This case was approved in State ex rel. Whitney v. Van Buskirk, 40 N. J. L. 463, and by the supreme court of Massachusetts in Baker v. Cushman, 127 Mass. 105. The case of People ex rel. Birch v. Mills, 32 Hun, 459, fully sustains the contention of relator. Also see Conger v. Gilmer, 32 Cal. 75."

The principle announced in the Oakman Case is sustained by the authorities cited, and is conclusive of the question under consideration here. The motion to reconsider the vote upon the approval of the mayor's appointments was made at the same session at which it was taken and the question was then laid on the table, to be taken up later at the convenience of the council, in accordance with its rules. The question of reconsideration remained undetermined in the

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possession of the council awaiting its action. The action of the appellees in assuming the offices the next day, while the question of the confirmation of their appointment was pending in the council, and in afterward exercising the powers and duties of the offices, did not have the effect of giving them any title to the offices. The effect of the motion to reconsider the vote to concur in the appointments was to suspend all action based upon that vote until the reconsideration was acted upon. The vote to reconsider at the meeting of June 22 was an annulment of the previous vote, and the subsequent vote was effectual to disapprove the appointments.

Office—rescission of approval of appointment.

The judgments of the Appellate Court and the Circuit Court are reversed, and the cause is remanded to the Circuit Court.

Duncan, Ch. J., and Cartwright and Carter, JJ., dissenting.

Petition for rehearing denied, October 3, 1918.

ANNOTATION.

Power to reconsider confirmation of appointment to office.

It has been held that the confirmation by a legislative assembly of an appointment to office cannot be reconsidered. State ex rel. Childs v. Wadhams (1896) 64 Minn. 318, 67 N. W. 64; State ex rel. Whitney v. Van Buskirk (1878) 40 N. J. L. 463; Re Fitzgerald (1903) 88 App. Div. 434, 84 N. Y. Supp. 1125.

In State ex rel. Childs v. Wadhams (Minn.) supra, it was held that a common council had no power to reconsider the confirmation of the appointment of a tax assessor, who had been appointed by the mayor with the advice and consent of the council, as required by statute.

In State ex rel. Whitney v. Van Buskirk (1878) 40 N. J. L. 463, it appeared that the relator had resigned the office of chief of police of the city of Bayonne. Thereupon, the defendant was nominated for the office by the mayor and the nomination confirmed by the common council, to take effect when the relator's term of office expired. The council then adjourned without further action thereon. Thereafter the council voted to reconsider the confirmation of the appointment of the defendant. It was held that the last act was performed to make the appointment complete when the vote of confirmation was taken, and the result publicly proclaimed, no certificate of appointment or commission being required, and that no reconsideration could thereafter be had.

In the case of Re Fitzgerald (N. Y.) supra, it appeared that the relator was appointed city clerk, having been nominated by the mayor and the nomination approved by the common council. He took the oath of office and filed his bond, which, however, was not approved. He afterward filed another bond which was neither approved nor disapproved. Subsequently, the common council passed a resolution rescinding its confirmation of the appointment of the relator. It was held that the common council had no power to deprive the relator of his office by recalling its approval of his appointment.

In at least two jurisdictions, however, it is held that a vote of confirmation of an appointment may be reconsidered in the same manner as any other legislative act. Atty. Gen. ex rel. Dust v. Oakman (1901) 126 Mich. 718, 86 Am. St. Rep. 574, 86 N. W. 151. And see the reported case (PEOPLE EX REL. MACMAHON v. DAVIS, ante, 1650).

In Atty. Gen. ex rel. Dust v. Oakman (Mich.) supra, it appeared that the senate had confirmed the governor's appointment of the respondent to the office of tax commissioner. At the same session a motion was made and passed, reconsidering the vote by which the appointment was approved.

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This was done under a rule of the senate which provided that any decision of the senate could be reconsidered if the matter voted on was still in the possession of the senate, and the motion to reconsider was made the same day the vote was taken, or within the next two days of the actual session of the senate. It also provided that no question should be reconsidered more than once. It was held that the senate had the right to make such a rule, and, as the power of reconsideration had not been cut off by lapse of time, the confirmation of the appointment of the respondent had been effectually reconsidered and was of no effect. B. F. D.

HELEN V. AMOS, Appt.,
v.
UNITED STATES CASUALTY COMPANY.

Maryland Court of Appeals — December 12, 1917.

(131 Md. 471, 102 Atl. 1001.)

Insurance — payment of premium by agent — effect.

1. The transmission in his monthly remittance of premiums by an insurance agent to his principal, without knowledge of the insured, of a renewal premium on a policy which he had not collected, does not amount to payment of the premium which will render the insurer liable on the policy if the renewal receipt is returned to the company unused and the money so forwarded is returned to the agent.

[*See note on this question beginning on page* 1664.]

Appeal — withdrawal from jury — assumption of truth of evidence.

2. In passing upon the validity of the withdrawal of a case from the jury because of insufficiency of plaintiff's evidence, the truth of the testimony in favor of plaintiff must be assumed.

Evidence — effect of statement.

3. A statement by an insurance agent that he has paid a renewal premium for the insured is not controlling if it appears that he transmitted the amount to the insurer in his monthly statement with the understanding that it should be returned if the insured did not pay it, which was in fact done, while the insurer did not accept it as a payment by the insured, the agent did not so intend it, and the insured did not understand at the time that the premium was paid for him.

APPEAL by plaintiff from a judgment of the Baltimore City Court in favor of defendant, in an action brought to recover the amount alleged to be due on an accident insurance policy. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. **George Moore Brady, William Milnes Maloy, Harry W. Nice,** and **William Joseph Tewes** for appellant.

Messrs. **Edward M. Hammond** and **Frederick T. Dorton** for appellee.

Thomas, J., delivered the opinion of the court:

This suit was brought to recover on an accident policy issued by the appellee, the United States Casualty Company, to James W. Amos, of Baltimore city, Maryland.

The policy is not set out in the record, but it would seem from the pleadings, evidence, and admissions of counsel that it was dated December 29th, 1911, was issued for a period of one year, and was renewable from year to year by the payment of a premium of $70, and the execution and delivery by the company of a renewal agreement. The company thereby agreed, in the event of the death of the insured while the pol-

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icy was in force, resulting "directly and independently of any and all other causes from bodily injury effected solely through external, violent, and accidental means," to pay to Helen V. Amos, the beneficiary named in the policy, the sum of $5,000, and it is stated in the brief of the appellee that there was a further stipulation that if the accident causing such injury occurred after three years from the date of the policy, and while it was in force, the company would pay to the beneficiary $7,500, instead of $5,000.

It appears from the evidence that, according to the regular course of dealing and a custom of business between the company and its agents, the renewal premiums are charged to the agents of the company, and that, during the month preceding the month in which the premiums are due, the company sends to its agent a renewal agreement for each policy solicited by him, signed by the proper officer of the company, and to be countersigned by the agent and delivered by him to the insured when the insured pays the premium. The premiums, less the agent's commissions, are paid by the agent before the 10th of the month following the month in which they are due, and the *agent* is given credit for the same by the company, but the company and the agent do not regard this payment by the agent as a payment by or for the insured of the premium for a renewal of the policy until the premium is paid by the insured to the agent; and if the premium is not paid by the insured, the agent is required to return the renewal agreement to the company, and the company then marks the renewal agreement "canceled flat," and returns to the agent the part of the premium received from him. The agent is allowed to hold the renewal agreement for thirty days, and if at the expiration of that time the premium has not been paid by the insured, he is expected to return it to the company, unless the company has consented to his holding it for a longer period.

The policy in question was renewed for the years beginning December 29th, 1912, and December 29th, 1913. The company received on December 29th, 1912, from A. Kirkland Weeks, of Baltimore city, its agent who solicited the policy, the renewal premium for the year commencing on that date, and received from him on December 28th, 1913, the premium for the year commencing December 29th, 1913. About the 1st of December, 1914, the company, in accordance with said custom, sent Mr. Weeks renewal agreements for the policies on which renewal premiums would be due that month, and received from him in accordance with said custom, on December 30th, 1914, a check for the company's share of all the premiums, amounting to about $600. The agreement for the renewal of this policy, which the company sent to Mr. Weeks, and which is set out in the appellee's brief, is as follows:

E. H. C. N. P. 211038.
80 Maiden Lane.
Md. 1. Home Office, New York City.
Premium: Accident$25.00
Health 45.00

(total) $70.00

Renewal Agreement No. D80402.

It is hereby agreed that disability policy No. 11,592 issued by the United States Casualty Company to
James W. Amos
is continued in force for twelve months from the 29th day of December, 1914, noon, standard time, subject to the provisions printed on the reverse side hereof.

Not valid unless countersigned by a duly authorized representative of the company.

D. G. Luckett,
Secretary.

Countersigned,

.....

The following is the reverse side of the agreement:

If the warranties in the schedule of statements or the application for the said policy are not true when the premium named herein is received,

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this renewal agreement is null and void. The premium named herein is due and payable on the date named herein. *The said policy shall not be in force while any premium remains unpaid.* Any premium due the insured will be returned on demand.

Having failed to collect the premium from Mr. Amos, Mr. Weeks wrote the company on February 9th, 1915, requesting permission to hold the agreement for thirty days longer, with the hope of collecting the premium from the insured. The company replied, giving its consent, and directing Mr. Weeks, in case he failed to collect the premium and returned the agreement, to call the company's attention to its letter authorizing him to hold it. On the 6th of April, 1915, Mr. Weeks wrote the company, stating that Mr. Amos had failed to pay the premium, and inclosing the renewal agreement for "cancelation." In this letter Mr. Weeks asked the company to return the renewal agreement to him in case Mr. Amos should pay the premium. Upon receipt of the renewal agreement, the company canceled the policy "as of December 29th, 1914," and on the 14th of April, 1915, sent Mr. Weeks its check for the part of the premium received from him.

On the 3d of June, 1915, the insured fell while crossing McCulloh street, in Baltimore city, and sustained injuries from which he died the following day. The company refused to pay the claim of the beneficiary, and this suit was brought by her to recover the amount of the policy.

A number of exceptions were reserved during the trial, but the important question is raised by the exception to the granting of the prayer of the defendant, withdrawing the case from the jury.

The plaintiff's witness, James W. Meadow, assistant secretary of the company, testified in substance to the course of dealing we have already stated between the company and its agent, Mr. Weeks; that the company received from Mr. Weeks "in usual course," on the 30th of December, 1914, the premium for the renewal of the policy in question for the year commencing December 29th, 1914; that the policies are renewed by renewal agreements which are not "valid" until countersigned by the agent to whom they are sent; that the agreement for the renewal of the policy issued to Mr. Amos was returned by Mr. Weeks to the company in April, 1915, and the policy was canceled by the company as of December 29th, 1914, because the premium had not been paid, and that the part of the premium which the company had received from Mr. Weeks was returned to him by the company. If the evidence had stopped there, it is clear that the plaintiff would not have been entitled to recover. The fact that the company received on December 30th, 1914, from Mr. Weeks, its share of the premium for the renewal of the policy, when considered in connection with the course of dealing between the company and its agent, as disclosed by this evidence, and the terms upon which the policy was renewable, cannot be treated as evidence that the premium for a renewal of the policy was paid by or for the insured. It was not considered by the company or by Mr. Weeks as a payment of the premium, and the proof referred to contains no evidence that the insured knew that the company had received a part of the premiums from Mr. Weeks, or that he understood that what Mr. Weeks did constituted payment of the premium. It is said in 25 Cyc. 725: "If the premium is actually paid by the agent of the company for the insured, on an agreement between them, and such payment is accepted by the company, this will be sufficient to bind the company;" and in the case of Home Ins. Co. v. Curtis, 32 Mich. 402, where the court said, "If the company actually received the premium, it is a matter of no consequence who paid it," the

Insurance—payment of premium by agent—effect.

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court stated in its opinion: "There was evidence introduced tending to show that at the time the insurance was effected, it was understood that credit was to be given for the premium; that the agents of the company afterwards paid the premium to the company and received from Linton an indorsed note for the amount in payment thereof, which they had discounted, and that this note was afterwards taken up and a new note given for the amount of the first, with interest added, and that this note matured and was paid some days after the loss under the policy occurred." It will be observed that the authorities cited, which are relied on by the appellant, deal with the payment of the premium by the agent in pursuance of an understanding with the insured, and where the amount of the premium is accepted by the company from the agent as payment of the premium. In the case at bar, the proof referred to furnishes no evidence that Mr. Weeks sent to the company the share of the premium due it in pursuance of any understanding or agreement with the insured, or that the company accepted it in payment of the premium. On the contrary, it tends to show, as we have stated, that neither the company nor Mr. Weeks regarded it as payment of the premium, and that the money was sent to the company by Mr. Weeks and accepted by it with the understanding that if the premium was not paid by the insured, it would be returned by the company to Mr. Weeks. In the case of Crook v. New York L. Ins. Co. 112 Md. 268, 75 Atl. 388, Judge Burke, speaking for this court, said on page 278: "The fact that the agent held a receipt of the appellee, transmitted to him from the home office, regularly executed, and only requiring to be countersigned by him to enable him to receive the money due on the policy, has been much relied on as evidence of the authority in the agent to receive the overdue premium and waive the forfeiture. But that fact must be taken in connection with the regular course of dealing between the home office and the agent, as shown by the appellant's evidence, and also in connection with what is expressly provided for on the face of the policy. It is not to be presumed that the receipt was transmitted to the agent to be used by him in any other manner than is required and authorized by the policy." In the case of Brown v. Massachusetts Mut. L. Ins. Co. 59 N. H. 298, 47 Am. Rep. 205, the court said: "Nor is the defect in the plaintiff's case supplied by the defendants' testimony. The fact that the company charged the premium to Hodgdon when they issued the policy, being in accordance with the custom of the business between the company and their agents, not being regarded by the company as a payment, and not being known to and understood by the plaintiff as a payment of his indebtedness to the company, cannot now be held to have had that effect. As against the agent, it was not a debt due to the company until he received the money; if he never received the money and returned the policy, the premium was credited to him on the company's books; and if he delivered the policy without receiving the premium, the policy by its terms was not to be enforced. And there is no evidence that Hodgdon agreed with the plaintiff to become personally responsible to the company for the amount of his premium." In the case of Van Wert v. St. Paul F. & M. Ins. Co. 90 Hun, 465, 36 N. Y. Supp. 54, the supreme court of New York said: "In making up the accounts between the defendant and the agent of the company, who issued the policy in question, the amount of this policy was charged to such agent, and, upon its being canceled, the unearned portion thereof was credited to such agent. It does not appear that this was done either at the request or with the knowledge of the plaintiff, for after the fire occurred, and before the commencement of this action, she tendered the full amount of the premium to the defendant. The claim is made that

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this payment, if it can be called such, by the agent to the company, inured to the benefit of the plaintiff, and was in law a payment by her, so far as the insurance company was concerned, of the premium. Without citing any authorities upon that question, it seems to me that, even if it should be considered payment by the agent instead of a mere regulation of the accounts between the company and the agent, it is not one that inures to the benefit of the plaintiff. She did not request it; it does not even appear that she knew that it had been done; so far as the evidence shows, the only communication that was made to her was in asking her to pay the premium, and to inform her that the policy would be canceled if it was not. As a matter of fact she did not pay a dollar, and did not offer to pay the premium until after her property had been destroyed by fire. There was neither prior authority nor subsequent ratification. The agent was not her agent, but the agent of the company. She never ratified the account before the fire, because she did not know that it had been done. She did not ratify it after the fire, and before the commencement of this action, but, on the contrary, tendered the amount of the premium, assuming it to be unpaid. It seems to me that the transaction was a mere matter of accounts between the defendant and its agent, of which the plaintiff cannot take advantage."

The appellant, however, relies upon the testimony of Mr. Nice as sufficient evidence of payment of the premium to require the trial court to submit the question to the jury. The testimony of Mr. Nice, as set out in the record, is as follows: "The witness took charge of Mr. Amos's affairs after the accident, and he saw Mr. Weeks. The witness did not know Mr. Weeks at that time, but understood his name to be Kirk. Mr. Singer called him Kirk. The witness had a conversation with Mr. Weeks on June 4th, the day after Mr. Amos was hurt. The witness went to Mr. Singer's office; the time was 4 o'clock in the afternoon of June 4. I had some information which caused me to call him up and advise him that I was coming up, and asked him if he would get his agent who wrote the policy for Mr. Amos. Mr. Weeks was there, and Mr. Singer introduced him to me as Kirk, and I was under the impression that his name was Kirk. I was there for the purpose of finding out whether the policy of Mr. Amos was in force, and I asked Mr. Weeks if the premium on that policy which the company had written for Mr. Amos had been paid, and he told me that the premium had been paid. I said: 'The policy is in force then?' He said: 'No, I have canceled it.' I said: 'Did you cancel it at the request of Mr. Amos?' He said, 'No;' and I said, 'Did you have any authority to cancel that policy for Mr. Amos?' and he said, 'No;' and I said, 'Did Mr. Amos know that you had canceled this policy?' and he said, 'I don't know;' and I said, 'Why did you cancel the policy?' and he said, 'I wanted my money; I got tired of waiting.' And I said, 'Did you ask Mr. Amos for his money?' and he said, 'Oh, yes;' and I said, 'What did he say?' 'He said he was going to pay me, and he told me that he had some money coming to him from Mr. Singer;' and I said, 'Did you see Mr. Singer?' and he said, 'Yes;' and I said, 'Then why did you cancel the policy without instructions from Mr. Amos?' and he said, 'Why, I just did it;' and I said, 'That is the most high-handed proceeding that I ever heard of.' He told me that he had paid the premium at the request of Mr. Amos, and I said, 'That is a civil matter between you and Mr. Amos, and you had no right in the world to cancel that policy without Mr. Amos's consent,' and I said, 'I am going to take charge, and take this matter into every court in the land.' I probably used some profanity. He said, 'You can't take charge unless the man is dead; is he dead?' I said, 'No, but he will not live very long.'"

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It must be conceded that no part of the premium for the renewal of the policy for the year beginning December 29th, 1914, was paid by Mr. Amos. The statements of Mr. Weeks as testified to by Mr. Nice are to that effect, for he says that Mr. Weeks told him that he, Mr. Weeks, paid the premium, and that he had the policy canceled because he was tired waiting for his money. The only part of this testimony that gives any color to the contention of the plaintiff is the statement that Mr. Weeks said that he paid the premium at the request of Mr. Amos. Mr. Weeks denied that he made any such statement to Mr. Nice, but in passing upon the prayer withdrawing the case from the jury we must assume the truth of Mr. Nice's testimony. Assuming then that Mr. Weeks told Mr. Nice that he had paid the premium at the request of Mr. Amos, the question is, Is that statement by Mr. Weeks, when considered in connection with the testimony of the plaintiff's witness, James W. Meadow, as to the course of dealing between the company and its agent, sufficient to justify a finding that the renewal premium was actually paid to the company for Mr. Amos? Now the testimony of Mr. Meadow shows that what was actually done was that Mr. Weeks, in accordance with the regular course of dealing between the company and its agent, sent the company its share of the premium for the renewal of the policy, and that the company received it on the 30th of December, 1914; that neither the company nor Mr. Weeks regarded that payment by Mr. Weeks as a payment by or for Mr. Amos of the renewal premium; that Mr. Weeks never countersigned or delivered the renewal agreement to Mr. Amos, and that, accordingly, when Mr. Weeks returned the agreement to the company because of Mr. Amos's failure to pay the premium, the company canceled the policy and returned to Mr. Weeks the part of the premium it had received from him. Under such circumstances, the statement by Mr. Weeks to Mr. Nice, that he paid the premium at the request of the insured, cannot be regarded as evidence to show that the premium was in fact paid by Mr. Weeks for Mr. Amos. The company did not accept the money received from Mr. Weeks as a payment of the premium, and Mr. Weeks did not so intend it, and there is not a suggestion in the testimony of Mr. Nice that Mr. Amos understood that the premium had been paid for him. The payment made by Mr. Weeks to the company did not, therefore, create any obligation on the part of the company to Mr. Amos, or any obligation on the part of Mr. Amos to Mr. Weeks.

Appeal—withdrawal from jury—assumption of truth of evidence.

Evidence—effect of statement.

We are not required, in this case, to determine whether an agent of an insurance company can, without the knowledge or the consent of the company, pay the premium due by a policyholder so as to bind the company. The only question with which we are here concerned is whether the record contains any legally sufficient evidence of payment of the premium, and we concur in the conclusion of the court below that it does not. We will therefore affirm the judgment, without, however, approving the form of the prayer granted at the conclusion of the testimony in the case, which refers only to the evidence offered by the plaintiff.

Judgment affirmed, with costs.

Petition for rehearing denied, March 2, 1918.

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ANNOTATION.

Insurance: conditional payment of premium by insurer's agent, or charging of premium to him.

This note does not deal with the power of insurance agents to bind the insurer by extending credit for premiums, nor with the validity or effect of private agreements by agents with the insured to pay premiums, nor with the effect of an agent's taking a note for the premium where it does not appear that the insurer charged him therewith.

Where the insurer and its agent do not regard the transaction as a payment, and it does not take place in pursuance of an agreement with the insured, or with his knowledge, it is generally held, in accord with the conclusion reached in the reported case (AMOS v. UNITED STATES CASUALTY CO. ante, 1658), that as between the insurer and the insured no payment of the premium is effected by reason of the insurer's conditionally charging the premium to the agent, or of a conditional remittance by the agent, the intention of the parties being that in case of nonpayment by the insured the money shall be returned and the agent credited with the amount. Marshall v. Farmers & B. L. Ins. Co. (1916) 98 Kan. 502, 159 Pac. 17; Brown v. Massachusetts Mut. L. Ins. Co. (1879) 59 N. H. 298, 47 Am. Rep. 205; Van Wert v. St. Paul F. & M. Ins. Co. (1875) 90 Hun, 465, 36 N. Y. Supp. 54; Wright v. Equitable Life Assur. Soc. (1876) 9 Jones & S. (N. Y.) 1; Acey v. Fernie (1840) 7 Mees. & W. 150, 151 Eng. Reprint, 717, 10 L. J. Exch. N. S. 9.

Thus, it has been held that the fact that the insurer, according to custom, charged the premium to its agent when it issued a policy, did not amount to a payment thereof where it was not regarded by the company as such, and was not known to the insured, or understood by him as a payment. Brown v. Massachusetts Mut. L. Ins. Co. (1879) 59 N. H. 298, 47 Am. Rep. 205.

And no payment inuring to the insured's benefit results from the insurer's charging its agent on its books with the amount of the premium, and, upon cancelation of the policy, crediting the unearned premium to the agent, where this was not done with the insured's knowledge, or at his request. Van Wert v. St. Paul F. & M. Ins. Co. (1875) 90 Hun, 465, 36 N. Y. Supp. 54.

And in Marshall v. Farmers & B. L. Ins. Co. (1916) 98 Kan. 502, 159 Pac. 17, the custom existing between the insurer and its agent of conditionally charging the latter with the company's portion of the premium on the issuance of a policy, done with the understanding that if the insured did not pay a note given for the premium the charge against the agent would be remitted, was held not a payment of the premium as between the company and the insured, the court stating that the methods between the company and its agent of adjusting their business were no concern of the insured or the beneficiary.

And in Wright v. Equitable Life Assur. Soc. (1876) 9 Jones & S. (N. Y.) 1, it was held that the evidence was insufficient to show an actual or constructive payment of the premium, and sustain a judgment on the policy, where the testimony, in substance, was to the effect that the insurer had, without the knowledge of the insured or the agent, charged the premium to the latter, and that subsequently, on a settlement between the agent and the insurer, the charge for the policy had been marked off, and instructions that the charge to the agent would be giving credit to the insured and would constitute, in judgment of law, a payment of the premium, were held erroneous.

And in Acey v. Fernie (Eng.) supra, there was held to have been no payment of the premium, as between the insurer and insured, although the former charged the agent with the amount of the premium in accordance with an instruction by the company that, if the

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agent failed to give notice of nonpayment of premiums within fifteen days of the time they were due, they would be charged to him, the court stating that this operated as a penalty on the agent, and did not authorize third persons to take advantage of it.

Where, however, it appears that the parties intended to substitute the agent as the insurer's debtor for the premium, a charge therefor against him by the company has been held to operate as a payment as between the company and the insured. Fidelity & C. Co. v. Willey (1897) 25 C. C. A. 593, 39 U. S. App. 599, 80 Fed. 497, affirming (1896) 77 Fed. 961; Bang v. Farmerville Ins. & Bkg. Co. (1876) 1 Hughes, 290, Fed. Cas. No. 838; Williams v. Empire Mut. Annuity & L. Ins. Co. (1910) 8 Ga. App. 303, 68 S. E. 1082; Perea v. State L. Ins. Co. (1910) 15 N. M. 399, 110 Pac. 559; Buckley v. Citizens' Ins. Co. (1907) 188 N. Y. 399, 13 L.R.A.(N.S.) 889, 81 N. E. 165; Train v. Holland Purchase Ins. Co. (1875) 62 N. Y. 598; Lebanon Mut. Ins. Co. v. Hoover (1886) 113 Pa. 591, 57 Am. Rep. 511, 8 Atl. 163; Wytheville Ins. & Bkg. Co. v. Teiger (1893) 90 Va. 277, 18 S. E. 195.

Thus, in Lebanon Mut. Ins. Co. v. Hoover (1886) 113 Pa. 591, 57 Am. Rep. 511, 8 Atl. 163, it was held that the insurer could not rely on a provision avoiding the policy in case of nonpayment of the premiums, where there was a mutual understanding that the agent should be treated as the insurer's debtor for the premiums, and pay therefor when an account was rendered, and that as between the agent and the insured the latter was to have credit in paying his premiums, and the insured paid the premium in accordance with such agreement, although not until after a loss had occurred.

And in Train v. Holland Purchase Ins. Co. (1875) 62 N. Y. 598, it was held immaterial that the premium was not in fact paid by the insured, where it appeared that a usage existed between the insurer and the agent, whereby the former charged the latter with the premiums upon all policies applied for, and at stated periods settlements were made, and in accordance with this arrangement the agent applied for a policy under an agreement with the applicant that the insurer would charge the premium to the agent, and that the latter would give applicant credit for the premium.

And where the insurer's agent takes the insured's note, payable to himself, instead of collecting the premium in cash, and the amount thus represented is charged to the agent by the insurer with the agent's consent, this constitutes a payment of the premium, and the nonpayment of the note will not avoid the policy under a forfeiture provision contained therein. Williams v. Empire Mut. Annuity & L. Ins. Co. (1910) 8 Ga. App. 303, 68 S. E. 1082.

And in Perea v. State L. Ins. Co. (1910) 15 N. M. 399, 110 Pac. 559, it was held that the insurer could not defend on the ground that a premium note was not paid when due, where it appeared that the note was given to the insurer's agent, and that the company charged the part of the premium due to it to the agent at once and issued the usual receipt to the insured, the court stating that the conduct of the company in charging the premium to the agent, and the act of the agent in taking a note to himself, operated as a transfer of the insured's indebtedness to the agent, and consequently as a payment to the company.

And in Wytheville Ins. & Bkg. Co. v. Teiger (Va.) supra, where there was no direct evidence that it was the insurer's practice to charge the agents personally with the premiums on policies sent to them, but there was testimony raising an inference that this was done, the court stated that if the premiums were in fact so charged, then as between the insured and the company the premium was paid when the policy was delivered, and observed that the rule was well settled that where the agent gives credit and the amount is charged to him by the insurer the transaction is equivalent to payment.

And in Fidelity & C. Co. v. Willey (Fed.) supra, where, as was the custom between the insurer and its general agent, the company charged the

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latter with the premiums on a renewal transmitted to him for delivery, and the agent delivered the policy to the insured without payment of the premium, it was held that the insured's indebtedness was transferred to the agent, and that as between the insurer and insured there was a payment, and that a provision of the policy for prepayment of the premium could not be set up in avoidance of it.

And in Buckley v. Citizens' Ins. Co. (1907) 188 N. Y. 399, 13 L.R.A.(N.S.) 889, 81 N. E. 165, it was held that the first premium on a policy must be deemed, as between the insurer and the insured, to have been paid at the time the former's general agents extended credit to the insured, where the premium was charged to the agents in their account with the insurer, pursuant to the general course of dealing between them, which disregarded any arrangement the agents might make with the insured as to credit, notwithstanding that a note for the premium given by the insured to the agents did not mature until after an attempt had been made to cancel the policy, nor until after the destruction of the property, and that upon maturity it was taken up by the agents, who had discounted it, and was still held by them at the time of the action on the policy, they having been credited in the meantime in their account with the company with the amount of the premium unearned at the time of the attempted cancelation.

And in Bang v. Farmville Ins. & Bkg. Co. (1876) 1 Hughes, 290, Fed. Cas. No. 838, where, according to custom, an insurance agent delivered a policy to a broker and with his knowledge charged him with the premium on the agent's books, and credited the insurer with the premium, and it appeared that it was the insurer's custom to charge premiums to its agents, it was held that it could not avoid the policy for nonpayment of premiums, although it provided that the insurer should not be liable until the premium was actually paid, and that anything less than a specific agreement clearly expressed in the policy should not be construed as a waiver of any printed condition.

And in White v. Connecticut F. Ins. Co. (1876) 120 Mass. 330, the evidence was held sufficient to justify a finding that the insurer accepted the credit given by its general agent to a broker as a payment of the premium, within a provision of the policy that the company should not be liable on the policy until the premium was actually paid, where there was evidence that it was the usual course of business for the general agent to deliver policies to the broker without requiring cash payment of premiums, but to charge the broker individually, and render a monthly statement, and that a large number of the company's policies, with its knowledge, had been issued to brokers in this way, and that the policy in suit was so delivered.

In Elkins v. Susquehanna Mut. F. Ins. Co. (1886) 113 Pa. 386, 6 Atl. 224, it was held that the question whether the insurer had waived a requirement of prepayment of the premium by the insured should have been left to the jury, there being evidence in part that the agent had power to deliver policies and collect the premium; that the company looked to him for a return of the policy or the premium, that on delivery of a policy he was obligated to pay the premium, that he kept an account with the company and charged himself with the premiums as the policies were delivered, and that this custom was followed in the case at bar.

J. T. W.

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CHARLES S. SMITH
v.
DONALD MacKAY HILL et al., Exrs., etc., of Warren M. Hill.

Massachusetts Supreme Judicial Court—February 24, 1919.

(232 Mass. 188, 122 N. E. 310.)

Evidence — proof of affirmative defense.

1. Pleading a discharge in bankruptcy in an action to enforce a judgment raises an affirmative defense, the burden of proving which is on defendant.

[*See note on this question beginning on page* 1672.]

— burden of proof.

2. Plaintiff by asserting in his declaration facts which, if proved, establish a liability due him on the part of defendant, has the burden of proving these facts.

— action on judgment.

3. One suing to enforce a judgment makes out his case by production of his judgment.

— prima facie — effect.

4. A prima facie case or prima facie evidence does not change the burden of proof.

— proving discharge in bankruptcy.

5. One pleading a discharge in bankruptcy against enforcement of a debt not scheduled in the proceedings has the burden of showing notice or actual knowledge of the proceedings on the part of the creditors, so that the claim was barred by the proceedings.

Bankruptcy — discharge — bar of debtor.

6. A discharge in bankruptcy is a bar to debts, because creditors have had opportunity to be heard in the bankruptcy courts upon the matters there in litigation, have had the privilege of proving their claims, and of sharing in the distribution of the assets of their debtors.

Evidence — burden of proof — bar of judgment.

7. Ordinarily, one who asserts the binding force of a judgment by any court must show jurisdiction by that court over the person sought to be charged with the force of the judgment.

EXCEPTIONS by defendants to rulings of the Superior Court for Suffolk County made during the trial of an action brought to enforce a judgment, which resulted in a verdict for plaintiff. *Overruled.*

The facts are stated in the opinion of the court.

Mr. Irving F. Carpenter, for defendants:

The discharge in bankruptcy of Warren M. Hill was properly pleaded by the defendants and received in evidence. Such discharge was prima facie evidence that the plaintiff's debt was properly scheduled and that the plaintiff was duly notified of the defendant's bankruptcy. Such discharge is a prima facie release from all provable debts.

Waller v. Edwards, Litt. Sel. Cas. (Ky.) 348.

Failure to schedule a debt will render a discharge inoperative against one who did not receive notice or have knowledge of the proceedings in bankruptcy, but there must be evidence of notice or knowledge. That fact cannot be presumed.

Re Peterson, 137 App. Div. 435, 121 N. Y. Supp. 738; Davis v. Findley, — Ala. —, 78 So. 869; Remington, Bankr. 2d ed. § 2777; Laffoon v. Kerner, 138 N. C. 281, 50 S. E. 654; Delta County Bank v. McGranahan, 37 Wash. 307, 79 Pac. 796; Dycus v. Brown, 135 Ky. 140, 28 L.R.A.(N.S.) 190, 121 S. W. 1010; Broadway Trust Co. v. Manheim, 47 Misc. 415, 95 N. Y. Supp. 93; Thomson v. Caverley, 148 Ill. App. 295; Perry Naval Stores Co. v. Caswell, 63 Fla. 552, 57 So. 660.

As the discharge by the express terms of the statute is operative when the creditor has notice or actual knowl-

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edge of the proceedings in bankruptcy, the burden falls upon the plaintiff to prove the exception. He must show that his claim is not within the terms of the bankrupt's discharge.

Laffoon v. Kerner, 138 N. C. 281, 50 S. E. 654; Gatliff v. Mackey, 31 Ky. L. Rep. 947, 104 S. W. 379; Beck & G. Hardware Co. v. Crum, 127 Ga. 94, 56 S. E. 242; Stevens v. King, 16 App. Div. 377, 44 N. Y. Supp. 893; Re Grout, 88 Vt. 318, 92 Atl. 646, Ann. Cas. 1917A, 210; Re Peterson, 64 Misc. 217, 118 N. Y. Supp. 1077, 137 App. Div. 435, 121 N. Y. Supp. 738, 68 Misc. 10, 124 N. Y. Supp. 907; Alling v. Straka, 118 Ill. App. 184; Claflin v. Wolff, 88 N. J. L. 308, 96 Atl. 73; Sherwood v. Mitchell, 4 Denio, 435; Meyer v. Bartels, 56 Misc. 621, 107 N. Y. Supp. 778; Van Norman v. Young, 228 Ill. 425, 81 N. E. 1060; Hallagan v. Dowell, — Iowa, —, 139 N. W. 883; Hilton v. White, 171 App. Div. 931, 156 N. Y. Supp. 9; Merchants' Bank v. Miller, 176 App. Div. 412, 162 N. Y. Supp. 999; Kreitlein v. Ferger, 238 U. S. 21, 59 L. ed. 1184, 35 Sup. Ct. Rep. 685, reversing 52 Ind. App. 199, 97 N. E. 819, 98 N. E. 1005; Collier, Bankr. 11th ed. p. 443; Parker v. Murphy, 215 Mass. 72, 102 N. E. 85; Wylie v. Marinofsky, 201 Mass. 583, 88 N. E. 448.

Mr. **Prescott Keyes**, for plaintiff:

The refusal to give the rulings requested as to burden of proof was in exact conformity with the law of Massachusetts.

Parker v. Murphy, 215 Mass. 72, 102 N. E. 85.

Rugg, Ch. J., delivered the opinion of the court:

This is an action upon a judgment recovered against Warren M. Hill on May 2, 1904. The defense is a discharge in bankruptcy. After the commencement of this action the defendant died, and the defense is conducted by his executors. The plaintiff introduced evidence that the judgment was unsatisfied, and rested. The defendants introduced a certified copy of the discharge of Warren M. Hill granted on December 3, 1912, and rested. The plaintiff then showed in rebuttal a certified copy of the schedule of creditors in bankruptcy filed by Warren M. Hill, in which the name of the plaintiff did not appear. There was no further evidence. The judge ruled as requested by the defendants (1) that the certified copy of the discharge in bankruptcy made a prima facie case that the plaintiff's debt was properly scheduled, and that he was duly notified of the debtor's bankruptcy; (2) that the burden was upon the plaintiff to show that his debt or judgment was not scheduled according to law in the bankruptcy court; (3) that the bankruptcy proceedings were regular; and (4) that the plaintiff's claim was provable in bankruptcy. but refused to rule that the burden was upon the plaintiff to show that he was not notified of the debtor's bankruptcy and had no knowledge thereof, and found for the plaintiff. The case comes here on the defendants' exceptions to the refusals to rule, and to the finding. The questions presented relate wholly to the burden of proof.

The statement of the general rule as to the burden of proof is plain. The plaintiff, by asserting in his declaration facts which, if proved, establish a liability to him on the part of the defendants, has the burden of proving those facts. It was said by Chief Justice Shaw in Powers v. Russell, 13 Pick. 69, at pages 76, 77, that "where the party having the burden of proof establishes a prima facie case, and no proof to the contrary is offered, he will prevail. Therefore the other party, if he would avoid the effect of such prima facie case, must produce evidence of equal or greater weight to balance and control it, or he will fail. Still the proof upon both sides applies to the affirmative or negative of one and the same issue, or proposition of fact; and the party whose case requires the proof of that fact has all along the burden of proof. It does not shift, though the weight in either scale may at times preponderate. But where the party having the burden of proof gives competent and prima facie evidence of a fact, and the adverse party, in-

Evidence—burden of proof.

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stead of producing proof which would go to negative the same proposition of fact, proposes to show another and a distinct proposition which avoids the effect of it, there the burden of proof shifts, and rests upon the party proposing to show the latter fact." Hughes v. Williams, 229 Mass. 467, 118 N. E. 914, and cases collected.

See Com. v. Thurlow, 24 Pick. 374, 380, 381.

Applying this rule to the case at bar, it is clear that the plaintiff made out his case by the production of his judgment. The defendants did not attack that case, but sought to avoid its force by proof of another independent, distinct, and subsequent fact, namely, that after the rendition of the judgment Warren M. Hill had received a discharge in bankruptcy. That raised a new issue. It was an affirmative defense. The burden of proving it rested on the defendants as the parties alleging it. That burden required the proof of a discharge granted under such circumstances as would bar the plaintiff's judgment. The judge ruled that, prima facie, that burden was sustained by proof of the discharge in bankruptcy. But that ruling was not and could not rightly have been to the effect that the burden of proof was shifted to the plaintiff upon any phase of the discharge in bankruptcy. As was said by Bigelow, J., in Central Bridge Corp. v. Butler, 2 Gray, 130, at 132: "The burden of proof and the weight of evidence are two very different things. The former remains on the party affirming a fact in support of his case, and does not change in any aspect of the cause; the latter shifts from side to side in the progress of a trial, according to the nature and strength of the proofs offered in support or denial of the main fact to be established."

—action on judgment.

—proof of affirmative defense.

A prima facie case or prima facie evidence does not change the burden of proof. It only stands until its weight is met by evidence to the contrary. Carroll v. Boston Elev. R. Co. 200 Mass. 527, 536, 86 N. E. 793. The burden of proof continues to rest upon the party who, either as plaintiff or as defendant, asserts the fact necessary to enable him to prevail. He must ultimately establish that fact before he can become entitled to a finding or verdict in his favor, and the burden rests on him to do that, whatever may be the intervening effect of different kinds of evidence, or evidence possessing under the law varying degrees of probative value.

—prima facie—effect.

The pleading by the defendants of the discharge in bankruptcy as a bar to the plaintiff's claim imposed on them the burden of proving it. Whatever might be the prima facie effect of evidence of the discharge in bankruptcy granted by a court of competent jurisdiction, the burden of proof did not change to the plaintiff on that point, for the reason that the assertion of bankruptcy as a bar was not a part of the plaintiff's case, but on the issues raised by the pleadings was alleged by the defendants as a separate, subsequent fact in avoidance of the plaintiff's claim. Hence, the burden of proving a discharge of such nature and granted under such circumstances as would bar the plaintiff's claim was assumed by the defendants under the pleadings and it rested upon them to the end. Wylie v. Marinofsky, 201 Mass. 583, 88 N. E. 448.

This conclusion is supported in principle by Parker v. Murphy, 215 Mass. 72, 75, 102 N. E. 85. It seems to us to be supported by the greater weight of well-reasoned decisions in other jurisdictions. Bailey v. Gleason, 76 Vt. 115, 118, 56 Atl. 537; Wineman v. Fisher, 135 Mich. 604, 608, 98 N. W. 404; Sloan v. Grollman, 113 Md. 192, 194, 77 Atl. 577, Ann. Cas. 1912A, 544; Calmenson v. Moudry, 137 Minn. 123, 126, 162 N. W. 1076; Armstrong v. Sweeney, 73 Neb. 775, 103 N. W. 436; Bogart v.

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Cowboy State Bank & T. Co. — Tex. Civ. App. —, 182 S. W. 678, 682; Bunting Stone Hardware Co. v. Alexander, — Tex. Civ. App. —, 190 S. W. 1152, 1153. There are, however, contrary decisions. Alling v. Straka, 118 Ill. App. 184; Re Peterson, 137 App. Div. 435, 121 N. Y. Supp. 738; Merchants' Bank v. Miller, 176 App. Div. 412, 162 N. Y. Supp. 999, affirmed without opinion in 221 N. Y. 490, 116 N. E. 1060; Laffoon v. Kerner, 138 N. C. 281, 285, 50 S. E. 654. Other decisions respecting the burden of proving that the nature of the plaintiff's claim is such as not to be within the bar of a discharge in bankruptcy are not necessarily inconsistent with this result. Gatliff v. Mackey, 31 Ky. L. Rep. 947, 104 S. W. 379; Van Norman v. Young, 228 Ill. 425, 81 N. E. 1060; Hallagan v. Dowell, — Iowa, —, 139 N. W. 883, and B. F. Roden Grocery Co. v. Leslie, 169 Ala. 579, 53 So. 815, related to a question of pleading. The distinction between the burden of proof, the weight of evidence and the prima facie effect of a discharge in bankruptcy does not seem to have been clearly drawn in them.

An analysis of § 17 (a) (3) of the Bankruptcy Act of July 1, 1898, 1 Fed. Stat. Anno. 2d ed. 708, as amended by Act Feb. 5, 1903 (30 Stat. at L. 550, chap. 541, 32 Stat. at L. 798, chap. 487, § 5, Comp. Stat. 1916, § 9601), confirms this view. It is as follows: "A discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as . . . have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy."

The fair implication of these words is that the person who asserts the force of the discharge as a bar must show, in those instances where the debt has not been scheduled as required by the law and hence is within the exception to the bar of the discharge in bankruptcy, that nevertheless the debt is barred because within the excepted class of such unlisted debts belonging to creditors who either had notice or actual knowledge of the proceedings. In such cases it is only when a creditor is shown to belong to a class particularly excepted out of a class more generally excepted that the discharge in bankruptcy becomes a bar. A special exception is thus grafted upon another exception to the chief proposition that, in the main, a discharge in bankruptcy relieves the debtor from legal obligation to his creditors. The burden of showing an exception as a relief from the apparent force of a written instrument rests upon the party asserting it in many kinds of cases. See, for example, A. J. Tower Co. v. Southern P. Co. 184 Mass. 472, 69 N. E. 348; Nichols v. Commercial Travelers' Eastern Acci. Asso. 221 Mass. 540, 546, 109 N. E. 449; Hughes v. Williams, 229 Mass. 467, 471, 118 N. E. 914. See Com. v. Boyer, 7 Allen, 306. That principle would seem to be equally applicable to an exception to an exception to a general principle.

—proving discharge in bankruptcy.

This conclusion is consonant with natural justice. A discharge in bankruptcy under the terms of § 17 of the Bankruptcy Act is a bar to debts because creditors have had an opportunity to be heard in the bankruptcy courts upon the various matters there in litigation, have had the privilege of proving their claims, and of sharing in the distribution of the assets of their debtors. Their claims thus have become res judicata. This result ensues from the basic proposition that the bankruptcy court acquired jurisdiction of the creditor, who thus has had his day in court. But if the creditor, through no fault of his own, but wholly through the fault of the debtor upon whom is cast that duty by the law, has no notice or knowledge of the opportunity afforded him to appear in the bankruptcy court, there appears to be no natural justice in holding him bound by its adjudications. He is a

Bankruptcy—discharge—bar of debtor.

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stranger to the proceedings. Ordinarily one who asserts the binding force of a judgment by any court must show jurisdiction by that court over the person sought to be charged with the force of the judgment. He assumes the burden of proof on this point. Eastman v. Cooper, 15 Pick. 276, 285, 286, 26 Am. Dec. 600; Bissell v. Wheelock, 11 Cush. 277, 279.

Evidence—burden of proof—bar of judgment.

By the terms of § 17 the discharge has the effect to bar a provable debt only when it was scheduled or the creditor had notice or actual knowledge of the proceedings. If these elements do not exist, then the creditor has no connection with the bankruptcy proceedings. A mere proffer of a discharge in bankruptcy, without facts to show that an unscheduled creditor by the terms of the act became subject to the jurisdiction of the bankruptcy court, does not make the discharge effective as to such creditor. As was pointed out in Birkett v. Columbia Bank, 195 U. S. 345, at page 349, 49 L. ed. 231, 232, 25 Sup. Ct. Rep. 38, 39: "Section 7 of the Bankrupt Law of 1898 devolves a number of duties upon the bankrupt, all directed to the purpose of a full and unreserved exposition of his affairs, property and creditors. Among his duties he is required to 'prepare, make oath to, and file in the court . . . a list of his creditors, showing their residences, if known, if unknown that fact to be stated, the amounts due each of them. . . .' To the neglect of this duty the law attaches a punitive consequence."

Then follows a quotation of § 17 (a) (3) hereinbefore set forth. That consequence could hardly be punitive if, when it had appeared that the bankrupt had failed signally in the performance of this duty by omission in his schedules of any reference to a creditor or his claim, the creditor still had the burden of proof of showing that he was not affected by the discharge. It would seem to be necessary, in order to give a real "punitive consequence" to noncompliance with the requirements of the statute, to cast upon the bankrupt or his representatives the burden of proving that the discharge affected the creditor. It further was said in Birkett v. Columbia Bank, 195 U. S. at page 350. "The provisions of the law relied upon by the plaintiff in error [§§ 7, 17, 38, 65] are for the benefit of the creditors, not of the debtor."

Since the discharge is for the benefit of the debtor and not of the creditor, there would seem to be a defect in the law if the burden of proving negative consequences arising from the default of the debtor should be borne by the creditor, and not by the debtor. We think a correct construction of the law does not lead to such a result.

There is nothing in Kreitlein v. Ferger, 238 U. S. 21, 59 L. ed. 1184, 35 Sup. Ct. Rep. 685, as we understand it, at all inconsistent with this conclusion. It there is said at page 26 of 238 U. S.:

"There are only a few cases dealing with the subject, but they almost uniformly hold that where the bankrupt is sued on a debt existing at the time of filing the petition, the introduction of the order makes out a prima facie defense, the burden being then cast upon the plaintiff to show that, because of the nature of the claim, failure to give notice, or other statutory reason, the debt sued on was by law excepted from the operation of the discharge."

These words seem to us not to refer to the burden of proof, but to the burden of evidence. See Powers v. Russell, 13 Pick. 69, 76; Central Bridge Corp. v. Butler, 2 Gray, 130, 132; Carroll v. Boston Elev. R. Co. 200 Mass. 527, 536, 86 N. E. 793. See also 16 Cyc. 926, 932, 933, and cases there collected, and 10 R. C. L. § 45, p. 897, and cases there cited. The ruling made at the request of the defendant at the trial, as to the probative value of the discharge in bankruptcy, was in accordance with the statement quoted from Kreitlein v. Ferger. That opinion, at pages 30 and 31 of 238

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U. S., referred to the burden of proof as to want of notice, but held that it was unnecessary to decide the point. The view of the dissenting justices, as expressed at pages 35 to 38 of 238 U. S., appears to be unequivocal to the effect that the burden of proof to show that the creditor has notice or actual knowledge of the bankruptcy proceedings rests upon the party relying upon the discharge. The decision in Claflin v. Wolff, 88 N. J. L. 308, 96 Atl. 73, goes no further than Kreitlein v. Ferger. It follows that in our opinion there was no error in the refusal to rule that the burden was upon the plaintiff to show that he was not notified and had no knowledge of the debtor's proceedings in bankruptcy.

There was no legal inconsistency or reversible error in ruling that the discharge in bankruptcy was, on the facts, prima facie evidence that the plaintiff's claim was scheduled, and that the burden of producing some evidence to meet this prima facie proof rested upon the plaintiff, and at the same time finding in favor of the plaintiff. The plaintiff met the prima facie proof made out by the discharge by proof from the record of the bankruptcy court that his debt was not scheduled by the bankrupt. The defendants, having failed to show notice to or actual knowledge of the bankruptcy proceedings by the plaintiff, did not sustain the burden of proof resting upon them, under their answer, to show a discharge in bankruptcy effective as to the plaintiff.

Exceptions overruled.

ANNOTATION.

Burden of proof as regards discharge in bankruptcy.

I. Primary proof of discharge, 1672.
II. Operation of discharge as to claim:
 a. Generally, 1672.
 b. As to provability of claim, 1674.
II.—continued.
 c. As to scheduling of claim, 1674.
 d. As to notice or knowledge of bankruptcy proceeding, 1675.

I. Primary proof of discharge.

The authorities seem to be uniform to the effect that where a discharge in bankruptcy is pleaded as a defense to an action, and the plea is traversed, the burden is upon the defendant to prove his discharge, which may be done by putting in evidence a certified copy of the order granting the discharge. It has been expressly so held in the following cases: Williams v. First Nat. Bank (1917) 21 Ga. App. 182, 94 S. E. 73; SMITH v. HILL (reported herewith) ante, 1667; Gregory v. Edgerly (1885) 17 Neb. 374, 22 N. W. 703; Cooper v. Cooper (1853) 9 N. J. Eq. 566. And see Bunting Stone Hardware Co. v. Alexander (1917) — Tex. Civ. App. —, 190 S. W. 1152.

II. Operation of discharge as to claim.

a. Generally.

The opinion in the reported case (SMITH v. HILL, ante, 1667), clearly draws and observes the distinction between the burden of proof and the duty of going forward with the evidence, or of making a prima facie case. The other cases, however, do not expressly draw this distinction, and while many of them employ the term, "burden of proof," it is not probable that the courts in these cases were consciously using that term in the sense of the "risk of nonpersuasion," to employ Professor Wigmore's phrase, as distinguished from the duty of going forward with the evidence. And in few, if any, of them, was there any necessity for making the distinction, so far as practical results were concerned.

There is a decided conflict of authority upon the question of the burden of proof, as to whether or not a discharge in bankruptcy, when pleaded in bar of a claim against the bankrupt which existed at the time of the bankruptcy, is operative as to such claim, there being certain classes of obligations exempted from discharge in the various bankruptcy acts.

However, the decided weight of au-

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thority is to the effect, generally, that after a bankrupt has made out a prima facie defense to a suit based upon an obligation existing at the time of filling out the petition in bankruptcy, by the introduction in evidence of the order of discharge in bankruptcy which is presumed to cover all his debts, the burden is then not upon the defendant, but is cast upon the plaintiff, of showing that such discharge is not operative as to his claim.

United States.—Kreitlein v. Ferger (1915) 238 U. S. 21, 59 L. ed. 1184, 35 Sup. Ct. Rep. 685; Re Levitan (1915) 224 Fed. 241.

Illinois.—Van Norman v. Young (1907) 228 Ill. 425, 81 N. E. 1060; Alling v. Straka (1905) 118 Ill. App. 184.

Iowa.—Hallagan v. Dowell (1913) — Iowa, —, 139 N. W. 883, on subsequent appeal in (1917) 179 Iowa, 172, 161 N. W. 177.

Kentucky.—Gatliff v. Mackey (1907) 31 Ky. L. Rep. 947, 104 S. W. 379. And see Dupuy v. Harris (1846) 6 B. Mon. 534.

Mississippi.—King v. Kellogg (1917) 114 Miss. 375, 75 So. 134, appeal dismissed for want of jurisdiction in (1917) 245 U. S. 626, 62 L. ed. 518, 38 Sup. Ct. Rep. 12.

New Jersey.—Claflin v. Wolff (1915) 88 N. J. L. 308, 96 Atl. 73.

New York.—Sherwood v. Mitchell (1847) 4 Denio, 435; Tompkins v. Williams (1912) 206 N. Y. 747, 100 N. E. 1134, affirming on opinion below (1910) 137 App. Div. 521, 122 N. Y. Supp. 152; Stevens v. King (1897) 16 App. Div. 377, 44 N. Y. Supp. 893; Culver v. Torrey (1901) 34 Misc. 793, 69 N. Y. Supp. 919; Broadway Trust Co. v. Manheim (1905) 47 Misc. 415, 34 N. Y. Civ. Proc. Rep. 310, 95 N. Y. Supp. 93, 14 Am. Bankr. Rep. 122; Meyer v. Bartels (1907) 56 Misc. 621, 107 N. Y. Supp. 778; Re Peterson (1910) 137 App. Div. 435, 121 N. Y. Supp. 738, 24 Am. Bankr. Rep. 270, affirming (1909) 64 Misc. 217, 7 Mills, 233, 118 N. Y. Supp. 1077, 22 Am. Bankr. Rep. 549, reaffirmed on application to reopen decree in (1910) 68 Misc. 10, 124 N. Y. Supp. 907; Larsen v. Hyman (1910) 126 N. Y. Supp. 100; Manheim v. Loewe (1918) 185 App. Div. 601, 173 N. Y. Supp. 260.

North Carolina.—Laffoon v. Kerner (1905) 138 N. C. 281, 50 S. E. 654.

Vermont.—Bailey v. Gleason (1903) 76 Vt. 115, 56 Atl. 537; Ex parte Peterson (1905) 77 Vt. 226, 59 Atl. 828; Re Grout (1914) 88 Vt. 318, 92 Atl. 646, Ann. Cas. 1917A, 210.

In other words the burden is upon the creditor to show that the liability was within one of the classes exempted from discharge by the Bankruptcy Act. Re Levitan (1915) 224 Fed. 241; Hallagan v. Dowell (1917) 179 Iowa, 172, 161 N. W. 177; Dupuy v. Harris (1846) 6 B. Mon. (Ky.) 534; Gatliff v. Mackey (1907) 31 Ky. L. Rep. 947, 104 S. W. 379; Burnham v. Noyes (1878) 125 Mass. 85; Sherwood v. Mitchell (1847) 4 Denio (N. Y.) 435; Tompkins v. Williams (1912) 206 N. Y. 744, 100 N. E. 1134, affirming on opinion below (1910) 137 App. Div. 521, 122 N. Y. Supp. 152; Culver v. Torrey (1901) 34 Misc. 793, 69 N. Y. Supp. 919; Re Grout (Vt.) supra.

And it has been held that the prima facie effect of a discharge in bankruptcy is such as to throw upon a judgment creditor the burden of proving that there is a difference between his judgment and an account which was scheduled by the bankrupt, and upon which the judgment was based. Kreitlein v. Ferger (U. S.) supra.

But on the other hand, as above stated, it has been held that a defendant, who relies upon his discharge in bankruptcy to defeat a suit brought against him for the recovery of a debt existing at the time of the bankruptcy proceeding, must show that the debt is not within the exceptions enumerated in the Bankruptcy Act. Sorden v. Gatewood (1848) 1 Ind. 107; Gregory v. Edgerly (1885) 17 Neb. 374, 22 N. W. 703; Hyde Park Flint Bottle Co. v. Miller (1917) 179 App. Div. 73, 166 N. Y. Supp. 110 (this decision has been declared erroneous, see Manheim v. Loewe (1918) 185 App. Div. 601, 173 N. Y. Supp. 260); Fields v. Rust (1904) 36 Tex. Civ. App. 350, 82 S. W. 331; Imhoff v. Whittle (1904) — Tex. Civ. App. —, 82 S. W. 1056, reversing (1904) 81 S. W.

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814, and rehearing denied in (1904) 84 S. W. 243; Bogart v. Cowboy State Bank & Trust Co. (1915) — Tex. Civ. App. —, 182 S. W. 678; Bunting Stone Hardware Co. v. Alexander (1917) — Tex. Civ. App. —, 190 S. W. 1152.

b. As to provability of claim.

The rule seemingly more in accordance with sound reasoning is to the effect that a creditor seeking to avoid the effect of a discharge in bankruptcy, on the ground that his debt was not a provable one, has the burden of proving that such discharge was not operative as to the same. Hallagan v. Dowell (1913) — Iowa, —, 139 N. W. 883; Bunting Stone Hardware Co. v. Alexander (1917) — Tex. Civ. App. —, 190 S. W. 1152. And, conversely, it has been held that a defendant setting up the defense of a discharge in bankruptcy is not required to prove that the claim sued on was provable in the bankruptcy proceeding. Hallagan v. Dowell (1917) 179 Iowa, 172, 161 N. W. 177; Bailey v. Gleason (1903) 76 Vt. 115, 56 Atl. 537.

On the other hand, a contrary rule has been laid down. Baker v. Hughes (1909) 5 Ga. App. 586, 63 S. E. 587.

c. As to scheduling of claim.

The various bankruptcy acts provide in effect that a debt shall not be discharged unless properly scheduled, or unless the creditor has notice or knowledge of the bankruptcy proceeding.

Under provisions of this character, the general rule is to the effect that, where a discharge in bankrupcty is set up as a defense and proved, the burden is upon the complaining creditor to allege and prove that his claim was not scheduled. It was so held in Alling v. Straka (1905) 118 Ill. App. 184; Re Peterson (1910) 137 App. Div. 435, 121 N. Y. Supp. 738, 24 Am. Bankr. Rep. 270, affirming (1909) 64 Misc. 217, 7 Mills, 233, 118 N. Y. Supp. 1077, 22 Am. Bankr. Rep. 549 (holding that the creditor must rebut the presumption that the debt was scheduled); Larsen v. Hyman (1910) 126 N. Y. Supp. 100 (holding same as next preceding case); Manheim v. Loewe (1918) 185 App. Div. 601, 173 N. Y. Supp. 260, and Laffoon v. Kerner (1905) 138 N. C. 281, 50 S. E. 654. And proof of a discharge in bankruptcy has been said to constitute a prima facie defense, imposing upon the creditor the duty of going forward with the evidence and showing that the debt was not scheduled. This was the position taken in the reported case (SMITH v. HILL, ante, 1667), wherein the court took particular pains to point out the distinction between burden of proof and burden of evidence, and that the former never changes, whereas the burden of evidence, or duty of going forward with the evidence, fluctuates as the weight of evidence in either scale preponderates. And see B. F. Roden Grocery Co. v. Leslie (1910) 169 Ala. 579, 53 So. 815, wherein it was said that the failure to schedule a debt is matter for special replication to a plea setting up a defense of a discharge in bankruptcy.

But see to the contrary, Hyde Park Flint Bottle Co. v. Miller (1917) 179 App. Div. 73, 166 N. Y. Supp. 110, wherein it was held that the burden rested upon the bankrupt to show that the judgment in question was discharged, and that "one element necessary to prove this fact is that it was duly scheduled" (this holding, however, was expressly declared to be erroneous in Manheim v. Loewe (1918) 185 App. Div. 601, 173 N. Y. Supp. 260). So, in Texas, it has been held that where a discharge in bankruptcy is pleaded the bankrupt has the burden of proving that the debt was properly scheduled. Fields v. Rust (1904) 36 Tex. Civ. App. 350, 82 S. W. 331; Bogart v. Cowboy State Bank & Trust Co. (1915) — Tex. Civ. App. —, 182 S. W. 678. And in Bailey v. Gleason (1903) 76 Vt. 115, 56 Atl. 537, it was held that a bankrupt who relies upon a discharge must prove that the debts sued on were scheduled. And that, where the creditor shows that his claim was not properly scheduled, the bankrupt has the burden of proving that he attempted to properly schedule it, see Lansing Liquidation Corp. v. Heinze (1918) 184 App. Div. 129, 171 N. Y. Supp. 738.

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d. As to notice or knowledge of bankruptcy proceeding.

Where the creditor has overcome the defendant's prima facie case, created by carrying his burden and proving a discharge in bankruptcy, by showing a failure upon the part of such defendant to schedule the plaintiff's claim, it has been held that the burden of proof is still with the defendant to establish his defense and avoid the plaintiff's rebuttal, by proving that such plaintiff had notice or knowledge of the bankruptcy proceeding, the act providing that claims shall be barred by a discharge even though not scheduled, provided the creditor had notice or knowledge of the proceedings. This was the rule laid down in the reported case (SMITH v. HILL, ante, 1667) and Calmenson v. Moudry (1917) 137 Minn. 123, 162 N. W. 1076.

And some courts, without special reference to the question of proof of omission of the claim from the schedule, have held that the burden is upon the bankrupt defendant, in a suit upon a claim alleged by him to have been discharged, to prove that the omitted creditor had notice or knowledge of the bankruptcy proceeding, so as to avoid application of the provisions of the Federal Bankruptcy Act to the effect that a discharge in bankruptcy does not affect claims which were not scheduled, unless the owners of such claims had notice or actual knowledge of the proceedings in bankruptcy. Sloan v. Grollman (1910) 113 Md. 192, 77 Atl. 577, Ann. Cas. 1912A, 544; Wineman v. Fisher (1904) 135 Mich. 604, 98 N. W. 404; Armstrong v. Sweeney (1905) 73 Neb. 775, 103 N. W. 436. And see Parker v. Murphy (1913) 215 Mass. 72, 102 N. E. 85, and Bogart v. Cowboy State Bank & Trust Co. (1915) — Tex. Civ. App. —, 182 S. W. 678. In Sloan v. Grollman (Md.) supra, the court proceeded upon the theory that since the discharge of a bankrupt is for his benefit, and that as the omission of a claim from his schedule is due to his default, he should bear the burden of justifying such omission by proof of the required notice or knowledge.

So, in New York, on applications to cancel judgments pursuant to a state statute taken against a bankrupt who later obtained his discharge, it has been held that the burden was upon the bankrupt to show that the debts had been scheduled, or that the creditors had notice or knowledge of the bankruptcy proceedings. Graber v. Gault (1905) 103 App. Div. 511, 93 N. Y. Supp. 76; Weidenfeld v. Tillinghast (1907) 54 Misc. 90, 104 N. Y. Supp. 712, 18 Am. Bankr. Rep. 531, affirmed in (1907) 104 N. Y. Supp. 902. In Graber v. Gault (N. Y.) supra, the court said that, since the terms of the Bankruptcy Act exempt a creditor from the operative force of the discharge if it does not appear that the debt was scheduled, or that the creditor had notice or knowledge of the proceeding, "the fair conclusion is that the burden of showing such facts is devolved upon the bankrupt." But this case has been expressly repudiated by later decisions. See Manheim v. Loewe (1918) 185 App. Div. 601, 173 N. Y. Supp. 269, and additional cases cited in the following paragraph.

However, there are authorities to the effect that the burden of proving failure to receive notice of bankruptcy proceedings is upon the creditor, where the bankrupt pleads and proves his discharge as a defense to an action on a claim against him. Merchants Bank v. Miller (1917) 221 N. Y. 490, 116 N. E. 1060, affirming without opinion (1917) 176 App. Div. 412, 162 N. Y. Supp. 999; Broadway Trust Co. v. Manheim (1905) 47 Misc. 415, 34 N. Y. Civ. Proc. Rep. 310, 95 N. Y. Supp. 93, 14 Am. Bankr. Rep. 122; Larsen v. Hyman (1910) 126 N. Y. Supp. 100; Manheim v. Loewe (N. Y.) supra; Laffoon v. Kerner (1905) 138 N. C. 281, 50 S. E. 654. And see New York Inst. v. Crockett (1907) 117 App. Div. 269, 102 N. Y. Supp. 412. And in Stevens v. King (1897) 16 App. Div. 377, 44 N. Y. Supp. 893, it was held that a defendant, in order to avail himself of a discharge in bankruptcy, did not have to prove that the plaintiff had no notice of the bankruptcy

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proceeding, the court maintaining that the burden is on the plaintiff to show that the discharge is not effectual as to him, and that the question of lack of notice fell within the rule.

G. J. C.

ZOE OLIVE LOGAN et al., Appts.,
v.
MODERN WOODMEN OF AMERICA et al.
ADOLPHUS JONES et al., Respts.

Minnesota Supreme Court — June 15, 1917.

(137 Minn. 221, 163 N. W. 292.)

Insurance — payment into court — waiver of rights.

1. Paying the money into court was not an admission of liability to any particular claimant, but a demand that the court protect the association against double liability by determining to whom the money rightfully belonged.

[*See note on this question beginning on page* 1680.]

— benefit — designation of beneficiary.

2. Where the by-laws of a fraternal association are made a part of the contract of insurance, and provide that no part of the benefit fund shall be paid to any person not bearing a specified relationship to the assured, the designation of a beneficiary not bearing such relationship is invalid.

— refusal of assessments.

3. Where the by-laws provide that, in case an ineligible person is named as beneficiary, the insurance shall be payable to the widow and children of the assured, the association cannot refuse to receive assessments on the ground that the beneficiary named is ineligible, and the acceptance of such assessments does not operate as a waiver of the provision which made such beneficiary ineligible.

— cancelation of designation.

4. Where the designation of an eligible beneficiary has been duly canceled in the manner prescribed by the contract, the designation of an ineligible beneficiary in the new benefit certificate does not operate to revive or reinstate such canceled designation, where the by-laws provide that in such event the new certificate shall remain in force, and be payable to certain eligible beneficiaries designated therein.

— payment of assessments — effect.

5. The by-laws declare void any and all attempts of the insured to dispose of the fund otherwise than as provided in the contract, and an ineligible beneficiary acquired no interest therein by paying assessments, under an agreement with the insured to share in it.

— designation by by-laws.

6. The designated beneficiary being ineligible, the by-laws made the children of the insured his beneficiaries.

Headnotes by TAYLOR, C.

APPEAL by plaintiffs from a judgment of the District Court for Ramsey County in favor of the substituted defendants in an action brought to recover the amount alleged to be due on a benefit certificate. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Mr. **Percy D. Godfrey** for appellants.

Messrs. **James E. Doran** and **T. J. Doyle**, for respondents:

The original contract of insurance in which plaintiff Olive W. Austin was named beneficiary, having been surrendered and canceled by the society at the request of the insured, is canceled forever, there being no element of fraud or undue influence entering into such transaction.

Bush v. Modern Woodmen, — Iowa,

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—, 152 N. W. 31; Supreme Lodge, N. E. O. P. v. Hine, 82 Conn. 315, 73 Atl. 791; O'Brien v. Massachusetts Catholic Order of Foresters, 220 Mass. 79, 107 N. E. 400; Doherty v. A. O. H. Widows' & Orphans' Fund, 176 Mass. 285, 57 N. E. 463; United Order, G. C. v. Merrick, 165 Mass. 421, 43 N. E. 127; Supreme Lodge, K. H. v. Bieler, 58 Ind. App. 550, 105 N. E. 244; Supreme Lodge, O. M. P. v. Dewey (Supreme Lodge, O. M. P. v. Nevins) 142 Mich. 666, 3 L.R.A.(N.S.) 334, 113 Am. St. Rep. 596, 106 N. W. 140, 7 Ann. Cas. 681; Grand Lodge, C. K. P. v. Mackey, — Tex. Civ. App. —, 104 S. W. 907; White v. White, 111 Miss. 219, 71 So. 322; Carson v. Vicksburg Bank, 75 Miss. 167, 37 L.R.A. 558, 65 Am. St. Rep. 596, 22 So. 1; Gibbs v. Knights of Pythias, 173 Mo. App. 34, 156 S. W. 11; Alfsen v. Crouch, 115 Tenn. 352, 89 S. W. 329; Supreme Lodge, F. B. v. Price, 27 Cal. App. 607, 150 Pac. 803; Hoeft v. Supreme Lodge, K. H. 113 Cal. 91, 33 L.R.A. 174, 45 Pac. 185; Gregory v. Sovereign Camp, W. W. 104 S. C. 471, 89 S. E. 391; 4 Cooley, Briefs on Ins. p. 3776; Luhrs v. Supreme Lodge, K. L. H. 54 Hun, 636, 7 N. Y. Supp. 487; 1 Bacon, Life & Acci. Ins. 4th ed. ¶ 413, p. 901.

The policy issued in 1912 was a valid policy with a void designation.

Supreme Lodge, N. E. O. P. v. Hine, 82 Conn. 315, 73 Atl. 791; Clark v. Schwarzenberg, 162 Mass. 98, 38 N. E. 17; Britton v. Supreme Council, R. A. 46 N. J. Eq. 102, 19 Am. St. Rep. 376, 18 Atl. 675; Knights of Columbus v. Rowe, 70 Conn. 545, 40 Atl. 451; Cunat v. Supreme Tribe, B. H. 249 Ill. 448, 34 L.R.A.(N.S.) 1192, 94 N. E. 925, Ann. Cas. 1912A, 213; National Union v. Keefe, 263 Ill. 458, 105 N. E. 319, Ann. Cas. 1915C, 271, 172 Ill. App. 101; United Order, G. C. v. Merrick, 165 Mass. 421, 43 N. E. 127; Meyer v. Grand Lodge, S. H. 108 Minn. 25, 121 N. W. 235; Walter v. Hensel, 42 Minn. 204, 44 N. W. 57; Jewell v. Grand Lodge, A. O. U. W. 41 Minn. 406, 43 N. W. 88; Sharpless v. Grand Lodge, A. O. U. W. 135 Minn. 35, L.R.A. 1917B, 670, 159 N. W. 1086; Union Cent. L. Ins. Co. v. Buxer, 62 Ohio St. 385, 49 L.R.A. 753, 57 N. E. 66; Grand Lodge, C. K. P. v. Mackey, — Tex. Civ. App. —, 104 S. W. 907.

Plaintiff Zoe Olive Logan is not entitled to take under the policy issued in 1912, not being a blood relative as required by § 45 of the by-laws of the Modern Woodmen of America.

National Union v. Keefe, 263 Ill. 458, 105 N. E. 319, Ann. Cas. 1915C, 271, 172 Ill. App. 101; Bush v. Modern Woodmen, — Iowa, —, 152 N. E. 31; Baldwin v. Begley, 185 Ill. 180, 56 N. E. 1065; Supreme Lodge, N. E. O. P. v. Hine, 82 Conn. 315, 73 Atl. 791; Dusenbury v. General Grant Council, 96 Misc. 665, 161 N. Y. Supp. 103; Gregory v. Sovereign Camp, W. W. 104 S. C. 471, 89 S. E. 391.

Respondents are proper parties to this action, and entitled to have their rights litigated and determined.

Bush v. Modern Woodmen, — Iowa, —, 152 N. W. 31; Sanders v. Grand Lodge, A. O. U. W. 153 Ill. App. 7; Grand Lodge, A. O. U. W. v. Ehlman, 246 Ill. 555, 92 N. E. 962; Supreme Council, R. A. v. McKnight, 238 Ill. 349, 87 N. E. 299; Kirkpatrick v. Modern Woodmen, 103 Ill. App. 468; 29 Cyc. p. 156, ¶ 3; Taylor v. Hair, 112 Fed. 913; Pleasant v. Locomotive Engineers Mut. L. & Acci. Ins. Asso. 70 W. Va. 389, 73 S. E. 976, Ann. Cas. 1913E, 490.

Taylor, C., filed the following opinion:

In 1889, Oliver Jones procured a benefit certificate for the sum of $3,000 in the Modern Woodmen of America in which Olive Austin, his housekeeper and the mother of his deceased wife, was named as the beneficiary. In his later years it became difficult for him to pay the assessments upon the certificate, and he made an arrangement with Zoe Olive Logan, a granddaughter of Mrs. Austin and a niece of his deceased wife, to the effect that Mrs. Logan should pay these assessments, should receive the proceeds of the certificate, and should divide such proceeds equally between herself and Mrs. Austin. Pursuant to this arrangement, the original certificate was duly surrendered and canceled, and in lieu thereof a new certificate was issued, in which Mrs. Logan was named as the beneficiary. After the making of this arrangement, Mrs. Logan paid the assessments as they became due, until the death of Oliver Jones on October 15, 1915. After the death of the assured, Mrs. Austin and Mrs. Logan joined as plaintiffs in bringing this suit, and ask to recover the in-

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surance under the certificate issued in favor of Mrs. Logan, and, in case they are not entitled to recover it under that certificate, ask to recover it under the original certificate issued in favor of Mrs. Austin, and, in case they are not entitled to recover under either certificate, ask to recover the assessments paid by Mrs. Logan, amounting in the aggregate to the sum of $400. The children of the assured also made a claim for the insurance, whereupon the society paid the money into court, and the children were substituted in its stead as defendants. The case then went to trial to determine whether the fund belonged to the plaintiffs or either of them, or to the children, and resulted in a judgment in favor of the children. Plaintiffs appealed.

The by-laws of the society are incorporated in and made a part of the contract of insurance. Section 45 of these by-laws provides: "Benefit certificates shall be made payable only to the wife, surviving children, including legally adopted children, or some other person or persons specifically named in said benefit certificate as beneficiary, who are related to the member as heir, blood relative (blood relative meaning relationship not further removed than cousin in first degree), or person dependent upon him, or member of his family whom the applicant shall designate in his application. No payment shall be made upon any benefit certificate to any person who does not bear such relationship as wife, surviving child, legally adopted child, heir, blood relative, or person dependent upon, or member of the family of, the member at the time of his death."

Under this by-law, the assured could appoint as beneficiary any person within any of the designated classes, but could make no valid appointment of any person not within some one of such classes.

It is conceded that Mrs. Austin was a dependent of the assured and a member of his family at the time the first certificate was issued, and so remained until his death, and that she was properly and lawfully designated as the beneficiary in such first certificate. Section 47 of the by-laws provides that any member who desires to change his beneficiary shall execute the surrender clause on the back of his certificate and return the certificate to the society, and that the head clerk "shall thereupon issue a new benefit certificate to the beneficiary named in said surrender clause, subject to the provisions of § 45 hereof." In his application to have Mrs. Logan named as his beneficiary in place of Mrs. Austin, Oliver Jones stated that Mrs. Logan was his niece; and upon this application the society canceled the first certificate and issued a new certificate payable to Mrs. Logan, "related to said member in the relationship of niece." It is conceded, however, that Mrs. Logan in fact is not a blood relative of the assured, but the niece of his deceased wife, and that she was never dependent upon him, nor a member of his family. Consequently, she is not within any of the classes of persons eligible to be appointed as his beneficiary; and her appointment as such, being prohibited by the laws of the society, gave her no right to share in the benefit fund of the society. Middelstadt v. Grand Lodge, O. S. H. 107 Minn. 228, 120 N. W. 37; Meyer v. Grand Lodge, O. S. H. 108 Minn. 25, 121 N. W. 235; Anderson v. Royal League, 130 Minn. 416, L.R.A.1916B, 901, 153 N. W. 853, Ann. Cas. 1917C, 691; Bush v. Modern Woodmen, — Iowa, —, 152 N. W. 31, 162 N. W. 59; Supreme Lodge, O. M. P. v. Dewey, 142 Mich. 666, 3 L.R.A. (N.S.) 334, 113 Am. St. Rep. 596, 106 N. W. 140, 7 Ann. Cas. 681; O'Brien v. Massachusetts Catholic Order of Foresters, 220 Mass. 79, 107 N. E. 400; Murphy v. Nowak, 223 Ill. 301, 7 L.R.A.(N.S.) 393, 79 N. E. 112; Gregory v. Sovereign Camp, W. W. 104 S. C. 471, 89 S. E. 391; Kerr v. Crane, 212 Mass. 224, 40 L.R.A.(N.S.) 692, 98 N. E. 783.

Insurance—benefit—designation of beneficiary.

Plaintiffs presented evidence

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tending to show that the clerk of the local camp of which Oliver Jones was a member knew the actual relationship between him and Mrs. Logan, and contend that the society, by accepting the assessments while the local clerk possessed this knowledge, waived the by-laws making Mrs. Logan ineligible as a beneficiary. If appointing an ineligible person as beneficiary rendered the contract of insurance void, there would be force in this contention; for the society could not collect and retain the subsequent assessments, and also assert the forfeiture. But appointing an ineligible beneficiary did not render the contract void. Section 46 of the by-laws provides: "In the event of the disqualification of the beneficiary under the provisions of § 45 hereof, and if such member has failed to have another beneficiary named, as provided in § 47 hereof, then the amount to be paid under the benefit certificate shall be payable to the surviving beneficiaries, if any there be, or, if no beneficiaries survive him, then to the widow; if no widow, to his children, including his legally adopted children."

—designation by by-laws.

By virtue of this provision, if the beneficiary named is found to be ineligible, the widow, and, if no widow, the children, become the beneficiaries, and the obligation of the society remains in full force. If the appointee in the certificate is ineligible, the by-laws step in and appoint another in his stead who is eligible. Consequently, the society could not declare the contract annulled, nor refuse to receive the assessments on the ground that the beneficiary named was ineligible, and the payment and acceptance of the assessments merely continued the contract in force according to its terms. As the society had no option to refuse the assessments, it cannot be held to have waived the provisions of the by-laws by accepting them. Abell v. Modern Woodmen, 96 Minn. 494, 105 N. W. 65, 906; Johnson v. Modern Brotherhood, 109 Minn. 288, 27 L.R.A.(N.S.) 446, 123 N. W. 819; Meyer v. Grand Lodge, O. S. H. 108 Minn. 25, 121 N. W. 235; Bush v. Modern Woodmen, — Iowa, —, 152 N. W. 31.

—refusal of assessments.

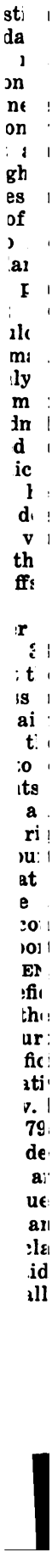
We are also unable to assent to the proposition that the payment of the money into court operated to waive the by-law. By paying the money into court, the society simply recognized liability to the rightful claimant thereto, not to any particular claimant; and its action amounted to nothing more than a demand that the court protect it against a double liability, by determining to whom the money rightfully belonged. Supreme Lodge, F. B. v. Price, 27 Cal. App. 607, 150 Pac. 803; Faubel v. Eckhart, 151 Wis. 155, 138 N. W. 615; Berg v. Damkoehler, 112 Wis. 587, 88 N. W. 606.

—payment into court—waiver of rights.

The contention that, if the appointment of Mrs. Logan as beneficiary was void, the original certificate issued in favor of Mrs. Austin remained in force, cannot be sustained. The appointment of Mrs. Austin as beneficiary was canceled by the assured in the manner prescribed by the by-laws; that the failure to appoint an eligible beneficiary in the new certificate did not revive or reinstate the canceled appointment, but, by force of the by-laws, made the children of the assured his legal beneficiaries. Vanasek v. Western Bohemian Fraternal Asso. 122 Minn. 273, 49 L.R.A.(N.S.) 141, 142 N. W. 333, Ann. Cas. 1914D, 1123; Meyer v. Grand Lodge, O. S. H. 108 Minn. 25, 121 N. W. 235; Jewell v. Grand Lodge, A. O. U. W. 41 Minn. 405, 43 N. W. 88; Bush v. Modern Woodmen, — Iowa, —, 152 N. W. 31; Supreme Lodge, N. E. O. P. v. Hine, 82 Conn. 315, 73 Atl. 791; Doherty v. A. O. H. Widows' & Orphans' Fund, 176 Mass. 285, 57 N. E. 463; Grand Lodge, C. K. P. v. Mackey, — Tex. Civ. App. —, 104 S. W. 907; Alfsen v. Crouch, 115 Tenn. 352, 89 S. W. 329.

—cancelation of designation.

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Plaintiffs further contend that, if they cannot recover under either certificate, Mrs. Logan is entitled to recover the amount of the assessments paid by her, pursuant to her agreement with the assured. She was undoubtedly entitled to collect them from him, or his estate, but it does not follow that she is entitled to collect them out of this benefit fund. The statutes provide that this fund shall not be applied by any legal or equitable process to pay any debt or liability of the insured. Gen. Stat. 1913, §§ 3548, 7951. Plaintiffs urge that the insurance was kept in force by the payments made by Mrs. Logan; that they were made pursuant to an agreement that she should share in the fund; and that the transaction should be given effect as an equitable assignment of the fund, to the extent, at least, of the amount advanced which went toward preserving the fund. Such contracts may doubtless be given effect, unless prohibited by statute or the laws of the society. Swedish Christian Mission Soc. v. Lawrence, 79 Minn. 124, 81 N. W. 756; Stronge v. Supreme Lodge, K. P. 189 N. Y. 346, 12 L.R.A.(N.S.) 1206, 121 Am. St. Rep. 902, 82 N. E. 433, 12 Ann. Cas. 941; McBride v. Thompson, 175 Mich. 136, 141 N. W. 541; Benard v. Grand Lodge, A. O. U. W. 13 S. D. 132, 82 N. W. 404; Kerr v. Crane, 212 Mass. 224, 40 L.R.A. (N.S.) 692, 98 N. E. 783. But § 47 of the by-laws provides: "Any attempt by a member to change the payee of the benefits of his benefit certificate by will or other testamentary document, contract, agreement, assignment, or otherwise than by strict compliance with the provisions of this section, shall be absolutely null and void. Any agreement entered into by the member, by the terms of which he attempts to assign the benefits, or any portion thereof, agreed to be paid under the certificate, to any other person than the beneficiary designated in the certificate, shall be absolutely void. Any agreement entered into by a member not to change his beneficiary shall be null and void."

—payments of assessments—effect.

This provision is a part of the contract, is valid and binding, and the assured could not create any right to the fund, or any part thereof, by an express or implied agreement prohibited by such provision. Thomas v. Covert (Thomas v. Supreme Lodge, K. P.) 126 Wis. 593, 3 L.R.A.(N.S.) 904, 105 N. E. 922, 5 Ann. Cas. 456; Faubel v. Eckhart, 151 Wis. 155, 138 N. W. 615; Baldwin v. Begley, 185 Ill. 180, 56 N. E. 1065: Supreme Lodge, N. E. O. P. v. Hine, 82 Conn. 315, 73 Atl. 791.

It follows that the trial court reached the correct conclusion, and its judgment is affirmed.

ANNOTATION.

What rights are waived by insurer who pays money into court.

In general.

It has been held that a payment into court by an insurer in an action on the policy precludes the insurer from objecting, in defense to its further liability, that the proper steps to perfect that liability were not taken. Giboney v. German Ins. Co. (1892) 48 Mo. App. 185; Johnston v. Columbian Ins. Co. (1810) 7 Johns. (N. Y.) 315; Canadian R. Acci. Ins. Co. v. Haines (1911) 44 Can. S. C. 386, 21 Ann. Cas. 916. In the case first cited, an action on an insurance policy, a payment into court was held to preclude the defendant from objecting that the action was premature, because brought before the expiration of sixty days after the furnishing of proofs of loss. In Johnston v. Columbian Ins. Co. (1810) 7 Johns. (N. Y.) 315, a payment into court was held to prevent an objection to the sufficiency of the proofs of loss, the court saying: "The payment of the money into court was an admission of the cause of action,

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as alleged in the declaration." In Canadian R. Acci. Ins. Co. v. Haines (1911) 44 Can. S. C. 386, 21 Ann. Cas. 916, the action was on an accident insurance policy, to recover for accidental death of the insured. The defendant tendered and paid into court $100, being the amount payable in case the insured had died as a result of intoxication. It was held that no objection could thereafter be made for failure to give the notice of death required by the policy.

In Elliott v. Lycoming County Mut. Ins. Co. (1870) 66 Pa. 22, 5 Am. Rep. 323, the action was on an insurance policy covering a house and a barn. The company paid into court the amount insured on the barn. It was held that this did not preclude it from maintaining, as against its liability for the sum insured on the house, that the policy was void for overinsurance. The court said: "Payment of money into court, when the declaration is on a special contract, admits a contract indeed, so as to supersede the necessity of proving it at the trial. 1 Tidd, Pr. 625. It is an acknowledgment of the right of action to the amount of the sum brought in; but beyond the amount of that sum it is no acknowledgment of the right whatever. id. 624. It waives the benefit of no defense, even though such defense be to the whole. It seems, therefore, that after payment of money into court there may be a nonsuit, a judgment as in case of a nonsuit, a demurrer to evidence, or a plea puis darrien continuance; in short, that the cause goes on substantially in the same manner as if the money had not been paid in at all; in other words, the defendant is not precluded by it from taking a defense which goes to the whole cause of action."

In Cox v. Parry (1786) 1 T. R. 464, 99 Eng. Reprint, 1199, the action was on an insurance policy, and was brought by a person not entitled to sue thereon, because not in privity with the person named as beneficiary. The defendant made a payment into court. After pointing out that the plaintiff had no right to recover on the contract, the court said: "But a great question in the case is, whether the defendant has not precluded himself from making that objection by paying money into court. Therefore, it will be necessary to see what effect paying money into court has in the cause. It admits that the plaintiffs have a right to maintain the action, and reduces the question simply to the quantum of damages which they are entitled to recover. In this case, if the defendant had not paid money into court, the plaintiffs must have been nonsuited; for the executors of Shultz could not have recovered on a policy made in the name of De Simons only. But as the defendant has paid money into court, he has thereby admitted that the plaintiffs are entitled to maintain their action on the policy to the amount of that sum. But he has admitted nothing more. He does not, by paying money into court, vary the construction and import of the policy, so as to entitle the plaintiffs to recover beyond that extent."

In Keener v. Grand Lodge, A. O. U. W. (1889) 38 Mo. App. 543, it appeared that the beneficiary named was the mistress of the insured. A relative also claiming the proceeds of the certificate, the association paid the amount into court and interpleaded the claimants. It was held that it did not thereby admit, but on the contrary denied, the right of the beneficiary to take, the court saying: "The fact of its fear that she is not the rightful party is the cause of the association taking the course it has."

In the reported case (LOGAN v. MODERN WOODMEN, ante, 1676), it is held that a beneficial association did not, by paying the amount of the certificate into court, waive a by-law whereby the beneficiary was required to be a blood relative of the insured.

In Clogg v. McDaniel (1899) 89 Md. 416, 43 Atl. 795, a mutual benefit company impleaded several claimants, and brought the amount of the policy into court. A question arising as to the validity of an assignment on which one of the claimants rested his case, the court said: "If this were a valid defense at all, it was one which the

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association might have made. Having admitted its liability by paying the money into court, the question is entirely foreclosed."

In Ballou v. Gile (1880) 50 Wis. 614, 7 N. W. 561, it appeared that the beneficiary died before the insured. His administrator claimed the proceeds of the insurance. By a by-law it was provided that in case no designated beneficiary was living the proceeds should go to the widow of the insured. It was held that a payment of the proceeds into court did not deprive the widow of her rights under the by-law.

As to change of beneficiary.

There is a conflict of authority as to whether an insurer, by paying into court the amount of the policy or benefit certificate, renders effective an attempted change of beneficiary by the insured, which was not made in accordance with the provisions of the policy or the by-laws of the insurer. In some jurisdictions it is held that such a payment has no effect on the rights of the parties, which must be judged by the situation existing at the time of the death of the insured. McLaughlin v. McLaughlin (1894) 104 Cal. 171, 43 Am. St. Rep. 83, 37 Pac. 865; Supreme Lodge, F. B. v. Price (1915) 27 Cal. App. 607, 150 Pac. 803; Finnell v. Franklin (1913) 55 Colo. 156, 134 Pac. 122; Freund v. Freund (1905) 218 Ill. 189, 109 Am. St. Rep. 283, 75 N. E. 925; Knights of Maccabees v. Sackett (1906) 34 Mont. 357, 115 Am. St. Rep. 532, 86 Pac. 423; Ireland v. Ireland (1886) 42 Hun (N. Y.) 212; Independent Foresters v. Keliher (1900) 36 Or. 501, 78 Am. St. Rep. 785, 59 Pac. 324, 1109, 60 Pac. 563; Modern Woodmen v. Headle (1914) 88 Vt. 37, L.R.A.1915A, 580, 90 Atl. 893; Berg v. Damkoehler (1902) 112 Wis. 587, 88 N. W. 606. See the dictum in Faubel v. Eckhart (1912) 151 Wis. 155, 138 N. W. 615. See also the following cases, wherein the point was not discussed, but the ruling was in accord with the foregoing rule: Wendt v. Iowa Legion of Honor (1887) 72 Iowa, 682, 34 N. W. 470; Shuman v. Ancient Order, U. W. (1900) 110 Iowa, 642, 82 N. W. 331; Ancient Order of Gleaners v. Bury (1911) 165 Mich. 1, 34 L.R.A.(N.S.) 277, 130 N. W. 191; Thomas v. Thomas (1892) 131 N. Y. 210, 27 Am. St. Rep. 582, 30 N. E. 61; Fink v. Fink (1902) 171 N. Y. 623, 64 N. E. 506.

In Ireland v. Ireland (1886) 42 Hun (N. Y.) 212, wherein the contest was between the original and the substituted beneficiary, the court said: "The insurance association was thus allowed to drop out of the contest, upon the theory that it was ready to pay the rightful claimant. Its payment of the money does not in any way better or prejudice the legal position of either party against the other. The party that succeeds must make a case that would have entitled her to succeed against the association." See to the same effect, Independent Foresters v. Keliher (1900) 36 Or. 501, 78 Am. St. Rep. 785, 59 Pac. 324, 1109, 60 Pac. 563.

In Supreme Lodge, F. B. v. Price (1915) 27 Cal. App. 607, 150 Pac. 803, it appeared that the by-laws of the insurance association provided for a change on a written application. The insured wrote a letter to a third person, expressing his desire that another than the beneficiary should receive the proceeds. A deposit of insurance money in court, and an interpleader of the claimants, were held not to waive a by-law of the insurer as to the manner of changing the beneficiary.

In McLaughlin v. McLaughlin (1894) 104 Cal. 171, 43 Am. St. Rep. 83, 37 Pac. 865, it appeared that the by-laws of an insurer required a change of beneficiary to be made by a surrender of the old certificate and the issue of a new one. A member attempted to make a change of beneficiary, but did not comply with the by-law. It was held that the failure was not waived by paying the amount called for by the certificate into court.

In Finnell v. Franklin (1913) 55 Colo. 156, 134 Pac. 122, it appeared that the by-laws regulated the manner of changing the beneficiary. The insured attempted to make the change by will. The court said: "Such provisions were for the mutual benefit of the association and its members, and

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the deposit of the money with the court in no sense constituted a waiver thereof. Rollins v. McHatton (1891) 16 Colo. 203, 25 Am. St. Rep. 260, 27 Pac. 254. The only substantial effect of that act, under the circumstances of this case, was to request the court to award the fund as equity and the law might direct, under the terms of the contracts of insurance." See to the same effect, Thomas v. Covert (Thomas v. Supreme Lodge, K. H.) (1906) 126 Wis. 593, 3 L.R.A.(N.S.) 904, 105 N. W. 922, 5 Ann. Cas. 456.

In Freund v. Freund (1905) 218 Ill. 189, 109 Am. St. Rep. 283, 75 N. E. 925, it appeared that an attempted change of beneficiary was not indorsed on the policy by the company at its home office, as required by the terms of the policy. The court said: "The mere fact that the company paid the money into court, to be disposed of as the court should direct, cannot operate as a waiver of any of the vested rights of Karl Freund, which accrued by reason of the death of his father. The waiver by the company can only operate in favor of the assured, as between the company and the assured; but not as between the company and the third persons whose rights have vested by the death of the insured."

In Knights of Maccabees v. Sackett (1906) 34 Mont. 357, 115 Am. St. Rep. 532, 86 Pac. 423, it appeared that the request for a change of beneficiary was not received by the insurer until after the death of the insured. The court said: "By paying the money into court the association waived, so far as it could do so, the failure of the insured to comply strictly with the by-laws of the order; but such waiver could not impair rights which became vested upon the death of the insured."

In Modern Woodmen v. Headle (1914) 88 Vt. 37, L.R.A.1915A, 580, 90 Atl. 893, it was held that where the new certificate was not delivered during the lifetime of the insured, as required by a by-law, the paying of the amount of the certificate into court did not waive the by-law. The court said: "It is also said that it waived the provisions of the by-laws by paying the fund into court, and asking that the adverse claimants be required to interplead. By the great weight of authority, the society cannot be regarded as having waived the requirement of the by-laws, by bringing the bill of interpleader and paying the fund into court. By so doing the society admitted its liability under one or the other of the certificates, and asked the court of chancery to protect it, by determining the conflicting rights of the claimants; but it cannot be held that the rights of either claimant are prejudiced thereby."

In Berg v. Damkoehler (1902) 112 Wis. 587, 88 N. W. 606, it appeared that the insured had a right to change the beneficiary, by making a request in writing duly acknowledged. He sent in an unacknowledged request, and died before he could be notified of its insufficiency. It was held that, by paying the amount of the insurance into court, the insurer did not waive the provision requiring acknowledgment.

In other jurisdictions the restrictions placed on a change of beneficiary are considered as being entirely for the benefit of the insurer, and it is held that by paying the amount of the insurance into court the restriction is waived, and the change is made effective. Supreme Conclave, R. A. v. Cappella (1890) 41 Fed. 1; Titsworth v. Titsworth (1888) 40 Kan. 571, 20 Pac. 213; Hall v. Allen (1897) 75 Miss. 175, 65 Am. St. Rep. 601, 22 So. 4; Frakes v. Brotherhood of Locomotive Firemen (1918) — Mo. App. —, 204 S. W. 26; Henderson v. Modern Woodmen (1912) 163 Mo. App. 186, 146 S. W. 102; John Hancock Mut. L. Ins. Co. v. White (1898) 20 R. I. 457, 40 Atl. 5; John Hancock Mut. L. Ins. Co. v. Bedford (1914) 36 R. I. 116, 89 Atl. 154; Coleman v. Grand Lodge, C. K. P. (1907) — Tex. Civ. App. —, 104 S. W. 909.

In Titsworth v. Titsworth (1888) 40 Kan. 571, 20 Pac. 213, involving the validity of a change of beneficiary, it was said: "It must be constantly borne in mind that the Ancient Order of United Workmen, the association

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that issued the benefit certificate, is no longer a party, and is not taking any part in the litigation. It has paid the money into court, and has been released from all obligation respecting it. This payment, however, is an admission on its part that the benefit certificate was rightfully issued, and hence all contention as to whether its rules and regulations respecting these matters had been complied with is out of the case, and is entirely disposed of."

In Supreme Conclave, R. A. v. Cappella (1890) 41 Fed. 1, it appeared that the insured did all that was incumbent on him to do in order to change the beneficiary, and only the formal making of the change by the association remained undone at the time of his death. The association paid the money into court, and interpleaded the original and the substituted beneficiary. It was held that, in the exercise of its equitable powers, the court would consider the change as made.

In Hall v. Allen (1897) 75 Miss. 175, 65 Am. St. Rep. 601, 22 So. 4, it appeared that the beneficiary named in a certificate died before the insured. The latter directed an agent to have a new certificate issued, but the insured died before the same was delivered. Section 66 of the constitution of the insurer provided as follows: "Any member desiring to make a new direction as to the payment of his benefit certificate may do so, by and with the consent of the lodge of which he is a member. He shall then authorize or make such change in writing on the back of the certificate in the form prescribed, attested by the secretary, with the seal of the lodge attached; but no such change or transfer shall be valid or have any binding effect until reported to the grand secretary and treasurer. . . . All transfers of beneficiary certificates shall be recorded in the beneficiary certificate register of the subordinate lodge, and also in the grand register." The insurer paid the money into a bank, subject to the order of the court. Holding that the newly designated beneficiary was entitled to the fund, the court said: "The payment of the money into the bank had the effect to remit the legal question of who was the rightful claimant of the fund arising from the benefit certificate, to the court. It had no effect as between the rival claimants, but it did operate a waiver by the order, so far as its rights were concerned, of conformity of the change in the benefit certificate to the provisions of § 66 of the constitution of the grand lodge; so long, at least, as the order did not appear as a party resisting the payment. The order is no party here; does not set up such want of conformity; and no other party can, in such case, invoke the said § 66, intended alone for the protection of the order."

In Henderson v. Modern Woodmen (1912) 163 Mo. App. 186, 146 S. W. 102, the court, after setting out the attempted change, said: "As against the company, this was not sufficient; but as it does not insist upon a strict compliance with the by-laws, and has paid the money into court and asked that the court determine who shall receive the benefits, in order that it may be protected from the adverse claims of the plaintiff and interpleaders, it thereby waived a strict compliance with said by-laws. The law is that such by-laws are made solely for the benefit of such organization, and as the plaintiff, the beneficiary named in the certificate, had no vested interest in the benefits, she can have no good reason to complain, on the ground that the by-law in question was not strictly complied with."

In John Hancock Mut. L. Ins. Co. v. White (1898) 20 R. I. 457, 40 Atl. 5, it appeared that the request for a change of beneficiary had been received, but not consented to, by the insurer at the time of the death of the insured. The court held that, by paying the proceeds of the policy into court, the absence of consent was waived, saying: "The assured had done everything that was necessary on her part to change the beneficiary under the policy. That a change was not made was due to the neglect of the company. The provision for the

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consent of the company to the change was solely for its protection, and therefore one on which it alone can insist. By filing its bill that the respondents interplead, and thereby offering to pay the fund as the court shall determine, it has waived its right to say that it did not consent, and no one else can urge the lack of its consent in its name." See to the same effect, John Hancock Mut. L. Ins. Co. v. Bedford (1914) 36 R. I. 116, 89 Atl. 154.

In Sofge v. Supreme Lodge, K. H. (1897) 98 Tenn. 446, 39 S. W. 853, it appeared that a change of beneficiary was made in due form. The former beneficiary denied the validity of the change, and the insurer paid the money into court. It was contended for the former beneficiary that, by so doing, it had waived the by-law permitting a change of beneficiary. The court, in holding the change to be effective, said: "We do not overlook the point pressed in argument that the rules and by-laws of the order are made for its protection, and that no issue is made in this case with the order, but that it has paid the money into court and retired from the contest. While this is true, the respective rights of these claimants must be determined by a consideration of the power reserved to the assured, under the rules and by-laws of the order, to deal with the benefit certificate issued upon his life." W. A. S.

STATE OF NEW HAMPSHIRE
v.
LEE HUTCHINS.

New Hampshire Supreme Court — January 7, 1919.

(— N. H. —, 105 Atl. 519.)

Estoppel — of state — failure to supervise construction of bridge.

1. The state does not, by failing to oversee the construction of a bridge from time to time so as to provide sufficient clearage for passage of boats, estop itself from requiring the owner to make the necessary changes at his own expense to accommodate such traffic.

[*See note on this question beginning on page* 1694.]

Water — right to obstruct navigation.

2. A riparian owner has no right to obstruct a public right of navigation unless it has been granted by the legislature.

Evidence — presumption — release of navigation rights.

3. A legislative grant or release of public rights of navigation in favor of private persons will not be presumed.

Water — grant of right to obstruct navigation — implication.

4. A right to obstruct the passage of boats will not be implied from a grant of a right to maintain a bridge, if the bridge can be maintained in such a manner as to give free passage to boats.

— construction of grant.

5. A provision in a grant of a right to construct and maintain a bridge that it shall not be lawful to continue any bridge so as to prevent the passage of boats is a reservation as against the structure then existing, as well as against those thereafter erected.

— conflicting clauses of grant — construction.

6. A grant of the right and privilege of a bridge and of continuing the same is not destroyed, so as to make the grant meaningless, by a subsequent clause that it shall be continued so as not to prevent the passage of boats, if the right to maintain any bridge at the point in question was doubtful.

— change in size of boats — effect.

7. A provision in a grant of a right to maintain a bridge that it shall not be lawful to continue it so as to prevent the passage of boats applies to any boats which may subsequently be

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put in service, although their size will require a reconstruction of the bridge.

Definition — boats.

8. A provision in a grant of a right to maintain a bridge that it shall not be lawful to continue it so as to prevent the passage of boats and rafts will not be restricted to rowboats and craft of a similar size, when the legislature, in several acts passed about the time of the one in question, applied the word "boat" to craft of a larger size.

Bridge — charter — navigation rights.

9. A charter for building a bridge which does not mention the navigation rights will leave such rights in the public.

— duty to alter to accommodate travel.

10. The owner of a right to bridge a navigable stream must alter the bridge to accommodate demands for travel in the water under it, and the comparative money value or utility of the conflicting uses is immaterial.

Water — encroachment — proceeding at peril.

11. One claiming against the rights of the public in public waters proceeds at his peril if he does not procure an authoritative definition of his rights in advance.

Estoppel — want of legal capacity.

12. Want of legal capacity cannot be supplied by estoppel.

Nuisance — abatement — contribution by state.

13. The state cannot be made to contribute to the abatement of a nuisance consisting of a bridge erected by a private citizen over navigable water.

Appeal — incompetent evidence — nonprejudicial error.

14. The admission in an action to compel reconstruction of a bridge, of incompetent evidence in the form of a statutory declaration that the bridge was a nuisance, is not reversible error if it is shown to be a nuisance in fact by obstructing general navigation.

EXCEPTIONS by both plaintiff and defendant to rulings of the Superior Court for Belknap County, made during the trial of an action brought to abate, as a public nuisance, a bridge obstructing navigation; the state excepting to the order for contribution and to limiting the height of the bridge to 11 feet; and defendant excepting to the order requiring removal of the bridge, or its reconstruction. *State's exception sustained. Defendant's exception overruled.*

The facts sufficiently appear in the opinion of the court.

Mr. Oscar L. Young, Attorney General, for the State:

The waterways are great natural highways, the gifts of nature; and when man attempts to interfere with them, it should be for the purpose of increasing the natural facilities, and not of destroying them.

Sullivan v. Jernigan, 21 Fla. 264.

The general power to construct a bridge does not carry with it the right to erect a structure which will in any way seriously interfere with navigation.

Thompson v. Androscoggin River Improv. Co. 54 N. H. 548; Barnes v. Racine, 4 Wis. 454; Hickok v. Hine, 23 Ohio St. 523, 13 Am. Rep. 255; Pennsylvania v. Wheeling & B. Bridge Co. 13 How. 518, 14 L. ed. 249; Clement v. Metropolitan West Side Elev. R. Co. 59 C. C. A. 289, 123 Fed. 271; Terre-Haute Drawbridge Co. v. Halliday, 4 Ind. 36; State v. Freeport, 43 Me. 198; Southern R. Co. v. Ferguson, 105 Tenn. 552, 80 Am. St. Rep. 908, 59 S. W. 343; Little Rock M. R. & T. R. Co. v. Brooks, 39 Ark. 403, 43 Am. Rep. 277; Columbus Ins. Co. v. Peoria Bridge Asso. 6 McLean, 70, Fed. Cas. No. 3,046; Selman v. Wolfe, 27 Tex. 68.

The requirements and conditions of the grant should have been followed and adhered to implicitly.

Cape Elizabeth v. Cumberland County, 64 Me. 456.

Even though the bridge as originally built and as contemplated by the legislature was consistent with the conditions then existing, there is no legal reason why the owner should not be required to alter the bridge in such a way that it shall comply with the demands and requirements of changed conditions.

United States v. St. Louis, A. & T. R. Co. 43 Fed. 414.

The right to do anything or transact any business which constitutes a public nuisance cannot be acquired by prescription.

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State v. Griffin, 69 N. H. 1, 41 L.R.A. 177, 76 Am. St. Rep. 139, 39 Atl. 260; Hynes v. Brewer, 194 Mass. 435, 9 L.R.A.(N.S.) 598, 80 N. E. 503; 29 Cyc. 1207.

Mr. Charles B. Hibbard, for defendant:

The court may refuse to the state, as well as to any other plaintiff, relief in violation of "equity or good conscience" and condition its decree on the state's performance of whatever justice may require.

Hunter v. Carroll, 64 N. H. 572, 15 Atl. 17, 67 N. H. 262, 29 Atl. 639; Cheshire Provident Inst. v. Stone, 52 N. H. 365; Moore v. Kidder, 58 N. H. 115.

Delay by the state in instituting proceedings for a length of time may be regarded as laches, precluding it from relief.

State v. Boston & M. R. Co. 75 N. H. 341, 74 Atl. 542; United States v. Insley, 130 U. S. 263, 32 L. ed. 968, 9 Sup. Ct. Rep. 485; Missouri v. Illinois, 180 U. S. 208, 245, 45 L. ed. 497, 513, 21 Sup. Ct. Rep. 331; Georgia v. Tennessee Copper Co. 206 U. S. 230, 239, 51 L. ed. 1038, 1045, 27 Sup. Ct. Rep. 618, 11 Ann. Cas. 488.

By the common law of New Hampshire, the state owns the land under the waters of Lake Winnipesaukee to high-water mark, but each littoral owner has the right of occupying and even of appropriating portions of the state's land, provided he does not unreasonably interfere with navigation, fishing, or any other public right.

Clement v. Burns, 43 N. H. 616; Concord Mfg. Co. v. Robertson, 66 N. H. 18, 18 L.R.A. 679, 25 Atl. 718; Winnipesaukee Camp-Meeting Asso. v. Gordon, 67 N. H. 98, 29 Atl. 412; Dolbeer v. Suncook Waterworks Co. 72 N. H. 564, 58 Atl. 504.

The word "boat" applies only to rowboats and craft of a similar size. Dugan v. Bridge Co. 27 Pa. 303, 67 Am. Dec. 464.

Peaslee, J., delivered the opinion of the court:

The state's exception to the refusal to order the raising of the bridge to a height giving 15 feet clearance above high water presents the question whether the public right of navigation in this strait has been granted away by the legislature. If it has not been so granted, the defendant has no right to prevent such navigation. Connecticut River Lumber Co. v. Olcott Falls Co. 65 N. H. 290, 13 L.R.A. 826, 21 Atl. 1090.

Water—right to obstruct navigation.

The defendant's rights in the premises are based upon an act passed by the legislature in 1808. At that time his predecessor in title, Nathaniel Davis, had constructed a bridge at this place, and petitioned the legislature for authority to maintain the same. The act provides: "That the right and privilege of said bridge, and of continuing the same, and of continuing any other bridge at the place where the said bridge is now erected, be and hereby is granted unto and vested in the said Nathaniel Davis, his heirs and assigns forever. And be it further enacted that it shall not be lawful for the said Nathaniel Davis, his heirs or assigns, to continue any bridge at the place aforesaid, so as to prevent the passage of boats or rafts under the same; and said bridge shall at all times be free for all persons who please to pass over the same." 7 N. H. Laws, 665.

The defendant contends that this is a grant of a right to maintain the bridge as it was in 1808, and that a permanent right to impede public travel to that extent was conveyed thereby. If this is not so, he further contends that the rights reserved to the state are only for the passage of rowboats and the like, and that as to larger craft the right to prevent travel was conveyed by the grant.

A legislative grant or release of public rights of navigation in favor of private parties is not to be presumed. It will not be inferred because it would make a private grant more beneficial to the grantee. The incidental power of discontinuing such right "cannot be implied from anything less than neces-

Evidence—presumption—release of navigation rights.

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sity." Connecticut River Lumber Co. v. Olcott Falls Co. 65 N. H. 380, 13 L.R.A. 826, 21 Atl. 1091. There is no necessity in the present case. A bridge can be maintained and still give free passage for the boats desiring to navigate the strait.

Water—grant of right to obstruct navigation—implication.

If a grant of a right to obstruct navigation could be inferred from the grant of "the right and privilege of said bridge, and of continuing the same," it is distinctly and in terms negatived by what follows. The provision "that it shall not be lawful for . . . Davis . . . to continue any bridge at the place aforesaid so as to prevent the passage of boats" is an express reservation of rights as against the structure then existing, as well as against those thereafter erected. The grant is not without limit as to the existing bridge. It conveys the right to maintain the bridge if and so far as it does not infringe upon the rights which are reserved. The legislature was careful to negative the claim that the bridge Davis had built should be the measure of his rights. They chose to have the public rights remain paramount. It follows that whatever rights are described in the last sentence of the act belong to the public, whether infringed upon by the original bridge or not.

—construction of grant.

It is urged that this interpretation of the act renders it meaningless; that it leads to the conclusion that rights were granted by the first clause and taken away by the second. But it is by no means certain that Davis had any right as an incident to his title as littoral proprietor to maintain a bridge, even though it did not obstruct public travel. It is manifest that the existence of such right would at least be questionable, and that a legislative grant would be desirable. It is this right which the act grants, and the second clause was added to make sure there should be no claim of an implied grant of a right to obstruct navigation, or that the existing bridge measured the rights conferred.

—conflicting clauses of grant—construction.

The language of the act aptly expresses the legislative purpose to retain the public right for use whenever occasion therefor should arise in the future. If there were no boats on the lake, the passage of boats could not fairly be said to be prevented by the bridge. If there were only small boats, a small opening only would be required. But whatever their size, the right of passage for them was retained, and could be asserted whenever the occasion to use it should arise. As before stated, it is the public travel over this public waterway which measures the extent to which Davis and his successors were bound to keep the channel free from obstruction by them. The existing structure was legalized so far only as it did not prevent the passage of boats. His rights are similar to those of abutters to temporarily use a land highway. He may exercise them in any way not inconsistent with the needs of public travel. State v. Kean, 69 N. H. 122, 125, 48 L.R.A. 102, 45 Atl. 256.

—change in size of boats—effect.

What was meant by the term "boats and rafts?" The defendant concedes that the meaning of the word "boat" may be broad enough to cover all water craft, but claims that it was here used in a restricted sense, and that it applies only to rowboats and craft of a similar size. Definitions satisfying the claim of either party are to be found in the dictionaries, but we are not left to the expedient of merely choosing between these. There is other and more satisfactory evidence of how the term was understood by the legislators who used it in 1808. From 1792 until the passage of this act in 1808, the legislature granted charters for many canal companies, and from time to time passed acts changing the rates of toll. In these acts the craft ply-

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ing upon the Merrimack and Connecticut rivers are uniformly described as boats. The matter of the size of craft is referred to, for the toll is fixed by tonnage. Such expressions as the following abound: "For every boat above one ton's burthen;" "for every loaded boat 3 cents per ton;" "according to the tons said boats will carry;" for every ton "not exceeding 5 tons, 10 cents; for every additional ton of said goods above 5, 6 cents;" "for each boat and loading not exceeding 2 tons' weight $1, if more than 2 tons 50 cents for each additional ton;" "boats of 10 tons' burthen." These and similar expressions are found in many different acts which were passed at about the time of the grant to Davis; three of them at the same session of the legislature.[1]

Their bearing upon the question here is manifest. They afford satisfactory proof that the term was used in a broad rather than a narrow sense, and that the intent was to retain the whole of the public right of navigation.

Definition—boats.

The enactment of this class of legislation bears upon the issue of legislative intent in other ways. It shows that at the beginning of the 19th century the idea was prevalent that the inland waters of the state were to become its great highways for the transportation of freight. The legislative viewpoint as to the use to be made of Lake Winnepesaukee is more accurately shown in this way than by the vague and scanty evidence as to what craft were then in actual use there. The country was undeveloped and sparsely settled. Great advances were expected and planned for. The grant in 1796 of a charter for improving the Upper Merrimack, upon condition that the grantees should "render said waters navigable for boats of ten tons' burthen to pass up and down from Isle of Hooksett falls to Winnipisiokee pond" (6 N. H. Laws, 298, 299), shows that a future commercial use of the lake as a waterway was contemplated before the grant to Davis was made.

In the forty or more bridge charters granted by the legislature before 1809, mention of public rights to navigate the waters to be crossed is found in but four. Two of these were for drawbridges over tidal waters, and the craft to be provided with passage are described as "vessels" (Piscataqua Bridge Charter, 6 N. H. Laws, 114, 116), and "vessels and craft" (Stratham Bridge Charter, 7 N. H. Laws, 617, 618). Of the other two charters, one was for a bridge over Lake Winnepesaukee, and provided that the bridge should not be so built as to "obstruct or prevent the passage of boats or rafts." Bagley's Point Bridge Charter, 7 N. H. Laws, 501, 502. The other was for a bridge over the Merrimack river at Goffe's Falls, and provided that navigation by those engaged "in boating or rafting" should not be impeded or obstructed. Goffe's Ferry Bridge Charter, 7 N. H. Laws, 728. There is nothing in the language used in these charters to indicate a restrictive use of the word "boats" in the grant to Davis. Water craft are described as vessels in the charters for bridges over tidal waters, the legislature evidently having in mind the sea-going ships which would have occasion to pass there. But the term is not found in the charters for bridging inland waters. The evidence seems conclusive that it was the legislative custom, at and before the time of the grant to Davis, to treat the term "boats" as including all craft that navigate the

[1] Union Canal (1808) 7 N. H. Laws, 782, 784; id. 812; Garvin's Falls Canal (1808) 7 N. H. Laws, 654, 656; Great Ossipee Canal (1807) 7 N. H. Laws, 620; Waterquechee Falls Canal (1805) 7 N. H. Laws, 378, 379; (1796) 6 N. H. Laws, 358, 359; Webster's Falls Canal (1804) 7 N. H. Laws, 271, 273; Blodgett's Canal (1798) 6 N. H. Laws, 524, 526; Upper Merrimack Canals (1796) 6 N. H. Laws, 295, 299; Isle of Hooksett Canal (1794) 6 N. H. Laws, 148, 150; Bellows Falls Canal (1792) 6 N. H. Laws, 69, 71; (1798) 6 N. H. Laws, 494; White Falls Canal (1792) 6 N. H. Laws, 18, 20.

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inland waters of the state. It follows that his grant is subject to the right of passage for all craft having reasonable occasion to navigate the strait.

This is the limitation that would reasonably be expected to be put upon a grant like his. If this had been a charter for building a new bridge, and no mention had been made therein of navigation rights, those rights would have remained in the public. Connecticut River Lumber Co. v. Olcott Falls Co. 65 N. H. 290, 389, 13 L.R.A. 826, 21 Atl. 1090. This was the situation as to nearly all the bridge charters that had been granted, and the remainder were, in terms, made subject to the right of navigation. In none of them is a grant of a right to obstruct navigation to be found. When a grant of the right to continue a bridge that had been built without authority was sought, it was the natural and reasonable thing to make sure that the grant was so worded that the grantee should not gain rights not conferred upon others. It would be an anomalous situation if Davis's unauthorized act in building his bridge before legislative sanction therefor was obtained should be the means of his thereafter acquiring a grant of extraordinary rights. "There is a natural presumption that if the legislature intended to do this, their purpose would be distinctly expressed." Connecticut River Lumber Co. v. Olcott Falls Co. 65 N. H. 388, 13 L.R.A. 826, 21 Atl. 1096.

Bridge—charter—navigation rights.

The finding of the court is that the bridge is a common nuisance, that to afford a reasonable passage for most of the boats desiring to pass there it must be raised to the height of 11 feet above high water, and that to accommodate the remaining boats it must be raised to a height of 15 feet. The order that it be raised only to the lesser height is a denial of the right of the larger boats to navigate the strait. This order is apparently based upon the theory that the height of the original bridge (11 feet) is of controlling effect. No other reason is suggested for so fixing the limit. But as before pointed out, the limit of the defendant's right is determined by the nature and extent of the public travel on the water. As there is occasion in the course of such travel to use the open space up to 15 feet above the water, the bridge must be raised so as to give such an opening.

If there is a bona fide demand for a use of the public right of navigation, the subordinate private right to maintain the bridge must give way. The question is not settled by a finding as to the comparative money value or utility of the two conflicting uses. "The reduction of the highway from one measured by the power of the undiverted stream to carry logs over the unobstructed falls, to one measured in each particular case, or, in this case, by an appraisal of the logging and manufacturing interests, is a piece of legislation that cannot be inferred from the fact that the statutes contain no allusion to so extraordinary an alteration." Connecticut River Lumber Co. v. Olcott Falls Co. 65 N. H. 290, 385, 13 L.R.A. 826, 21 Atl. 1094. "The entire natural capacity" of the lake for flotation is public property; and boat owners, "as travelers on a highway, are entitled to a reasonable and careful use of that estate." 65 N. H. 392.

—duty to alter to accommodate travel.

The decree also orders that the opening for the passage of boats be constructed at a point some distance from the present one, so as to afford sufficient depth of water for the boats of larger draft. The defendant objects to this part of the order, and presents computations to show that there was a causeway at this point in 1808. So far as appears, the defendant took no exception to the decree or to the findings, and the question does not appear to be open to him now. But if it were, it would be disposed of by

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what has already been said as to the meaning of the grant to Davis and the extent of the public right of navigation. The fact, if proved, that the original bridge obstructed travel, is not a defense to a proceeding for its removal.

There was also an order that the state pay one half the expense of the changes, "unless it is the legal duty of the defendant to bear them alone." This decree is based upon a finding that the state's failure to oversee the operations of the defendant and his predecessors for 100 years makes it equitable that the state should pay for the removal of their encroachments on the public right. There is no finding or suggestion that the state has actively misled the defendant into making expenditures. The most that can be said is that he may have thought that it would not object to his encroachments. But even this is not found. The whole theory of the decree for contribution rests upon the proposition that it was the duty of the state to oversee the defendant's operations, and that if it did not do so the burden of removing the obstruction would be transferred from the defendant to the public.

It will be seen that the real basis of this theory is that there is something in the nature of an estoppel against the state, that it has so conducted that it cannot now deny the lawfulness of the situation it has permitted, except upon compliance with the terms imposed. This presents the question whether mere failure to act, on the part of the state, will estop it, either wholly or partially, to assert the purely public right of navigation. The question is not a doubtful one in this jurisdiction.

Estoppel—of state—failure to supervise construction of bridge.

The case presented is that of a grant by the legislature of an easement over public waters. The limits of the right are fixed by the grant. No act, or failure to act, on the part of state officials could enlarge it. The public rights in public waters cannot be alienated, or made subject to easements, except by legislative action. Connecticut River Lumber Co. v. Olcott Falls Co. 65 N. H. 290, 386, 388, 13 L.R.A. 826, 21 Atl. 1090; Concord Mfg. Co. v. Robertson, 66 N. H. 1, 6, 7, 12, 18 L.R.A. 679, 25 Atl. 718. They cannot be lost by mere neglect to assert them. They cannot be prescribed against. State v. Franklin Falls Co. 49 N. H. 240, 252, 6 Am. Rep. 513. The rule here is not subject to exception. "In this state, the law of public waters being what justice and reason require, there is no exceptional power of invading the public right by prescription." Concord Mfg. Co. v. Robertson, 66 N. H. 1, 22, 18 L.R.A. 679, 25 Atl. 728. It applies as well to public rights in small streams, the bed of which is owned by the abutters. Collins v. Howard, 65 N. H. 190, 18 Atl. 794.

The reason given for the rule that the public rights cannot be lost by showing a claim of right against them, and acquiescence therein for twenty years, is because there is no one whose especial duty or interest it is to take upon himself to make, in behalf of the public, the protest necessary to prevent the running of the statute. State v. Franklin Falls Co. supra. This is one reason why the state is not here estopped to assert its full right. There was no one whose duty it was to speak and to object to the course pursued by the owners of the island. The reasoning of the cases holding that the state's rights in public waters cannot be prescribed against is conclusive that these rights cannot be conveyed or impaired by an estoppel growing out of mere failure to object to encroachments.

One claiming against such rights proceeds at his peril if he does not procure an authoritative definition of his rights in advance. When his right is determined by the doctrine of reasonable use, if he proceeds "without a decree or judgment on the question of reasonable use, the

Water—encroachment—proceeding at peril.

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it is a nuisance, it is immaterial that incompetent evidence may have been introduced to prove an incontestable fact. The act does not undertake to declare the extent to which alterations must be made, and that was the only substantial and material question of fact litigated. If the admission of the act was erroneous it was also harmless, and affords no ground for ordering a new trial.

Appeal—incompetent evidence—nonprejudicial error.

The decree of the Superior Court should be modified by striking out the order for contribution by the state, and by increasing the height to which the bridge is to be raised from 11 feet to 15 feet.

Plaintiff's exceptions sustained.

Defendant's exceptions overruled.

All concur.

Petition for rehearing denied.

ANNOTATION.

Laches: waiver or estoppel on part of government respecting obstruction to navigation.

General rule.

As a general principle laches is not imputable to the government. 10 R. C. L. title, Equity, p. 401. Neither can a state be estopped from exercising its sovereign power. 10 R. C. L. title, Estoppel, p. 704. And the neglect or omission of a public officer as to his public duty will not work an estoppel against the state. 10 R. C. L. title, Estoppel, p. 705. So, where the Federal or a state government brings a suit to enforce rights vested in it in its sovereign capacity, it is not bound by a Statute of Limitations unless the statute by its terms declares that it is to be bound. 17 R. C. L. title, Limitation of Actions, pp. 968 et seq.

Consequently, any laches, waiver, or estoppel on the part of the government, respecting an obstruction to navigation, will not, as a general rule, work a loss of its right to have the obstruction removed.

United States.—Monongahela Bridge Co. v. United States (1910) 216 U. S. 177, 54 L. ed. 435, 30 Sup. Ct. Rep. 356, affirming (1908) 160 Fed. 712; United States v. Moline (1897) 82 Fed. 592; United States v. Union Bridge Co. (1906) 143 Fed. 377, affirmed in (1907) 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367.

California.—People v. Gold Run Ditch & Min. Co. (1884) 66 Cal. 138, 56 Am. Rep. 80, 4 Pac. 1152.

Illinois.—West Chicago Street R. Co. v. People (1905) 214 Ill. 9, 73 N. E. 393, affirming (1904) 115 Ill. App. 172, and affirmed in (1906) 201 U. S. 506, 50 L. ed. 845, 26 Sup. Ct. Rep. 518; People ex rel. Hoyne v. Metropolitan West Side Elev. R. Co. (1918) 285 Ill. 246, 120 N. E. 748. Compare, Chicago v. Laflin (1868) 49 Ill. 172.

Kansas.—Kaw Valley Drainage Dist. v. Kansas City Terminal R. Co. (1912) 87 Kan. 272, 123 Pac. 991.

New Hampshire.—See the reported case (STATE v. HUTCHINS, ante, 1685).

New York.—Ogdensburg v. Lovejoy (1873) 2 Thomp. & C. 83, affirmed in (1874) 58 N. Y. 662; People v. Delaware & H. Co. (1912) 75 Misc. 322, 135 N. Y. Supp. 339, affirmed with modification of decree in (1912) 154 App. Div. 909, 139 N. Y. Supp. 392, which was affirmed with modifications in (1914) 213 N. Y. 194, 107 N. E. 506; Watervliet Hydraulic Co. v. State (1917) 177 App. Div. 7, 163 N. Y. Supp. 939.

North Carolina.—Lenoir County v. Crabtree (1912) 158 N. C. 357, 74 S. E. 105.

Thus, in an action to recover a penalty for the breach of an ordinance forbidding the deposit of sawdust in a river, whereby it was alleged that the channel was obstructed, it was held that the fact that the defendant had deposited sawdust in the river for more than twenty years was insufficient as a defense. Ogdensburg v. Lovejoy (1873) 2 Thomp. & C. (N. Y.) 83, affirmed in (1874) 58 N. Y. 662.

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The court said: "As against the right of the legislature, or the common council, under its authority, to make provision for preventing the filling up of the public water channels and harbors, the fact that an owner of land adjacent to such channels or harbors has, for twenty years or more, done acts upon his own land, the effect of which was to fill up such channels and harbors, is clearly no defense. The doing of such acts amounts to a public nuisance. The harbors are for the public use, and the obstructing and filling them up, it cannot be doubted, constitutes a common or public nuisance. 'No length of time will legalize a nuisance. Nullum tempus occurrit respublicæ applies with unmitigated force against a public nuisance.' Dygert v. Schenck, 23 Wend. (N. Y.) 448, 35 Am. Dec. 575."

In West Chicago Street R. Co. v. People (1905) 214 Ill. 9, 73 N. E. 393, affirming (1904) 115 Ill. App. 172, and affirmed in (1905) 201 U. S. 506, 50 L. ed. 845, 26 Sup. Ct. Rep. 518, the city of Chicago brought mandamus against a street railway company to compel the latter to lower its tunnel under the Chicago river so as to provide for a clear depth of at least 21 feet of water above the tunnel. It appeared that the tunnel was about 18 feet under the surface of the water. Its construction was authorized by an ordinance of the plaintiff. At the time of the passage of the ordinance there was in force a state statute, which made it a condition to the right of a street railway company to place a tunnel under the river that it should be so located as not unnecessarily to interrupt navigation. The tunnel, when constructed, did not obstruct navigation, but at the time of the suit it did so, owing to the fact that the vessels in use were larger and of deeper draft. The defendant urged that the plaintiff could not insist on the removal of the tunnel, for the reason that in granting the license no right was reserved to require a removal of the tunnel, and that there was no contract by which the defendant bound itself to remove it when the navigation of the river might require it. Answering this contention, the court said: "The city could not, if it would, grant the right to obstruct the navigation of the river, or bind itself to permit anything which has become an obstruction to be continued. The state of Illinois has never attempted to grant such a right to the city or to the defendant. The power given to the city is to deepen the channel and improve navigation, not to destroy it. By § 1 of the Horse and Dummy Act it was expressly provided that street railroad corporations, in crossing rivers, should not interrupt navigation."

In People v. Gold Run Ditch & Min. Co. (1884) 66 Cal. 138, 56 Am. Rep. 80, 4 Pac. 1152, a contention that the defendant had acquired from custom, and by prescription and the Statute of Limitations, the right to use a navigable river as an outlet for débris resulting from its hydraulic mining operations, was held to be untenable in a suit by the state to enjoin the defendant, because the débris from its mine, together with that of other mines, obstructed the navigation of the river.

In People ex rel. Hoyne v. Metropolitan West Side Elev. R. Co. (1918) 285 Ill. 246, 120 N. E. 748, an action in equity was brought by the state to require a street railway company to alter or remove its bridge over the Chicago river so as to provide a channel at least 150 feet wide. It appeared that the bridge was built under the authority of the state and Federal laws. The act of the state legislature under which the defendant was incorporated provided that its bridge should be maintained so as not unnecessarily to impair the usefulness of the river. The ordinance of the city of Chicago which authorized the construction of the bridge provided that it should not be so constructed as unnecessarily to obstruct navigation or drainage. The bridge, when built, was a lawful structure, and did not unreasonably interfere with navigation; but on account of changed conditions and the increased demands of commerce and navigation it became an unreasonable interference with traffic on the river. It was held that the

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authorities had the power to require the alteration of the bridge to meet the changed conditions, and that the police power of the state or Federal government could not be contracted away or destroyed by compromise, and neither the state nor the city could be estopped to exercise its power.

In Kaw Valley Drainage Dist. v. Kansas City Terminal R. Co. (1912) 87 Kan. 272, 123 Pac. 991, the plaintiff, a board of an irrigation district, brought an action of mandamus against the defendant, a railway terminal corporation, to compel it to raise its bridge across the Kansas river. It appeared that a contract was made between the plaintiff and the defendant, whereby the bridge was to be deemed lawful and sufficient. The board was empowered, among other things, to "prescribe, regulate, and fix the height of the superstructures above the water." It was held that in clearing the channel of the river and fixing the height of superstructures, the board was exercising the police power which could not be abrogated by any contract, and that any person or corporation contracting with the board must be held to do so subject to such changes in the matters contracted about as subsequent exigencies might require.

In Lenoir County v. Crabtree (1912) 158 N. C. 357, 74 S. E. 105, the fact that a building, which was situated on land between high and low water mark and obstructed the opening of a drawbridge over a navigable stream on one side, had existed for fourteen months without objection from the county commissioners, was held not to work an estoppel on the county, in an action for an injunction to prohibit the owner of the building from maintaining it.

In United States v. Moline (1897) 82 Fed. 592, the fact that a state authorized an obstruction to navigation consisting of a bridge was held to be no bar to the right of the Federal government to compel its removal, when it decided to employ the river as an interstate highway.

In United States v. Union Bridge Co. (1906) 143 Fed. 377, affirmed in (1907) 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367, it was held that the fact that the Federal government made no objection to the erection of a bridge over a navigable stream did not prevent it, by reason of estoppel or laches, from exercising its power by compelling an alteration of the bridge so as to prevent it from being an obstruction to navigation.

So in Monongahela Bridge Co. v. United States (1910) 216 U. S. 177, 54 L. ed. 435, 30 Sup. Ct. Rep. 356, affirming (1908) 160 Fed. 712, it was held that the mere silence of Congress and its failure directly to interfere and prevent the original construction, under the authority of a state, of a bridge over a navigable stream, imposed no constitutional obligation on the United States to make compensation for subsequent changes or alterations which the public good, in its judgment, required to be made.

In Watervliet Hydraulic Co. v. State (1917) 177 App. Div. 7, 163 N. Y. Supp. 939, it was held that the fact that a water power company and its predecessors had maintained a dam in a river for about forty years, without any objection being raised thereto by the state, did not give it a prescriptive right, as against the state, to interfere with the use by the public of the river as a part of the Barge canal, the state having appropriated the river for that purpose.

In People v. Delaware & H. Co. (1912) 75 Misc. 322, 135 N. Y. Supp. 339, affirmed with modification of decree in (1912) 154 App. Div. 909, 139 N. Y. Supp. 392, which was affirmed with modifications in (1914) 213 N. Y. 194, 107 N. E. 506, supra, it was held in a suit brought by the state that a railroad company could not acquire a prescriptive right to maintain a bridge across a navigable stream in such a way as to impair its navigability.

But in Chicago v. Laflin (1868) 49 Ill. 172, the city of Chicago filed a bill against the defendants to have their wharves or docks in the Chicago river declared a nuisance. It appeared that the defendants derived their title to the adjoining lots from grantees of the United States. The docks had existed for more than twenty-five

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years, and did not cause any obstruction to the navigation of the river until the city built a bridge and dredged the river. It was held that the city could not maintain its suit. The court said: "They had enjoyed the use of these wharves for over a quarter of a century, and, so far as we can see, without complaint or interruption, and if they had been a nuisance we may readily suppose that those engaged in the vast commerce of the river at that point, fully alive to their interests and tenacious of their rights, would not have slumbered so long before endeavoring to enforce them. Even if these owners were not riparian proprietors, and their boundaries did not extend beyond the water's edge, we do not see that the general government granted or dedicated the bed of the river to the city, and the general government has not complained of these erections, and after such long acquiescence, the city cannot now declare them a nuisance. And even if the state has delegated its rights to the city to change the channel of this stream, and we have been referred to no law which grants the power, it could exercise no higher or greater power than the state; and we have seen that if the state exercises such power, and it injures the rights of individuals, compensation must first be made. It would be monstrous that the city should, at pleasure, make changes in this stream so as to render buildings on the wharves an obstruction, and then require their removal without compensation. . . . If this has become a nuisance, it was by the act of the city, and the appellees cannot be made responsible for their acts."

Rule in Wisconsin.

In Wisconsin, it is provided by statute (§ 1586, as amended by chap. 652, Laws 1911) that all rivers and streams navigable in fact for any purpose are declared navigable, to the extent that no dam, bridge, or other obstruction shall be made therein without the permission of the legislature.

In State v. Sutherland (1918) 166 Wis. 511, 166 N. W. 14, an action was brought by the attorney general to abate as a public nuisance a building standing on piles in the bed of a river. It appeared that the river had not, for many years, been used as a waterway. It was at the time of the suit only navigable by canoes, skiffs, and small motor boats between the numerous dams of the river, and the passage of these was not obstructed by the building complained of. The conditions of the adjacent country and the requirements of commerce were such that it was not likely that the river would ever be used as a passageway for through commerce. The building was erected many years before the passage of the statute as amended in 1911. Buildings similarly situated on the same stream were held, by decisions prior to that act (State v. Carpenter (1887) 68 Wis. 165, 60 Am. Rep. 848, 31 N. W. 730; Janesville v. Carpenter (1890) 77 Wis. 288, 8 L.R.A. 808, 20 Am. St. Rep. 123, 46 N. W. 128), not to be structures which could be abated as a nuisance at the suit of the state or private parties, and the defendant, in erecting the building complained of, relied on those decisions. It was held that the decisions established a rule of law, and the rights of the plaintiff thereunder accruing could not be summarily destroyed by a statute subsequently passed.

In Milwaukee v. Gimbel Bros. (1906) 130 Wis. 31, 110 N. W. 7, it appeared that an ordinance of Milwaukee, passed in 1863, established a dock line on the shore of the Milwaukee river. At that time there existed a dock platform which extended 11 feet beyond the dock line. The defendants owned the dock platform, and they had prepared plans and were proceeding to erect a building which would replace the dock platform. It was held in a suit brought by the city that the defendants would be enjoined from erecting their building. The court said: "The fact that the government permits a structure in some degree interfering with navigation does not work a surrender of its authority to prevent other structures, even on the same spot. Obviously, a fringe of platform alongside of this harbor, in which vessels must pass and turn

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found, near enough to the water level not to interfere with protruding upper portions of hull or rigging, may less obstruct the use of the harbor than would the wall of a building on the same line. Nor because a party had driven a certain number of piles in a given space would the government be disabled from preventing driving others in the same space, if unlawful, thus making the whole structure more substantial and more difficult of abatement, which, by the way, seems to be one of the objects of the present action, although defendants assume otherwise."

In Charnley v. Shawano Water Power & River Improv. Co. (1901) 109 Wis. 563, 53 L.R.A. 895, 85 N. W. 507, a suit to recover damages to the plaintiff's property by reason of its being overflowed by water backed up by the defendant's dam in a navigable stream, it was said by way of dictum that the right to obstruct a navigable stream could not be acquired by prescription, as against a suit to enforce the rights of the public. R. J. B.

CHARLES F. LANG et al., Appts.,
v.
EDWIN M. WILMER.

Maryland Court of Appeals — June 28, 1917.

(131 Md. 215, 101 Atl. 706.)

Limitation of actions — against judgment — death of debtor.

1. The Statute of Limitations begins to run against a judgment from its date, and is not suspended by the death of the judgment debtor or neglect of those entitled to obtain administration upon his estate.

[*See note on this question beginning on page* 1706.]

Husband and wife — tenants by entirety — construction of conveyance.

2. A conveyance to husband and wife, habendum to said grantee and his wife, "and unto the survivors, personal representatives, and assigns," makes the grantees tenants by entireties.

Vendor and purchaser — intention of grantor — effect.

3. The intention of the grantor in a deed should prevail unless in conflict with some settled rule of law.

Descent — leasehold property.

4. Upon the death of the owner of leasehold property, the estate devolves upon his personal representatives.

Judgment — revival — against administrator.

5. Upon death of a judgment debtor a scire facias may be sued out to revive the judgment against the administrator alone, to bind the assets in his hands.

— revival against land.

6. To revive a judgment against land of the deceased judgment debtor the scire facias must issue against his heirs and terretenants.

Husband and wife — entireties — lien of judgment.

7. The wife's interest in an estate by entireties is not subject to the lien of a judgment against her husband.

Judgment — revival — interest of wife.

8. A wife holding real estate by entireties with her husband is not a proper party to a scire facias to revive a judgment against him, and her title is not affected by a judgment of fiat upon the judgment against him.

— lien on leasehold — scire facias to revive.

9. A scire facias against terretenants to revive a judgment against one who dies leaving leasehold property is a proceeding in rem, and the judgment will not bind them personally, and the proceedings must contain a specific description of the property against which execution is to be awarded by the judgment of fiat.

Pleading — bill to enforce judgment — sufficiency.

10. A bill to enforce a judgment against leasehold property fails to show

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a lien upon the land, which alleges revival against personal representatives of the deceased owner of the property. — binding effect of.

11. The court is not justified in holding that a judgment had been revived against administrators of the deceased judgment debtor, where the bill clearly shows that no administration was had upon the estate.

APPEAL by defendants from a decree of the Circuit Court of Baltimore City overruling a demurrer to a bill filed to enforce a judgment against certain leasehold property. *Reversed.*

The facts are stated in the opinion of the court.

Mr. William L. Stuckert for appellants.

Mr. David Ash, for appellee:

Exceptions to the jurisdiction of the court of chancery, whether by demurrer, plea, answer, or by special exception to the sufficiency of the averment of the bill, do not dispute the rights of the plaintiff in the subject-matter of the suit.

Shryock v. Morris, 75 Md. 76, 23 Atl. 68.

In equity a direct conveyance from the husband to the wife creates a separate equitable estate in her.

21 Cyc. 1288.

From the equitable nature of the interest in the property, a court of equity would have original jurisdiction thereof.

Shryock v. Morris, 75 Md. 77, 23 Atl. 68.

In order to create an estate by the entireties it must be "conveyed to them originally as husband and wife;" it cannot be conveyed by one of them to himself and the other of them.

1 Washb. Real Prop. 6th ed. § 912, p. 562.

Thomas, J., delivered the opinion of the court:

The bill of complaint in this case, which was filed by the appellee "in his own right and on behalf of all creditors of the respective defendants, who may come in and share the costs of this cause," against the appellants, Charles F. Lang and Henrietta V. Lang, his wife, Albert Lang, August Lang, and the Ninth West Columbia Building Association of Baltimore City, alleges: (1) That the appellee obtained a judgment by confession against Charles Lang for the sum of $59.97, and costs, with interest from May 31st, 1901, which was duly recorded on June 2d, 1901, in the superior court of Baltimore city. (2) "That on or about the 3d day of November, 1890, a conveyance was recorded among the land records of Baltimore city in the office of the superior court in liber J. B. No. 1317, folio 100, etc., of a certain leasehold property known as No. 764 St. Peters street, from Charles Lang, grantor, to Charles Lang and Maria Lang, his wife, grantees, said conveyance containing these words: 'Grants unto Charles Lang and Maria Lang, his wife, their personal representatives and assigns' . . . 'To have and to hold the said described lot of ground and premises unto and to the use of said Charles Lang and Maria Lang, his wife, and unto the survivor's personal representatives and assigns.'" (3) That Charles Lang died intestate on the 7th of September, 1906, "leaving no real or leasehold property or interest in other than his interest in the property referred to in paragraph 2;" that his said widow and his next of kin "defaulted as to an administration" on Charles Lang's estate, but that Maria Lang assumed possession of the "entire estate" in the leasehold property, No. 764 St. Peters street, as her own property, and so dealt with it as stated in paragraph 4 of the bill. (4) That immediately prior to the death of Maria Lang, on September 23d, 1907, she attempted to convey the property, by deed dated the 19th of September, 1907, and duly recorded among the land records, etc., to her son, Charles F. Lang, and Henrietta V. Lang, his wife, "by the entireties." (5) That on September 19th, 1907, Charles F. Lang and his wife executed a mortgage of said leasehold property, which was duly

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recorded, to the Ninth West Columbia Building Association of Baltimore city to secure the payment of $800. (6) That the plaintiff is advised that the conveyance to Charles Lang and Maria Lang, his wife, "passed nothing; or, if anything at all, only an indetermined moiety interest in said leasehold property to Maria Lang, and not a survivorship in the whole property, which, according to the terms of said conveyance, gives the said leasehold property to the 'survivor's personal representatives and assigns.'" (7) That he, the plaintiff, on the 8th of February, 1907, "recovered a judgment fiat executio," on his said judgment, "against Maria Lang, Albert Lang, and Charles F. Lang, personal representatives of Charles Lang, deceased, and said judgment fiat was duly recorded on or about the 9th of April, 1907, in the superior court of Baltimore city." (9) That, so far as the plaintiff knows, the surviving children of Charles Lang and Maria Lang are Charles F. Lang, Albert Lang, and August Lang. (10) "That your orator is a judgment fiat creditor of said Maria Lang, now deceased, and of Charles F. Lang and Albert Lang, as aforesaid; and that he is a judgment fiat creditor of August Lang in the sum of $13.05, with interest from the 20th day of April, 1903, and costs $2.60, and counsel fee of $10, with waiver of all exemption and other laws, which judgment has been duly recorded in the superior court of Baltimore city in Magistrate's Judgment Records, liber S. C. L. No. 71, folio 550, etc.; and that he is, also, a judgment creditor of Henrietta V. Lang, the wife of Charles F. Lang, in the sum of $32.49, with interest from September 29th, 1908, and costs $4.23, and $.25 recording fees, duly recorded in the superior court of Baltimore city in Magistrate's Judgment Records, liber S. C. L. No. 52, folio 306," etc. (11) "That your orator's respective judgment liens aforesaid are liens upon the estate of Charles Lang, deceased, in the said leasehold property No. 764 St. Peters street, as well as liens upon any part or share of said property claimed by or otherwise distributable to any of said judgment debtors aforesaid." (12) That the plaintiff is without an adequate remedy at law.

The bill prayed the court: (1) To decree that said leasehold property No. 764 St. Peters street "is subject to the liens of the respective judgment debts of said respective persons, due to your orator, and to other creditors who may come into this cause, as aforesaid, by the priorities." (2) "That the aforesaid deed of conveyance from Charles Lang to himself and Maria Lang, his wife, be decreed to be null, void, and of no effect to pass a joint estate or an estate by entireties." (3) That the deed of said property from Maria Lang to Charles F. Lang and Henrietta V. Lang, his wife, be decreed to be null and void. (4) That the mortgage to the Building Association be declared void except as to the share or interest of Charles F. Lang in said leasehold property. (5) That the "court take jurisdiction of said leasehold property . . . and appoint a trustee to sell" the same, "and that the proceeds be distributed under the direction of the court, to such persons as may be entitled thereto."

Charles F. Lang and Henrietta V. Lang, his wife, and the Building Association demurred to the bill on the following grounds: (1) That the plaintiff had not stated such a case as entitled him to any relief against them; (2) that the plaintiff had an adequate remedy at law; and (3) that the judgments referred to in the bill were barred by the Statute of Limitations. This appeal is from the order of the court below overruling the demurrer.

The averments of the bill are very indefinite, but apparently the theory upon which the bill was filed is that the deed of November 3d, 1890, from Charles Lang to Charles Lang and Maria Lang, his wife, was either totally void, or was only effective to convey to Maria Lang an undivided

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one-half interest in the property mentioned.

The deed is not set out in full in the bill or filed as an exhibit, but judging from the part of the premises and the habendum quoted in the bill, it is clear that if the property had been so conveyed by a third person to Charles Lang and Henrietta V. Lang, his wife, the grantees would have held the property as tenants by the entireties, not only because the conveyance was to them jointly, but because the habendum clearly indicates that the survivor was to take. Craft v. Wilcox, 4 Gill, 504; Marburg v. Cole, 49 Md. 402, 33 Am. Rep. 266; Fladung v. Rose, 58 Md. 13.

Husband and wife—tenants by entirety—construction of conveyance.

It is said in 13 Cyc. 527: "A person cannot convey to himself alone, and if he makes a conveyance to himself and others the latter only will take as joint tenants." In support of the text, the author cites Cameron v. Steves, 9 N. B. 141. The same case is referred to in note 1, page 109 of 9 Am. & Eng. Enc. Law, 2d ed. where it is said: "In Cameron v. Steves, supra, it was held that a man cannot convey land to himself, and therefore a deed from A to B, C, and himself and their heirs, being inoperative as to A, vested the whole estate in B and C as joint tenants. Delivering the opinion of the court, Carter, Ch. J., said: 'It is laid down in Perkins, that a feoffment, with livery from A, to A and B, vests the whole estate in B, for A could not make livery to himself; therefore, by virtue of the livery to B, he became enfeoffed of the whole. The reason of this case would not seem to apply equally to statutory conveyances where no livery is required, and it may be doubted whether a man could enfeoff another of an undivided share of an estate to be held with the feoffor. But there is another principle which would seem applicable to this case, under which the whole estate would vest in Cameron and Marshall. In Sheppard's Touchstone (a book of very high authority), at page 82, it is laid down: "If a deed be made to one that is incapable, and to others that are capable, in this case it shall inure only to him that is capable. And if they were to be joint tenants, the person who is capable shall take the whole; but if they were to be tenants in common, he shall have only his particular share."'"

In the case of Bassett v. Budlong, 77 Mich. 338, 18 Am. St. Rep. 404, 43 N. W. 984, which was an action of ejectment to recover certain lands, William H. Budlong, the owner of the fee in the property, executed and delivered to his wife, Annette Budlong, a quitclaim deed, by which he purported to convey the property to her, her heirs and assigns, forever. Following the habendum clause of the deed was the following proviso: "Provided always, and this indenture is made (in all respects) upon these express conditions and reservations, that is to say: 1. It is reserved that said party of the second part shall not, at any time during the lifetime of the said party of the first part, convey to any person or persons, by deed, mortgage, or otherwise, the whole or any part of the said premises, as above described, without the written assent of the said party of the first part, or his joining in such conveyance. 2. It is further reserved that in case of the decease or death of the said Annette Budlong, party of the second part, at any time before the decease or death of the said William H. Budlong, party of the first part, then in such case, and upon such decease, the said premises, as above described, with all and singular hereditaments and appurtenances thereunto belonging or in any way appertaining, shall forthwith, upon such decease, revert back unto the said William H. Budlong, of the first part, and to his assigns forever."

Budlong's wife died in April, 1886, and he died in June of the same year. Previous to his death he devised the land so conveyed to

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Bertha M. Budlong, and Bassett, a brother, and Beeman, a nephew of Annette Budlong, her only heirs at law, brought the suit. The circuit court held that the plaintiffs were entitled to recover, but the Michigan supreme court reversed the judgment, and, in the course of its opinion, said: "Every deed or contract in writing is supposed to express the intention of the parties executing it, and when the object or purpose of such deed or contract is called in question in a court of justice, the first inquiry is, What is the intention of the parties, as expressed in the written instrument? It is very plain, upon the face of the instrument, that Mr. Budlong did not intend to convey to his wife the title to the premises in fee simple absolute. She was precluded from conveying in any manner the premises described without his written assent, or joining in the conveyance; and if she died before he did she was to have no further interest in the land. If he died before she did, then the title in fee simple absolute should pass and become vested. Such is the apparent intention of the parties, as expressed in the deed. It is the duty of the court to so construe the instrument as to carry out the intent of the parties making it, if no legal obstacle lies in the way. . . . We do not think it is necessary to resort to the surrounding facts and circumstances in order to discover the intent of the parties. If, however, we look to the surrounding facts and circumstances, we find them all affording evidence of the intent expressed in the instrument. . . . When it is considered that he was a farmer and a householder, and continued his residence upon the premises until his death, and retained the use and enjoyment of his personal property, it is evident that by executing the deed to his wife he did not intend to part with the title to his real estate unless the contingency should occur of his dying before his wife died. That event did not occur, and the estate never vested in his wife. The condition in the deed that his wife should not convey or mortgage the land without his written assent or joining in the deed, is a clear indication that the title should not pass, because if it was the intention that it should pass, and the estate vest in his wife, the condition would be nugatory, and no force or effect be given to this part of the instrument. To hold that the title did pass by the absolute words of the granting clause would violate that rule of construction which requires that every portion of the instrument should be given effect according to the intention of the parties. When we consider the intimate relation of the parties to the instrument—that of husband and wife—the effect of the arrangement entered into was that the title of the real estate should, in the event of the death of either, go to the survivor. Doubtless, a simpler way to accomplish the object would have been for them to have united in a deed to a third party, and for him to have conveyed to them jointly, and then, under the statute, the survivor would have succeeded to the whole title and estate."

In the case of Pegg v. Pegg, 165 Mich. 228, 33 L.R.A.(N.S.) 166, 130 N. W. 617, Ann. Cas. 1912C, 925, Davis Pegg conveyed to his wife, Mary C. Pegg, "an undivided one-half interest" in and to two parcels of land. In the deed, between the granting and habendum clauses, there was inserted the following clause: "The object and purpose of this deed is to convey to said second party such an interest in said land that the parties hereto will have an estate in entirety, and that the same shall survive and vest in the survivor as a full and complete estate." Davis Pegg died and his wife claimed the property on the theory that she and her husband owned it as tenants by the entirety, while the children and grandchildren of Davis Pegg insisted that the grantor and grantee were tenants in common, and that upon the death of Davis Pegg his one-half interest in the property descended to them. In dis-

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posing of the case the Michigan supreme court said: "Davis Pegg conveyed an undivided one-half interest in said premises to complainant. He retained an undivided one-half interest therein. After this was done, they had distinct titles, and were therefore tenants in common. The title remained that way until Davis Pegg died. The question is then, What became of his undivided half? Ordinarily, it would descend to his heirs, the defendants; and it did so descend, unless the clause which was inserted carried it in a different direction. Complainant contends that it did not so descend, because she and her husband owned the premises as tenants by the entirety, and were made such by said deed, and that now, as survivor of her husband, she is entitled to the whole of said premises. In order to own the whole, as survivor, she would have to be seised of the whole before his death. Whatever vested in her as survivor must have been owned by both her and her husband before his death, and each must have been seised of the whole. As neither one was seised of the whole, but both held by distinct titles, they could not have been tenants by the entirety. Neither were they tenants by entirety of the undivided half conveyed to her, because Davis Pegg reserved no interest in the undivided half he conveyed to complainant. The deed as a whole cannot be construed as creating a tenancy by entirety, because the law was not followed in creating it. At the common law, the unities of time, title, interest, and possession had to be observed in creating such an estate. . . . The common law has remained unchanged in this respect, and is now in force. In the attempt to create an estate by entirety, in the case under consideration, neither the unity of time nor title was observed. The estate was not created by one and the same act; neither did it vest in them at one and the same time. If the clause inserted can be said to be a part of the habendum of the deed, as is argued, then that part of the habendum must fail, on the ground that it seeks to enlarge an estate in common, which is granted, into an estate of entirety, without complying with the rules of law for the creation of such an estate. By reason of these considerations, the deed must be read as though the clause had been omitted. The deed created a tenancy in common between complainant and husband, and upon his decease his undivided one half of the premises descended to his heirs."

The decision in Pegg v. Pegg is criticized in the editor's note, and he cites McRoberts v. Copeland, 85 Tenn. 211, 2 S. W. 33, as holding that where a husband conveys property, and in the habendum reserves a life estate to himself and his wife, the life estate inures upon the death of the grantor to the survivor. But it is apparent that the controlling feature of Pegg v. Pegg was that the grant to the wife was only of an undivided one-half interest in the property, which made the wife a tenant in common, and which the court held could not be enlarged by the subsequent clause of the deed. Neither the husband nor wife was seised of the whole.

In the case at bar the conveyance was not in terms of an undivided one-half interest in the property, but a grant of the entire estate to husband and wife, "their personal representatives and assigns," and there is no conflict between the granting and the habendum clauses of the deed. The intention of the grantor that the whole estate should vest in the survivor is manifest, and that intention should prevail unless in conflict with some settled rule of law. Georges Creek Coal & I. Co. v. Detmold, 1 Md. 238. Under the Code, a married woman may hold property acquired by her after her marriage as her separate estate, and a married man may convey property directly to his wife. Code, art. 45, §§ 1 and 4; Trader v. Lowe, 45 Md.

Vendor and purchaser—intention of grantor—effect.

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1, 14. As Charles Lang did not intend to convey the estate to himself and wife as tenants in common, under the principle announced in Cameron v. Steves, Maria Lang would take the whole property. On the other hand, if, contrary to the express intention of the parties, we construe the deed as conveying to Maria Lang only an undivided one-half interest in the property, then under the decision in Pegg v. Pegg, Charles Lang and his wife held the property as tenants in common, and upon his death his interest passed to his personal representatives. If, as in McRoberts v. Copeland, we treat the deed as *creating* a new estate in *both* of the grantees, we not only have the common-law unities of time, title, etc., of a tenancy by entireties, but we give effect to the clear intention of the parties, that the whole estate should vest in the survivor, his or her personal representatives and assigns.

In this case, however, we do not find it necessary to construe the deed in question. In the demurrer the appellants rely upon the Statute of Limitations. The judgment against Charles Lang was recorded on the 22d of June, 1901, and the bill of complaint in this case was not filed until September 5th, 1916. Upon the death of an owner of leasehold property, the estate devolves upon his personal representatives. Merryman v. Long, 49 Md. 540. The bill alleges that no letters of administration upon the estate of Charles Lang were taken out. It further alleges that on the 8th of February, 1907, the plaintiff "recovered a judgment of fiat executio . . . against Maria Lang, Albert Lang, and Charles F. Lang, personal representatives of Charles Lang, deceased." If no letters of administration were taken out, as averred in the bill, Maria Lang, Albert Lang, and Charles F. Lang could not have been the personal representatives of the deceased.

Descent—leasehold property.

Where the defendant in a judgment dies, a scire facias may be sued out to revive the judgment against the administrator alone to bind the assets in his hands; but where it is desired to review the judgment against the land of the deceased judgment debtor the scire facias should also issue against the heirs and terretenants. 2 Poe, Pl. & Pr. § 593; Tiers v. Codd, 87 Md. 447, 39 Atl. 1044. In Polk v. Pendleton, 31 Md. 118, Chief Judge Bartol said: "Who are terretenants within the meaning of the law, whom it is necessary to make parties to the scire facias? All who are in possession, deriving title under the judgment debtor, such as heirs, devisees, or alienees, after the judgment. They are in, as of the estate of the judgment debtor, and before the judgment can be revived and enforced by execution against the land, so as to devest their title, it is necessary to warn them by the scire facias, so that they may have an opportunity of making their defense, and claiming contribution from others holding lands of the judgment debtor, bound by the judgment. . . . But where a party is in possession, holding by title adverse to that of the judgment debtor, or paramount to his, such party is not a terretenant, within the meaning of the law, because his rights are in no manner affected by the judgment. If he have a good title, the judgment does not bind the land, nor can a sale under the execution affect his interest. If he have not a good title, then he would have no right to claim contribution, by reason of the land being taken to satisfy the judgment."

Judgment—revival—against administrator.

—revival against land.

The estate Maria Lang acquired under the deed in question was not subject to the lien of the judgment against Charles Lang, and she was, therefore, as to such interest, not a proper party to the scire facias, and

Husband and wife—entireties—lien of judgment.

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her title under the deed was not affected by the alleged judgment of fiat. 2 Freeman, Judgm. 4th ed. § 448; Adams v. Stake, 67 Md. 447, 10 Atl. 444.

Judgment—revival—interest of wife.

Assuming that where a judgment debtor dies leaving leasehold property, the judgment may be revived by a scire facias against his next of kin as terretenants without making the administrator a party, the scire facias against them is a proceeding in rem, and the judgment obtained is not a personal judgment against them, but one subjecting the property in their possession, which belonged to the judgment debtor, to the payment of the debt, and the proceedings must therefore contain a specific description of the property against which execution is to be awarded by the judgment of fiat. 2 Poe, Pl. & Pr. § 600; Thomas v. Farmers' Bank, 46 Md. 57; Bish v. Williar, 59 Md. 382; Tiers v. Codd, 87 Md. 447, 39 Atl. 1044; Wright v. Ryland, 92 Md. 645, 53 L.R.A. 702, 48 Atl. 163, 49 Atl. 1009. The bill does not allege that the judgment against Charles Lang was revived by a judgment of fiat against his next of kin or those who would be entitled to the property as distributees of his estate, and it does not therefore appear from the bill that the judgment was revived as a lien against the property. On the contrary, the bill alleges that he recovered a judgment of fiat against Maria Lang, Charles F. Lang, and Albert Lang as the *personal representatives* of the deceased.

—lien on leasehold—scire facias to revive.

Pleading—bill to enforce judgment—sufficiency.

As we have said, the bill avers that no letters of administration were taken out. We would not be justified in holding that the judgment was revived against Maria Lang and Charles F. Lang, *as administrators of Charles Lang*, when the bill clearly shows that they were not the administrators of his estate. In Wilmer v. Trumbo, 121 Md. 445, 88 Atl. 259, this court held that execution on a judgment of fiat against one who had been proceeded against as the personal representative of the deceased judgment debtor, but who in fact was not the personal representative of the deceased, should be enjoined.

—binding effect of.

Upon the failure of those first entitled to administration to apply for letters, administration may be granted by the orphans' court to the largest creditor applying for the same. Code, art. 93, § 30. The Statute of Limitations begins to run as to judgments from the date of the judgment, and is not suspended by the death of the judgment debtor, or neglect of those entitled to obtain administration upon his estate. See Brooks v. Preston, 106 Md. 693, 68 Atl. 294, and cases cited in the opinion of the court.

Limitation of Actions—against judgment—death of debtor.

It follows from what has been said that the demurrer interposed in the court below by Charles F. Lang and Henrietta V. Lang, his wife, and the Building Association, the appellants in this court, should have been sustained, and that the decree of the court below must therefore be reversed.

Decree reversed, with costs, and bill dismissed as to the appellants, Charles F. Lang and Henrietta V. Lang, his wife, and the Ninth West Columbia Building Association of Baltimore City.

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ANNOTATION.

Death of judgment debtor as affecting running of Statute of Limitations against judgment.

I. In absence of statute, 1706.
II. Under statute:
a. Generally, 1706.
b. Statute prohibiting suit within specified time after death, 1706.
c. Statute providing special statutory period after death for enforcement of judgment, 1707.

I. In absence of statute.

The general rule, at least, in the absence of special controlling statutory provision, is that the death of the judgment debtor does not suspend or toll the running of the general Statute of Limitations against the judgment, which period usually dates from the entry of the judgment. This was the rule expressly laid down in the reported case (LANG v. WILMER, ante, 1698); Whiteside v. Catching (1897) 19 Mont. 394, 48 Pac. 747; and Daniel v. Laughlin (1882) 87 N. C. 433. And see the following cases, which, in effect, hold that the death of a judgment debtor does not affect the running of the Statute of Limitations against the judgment:

Iowa.—Davis v. Shawhan (1872) 34 Iowa, 91.

Kentucky.—Steele v. Dishman (1908) — Ky. —, 113 S. W. 52.

Maryland.—Mullikin v. Duvall (1835) 7 Gill & J. 355.

Mississippi.—Vick v. Chewning (1856) 31 Miss. 201; Pollard v. Eckford (1874) 50 Miss. 631.

Missouri.—McFaul v. Haley (1901) 166 Mo. 56, 65 S. W. 995.

New York.—Re Kendrick (1887) 107 N. Y. 104, 13 N. E. 762.

North Carolina.—Lilly v. West (1887) 97 N. C. 276, 1 S. E. 834.

Virginia.—Fleming v. Dunlop (1833) 4 Leigh, 338.

West Virginia.—Handy v. Smith (1887) 30 W. Va. 195, 3 S. E. 604.

Ireland.—O'Hara v. Creagh (1841) 3 Ir. Eq. Rep. 179, 1 Longf. & T. 65.

In Davis v. Shawhan (1872) 34 Iowa, 91, cited supra, the holding was that a judgment rendered against a decedent prior to his death may be enforced against the real estate, on which it is a lien, at any time within the statutory period after the death of the judgment debtor, unaffected by such death.

II. Under statute.

a. Generally.

The great majority of the cases falling within the scope of the present annotation are controlled, or at least affected, by special statutory provisions.

b. Statute prohibiting suit within specified time after death.

In some jurisdictions the statutes expressly prohibit suits to enforce judgments against decedents' estates until after the lapse of a specified time from his death. See, for example, Home Nat. Bank v. People's State Bank (1911) 49 Ind. App. 13, 96 N. E. 710, which applies Burns's Anno. Stat. (Ind.) 1908, § 2847; Alexander v. Mullins (1894) 16 Ky. L. Rep. 31, applying a Kentucky statute; Pollard v. Eckford (1874) 50 Miss. 631, construing and applying Miss. Code 1857, art. 126, p. 457, and Miss. Code 1871, § 1184; Re Holmes (1892) 131 N. Y. 80, 29 N. E. 1002, construing N. Y. Code Civ. Proc. § 1380; Matthews v. Peterson (1909) 150 N. C. 132, 63 S. E. 721, construing N. C. Rev. Stat. § 367; and Delle v. Boss (1916) 164 Wis. 392, 160 N. W. 179, construing Wis. Stat. 1915, § 2978. Such provisions would seem necessarily to toll the running of the general Statute of Limitations, as against judgments obtained against a decedent in his lifetime; and such has been held to be the law, at least, as to original suits to enforce judgments. Pollard v. Eckford (1874) 50 Miss. 631, holding in effect that, where a disability grows out of a positive statutory provision, the time of such temporary disability should be excluded in reckoning the statutory period. But that scire facias to revive a judgment is not a

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"suit or action," within the meaning of such a statutory provision, was the holding in Pollard v. Eckford (Miss.) supra, the court saying that the statute embraced only original suits, and did not include such judicial processes as scire facias, which are continuations of the original action, and not original proceedings. But for a contrary holding to the effect that a scire facias to revive a judgment against a deceased debtor is a new action, and not merely a continuation of the former suit, within the meaning of a special statute limiting actions on judgments, see Bank of State v. Vance (1836) 9 Yerg. (Tenn.) 471, as set out infra.

Some of the statutes which provide that a judgment creditor shall be stayed for a specified period also declare that such periods shall not constitute a part of the statutory period for enforcing the judgment. This was the effect of N. Y. Civ. Code, § 1255, as applied in Re Holmes (1892) 131 N. Y. 80, 29 N. E. 1003. And N. C. Revisal, § 367, as set out and applied in Matthews v. Peterson (1909) 150 N. C. 132, 63 S. E. 721, is to the same effect. And in Montana, it seems, according to Whiteside v. Catching (1897) 19 Mont. 394, 48 Pac. 747, that the statute expressly excludes the time between the judgment debtor's death and the granting of letters of administration on his estate, from being counted in reckoning the statutory period. And § 2902 of the Wisconsin Statute 1915, provided that where enforcement of a judgment is suspended by injunctional order, or otherwise by law, and the judgment creditor also causes the fact of suspension to be entered on the judgment docket, the period of suspension shall not be reckoned as part of the statutory period; but the running of the statute is not interrupted by virtue of the provisions suspending the running of the statute against a deceased judgment debtor for one year, where entry of such fact is not made on the judgment docket. Delle v. Boss (Wis.) supra.

c. Statute providing special statutory period after death for enforcement of judgment.

A considerable number of jurisdictions have statutes which expressly provide that judgments taken against a debtor in his lifetime may be enforced within specified periods after his death. It was expressly held, in the West Virginia case of Werdenbaugh v. Reid (1882) 20 W. Va. 588, that a statute limiting the period within which a judgment against a deceased person may be enforced, to five years, may shorten the general ten-year period for enforcement of judgments. But that such a provision cannot lengthen the general statutory period, see Handy v. Smith (1887) 30 W. Va. 195, 3 S. E. 604.

In construing Pa. Act Feb. 24, 1834, § 25, which provided that "all judgments which, at the time of the death of a decedent, shall be a lien on his real estate, shall continue to bind such estate during the term of five years from his death, although such judgment be not revived by scire facias or otherwise after his death," it was held, in Nicholas v. Phelps (1850) 15 Pa. 36, that the phrase, "at the time of the death," refers to lands of which the deceased was seised "at the rendition of the judgment," so as not to be affected by a subsequent transfer thereof during the life of the judgment debtor. To the same effect is Biesecker v. Cobb (1900) 13 Pa. Super. Ct. 56. And see Shannon v. Newton (1890) 132 Pa. 375, 19 Atl. 138. But see also Aurand's Appeal (1859) 34 Pa. 151; Shearer v. Brinley (1874) 76 Pa. 300; and Miskey v. Miskey (1888) 9 Sadler (Pa.) 185, 11 Atl. 881. This statute, of course, does not apply to judgments which were never a lien upon the decedent's real estate. See Henry's Estate (1907) 34 Pa. Super. Ct. 597. The Act of 1834 was practically re-enacted by the Pennsylvania Act of May 3, 1909, P. L. 386, § 25. See Rankin v. Rinehart (1917) 66 Pa. Super. Ct. 385, holding that a judgment cannot be revived after the expiration of the five-year period.

According to the following cases, by 1 Old Rev. Code (Va.) chap. 92,

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§ 57 (statute originally enacted in 1792), it was expressly provided that no action of debt upon, or scire facias to revive, any judgment against a decedent in his lifetime, should be brought or issued after five years from the appointment of an executor or administrator, and that all judgments not proceeded upon within such period should be deemed to have been paid and discharged: Peyton v. Carr (1823) 1 Rand. (Va.) 436 (holding that a judgment not revived within five years after the judgment debtor's death was barred, and that the operation of the statute was not affected by scire facias sued out within five years, but upon which a nonsuit was suffered); Mercer v. Beale (1833) 4 Leigh (Va.) 189 (provision of statute quoted in full in footnote to case). These provisions, in substantially the same form, appear in Va. Code 1904, § 3577. See Spencer v. Flanary (1905) 104 Va. 395, 51 S. E. 849, and Cox v. Caskie (1914) 116 Va. 388, 82 S. E. 118, both of which construe and apply the statute.

Likewise, in West Virginia, statutes have been enacted under which the period within which a judgment against a deceased debtor may be enforced was limited to five years after the qualification of the personal representative of the deceased, the lien of the judgment ceasing after that time. The following cases apply (W. Va. Code 1868, chap. 139 §§ 11): Werdenbaugh v. Reid (W. Va.) supra (holding that such provision may shorten the period specified in the general Statute of Limitations); Laidley v. Kline (1884) 23 W. Va. 565 (following the Reid Case); Handy v. Smith (W. Va.) supra (holding that the provision cannot lengthen the general statutory period); Sherrard v. Keiter (1889) 32 W. Va. 144, 9 S. E. 25.

And in Kansas, under statutes which provided that actions against executors and administrators must be commenced within three years after notice of their appointment is given, or be forever barred, the rule was that the statute applied to actions on dormant domestic judgments. See United States v. Houston (1891) 48 Fed. 207 (holding, however, that the statute [Kan. Gen. Stat. § 2890] did not apply to judgments obtained by the United States government); Scroggs v. Tutt (1879) 23 Kan. 181 (holding that where the holder of a judgment against a decedent, obtained in his lifetime, did not exhibit it against the estate for over three years after letters of administration were granted, his claim was barred by Executors and Administrators Act, § 81, and, by failing to bring an action on the judgment within such three-year period, was barred by § 106 of the same act); and Mawhinney v. Doane (1889) 40 Kan. 676, 17 Pac. 44.

So, in Tennessee, a statute (Act 1789, chap. 23, § 4), requiring all creditors of a person deceased to commence suit for any claim due them against the executor or administrator within two years after letters were granted, has been held to apply to judgments obtained against a decedent in his lifetime. Bank of State v. Vance (1836) 9 Yerg. (Tenn.) 471 (holding that a scire facias upon a judgment obtained against an intestate in his lifetime, seeking to subject the effects in the administrator's hands to its payment, was a new action within the meaning of the statute, and not merely a continuation of the original suit). But that a scire facias to revive a judgment is not a "suit or action," but merely a continuation of the original suit, see Pollard v. Eckford (1874) 50 Miss. 631, as set out supra.

And in Kansas, under the Civil Code, it has been held that a judgment creditor, holding a money judgment against a deceased person, cannot revive it against the administrator of such deceased person, against the will of the administrator, by substitution of parties, unless he does it within one year (extended in 1909 to two years) of such administrator's appointment and qualification. Scroggs v. Tutt (Kan.) supra; Myers v. Kothman (1882) 29 Kan. 19; Markson v. Kothman (1883) 29 Kan. 718; State v. Dixon (1913) 90 Kan. 594, 47 L.R.A. (N.S.) 905, 135 Pac. 568 (holding that the limitation does not apply to a judg-

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ment obtained by the state, suing in its sovereign capacity); Harvey v. Wasson (1913) 91 Kan. 70, 136 Pac. 919. And that Oklahoma Rev. Laws 1910, §§ 5291, 5293, 5299, were to the same effect, see Jackson v. Scott (1918) — Okla. —, 173 Pac. 70.

And in Alabama, it has been held that judgments against a decedent fall within the statute of nonclaim (Ala. Dig. p. 337), requiring all claims against the estates of deceased persons to be presented within eighteen months. Ready v. Thompson (1838) 4 Stew. & P. (Ala.) 52.

And that by 2 N. Y. Rev. Stat. 477, § 2, a scire facias to revive a judgment against a personal representative of a deceased judgment debtor had to be sued within one year after the death of such judgment debtor, see Clark v. Sexton (1840) 23 Wend. (N. Y.) 477.

And that, in Mississippi, § 2155 of the Code of 1871 denied an action or scire facias against any executor or administrator, upon any judgment against his testator or intestate, unless within four years after qualification as such executor or administrator, see Champion v. Cayce (1877) 54 Miss. 695.

And in Iowa, to enable one holding a judgment against a deceased person, to payment from the personal assets, he must, under the statute (Rev. Stat. § 2405), file and prove his claim within eighteen months after notice of administration granted, or be forever barred. Davis v. Shawhan (1872) 34 Iowa, 91, applied this provision. G. J. C.

STATE OF LOUISIANA
v.
LOJA CLARK, Appt.

Louisiana Supreme Court — October 29, 1917.

(142 La. 305, 76 So. 722.)

Evidence — dying declaration — parol proof — loss of writing.

1. Where the loss or destruction of paper containing a written memorandum of a dying declaration is first proved, the contents of such written memorandum, if otherwise admissible as a dying declaration, may be proved by parol.

[*See note on this question beginning on page* 1711.]

Judge — incompetency — waiver.

2. Where the defendant becomes aware, during the trial, that a cause may exist to demand the recusation of the judge, it is too late for him to demand such recusation after trial and conviction.

Evidence — contents of lost instrument.

3. The contents of written instruments, when lost or destroyed, may always be proved by parol.

Headnotes 1 and 2 by LECHE, J.

APPEAL by defendant from a judgment of the Judicial District Court for the Parish of Assumption, convicting her of murder. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Marks, Le Blanc, & Talbot for appellant.

Messrs. A. V. Coco, Attorney General, Vernon A. Coco, Assistant Attorney General, and George Seth Guion, for the State.

Leche, J., delivered the opinion of the court:

Defendant, charged with murder, appeals from a verdict wherein she was found guilty without capital punishment.

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She relies upon two bills of exception, the first of which she reserved to the trial judge's ruling upon the admissibility of parol evidence to prove a dying declaration, of which a written memorandum was taken at the time it was made. It seems that the coroner took down in writing the dying declaration of the deceased shortly after the shooting, on September 13, 1916. The deceased thereafter underwent treatment, and, his condition having much improved, the coroner, acting under the honest belief that all danger of death had passed, destroyed the paper upon which was written the dying declaration. These facts, constituting a foundation, having first been proved, parol evidence was admissible to show the contents of the written dying declaration. The general rule is that the contents of written instruments, when lost or destroyed, may always be proved by parol, and the rule has been applied to a dying declaration in the case of State v. Rector, 35 La. Ann. 1098. We are, therefore, of the opinion that the trial judge's ruling is correct.

Evidence—dying declaration—parol proof—loss of writing.

—contents of lost instrument.

The second bill is to the refusal of the judge to grant a new trial to defendant, on the ground that he, the trial judge, should have recused himself in the case. During the trial, while the coroner was on the stand, it appears that the accused discovered, from the testimony of that officer, that at the time the killing took place, on the 13th of September, 1916, the trial judge, who was afterwards elected to the bench, was district attorney and had advised the coroner, prior to indictment, as to his duties in this case. The judge's testimony, which is annexed to the bill, is in the following words: "My recollection is that the only discussion I had with the coroner, and the only thing I positively remember of having advised him, was at the time the deceased, Mr. Perkins, was in New Orleans, at the hospital or other infirmary, that it was his duty to notify such place where Mr. Perkins was that, in the event of death, not to remove the body until he reached there, in order that he, as coroner of the Parish of Assumption, could view the body, in order to prove corpus delicti and to ascertain the cause of death. The only other party that I discussed this matter with was the present district attorney, who was then nominated to the office, and who, I then knew, would have to prosecute the case. I especially requested him to take charge of the investigation of this case, because I then knew I would become the trial judge thereof, and did not want to put myself in a position where I would have to be recused."

It further appears that defendant, at the time she first discovered these facts, during the trial, made no objection to the proceeding, but allowed the trial to continue uninterruptedly until after conviction. Thereafter, on a motion for a new trial, she raised, for the first time, the objection that the trial judge should have recused himself.

Without expressing any opinion as to whether there was a legal cause for recusation, we believe that defendant waived her right to challenge the competency of the judge on such ground when she consented to proceed with the trial.

Judge—incompetency—waiver.

In State v. Arbuno, 105 La. 719, 30 So. 163, it was held that a prisoner on trial, under our laws, can only exceptionally be permitted to stand by and suffer irregular proceedings to take place and then ask to have the proceedings reversed on account of such irregularities. It was also held that there are few exceptions to the doctrine that a party in a cause may waive any right which the law has given him, even a constitutional one. See also State v. Rose, 114 La. 1061, 38 So. 858; State v. Lee, 116 La. 608, 40

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So. 914; State v. Baudoin, 115 La. 774, 40 So. 42; State v. Duncan, 118 La. 705, 10 L.R.A.(N.S.) 791, 43 So. 283, 11 Ann. Cas. 557; State v. Emile, 140 La. 832, 74 So. 163.

In a recent decision by this court (State v. Bordelon, 141 La. 611, 75 So. 429) the doctrine of waiver by silence and implied consent was applied to an objection which might have been raised to the competency of a judge under circumstances very similar to those in the present case. We are therefore of the opinion that defendant's second ground of complaint is not supported by law.

For these reasons, the judgment appealed from is affirmed.

ANNOTATION.

Admissibility of parol evidence of dying declarations where written memorandum thereof has been lost or destroyed.

In the few cases passing on the point, it is held that parol evidence is admissible to prove a dying declaration, of which a written memorandum was made at the time, where the memorandum has been destroyed or lost. Tyree v. Com. (1914) 160 Ky. 706, 170 S. W. 33; State v. Rector (1883) 35 La. Ann. 1098; Rodriques v. State (1916) 79 Tex. Crim. Rep. 631, 186 S. W. 335; State v. Patterson (1871) 45 Vt. 308, 12 Am. Rep. 200. And see the reported case (STATE v. CLARK, ante, 1709).

In State v. Rector (1883) 35 La. Ann. 1098, in holding that oral testimony was admissible to establish the contents of a paper containing a dying declaration, the court stated that the loss of that document having first been established, and not being disputed, there was no other course to be pursued than to prove its contents by secondary evidence. Were oral testimony inadmissible in such a case, the court said, the suppression, loss, or destruction of such proof could often secure a verdict of acquittal in a clear case of felonious homicide.

In the reported case (STATE v. CLARK), the trial judge ruled that parol evidence was inadmissible to prove a dying declaration of which a written memorandum was taken at the time it was made. It seems that the coroner took down in writing the dying declaration of the victim, shortly after the shooting. The declarant thereafter underwent treatment, and, his condition having much improved, the coroner, acting under the honest belief that all danger of death had passed, destroyed the paper on which was written the dying declaration. These facts, constituting a foundation, having first been proved, it is held that parol evidence was admissible to show the contents of the written dying declaration.

In Rodriques v. State (1916) 79 Tex. Crim. Rep. 631, 186 S. W. 335, objection was made to the admissibility of oral proof of dying declarations, which had been reduced to writing. The court held that in as much as the written statement had been lost, and proper search was shown to have been made, there was no error in admitting oral proof of the declarations.

In Tyree v. Com. (Ky.) supra, it appeared that a short time before the victim of a homicide died, a justice of the peace was sent for, and to him the dying man made a statement, which was reduced to writing and signed. The justice delivered that paper to the county attorney, and when the county attorney's office was subsequently destroyed by fire, it was contended, though not distinctly shown, that the paper containing the dying statement was destroyed along with the rest of the contents of the office. The defendant introduced the justice, and by him proved the execution of the paper and its delivery to the county attorney; but when the commonwealth, on cross-examination, attempted to prove the contents of the written statement, it was not permitted to do so over the objection of the defendant. The trial court further refused to permit the justice to testify as to the contents of the written statement, or as to what the decedent told

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him at the time he took the statement. It was held that, on the proof of the destruction of the written statement, the court should have admitted oral testimony to prove its contents.

In State v. Patterson (Vt.) supra, the prosecution introduced a witness to prove dying declarations, who testified that he reduced the statements of the dying man to writing at the time, to preserve them, but that the paper was lost. The court held that the fact that the witness had lost the paper containing the declarations in writing did not bear on the question of their admissibility, but only on the weight which ought to be accorded to the evidence thus given, as depending on the accuracy of the witness's recollection and his correctness in repeating from memory what the dying man had said to him. H. D. B.

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